BEYOND BRIBERY: EXPLORING THE INTIMATE INTERCONNECTIONS BETWEEN CORRUPTION AND TAX CRIMES

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I

INTRODUCTION

> [N]othing is so holy that it cannot be corrupted, or so strongly fortified that it cannot be stormed by money. But if he were as secret in acting as he is audacious in attempting, perhaps . . . he might . . . have escaped our notice. But it happens very fortunately that . . . . he was unconcealed in committing his robberies of money . . . .
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> Marcus Tullius Cicero[1]

In 2018, a joint report of the World Bank Governance Global Practice and the Organization for Economic Co-operation and Development (OECD) Centre for Tax Policy and Administration illustrated the serious threat facing the global community from increasingly complex forms of economic crime.[2] Critically, in documenting such crime, the report confirmed that "while viewed as distinct crimes, tax crime and corruption are often intrinsically linked."[3] Although clearly acknowledging the intimate relationships between fraudulent and corrupt practices in taxation, the study did not delve deeply into these interconnections. The report used the word "corruption" but its analysis adopted the narrower conception of "bribery," in this context meaning a payment to a government official to evade taxes.[4] Thus, the study failed to explore the complexity of the linkages between tax crimes and corruption. This article argues that such a

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1. 1 MARCUS TULLIUS CICERO, ORATIONS 133 (C. D. Yonge trans., 1916) (c. 70 B.C.).

2. WORLD BANK GRP. & ORG. FOR ECON. CO-OPERATION & DEV., IMPROVING CO-OPERATION BETWEEN TAX AUTHORITIES AND ANTI-CORRUPTION AUTHORITIES IN COMBATING TAX CRIME AND CORRUPTION 13 (2018).

3. *Id.*

4. *See generally* Meghana Ayyagari et al., *Are Innovating Firms Victims or Perpetrators? Tax Evasion, Bribe Payments, and the Role of External Finance in Developing Countries* (World Bank Pol'y Rsch. Working Paper No. 5389, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650999 [https://perma.cc/T9U4-SHYP].

limited perspective may distort justice by creating a false narrative and disregarding how other forms of pervasive corrupt practices adversely affect tax crime enforcement. To facilitate a deeper understanding of how corruption may undermine strategies to counter tax crimes, society must embrace a conception of corruption that extends beyond the notion of bribery.[5] Such corruption must be recognized as a pervasive social problem and a multifaceted criminal phenomenon.[6]

This article undertakes the challenge of identifying and documenting interconnections between tax crimes and corrupt practices beyond simple bribery. Not only does this mission require a more comprehensive vision of corruption, but it also demands that the full scope of problematic tax conduct, reaching beyond currently-specified tax crimes, be embraced. This approach requires reframing issues that may historically have been perceived exclusively through one lens—for example, tax abuse—so that they may now be analyzed through a richer and more integrated frame with tax abuse and corruption combined. Of course, with this effort at both definitional and conceptual expansion comes a wide range of objections, questions, and resistance. Given the depth and complexity of the issues, this initial article cannot tackle all of them. Rather, this article, which serves as both the lead off to this symposium and as an initial foray into reconceptualizing the societally undermining behavior of political, social, and economic elites, begins a conversation from which future research should build. Accordingly, Part II explores the definitional facets of both corruption and tax crime that will ground subsequent analysis. Starting at the global level, Part III identifies patterns of tax abuse and corruption, and introduces one of their vital interconnections: their parallel structure. Part IV shifts to the domestic level, probing how tax abuse and corruption impact national governance and democracy, and introduces further interconnections: how both operate in tandem and reinforce each other. The Conclusion places this initial examination in context and offers guidance for next steps.

II

A CALL FOR A DEEPER CONCEPTION OF CORRUPTION AND TAX ABUSE

An expanded definition of corruption facilitates a richer teleological examination of criminal schemes based on a combination of unethical and corrupt practices in taxation. This focus on terminology builds on critiques levied at the common conceptualization of "corruption" and its definitions at legal and political levels. As noted by Pardo:

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5. *See* Carl J. Friedrich, *Corruption Concepts in Historical Perspective*, *in* POLITICAL CORRUPTION: A HANDBOOK 3, 5 (Arnold J. Heidenheimer et al. eds., 1993) (explaining that acceptance of a bribe by a public official for misusing official powers can be distinguished from the broader concept of corruption as "institutional decay").

6. *See* Costantino Grasso, *The Dark Side of Power: Corruption and Bribery within the Energy Industry*, *in* RESEARCH HANDBOOK ON EU ENERGY LAW AND POLICY 237–39 (Rafael Leal-Arcas & Jan Wouters eds., 2017) (explaining how corruption infects every aspect of society).

> [E]xisting definitions of corruption and abuses of power in state societies tend to focus on the material, monetary aspect. Only in such restricted, hard-core sense is corruption clearly defined by the most modern legal systems . . . . Constrained in such straightjacket, legislation proves to be limited, inadequate and inefficient, de facto allowing corruption to thrive.[7]

One consequence of a narrow approach is that the legal definitions of corruption fail to capture some of the worst cases of corrupt activities. Corrupt practices may be difficult to identify, such as asymmetric exchanges of favors. They may even be institutionalized in the laws of the state or economy,[8] as with unethical lobbying. One poignant example is the enactment of the 2010 U.K. Bribery Act. This was one of the more innovative pieces of legislation aimed at countering corruption, but the legislature lost a crucial opportunity when it decided not to criminalize three main forms of corruption: "nepotism, asynchronous exchanges, and unreciprocated but corrupt granting of favors."[9] These forms of corruption have never been criminal under English law.[10]

A reluctance to adopt a conception of corruption that goes beyond bribery permeates the legal literature. Legal scholars appear hesitant to adopt a broader notion of corruption for two reasons. The first seems grounded in matters of proof. Scholars expect that these broader corrupt practices can be difficult to discover; if they can be discovered, they cannot be proved; if they can be proved, the proof cannot be published.[11] The second reflects concerns of scope. Legal scholars appear worried about potential conflicts with the "principle of legality."[12] The scope of the corruption offense would need to be greatly expanded to capture all relevant corrupt practices, thereby creating a risk that the boundaries of illegal conduct subject to punishment could be unclear.

Finally, a general hesitancy to define corruption widely may also derive from the fact that corrupt practices constitute crimes of the powerful. Unlike with many other crimes having lower barriers to "entry," more powerful members of society are the most likely to have the resources needed to support corruption, such as *quid pro quo*. Such powerful persons are frequently linked to well-established societal structures that sustain their world views and tend to justify their actions.[13] These powerful persons may also afford the most expensive forms of legal representation that may effectively shield them from liability.[14] As will be

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7. Italo Pardo, *Introduction: Corruption, Morality, and the Law*, *in* BETWEEN MORALITY AND THE LAW: CORRUPTION, ANTHROPOLOGY AND COMPARATIVE SOCIETY 2 (Italo Pardo ed., 2004).

8. Mark Philp, *The Definition of Political Corruption*, *in* ROUTLEDGE HANDBOOK OF POLITICAL CORRUPTION 17, 22 (Paul M. Heywood ed., 2015).

9. *See generally* Peter Alldridge, *The U.K. Bribery Act: "The Caffeinated Younger Sibling of the FCPA*,*"* 73 OHIO STATE L.J. 1181, 1184 (2012).

10. *Id.*

11. *See* Colin Leys, *What is the Problem About Corruption?*, *in* POLITICAL CORRUPTION: A HANDBOOK 51, 51 (Arnold J. Heidenheimer et al. eds., 1993) (explaining that these concerns appear unfounded because both circumstantial and systemic sources of information are available).

12. *Id.*

13. *See generally* VINCENZO RUGGIERO, POWER AND CRIME 2–5 (2015).

14. *See* Catherine Albiston, Scott L. Cummings, & Richard L. Abel, *Making Public Interest Lawyers in a Time of Crisis: An Evidence-Based Approach*, 34 GEO. J. LEGAL ETHICS 223, 229 (2021) (illustrating

discussed, the payment of such extremely high fees may generate an interdependence between top professionals and the elite that, when amplified by the revolving door phenomenon, may result in perilous situations of capture.[15] Facing this combination of factors, legal systems of many modern democracies have reached an impasse and, bribery aside, have proven incapable of countering some of the most pervasive forms of corruption affecting society and governance.

Inspired by the idea of contributing to efforts to resolve this impasse, this article endorses a vision of corruption encompassing multifaceted and multidimensional practices ranging from petty bribes to the undue influence that large multinational corporations may exert on the political decision-making process. While embracing the general international definition of corruption as "misuse of power for private gain,"[16] the analysis will also explore the nuances in corrupt practices, such as favoritism, unethical lobbying, and conflict of interests. Research and analysis support expansion of the concept of corruption but recognize that contextualized responses are required depending on the severity of the corrupt practice. This article will investigate some of the intimate interconnections between tax crimes and corrupt practices by adopting a multidisciplinary approach which includes the study of criminological and socio-legal literature, the examination of high-profile cases, and the integration of the multiple sources of information gathered during the international research project VIRTEU.[17]

Just as the corrupt practices under scrutiny will be broadly defined, so too will tax crimes. This article will use the term "tax abuse" rather than tax crime or tax evasion. In their currently limited scope, the applicable criminal law definitions of tax crime appear unable to capture the multifaceted ways in which the tax system can be abused. The legal relevance of the term tax abuse has been confirmed by the European Court of Justice, which affirmed that:

> Whilst the pursuit by a taxpayer of the tax regime most favourable for him cannot, as such, set up a general presumption of fraud or abuse . . . . it is incumbent upon the national authorities and courts to refuse to grant entitlement to the rights . . . where they

how studies have demonstrated that the quality of legal representation makes a difference to judicial outcomes).

15. Although such forms of interdependence are obscure and commonly understudied, a recent journalistic investigation examines this phenomenon. *See generally* DAVID ENRICH, SERVANTS OF THE DAMNED: GIANT LAW FIRMS, DONALD TRUMP, AND THE CORRUPTION OF JUSTICE (2022).

16. *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME, UNITED NATIONS MANUAL ON ANTI-CORRUPTION POLICY 75 (2001), www.unodc.org/pdf/crime/gpacpublications/manual.pdf [https://perma.cc/8NUM-NN5T] (noting that corruption has been defined as "the abuse of (public) power for private gain").

17. VIRTEU (VAT Fraud: Interdisciplinary Research on Tax Crimes in the European Union) was a two-year international research project funded by the European Anti-Fraud Office (OLAF) of the European Commission (Grant Agreement no: 878619), which aimed at exploring the interconnections between tax crimes and corruption. All documents produced, as well as all the video recordings of the events organized over the course of the project, are available online on the Corporate Crime Observatory, which serves as the long-term repository of the project's outcomes: www.corporatecrime.co.uk [https://perma.cc/88KU-BGUB].

> are invoked for fraudulent or abusive ends[18] . . . . [A]n abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the . . . rules, the purpose of those rules has not been achieved and, second, . . . the intention to obtain an advantage . . . by artificially creating the conditions laid down for obtaining it.[19]

Tax abuse has also assumed legal relevance in various domestic legal systems including France, Italy, and Poland.[20] Moreover, the term has been adopted by international non-profit organizations (NGOs) in recognition of the fact that the old distinction between tax evasion and tax avoidance is difficult to sustain because of the multitude of "examples where legal avoidance is effectively evasion, especially where the law has been rigged by bribes."[21] As a result, although the term tax abuse has been used to refer to exploitative tax avoidance schemes,[22] this article uses the term tax abuse to include not only tax evasion and other forms of tax crimes, but also unethical and unscrupulous use of legal loopholes to minimize tax liability in violation of the spirit of the law.[23]

VIRTEU project research has identified close links connecting various forms of corruption with tax abuse. First, both tax crimes and corruption constitute forms of economic crime.[24] Although there is no universally accepted definition of economic crime, for purposes of this article, Edwin Sutherland's 1940 definition offers a functional approach: a crime that involves members of the "upper class," which is composed of respectable or at least respected business and professional individuals.[25] In his arguments, one can identify the germs of the idea on which this article focuses:

> White-collar criminality . . . is expressed most frequently in the form of . . . commercial bribery, bribery of public officials directly or indirectly in order to secure favorable contracts and legislation . . . tax frauds, misapplication of funds in receiverships and

18. Joined Cases C 116/16 & C 117/16, Skatteministeriet v. T Danmark & Y Denmark Aps, ECLI:EU:C:2019:135, ¶¶ 81–82 (Feb. 26, 2019).

19. *Id.* at ¶ 97.

20. ELODIE THIRION & AMANDINE SCHERRER, EUR. PARLIAMENTARY RSCH. SERV., MEMBER STATES' CAPACITY TO FIGHT TAX CRIMES: EX-POST IMPACT ASSESSMENT 22 (July 2017), www.europarl.europa.eu/RegData/etudes/STUD/2017/603257/EPRS_STU(2017)603257_EN.pdf [https://perma.cc/D33W-R2DT].

21. Robert Barrington, *When Is Tax Abuse Corruption? The New Official View of Transparency International*, TRANSPARENCY INT'L UK (Dec. 2, 2016), www.transparency.org.uk/when-tax-abuse-corruption-new-official-view-transparency-international [https://perma.cc/SM3U-F6CF].

22. *See generally* Leandra Lederman, *W(h)ither Economic Substance?*, 95 IOWA L. REV. 389 (2010) (exploring factors that have proven challenging in determining when taxpayer planning crosses a line and tax benefits should be denied).

23. *See* Lloyd Lipsett et al., *Tax Abuses, Poverty and Human Rights*, INT'L BAR ASS'N 7 (Oct. 2013) ("[T]ax abuses include the tax practices that are contrary to the letter or spirit of domestic and international tax laws and policies. They include tax evasion, tax fraud and other illegal practices . . . [they] also include tax practices that may be legal, strictly speaking, but are currently under scrutiny because they avoid a 'fair share' of the tax burden and have negative impacts on the tax revenues.").

24. *See* KAREN HARRISON & NICHOLAS RYDER, THE LAW RELATING TO FINANCIAL CRIME IN THE UNITED KINGDOM 3 (2d ed. 2017) (explaining that economic crime is also referred to as "financial crime," "white collar crime," or "illicit finance").

25. Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOCIO. REV. 1, 1 (1940).

> bankruptcies . . . . These and many others are found in abundance in the business world.[26]

This common heritage explains the close affinity between the two phenomena. Corruption works as a fundamental "gear" in what could be described as a "multi-offense engine"[27] that allows private interests to penetrate the public sphere unlawfully or in a way that constitutes a breach of ethical standards. The relationships between tax crime and corruption can be multifarious. For instance, apart from the baseline connection created by the payment of a bribe to a public official to avoid tax investigations or to facilitate complex tax or customs frauds,[28] tax abuse may generate a source of ill-gotten money that could be later "invested" in more expansive corruption efforts. The dynamic is complicated by the reality that most tax rules are domestic in nature—enacted and enforced by a single state—yet the most relevant tax abuses have a transnational dimension[29] and involve the presence of tax havens in developed and developing economies. These havens may contribute a supply-side stimulus that encourages corrupt practices by providing an operational base for professional enablers and their clients to exploit legislative gaps and fragmented regulation.[30] Also, starting from the late 1990s,[31] tax crime and corruption have developed a symbiotic relationship because the flow of money involved in such criminal practices must be surrounded by a shroud of secrecy. The case of Walmart operations in Mexico in the 2000s, as well as the response of its United States headquarters, is illustrative of such a symbiotic relationship.

Thanks to the revelation of a whistleblower, the government and the public learned that Wal-Mart de Mexico—Wal-Mart's largest foreign subsidiary—orchestrated a campaign of bribery to win market dominance in Mexico.[32] Over

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26. *Id.* at 2–3.

27. Gaetana Morgante, *VIRTEU International Final Conference - Day 2 - Panel 1*, CORP. CRIME OBSERVATORY, at 17:25 (June 24, 2022), www.corporatecrime.co.uk/virteu-final-conference-day2-panel1 [https://perma.cc/6LNC-FHDJ].

28. *See* PHILIP GOUNEV & TIHOMIR BEZLOV, CTR. FOR THE STUDY OF DEMOCRACY, EXAMINING THE LINKS BETWEEN ORGANISED CRIME AND CORRUPTION 16 (2010), https://op.europa.eu/s/w4Fg [https://perma.cc/9YPY-SBYX] (explaining how corruption of officials facilitates customs fraud).

29. On the complexity and fragmentation of tax rules applicable to cross border transactions, see generally Diane Ring, *International Tax Relations: Theory and Implications*, 60 TAX L. REV. 83 (2007).

30. *See* ORG. FOR ECON. CO-OPERATION & DEV., ENDING THE SHELL GAME: CRACKING DOWN ON THE PROFESSIONALS WHO ENABLE TAX AND WHITE COLLAR CRIMES 14 (2021), www.oecd.org/tax/crime/ending-the-shell-game-cracking-down-on-the-professionals-who-enable-tax-and-white-collar-crimes.pdf [https://perma.cc/C4FA-9BF9](illustrating, for instance, how a Department of Justice's sting operation unveiled professional enablers setting up investment vehicles in offshore jurisdictions).

31. At the international level, the "Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials in International Business Transactions" adopted by the OECD in 1996, finally sent a clear message that bribery would no longer be treated as a business expense. The "Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions" of 2009 explicitly prohibited the tax deductibility of bribes. *See* ORG. FOR ECON. CO-OPERATION & DEV., BRIBERY AND CORRUPTION AWARENESS HANDBOOK FOR TAX EXAMINERS AND TAX AUDITORS 3 (2013) (discussing the content of the 1996 report).

32. *See* David Barstow, *Wal-Mart Hushed Up a Vast Mexican Bribery Case*, N.Y. TIMES (Apr. 22,

the course of that decade, Charles Middleton, an international tax lawyer who served as Vice President of International Tax for Wal-Mart Stores, Inc., discovered that the firm's failure to comply with U.S. tax law related to a flow of money connected with the corporate business operations in Mexico.[33] When he brought the matter to the attention of Walmart's senior executives, the response was to ignore it.[34] The company did not want to draw more attention to Mexico because they were already hiding corrupt payments being made in that country.[35] This Walmart link between corruption and tax noncompliance was not a unique case. As the subsequent "Lagarde list" case demonstrated, tax abuse can provide incentives for financial institutions, authorities, and politicians to engage in corrupt activities.[36] This creates a vicious cycle whereby banks prioritize increasing their profits over compliance and government authorities ignore bad conduct to safeguard their positions of power.[37]

Not only are tax crime and corruption linked as economic crimes—and economic crimes that may be intertwined—but they are also both crimes of the powerful. They are grounded in illicit activities that are commonly perpetrated by offenders who possess critical economic resources or are in positions of power and aim to perpetuate the privileges they enjoy.[38] The paradox of power and morals expressed by Lord Acton in his iconic phrase "power tends to corrupt and absolute power corrupts absolutely"[39] starkly illustrates how both the intensity

2012), www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html#:~:text=Wal%2DMart%20dispatched%20investigators%20to,totaling%20more%20than%20%2424%20million [https://perma.cc/26PC-UFKG] (exploring the role of a whistleblower in the Wal-Mart bribery case in Mexico).

33. US tax law required calculating the earnings of foreign subsidiaries using US tax principles (the so-called "earnings and profits" of the foreign subsidiary). Wal-Mart was not able to comply because its general ledger did not have the functionality to create separate income statements and balance sheets for each foreign subsidiary. The company could only create consolidated financial statements. For ten years the company internal tax department used such a deficiency hiding the irregularities in the financial reporting system from the IRS. *See* Allyson Versprille, *IRS 'Black Hole' Swallows Whistleblower Against Koch, Walmart*, BLOOMBERG TAX (July 1, 2019), https://news.bloombergtax.com/daily-tax-report/irs-black-hole-swallows-whistleblower-against-koch-walmart [https://perma.cc/L8NA-H8GQ] (discussing how Walmart was able to hide corruption from the IRS).

34. *See* Charles Middleton, *Whistleblowing, Reporting, and Auditing in the Area of Taxation*, CORP. CRIME OBSERVATORY, at 17:36 (Feb. 26, 2021), www.corporatecrime.co.uk/virteu-whistleblowing [https://perma.cc/LLN6-GLZH] (discussing his discovery of corrupt practices).

35. *Id*.

36. The scandal concerned a former Greek culture minister, several employees of the Finance Ministry, and business leaders included on a list of more than 2,000 Greeks said to have accounts in a Swiss bank to help evade taxes. *See* Rachel Donadio & Liz Alderman, *List of Swiss Accounts Turns Up the Heat in Greece*, N.Y. TIMES (Oct. 27, 2012), www.nytimes.com/2012/10/28/world/europe/list-of-swiss-accounts-turns-up-the-heat-in-greece.html [https://perma.cc/7924-8TGQ] (outlining the discovery of Swiss bank accounts where business leaders stashed their money to evade taxes).

37. *See* RUI TAVARES, SPECIAL COMM. ON ORGANISED CRIME, CORRUPTION AND MONEY LAUNDERING, RELATIONSHIP BETWEEN MONEY LAUNDERING, TAX EVASION AND TAX HAVENS 3 (2013) (discussing why administrations may not want to prevent tax evasion).

38. *See* RUGGIERO, *supra* note 13, at 3 (outlining social theory's view on crimes perpetrated by powerful people).

39. Letter from Lord Acton to Archbishop Creighton (April 5, 1887) (on file with the Online Library of Liberty).

and seriousness of tax crimes and corrupt practices increase hand in hand with the power possessed by the wrongdoers. The most profitable, worrisome, and potentially damaging tax abuses are the ones perpetrated by extremely rich individuals or corporate entities. At the same time, the most powerful natural or legal persons are the ones who have more opportunity to arrange corrupt deals to preserve or augment the advantages they possess.[40] It should not be surprising that our justice systems experience a stress test each time a major corporate player is investigated for economic crime, a tension explored in Part IV below. In such situations, the titanic scale of their power is on display as government enforcers often pursue compromises rather than risk the broader economic fallout of full enforcement.[41] This relationship between economic crime and the members of the ruling elite may also explain the considerable difficulties that society experiences in effectively countering both tax crime and corruption. As Michel Foucault brilliantly explained, these obstacles are inherent in the capitalist society:

> The economy of illegalities was restructured with the development of capitalist society. The illegality of property was separated from the illegality of rights . . . . And this great redistribution of illegalities was even to be expressed through a specialization of the legal circuits: for illegalities of property - for theft - there were the ordinary courts and punishments; for the illegalities of rights - fraud, tax evasion, irregular commercial operations - special legal institutions applied with transactions, accommodations, reduced fines, etc. The bourgeoisie reserved to itself the fruitful domain of the illegality of rights.[42]

Finally, conceptualizing tax crime and corruption as crimes of the powerful illuminates their inherent potential to distort justice in our society. This article is inspired by a notion of justice based on John Rawls' idea of fairness in liberal societies.[43] Thus, it is relevant to note that Rawls proposes a basic structure of the state capable of removing social and economic inequalities, offering equal liberty

40. A powerful historical example illuminates the close links in the 1920s between the US presidency and the elite group of Wall Street bankers and financiers that kept the administration silent on the speculative mania that was gripping the financial market and that eventually led to the Great Crash of 1929. The ensuing inquiry of the Pecora Commission revealed the magnitude of the corrupt deals between private elites and public administrators. *See* Joanna Bartholomew, *1929: The Great Crash*, BRIT. BROAD. CORP., at 19:05 (2009) (discussing the inquiry of the Pecora commission and what it revealed about corruption). *See also* FERDINAND PECORA, WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGERS 28 (1939) (illustrating how the financial elite pursued state capture by providing privileged investment opportunities to a "preferred list" of a few hundreds of individuals, who represented "men who were exceedingly eminent and powerful in finance, business, industry, politics, and public life;" the list included President Coolidge). In the United States, the presence of potential conflicts of interests has recently emerged from a journalistic investigation, *see* Rebecca Ballhaus et al., *Federal Officials Trade Stock in Companies Their Agencies Oversee*, WALL ST. J. (Oct. 11, 2022), www.wsj.com/articles/government-officials-invest-in-companies-their-agencies-oversee-11665489653 [https://perma.cc/D8N7-LXFH] (unveiling thousands of officials employed by government's executive branch agencies owning or trading stocks that stood to rise or fall with decisions their agencies made).

41. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 7–8 (2014) (presenting data on corporate prosecution agreements).

42. MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 87 (2d ed. 1995).

43. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) (discussing his theory of justice as fairness).

and fair opportunities for everybody.[44] Rawls recognizes that humans are characterized by a self-interested nature and that complete egalitarianism may destroy work incentives and impoverish all.[45] He also admits that, under the "difference principle," self-interest motivates industry and generates bounty.[46] Consequently, he accepts the existence of income inequalities in society. However, it is also clear that under Rawls' theory, unrestrained self-interest becomes ethically unjustifiable when it undermines the fundamental values of fairness and justice on which the basic structure of the state should be based.[47]

Tax abuse—evading taxation or minimizing tax liability in breach of the spirit of the law—and the corrupt behaviors that facilitate or enable them generate a distortion of justice that is intolerable in a democratic state. They deprive states of fundamental resources needed to guarantee that equal liberty and fair opportunities are assured to all members of society. Even if everyone may legitimately reduce their tax liability while respecting both the letter and the spirit of the law, illegal or unethical practices that circumvent the democratically imposed system of taxation become unacceptable as inherently unjust and unfair. Tax abuses not only undermine the state's fiscal position but also increase the potential for the corruption of officials and financial elites willing to circumvent existing rules and prevailing principles, triggering a cycle of misconduct and illegitimacy.[48] This distortion of justice is aggravated by the reality that those who are in a position to perpetrate tax abuses are the natural and legal persons who possess the capacity to siphon income into tax havens or secrecy jurisdictions.[49] Thus, in financial terms, they hold an advantaged position in society.[50] Their actions place a greater burden on honest taxpayers and those not in a position to pursue abusive tax planning.[51] The interplay of corrupt practices and tax abuses is magnified by the extreme difficulties authorities face in prosecuting large corporations for tax evasion and the reality that the corporate executives are rarely convicted.[52] Together, these phenomena may also generate a widespread

44. *Id.* at 76.

45. *Id.* at 68.

46. *Id*. at 69–70.

47. *Id*.

48. *See* TAVARES, *supra* note 37, at 7 (advocating for the European Parliament to take action to combat tax evasion).

49. A secrecy jurisdiction could be defined as a jurisdiction that is not formally classified as a tax haven but provides facilities that enable people or entities to escape or undermine the laws, rules and regulations using secrecy as a prime tool. *See* TAX JUST. NETWORK, TAX HAVENS AND SECRECY JURISDICTIONS (Nov. 14, 2020), https://taxjustice.net/topics/tax-havens-and-secrecy-jurisdictions [https://perma.cc/UX3W-7V6J].

50. Over the last decade, well-publicized leaks of tax data have revealed the secret offshore financial holdings of high-net-worth individuals and the tax evasion and minimization practices of various taxpayers, financial institutions, and tax havens. *See* Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA. L. REV. 532, 536 (2018) (discussing how tax data leaks have revealed tax evasion practices).

51. *See* TAVARES, *supra* note 37, at 3 (discussing how tax evasion widens social inequality).

52. Eva Joly, *Corporate Power and Tax Abuses: Focus on the* McDonald *Case*, CORP. CRIME OBSERVATORY, at 07:03 (June 23, 2022), www.corporatecrime.co.uk/virteu-final-conference-day1-panel4 [https://perma.cc/KGK5-M2MD].

perception that the public administration is not acting in the interests of the people it is supposed to serve.[53] This can, in turn, produce a profound "trust deficit" between individuals and the public administration.[54] A generalized and deep-rooted democratic malaise may emerge from such a deep societal fracture. This is a perilous scenario from which countries characterized by well-established democratic traditions are not immune,[55] and may lead to a radical shift towards populist choices by the electorate.[56]

This article seeks to cast light on the underexplored ways in which corrupt practices and tax abuses may interact at the phenomenological level. Through a study of criminological and socio-legal literature and the evaluation of high-profile cases, this article will examine several common arrangements. These arrangements include harmful tax practices adopted by national states utilizing preferential tax regimes or "sweetheart deals" to compete against each other, unethical lobbying practices and corporate power distortions of the democratic process, and the undue interference through which anti-tax evasion strategies may be frustrated. Ultimately, the analysis reveals that corrupt practices and tax abuse intersect operationally in several discrete ways. First, both exist as similar parallel problems that may benefit from similar responses. Second, both regularly operate together magnifying their individual effect. Third, many of the most damaging tax abuses depend on some level of corruption.

III

TAX ABUSE AND CORRUPT PRACTICES: GLOBAL DYNAMICS

The interconnections between corrupt practices and tax abuse operate actively on the global stage. Many such examples can be grouped under the rubric of sweetheart deals. These arrangements, by which states compete in the supranational tax arena, intertwine tax abuse with potentially corrupt behavior.

A. The Questionable Practice of International Sweetheart Tax Deals

A sweetheart deal can include a preferential tax treatment that government officials make available to a specific company considered of strategic importance or a favorable result accorded to such a firm in settlement of a tax dispute. Although sweetheart deals do not entail a breach of the law, as they can be achieved using administrative discretion or application of complex regulations,

53. *See* WORLD ECON. F., CORRUPTION AND THE EROSION OF TRUST (2017) (discussing the importance of transparency in public-private cooperation).

54. *Id*.

55. *See* THORBJØRN JAGLAND, COUNCIL OF EUR., STATE OF DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW, POPULISM – HOW STRONG ARE EUROPE'S CHECKS AND BALANCES?, at 8 (2017) (discussing the decentralization of Council of Europe member states).

56. *See The Corrupting of Democracy: Cynicism is Gnawing at Western Democracies*, ECONOMIST (Aug. 29, 2019), www.economist.com/leaders/2019/08/29/the-corrupting-of-democracy [https://perma.cc/NM32-H8QK] (discussing Hungary's hidden populism). For a recent study on interconnections among corrupt practices and populism, see generally POPULISM AND CORRUPTION: THE OTHER SIDE OF THE COIN (Jonathan Mendilow & Éric Phélippeau eds., 2021).

they may be characterized by extreme complexity and limited public disclosure. Such a lack of transparency is a function of multiple factors, including rules regarding privacy and taxpayer data. But the pressure to retain secrecy is intensified given such deals may provide advantages to select taxpayers—a practice that is problematic in a democratic society.

Both the scale of such practices as well the interplay with privacy rules can be seen in U.K. data emerging over the past ten years. In 2013, a leaked document revealed that U.K. tax officials had entered into four sweetheart tax agreements with corporations to settle disputes worth 4.5 billion GBP.[57] Speaking about one of the agreements, HM Revenue and Customs (HMRC),[58] Permanent Secretary for Tax David Hartnett agreed before a parliamentary committee that the decision to forgive up to 10 million GBP of interest owed by Goldman Sachs was "a mistake" and came from an effort to address a "huge relationship issue" between the bank and HMRC.[59] Information regarding the deals had not been previously released by HMRC on grounds of "taxpayer confidentiality."[60]

In 2021, a group of U.K. members of parliament (MPs) from the All-Party Parliamentary Group on Anti-Corruption & Responsible Tax criticized HMRC for settling a long-running dispute with General Electric. The parliamentary group, which declared the settlement "pitiful" as compared to the amount of tax HMRC had accused General Electric of owing,[61] also called for greater public scrutiny of HMRC on corporate tax affairs, sharply criticizing the cloak of secrecy that surrounds these deals. Although the MPs acknowledged that HMRC officials are required by statute to keep taxpayer information confidential, they stressed that such an obligation imposed as a matter of general law on public bodies is subject to the possibility of disclosure in the public interest.[62] The MPs further stated that such an interest is present when HMRC enters into settlements with large U.K.-listed public companies or foreign multinationals with a significant economic footprint in the country.[63]

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57. *See* Rajeev Syal, *Revealed: "Sweetheart" Tax Deals Each Worth Over £1bn*, GUARDIAN (Apr. 29, 2013), www.theguardian.com/politics/2013/apr/29/sweetheart-tax-deals [https://perma.cc/3FWQ-V3QC] (discussing the scale of the UK sweetheart deals).

58. HMRC is a non-ministerial Department established by the Commissioners for Revenue and Customs Act (CRCA) 2005, replacing the Inland Revenue and Customs and Excise. The tax authority is responsible for collection, compliance and enforcement activities related to taxation. *See* HM REVENUE & CUSTOMS, *About Us*, www.gov.uk/government/organisations/hm-revenue-customs/about [https://perma.cc/K6K8-ZUWT] (last visited Nov. 4, 2022).

59. Liam Vaughan, *Forgiving Goldman Sachs Tax Interest Was a 'Mistake,' HMRC Says*, BLOOMBERG BUS. (Oct. 12, 2011), www.bloomberg.com/news/articles/2011-10-12/forgiving-goldman-sachs-tax-interest-was-mistake-hmrc-says [https://perma.cc/ZZC9-H2PQ].

60. Syal, *supra* note 57.

61. *See* Emma Agyemang, *MPs Accuse HMRC of 'Sweetheart' Tax Settlement with GE*, FIN. TIMES (Sept. 16, 2021), www.ft.com/content/31e01fdd-7a10-4985-9b37-3793662bda47 [https://www.ft.com/content/31e01fdd-7a10-4985-9b37-3793662bda47] (discussing the parliamentary group's opinions on the GE settlement).

62. UK ALL-PARTY PARLIAMENTARY GRP. ON ANTI-CORRUPTION & RESPONSIBLE TAX, RESTORING PUBLIC TRUST IN HMRC: SETTLEMENTS WITH LARGE CORPORATE TAXPAYERS 4 (2021).

63. *Id*.

This situation is not limited to the United Kingdom. According to recent data, the number of similar deals has continued to grow across the European Union over the last decade.[64] Notwithstanding increased public awareness, deals continue to be negotiated in private with disclosure only achieved through whistleblowers,[65] leakers,[66] and investigative journalists,[67] who often face retaliation by both government authorities and corporate entities. The LuxLeaks scandal typifies this dynamic: Antoine Deltour and Raphaël Halet, two former PwC employees, and Edouard Perrin, a French journalist, leaked a series of documents that revealed sweetheart tax deals offered by the Grand Duchy of Luxemburg to dozens of multinational enterprises.[68] They discovered:

> [A] system set up by the authorities with the council of auditing firm, a system of tax deals which allowed multinationals from all over the world to avoid tax . . . . Luxembourg authorities approved deals with almost no means to verify [their] legality . . . . [there was] only one tax officer [who] approved all the hundreds of tax deals every year . . . . These tax practices wouldn't exist without this active role of auditing firm and the authorities turning a blind eye on the real tax practices.[69]

As a consequence of their disclosures, the three were subject to retaliatory criminal charges that resulted in a prolonged legal battle that involved national judicial authorities and, in relation to Raphaël Halet, even the European Court of Human Rights.[70]

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64. According to calculations based on European Commission data, the number of sweetheart deals in the European Union grew from 399 in 2013 to 2,053 in 2016. *See* TOVE MARIA RYDING, EUR. NETWORK ON DEBT & DEV., TAX 'SWEETHEART DEALS' BETWEEN MULTINATIONALS AND EU COUNTRIES AT RECORD HIGH 2 (2018) (discussing the growth of sweetheart deals in the European Union).

65. *See* Costantino Grasso, *The Whistleblowers' Revolution*, *in* WHISTLEBLOWERS: VOICES OF JUSTICE (Costantino Grasso ed., forthcoming) (discussing how whistleblowers play a crucial role in piercing the veil of ignorance, which limits access to information, covers the distorted ways in which democratic institutions may operate, and alters citizens' perception of the reality).

66. *See generally* Oei & Ring, *supra* note 50 (discussing how tax data leaks have revealed tax evasion practices).

67. *See* Will Fitzgibbon, *VIRTEU International Final Conference - Day 1 - Panel 4*, CORP. CRIME OBSERVATORY, at 32:11 (June 23, 2022), www.corporatecrime.co.uk/virteu-final-conference-day1-panel4 [https://perma.cc/8XBZ-AX6U] (discussing the role of investigative journalists and the ICIJ in exposing taxation practices in Europe).

68. *See Grand Dodgy: The Good Deeds of the Luxembourg Leakers Do Not Go Unpunished*, ECONOMIST (June 30, 2016), www.economist.com/finance-and-economics/2016/06/30/grand-dodgy [https://perma.cc/GXD8-982Q] (explaining how the three individuals behind the LuxLeaks faced criminal liability for leaking the documents that revealed the sweetheart tax deals given to multinational corporations).

69. Antoine Deltour, *VIRTEU - The Professionals: Dealing with the Enablers of Economic Crime - Panel 1: The Phenomenon*, CORP. CRIME OBSERVATORY, at 28:29 (July 21, 2021), www.corporatecrime.co.uk/virteu-symposium-the-professionals [https://perma.cc/G39G-5YYS].

70. *See* Donato Vozza & Umut Turksen, *When the State Keeps It on the Hush: On the Limits of the Punishment of Whistle-blowers*, *in* WHISTLEBLOWERS: VOICES OF JUSTICE (Costantino Grasso ed., forthcoming) (discussing how many whistleblowers have been investigated, prosecuted, and convicted, often unfairly and unlawfully, for having disclosed documents and information to media or state authorities).

B. The Apple-Ireland Tax Case: A Closer Look

The tax scandal and the ensuing legal battle in which the American tech giant Apple[71] has been enmeshed in the European Union offers a rich case study illustrating how the interrelations between tax abuse and potential corrupt practices exert their effects at the supranational level.

Apple located its main subsidiaries in the Republic of Ireland (hereinafter "Ireland") to secure standard benefits that the country offers to multinational enterprises. Apart from Hungary (nine percent), Ireland maintains the lowest corporate income tax rate (now 12.5 percent) among the EU Member States.[72] Additionally, Ireland offers a common law tradition, a relatively stable government, EU membership, and English as the universal spoken language, although Ireland has its own language and distinct cultural identity. Not surprisingly, Ireland has been an attractive option for U.S. corporations looking to operate in Europe. However, Apple's tax arrangement in Ireland went well beyond the above-mentioned advantages. The company has been described as implementing "a convoluted and self-serving cost-sharing arrangement, shifting its 'crown jewels' to a foreign affiliate with no employees and very little activity."[73]

At the time of the scandal, under the corporate arrangements made by the firm, about ninety percent of Apple's foreign profits were earned by two Irish subsidiaries, which held the company's highly profitable intellectual property.[74] The subsidiaries—Apple Operations Europe (AOE) and Apple Sales International (ASI)—were fully owned by the Apple Group and ultimately controlled by the parent company Apple Inc.[75] Under a special agreement with Ireland, AOE and ASI were allowed to allocate most of their profits to a "head office" that was not located in any country and had no employees.[76]

In a letter sent by the European Commission (hereinafter "the Commission") to the Irish government in June 2014, the Commission formally communicated that, from its preliminary view, the calculation of profit attributable to AOE and ASI as accepted by the Irish Revenue was based on negotiation rather than

71. Apple Inc. was incorporated in Cupertino, California, in 1977. The company designs, manufactures and markets smartphones, personal computers, tablets, wearables, and accessories, and sells a variety of related services. Between the end of July 2021 and the end of July 2022, the company, which has 154,000 employees, generated revenues of 387.54bn USD and net income of 99.63bn USD. *See Equities, Apple Inc. – About the Company*, FIN. TIMES (last accessed July 29, 2022).

72. Sean Bray, *Corporate Income Tax Rates in Europe,* TAX FOUND. (Feb. 22, 2022), https://taxfoundation.org/corporate-tax-rates-europe-2022 [https://perma.cc/S475-GK99].

73. Margaret Kent & Robert Feinschreibe, *"The Apple of Your Eye" or "A Rotten Apple" - Let's Look at Apple's Facts,* 15 CORP. BUS. TAX'N MONTHLY 37, 38 (2014).

74. *See* Vanessa Houlder et al., *Apple's EU Tax Dispute Explained*, FIN. TIMES (Aug. 30, 2016), www.ft.com/content/3e0172a0-6e1b-11e6-9ac1-1055824ca907 [https://perma.cc/PJS8-Q5B6] (explaining how a majority of Apple's profits are earned by its Irish subsidiaries, which are lightly taxed because of the differences in how residence for tax purposes is defined in US and Irish laws).

75. *See* Theodore F. DiSalvo, *The Apple-Ireland Tax Case: Three Stories on Sovereign Power,* 28 DUKE J. COMP. & INT'L L. 371, 373 (2018).

76. *Id.* at 374.

reasoned pricing methodology,[77] and that such a sweetheart deal represented a form of State aid granted in violation of the EU rules.[78] Then, in August 2016, the Commission reached its final decision and found that Ireland, by entering into the contested tax arrangements with ASI and AOE, had unlawfully granted State aid to the Apple group in breach of the Treaty on the Functioning of the European Union and ordered Ireland to recover the unpaid tax.[79] Under the Commission's calculation, "this selective treatment allowed Apple to pay an effective corporate tax rate of 1 percent on its European profits in 2003 down to 0.005 percent in 2014."[80] By declaring Apple's Irish tax scheme unlawful under the EU legal framework and issuing a thirteen billion EUR recovery order, the Commission set the stage for a transatlantic political tussle over the taxation of U.S. multinational enterprises.[81]

The reactions sparked by the European Commission's decision offer insights into the dynamics at play. Some may have expected that Ireland would revel in a decision that might lead to the recovery of billions of unpaid taxes. Instead, Ireland resolutely opposed the decision. From the Irish government's perspective, the short-term revenue boost would be outweighed by the long-term economic harm from recovering the money. Ireland would become less attractive for other multinational enterprises, such as Google, looking to establish—or maintain—Irish subsidiaries to minimize tax liability.[82]

Both Apple and Ireland challenged the Commission's decision before the European General Court (hereinafter the "General Court"). In a July 2020 decision, the General Court annulled the Commission's state aid decision that condemned Ireland,[83] yet the court's decision did not legitimize the deal. On the

77. *State Aid SA.38373 – Ireland: Alleged Aid to Apple*, EUR. COMM'N (June 11, 2014), https://ec.europa.eu/competition/state_aid/cases/253200/253200_1582634_87_2.pdf [https://perma.cc/UK3V-5XKG].

78. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2008 O.J. (C 115) 91.

79. Commission Decision (EU) 2017/1283, 2017 O.J. (L 187) 1, 104–05.

80. *State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth Up to €13 Billion*, EUR. COMM'N (Aug. 30, 2016), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923 [https://perma.cc/K6JT-HX4C].

81. Alex Barker & Arthur Beesley, *Apple Hit with €13bn EU Tax Penalty Over Illegal Irish Aid*, FIN. TIMES (Aug. 30, 2016), www.ft.com/content/b573ac02-6e90-11e6-a0c9-1365ce54b926 [https://perma.cc/L6QL-AN5Y]. EU Member States enjoy fiscal sovereignty; domestic tax policies fall outside the remit of the Union. To counter aggressive tax avoidance practices, the Commission had to invoke the EU rule on State aid provided by Article 107 of the consolidated version of the Treaty on the Functioning of the European Union pursuant to which "any aid granted by a Member State [. . .] in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall [. . .] be incompatible with the internal market." *See also* DiSalvo, *supra* note 75.

82. Henry Farrell, *Apple May Owe Ireland $19 Billion, But Ireland Doesn't Want the Money. Here's Why.*, WASH. POST (Jan. 26, 2016), www.washingtonpost.com/news/monkey-cage/wp/2016/01/29/apple-may-owe-ireland-19-billion-but-ireland-doesnt-want-the-money-heres-why/ [https://perma.cc/EYX9-222Q].

83. Cases T 778/16 and T 892/16, Ireland and Apple Sales Int'l, and Apple Operations Eur. v. Eur. Comm'n and EFTA Surveillance Auth., 2020 ECLI:EU:T:2020:338.

contrary, the decision was grounded in the inherent limits that the EU, as a supranational organization with defined competencies, faces in combatting such phenomena. In brief, the decision was based on the Commission's improper use of state aid rules to investigate domestic tax systems—an area outside the competence of the Union. The General Court characterized the Irish deal as methodologically "regrettable"[84] and in its official press release affirmed that "although the General Court regrets the incomplete and occasionally inconsistent nature of the contested tax rulings, the defects identified by the Commission are not, in themselves, sufficient to prove the existence of an advantage for the purposes of Article 107(1) TFEU."[85] The Commission contends that the General Court misinterpreted its decision that Apple had been granted illegal state aid in Ireland and lodged an appeal with the European Court of Justice;[86] the case is currently in progress.[87]

Although the General Court decision represented a setback, the Commission demonstrated its willingness to continue challenging tax advantages given by Member States to powerful corporations.[88] Two other cases followed Apple: the first involved Starbucks, whom the Commission ordered in 2015 to pay up to thirty million EUR in unpaid taxes in the Netherlands.[89] The second involved Fiat Chrysler, whom the Commission ordered in 2015 to pay thirty million EUR in Luxembourg because its tax arrangements did not match economic reality.[90] The Commission lost its legal battle against Starbucks before the General Court,[91] it won the case against Fiat Chrysler, however, on the 8th of November 2022 the Court of Justice held that the General Court was wrong; in a decision the Court explained that the concept of "State aid" used within the European Union cannot be used in cases where exceptions to general taxation rules "flow from the nature

84. *Id.* at ¶ 348.

85. General Court of the European Union Press Release No. 90/20, The General Court of the European Union Annuls the Decision Taken by the Commission Regarding the Irish Tax Rulings in Favour of Apple (July 15, 2020), https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200090en.pdf [https://perma.cc/AH2D-T6Z7].

86. *See* Josh White, *European Commission Accuses EU Court of 'Errors' in Apple Case*, INT'L TAX REV. (Feb. 2, 2021), www.internationaltaxreview.com/article/2a6a7p33rsz3j90cdqj28/european-commission-accuses-eu-court-of-errors-in-apple-case [https://perma.cc/3LEA-KY6G] (explaining how the European Commission believed that the Court misinterpreted the Commission's decision by holding that the state aid case ultimately came down to the lack of employees and physical presence in Apple's head office).

87. Case C-465/20 P, Commission v. Ireland and Others, https://curia.europa.eu/juris/liste.jsf?num=C-465/20.

88. Javier Espinoza & Arthur Beesley, *Brussels to Appeal against Court Decision Quashing Apple Tax Order*, FIN. TIMES (Sep. 25, 2020), www.ft.com/content/058d380a-a0fa-40b7-95f9-1867378daf99 [https://perma.cc/ZW6W-BDV5].

89. Cases T 760/15 and T 636/16, Kingdom of the Netherlands and Starbucks Corp., and Starbucks Mfg. Emea B v. Eur. Comm'n, 2019 ECLI:EU:T:2019:669.

90. Cases T 755/15 and T 759/15, Grand Duchy of Luxembourg and Fiat Chrysler Fin. Eur. v. Eur. Comm'n, 2019 ECLI:EU:T:2019:670.

91. *See Kingdom of the Netherlands and Starbucks Corp.*, *supra* note 89 (holding that Starbucks did not have to pay the tax bill given by the Commission as Netherlands did not give Starbucks preferential tax treatment).

or general structure of the system."[92] Such a perspective, however, is based on the scope of the European Union's competences and their interpretation rather than on a critical evaluation of selective tax arrangements and their implication on democracy and the rule of law. Through the adoption of a decision based on technicalities and a limited interpretation of the European Union's legal framework, the Court of Justice lost an opportunity to safeguard fundamental values in the bloc. Nonetheless, investigations continue; in 2019, the Commission opened an in-depth investigation into whether tax rulings granted by the Netherlands to Nike gave the company an unfair advantage over its competitors in breach of EU State aid rules. On the 14th of July 2021, the General Court of the European Union confirmed that the Commission complied with the procedural rules and undertook correctly its assessment.[93] These efforts likely represent the dawn of what may be a long-lasting confrontation over special tax arrangements between big businesses and the EU Commission.[94]

Another dimension of the Apple case particularly relevant to this paper's examination of corruption and tax abuse is the hostile reaction from the United States. The U.S. Senate Committee on Finance staked out a strong pro-taxpayer position:

> We urge Treasury to intensify its efforts to caution the EU Commission not to reach retroactive results that are inconsistent with internationally accepted standards and that the United States views such results as a direct threat to its interests . . . . We recognize that the EU Commission believes it is on solid ground in pursuing these cases . . . . It alarms us, however, that the EU Commission is using a non-tax forum to target U.S. firms essentially to force its Member States to impose taxes . . . . The EU Commission surely understands the importance of promoting a tax environment that is fair, efficient, and growth-friendly.[95]

This U.S. stance, confirmed by the U.S. Department of the Treasury,[96] marked a major shift in the U.S. position on Apple's tax conduct. Just a few years

92. *See Grand Duchy of Luxembourg and Fiat Chrysler Fin. Eur.*, *supra* note 90 (confirming that the Grand Duchy's grant of state aid contrary to Art. 107 of the TFEU gave a selective advantage to Fiat); Cases C 885/19 P and C 898/19 P, Fiat Chrysler Fin. Eur. and Ireland v. Eur. Comm'n, 2019 ECLI:EU:C:2022:859 (the Court of Justice setting aside the judgment delivered by the General Court in September 2019 annulling the decision of the Commission on the State aid granted by Luxembourg to Fiat Chrysler Finance Europe).

93. *State Aid: Commission Opens In-Depth Investigation into Tax Treatment of Nike in the Netherlands*, EUR. COMM'N (Jan. 10, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_322 [https://perma.cc/N6HC-494Z]. *See* also Case T-648/19, Nike Eur. Operations Netherlands BV and Converse Netherlands BV v. Eur. Comm'n, ECLI:EU:T:2021:428 (dismissing the action brought against the Commission's investigative decision).

94. *See A Victory for Starbucks Clarifies EU Rules on Sweetheart Tax Deals*, ECONOMIST (Sept. 26, 2019), www.economist.com/business/2019/09/26/a-victory-for-starbucks-clarifies-eu-rules-on-sweetheart-tax-deals [https://perma.cc/Q5HU-RUSG] (highlighting the European Commission's past proceedings against "tax-shy" multinational corporations and the likelihood that such proceedings will continue in the future).

95. *Finance Committee Members Push for Fairness in EU State Aid Investigations*, U.S. COMM. ON FIN. (Jan. 15, 2016), www.finance.senate.gov/chairmans-news/finance-committee-members-push-for-fairness-in-eu-state-aid-investigations- [https://perma.cc/BV3T-7GRE] (emphasis added).

96. *See* U.S. DEP'T OF THE TREASURY, THE EUROPEAN COMMISSION'S RECENT STATE AID AND

earlier, Apple had been accused by the U.S. Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs of avoiding taxes using a complex web of offshore entities with no employees or physical offices.[97] The investigation, which specifically focused on the above-mentioned Irish ownership scheme, found that Apple's tax avoidance efforts shifted at least seventy-four billion USD out of reach of the Internal Revenue Service between 2009 and 2012.[98] From testimony and comments made during the hearing before the Permanent Subcommittee on Investigations, it emerged that, by 2013, the investigators already considered Apple's deal with the Irish government as secretive and as a form of corporate wrongdoing that had produced adverse consequences on the American revenue:

> Despite the immense impact of these offshore tax practices that deepen the Federal deficit and increase the tax burden on American families, few Americans see the problem because of its complexity . . . . Today, we again spotlight corporate offshore tax avoidance so that our colleagues, and the American people, understand the depth of our offshore tax loophole problem and the damage that it does to our fiscal and economic health.[99] [The] critical factor in Apple's planning was they were able to avoid paying any material Irish tax. It is not clear to me whether they cut a specific deal with the Irish taxing authorities. But . . . we became aware that Apple has entities in Ireland that are not managed and controlled—in fact, all of their major entities in Ireland are viewed as not managed and controlled and, therefore, not tax resident in Ireland. But be that as it may, the bottom line is that they had a substantial amount of income, $74 billion over 4 years, recorded in Ireland, and they paid essentially no tax.[100] . . . . You have an agreement which shifts the economic rights, the most valuable thing you have, to three Irish companies that pay no taxes. That is the shift. That is the Golden Goose right there. That is your crown jewels. That is your intellectual property . . . . Apple Inc. is going to pay the taxes on the income for all the parts of the world except for where two-thirds of the profits are created, roughly.[101]

The European Commission's decision triggered a radical change in the position of American lawmakers, who previously accused the multinational

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INVESTIGATIONS OF TRANSFER PRICING RULINGS (Aug. 24, 2016), https://home.treasury.gov/system/files/131/WhitePaper-EU-State-Aid-8-24-2016.pdf [https://perma.cc/4XUX-RFGT] (affirming that the Commission's interpretation raised four principal concerns: the retroactive application of penalties, a disproportionate impact on US companies, a potential violation of international tax standards, and an uncertainty over the application of US tax treaties with EU Member States).

97. Cecilia Kang, *Apple Avoids Taxes with "Complex Web" of Offshore Entities, Senate Inquiry Finds*, WASH. POST (May 20, 2013) www.washingtonpost.com/business/technology/with-complex-web-of-offshore-entities-apple-avoids-taxes-senate/2013/05/20/a59daea6-c16c-11e2-bfdb-3886a561c1ff_story.html [https://perma.cc/8AAU-Q5LB].

98. Nelson D. Schwartz & Charles Duhigg, *Apple's Web of Tax Shelters Saved It Billions, Panel Finds*, N.Y. TIMES (May 20, 2013), www.nytimes.com/2013/05/21/business/apple-avoided-billions-in-taxes-congressional-panel-says.html [https://perma.cc/NE2W-X587].

99. *Offshore Profit Shifting and the U.S Tax Code—Part 2 (Apple Inc.): Hearing Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs*, 103rd Cong. 2 (May 21, 2013) (statement of Sen. Carl Levin, Chairman, Permanent Subcommittee on Investigations) (emphasis added).

100. *Id.* at 15 (statement of J. Richard Harvey, Professor, Villanova University School of Law) (emphasis added).

101. *Id.* at 61 (statement of Sen. Carl Levin, Chairman, Permanent Subcommittee on Investigations) (emphasis added).

of dodging taxes through the same overseas maneuvers. The nature of the U.S. shift is characteristic of a wider level of hypocrisy and the multifaceted decision-making calculus that drive policy when both national economic interests and those of major corporations are at stake.[102]

C. Sweetheart Tax Deals And Corruption: Interconnections Through Parallel Practices

The practice of allowing select corporate entities to enter sweetheart deals may lead to questionable arrangements that appear to prioritize the financial interests of one entity over public policy, legitimate political decision making, or consistent application of rule of law, or both. Looking more closely at where and how these tax deals intersect with corrupt practices can offer insight into both the nature of the harms and risks and also possible policy responses. Sweetheart tax deals are potentially corrupt in nature and may not only distort justice but also shape how countries compete and position themselves within the international order and maintain alliances, economic institutions, security organizations, and political and liberal norms.[103]

Although formally supported by government authorities, sweetheart deals—such as Apple's Ireland arrangement—can be considered a perilous departure from the ideal of fairness, justice, and the rule of law. Identifying key traits that these agreements share with traditional forms of corruption reinforces this concern and can highlight the problems facing the democratic environments in which these deals operate.

The first shared factor is their selective nature. Similar to traditional corrupt practices, which may be perpetrated only by those with critical economic resources or in a position of power,[104] sweetheart tax deals are only negotiated between authorities with political or administrative power and select, powerful corporations. As a result, the deals offer special advantages, such as departures from baseline tax rules, only to these economic actors. The absence of adequate formal and transparent legal criteria pre-determined by national parliaments for entry into such agreements indirectly reinforces social, political, and economic inequality.[105] Select corporations secure a competitive advantage—an outcome that positions them above the law generally applicable to those without privileged status.

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102. *See* Alan Rappeport, *Yesterday, Outraged by Apple's Tax Dodge. Today, By Its Tax Bill.*, N.Y. TIMES (Aug. 31, 2016) www.nytimes.com/2016/09/01/business/yesterday-outraged-by-apples-tax-dodge-today-by-its-tax-bill.html [https://perma.cc/VC7Q-JR25].

103. *See, e.g.*, MICHAEL J. MAZARR ET AL., UNDERSTANDING THE CURRENT INTERNATIONAL ORDER (2016) (discussing how US policymakers have consistently viewed the international order as a key means of achieving US interests in the world).

104. *See* RUGGIERO, *supra* note 13.

105. *See* Ralph K. Winter, Jr., *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. UNIV. L. Q. 741 (1979) (discussing the difference between formal equality before the law and equality in social-political-economic status).

Second, sweetheart tax deals and traditional corrupt practices both rely on a *quid pro quo*. The special tax arrangements consist of an exchange between the government's authorities and the corporate entity that yields both parties a benefit and is characterized by their shared intent to circumvent the application of existing corporate tax rules.[106] Only corporations with significant global wealth and market power may motivate a state to deviate from its established tax policies to capture some value from having them reside in its jurisdiction.[107] This parallel exists without even considering the possible presence in some tax cases of an illicit *quid pro quo* represented by financial or other advantages—including from unethical lobbying practices—that a powerful corporate entity might offer directly or indirectly to induce government assent to the special tax arrangements. Such corrupt exchanges would be extremely difficult to discover not only because they would obviously be shrouded in secrecy, but also because such tax deals would typically be nestled within the mantle of state legitimacy and process and would not normally trigger criminal investigations.

The third shared feature is their inherently secretive nature. As noted, these special tax arrangements are not public.[108] Their existence is only disclosed through whistleblowers, leakers, or investigative journalists.[109] Unsurprisingly, neither Ireland nor Apple made public their tax arrangements, and they presented their tax liabilities by reference to the ordinary 12.5 percent corporate tax rate.[110] The absence of transparency suggests more than mere "privacy" at stake, and that tax authorities appreciate the problematic and potentially illicit aspects of such deals, as well as foresee the public and international outcry. Continued efforts to keep arrangements undisclosed stand in contrast to more general trends increasing transparency over the last two decades.[111]

Relatedly, a parallel exists between the way in which corporate entities obfuscate tax privileges that they extract from the political environment using their economic clout, and how they frustrate attempts to establish adequate levels of transparency for identifying and countering potentially corrupt practices. This parallel was illustrated by the dynamic within the U.S. extractive sector in opposing introduction of anti-corruption transparency rules for agreements with foreign governments.

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106. *See generally* Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, And Honest-Services Fraud*, 75 LAW & CONTEMP. PROBS., no. 2, 2012, at 61 (exploring the understanding of corrupt practices from an economic standpoint).

107. *See* DiSalvo, *supra* note 75, at 379.

108. *See e.g.*, *Offshore Profit Shifting and the U.S Tax Code*, *supra* note 99 (statement of J. Richard Harvey).

109. *See* Oei & Ring, *supra* note 50. *See also* Deltour, *supra* note 69; Fitzgibbon, *supra* note 67.

110. Robin F. Hansen, *Taking More than They Give: MNE Tax Privateering and Apple's "Ocean" Income*, 19 GERMAN L.J. 693, 714–15 (2018).

111. Costantino Grasso, *The Troubled Path Towards Greater Transparency as a Means to Foster Good Corporate Governance and Fight Against Corruption in the Energy Sector*, *in* HANDBOOK OF ENERGY FINANCE: THEORIES, PRACTICES AND SIMULATIONS 363, 363 (Stéphane Goutte & Duc Khuong Nguyen eds., 2020).

Following the 2008 financial crisis, the United States enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter "Dodd-Frank") in 2010. The Act introduced a transparency rule to fight corruption in the extractive industry. Section 1504 of Dodd-Frank expressly provides that companies in the extractive industries (oil, gas, and mining) have to publicly disclose the amounts that they pay to foreign governments in connection with projects abroad.[112] Section 1504, however, lacks direct applicability because Dodd-Frank requires further implementing steps by the U.S. Securities and Exchange Commission (SEC). Eventually, after long-lasting legal battles initiated mainly by the American Petroleum Institute, the SEC finally adopted the implementing rules in 2016.[113] Having exhausted all potential legal remedies to fight the implementation of Section 1504, corporate powers turned to the remaining remedy at their disposal—exerting influence on the political decision-making process. Shortly after Donald Trump became president of the United States in 2017, the U.S. Congress nullified the 2016 rules that the SEC issued to implement Section 1504 of Dodd-Frank.[114] The following statement was made in the Senate by James Inhofe, Republican Senator from Oklahoma. It aptly demonstrates that, as with the tax deals, where a corporate-state nexus is established, corporate powers not only may bend the domestic political decision-making process to their will, but also they may do so in ways that block the very transparency that would reveal the larger scope of their influence:

> Section 1504 of the Dodd-Frank bill requires the Securities and Exchange Commission to develop a rule that requires companies to report payments made to a foreign government or the U.S. Federal Government relating to the commercial development of oil, natural gas, and minerals . . . . While that may not sound all that significant, it strikes at the heart of American competitiveness. It makes public the information of our very best companies on how to win oil and gas deals. It requires companies to disclose and make public highly confidential and commercially sensitive information, and this is information that foreign competitors don't have to provide. . . . That means that American companies would have to disclose all of the background and sensitive information that companies develop in competing for contracts . . . . with another country, like Iran . . . . with individuals over there who are not friendly to the United States.[115]

Given the determined opposition from powerful corporate entities and the pressure exerted on politicians, the SEC only managed to re-issue the implementing rule in a watered-down version and only in 2020, more than ten years after the enactment of Dodd-Frank.[116] The resulting rule has been openly criticized for being weak and unable "to provide the level of granular

112. *Id.* at 378.

113. *See id.* at 379–80.

114. *See* H.R. J. Res. 41, 115th Cong. (2017) (providing for congressional disapproval of an SEC rule regarding "disclosure of payments by resource extraction issuers").

115. 163 CONG. REC. S493 (daily ed. Jan. 30, 2017) (statement of Sen. James Inhofe) (emphasis added).

116. *See Section 1504: Specialized Disclosures*, U.S. SEC. & EXCH. COMM'N (Dec. 16, 2020), www.sec.gov/spotlight/dodd-frank-section.shtml#1504 [https://perma.cc/8UXP-D37W].

transparency necessary to satisfy the original bipartisan Congressional intent behind the statute."[117]

Another key parallel between special tax arrangements and corrupt practices may be identified by exploring the effects that they exert on society. Revisionist views about corruption stress that it may reduce uncertainty and increase investment,[118] that it may be functional to the maintenance of a political system,[119] or that it may "grease the wheels" of the economic system by serving as an efficient way to manage burdensome regulations and ineffective legal systems.[120] One can imagine articulating similar systemic benefits from sweetheart tax deals—these special arrangements may attract powerful multinational enterprises to the country and, as such, they may boost the economy by providing immediate and concrete benefits. Moreover, both corrupt deals and tax abuses may be depicted as victimless practices with only remote, intangible harms.[121]

However, the reality is that both special tax arrangements and traditional corrupt deals can produce profound and harmful effects on democratic societies. The fact that a state may allow profits earned by powerful corporations to be effectively exempt from taxation through special tax arrangements stands as a deviation from the ordinary administration of the taxation system and, as such, it inherently entails a distortion of fairness and justice. Sweetheart tax deals may be beneficial to the economy, but such positive effects are specific and selective in nature. In contrast, after taxes are paid and collected, proceeds are redistributed to allow public services in all relevant sectors throughout the entire country. This process can be seen in the United Kingdom's 1787 establishment of a consolidated fund, which served as "one fund into which shall flow every stream of public revenue and from which shall come the supply for every service."[122] Taxes can enable benefits to be shared more equally and may help reduce inequality through redistribution policies.

In contrast, when special tax arrangements—with other economic benefits—substitute for the collection of taxes, such crucial effects are lost. By their very nature, the economic benefits of sweetheart tax deals may be enjoyed mainly by the same population that is directly affected by the business activities undertaken

117. Press Release, Benjamin L. Cardin & Richard J. Durbin, Cardin, Durbin Call on SEC to Amend Weak Final Rule Implementing Section 1504 of Dodd-Frank Act (Mar. 10, 2021), www.cardin.senate.gov/press-releases/cardin-durbin-call-on-sec-to-amend-weak-final-rule-implementing-section-1504-of-dodd-frank-act/ [https://perma.cc/944T-MX54].

118. *See* Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8 (1964) (arguing that corruption such as bribery has positive economic effects).

119. SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 64 (1968).

120. *See* Francis T. Lui, *An Equilibrium Queuing Model of Bribery*, 93 J. POL. ECON. 760 (1985) (proposing a new model demonstrating how bribery causes delays by attracting more bribes).

121. *See* PETER ALLDRIDGE, CRIMINAL JUSTICE AND TAXATION 17 (2017) ("For many years, tax evasion, particularly under-declaration for the purposes of income tax, was thought of as a victimless crime or a crime with only remote, intangible harms.").

122. Sir Jhon Bourn, *Public Audit in the United Kingdom*, *in* PUBLIC EXPENDITURE CONTROL IN EUROPE: COORDINATING AUDIT FUNCTIONS IN THE EUROPEAN UNION 30, 41 (Milagros García Crespo ed., 2005).

by the favored corporate entities. For example, primary beneficiaries may include employees that the entity hires or its suppliers. Thus, like clientelist policies, the substituted economic benefit targets specific groups rather than society. Similar to traditional corrupt deals, special tax arrangements tend to accentuate existing inequalities; only the most powerful corporations, with access to political power, have the opportunity to preserve and amplify their economic status.[123] Furthermore, like corrupt practices that allow only the corrupt parties to extract the economic benefits deriving from them, special tax arrangements are inherently anti-competitive.[124] Due to tax base erosion and profit-shifting, other market players following the national tax rules bear a tax burden disproportionately higher than that borne by favored multinational enterprises.[125]

Thus, sweetheart tax deals entail a distortion of justice and may be considered anti-democratic in their deviation from core principles based on equality of citizens and translation of that expectation into the operation of the tax system.[126] Mirroring corrupt practices, these tax deals disproportionately hurt poorer members of society, who may find themselves paying larger fractions of their income in tax despite being in greatest need of government welfare and redistribution policies. Relatedly, special tax arrangements may undermine political stability and government legitimacy, fueling distrust of government as the public learns that some need not follow the same rules.[127] Such pressures on a democracy do not exist in isolation. Money poured legally into politics allows major donors disproportionate weight in public decision-making and exacerbates an already poor public perception of politics.[128] Sweetheart tax deals may further destabilize this democratic environment by undermining the mutual trust that makes social and economic relationships possible. Moreover, the deals invite further tax abuse. They may disincentivize compliant behavior among other market players who now consider the tax system unfair.

Finally, corrupt practices disturb transnational markets, business, and the economy.[129] Special tax deals may produce comparable disruptive effects on the

123. *See generally* Branislav Hock, *Policing Fiscal Corruption: Tax Crime and Legally Corrupt Institutions in the United Kingdom*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 161 (discussing how tax abuse contributes to generating inequalities).

124. Hansen, *supra* note 110, at 694.

125. *Id.* at 695.

126. *Id.* at 694.

127. *See* Francis Fukuyama, *What is Corruption?*, *in* AGAINST CORRUPTION: A COLLECTION OF ESSAYS, (May 12, 2016), www.gov.uk/government/publications/against-corruption-a-collection-of-essays/against-corruption-a-collection-of-essays#francis-fukuyama-what-is-corruption [https://perma.cc/3N8Z-D76W] ("Corruption also breeds public distrust in government . . . [by] undermin[ing] the state's capacity to raise revenue and to perform its functions as a supplier of public goods and services, regulator of markets and agent for society's redistributive goals.").

128. Catalina Perdomo & Catalina Uribe Burcher, *Money, Influence, Corruption and Capture: Can Democracy be Protected?*, *in* THE GLOBAL STATE OF DEMOCRACY: EXPLORING DEMOCRACY'S RESILIENCE 126, 127 (2017) www.idea.int/publications/catalogue/global-state-democracy-exploring-democracys-resilience [https://perma.cc/BCS9-SCV2].

129. Lorenzo Pasculli & Nicholas Ryder, *Corruption and Globalisation*, *in* CORRUPTION IN THE GLOBAL ERA: CAUSES, SOURCES, AND FORMS OF MANIFESTATION 3, 11 (Lorenzo Pasculli & Nicholas

economy of multiple countries and international business operations.[130] Sweetheart tax deals dominated by multinational taxpayers generate negative consequences beyond the national borders of the countries in which they are concluded.[131] Through the taxpayers' use of foreign subsidiaries, all states in which the entities operate lose significant tax revenues. As highlighted in the Apple case,[132] the United States was losing substantial revenue through this form of aggressive tax minimization that was pursued with the engagement of foreign countries.[133] Estimates from the period of Apple's case suggested that U.S. multinational corporations were paying on average less than three percent in taxes to foreign governments.[134] While their profits become taxable when repatriated, in practice, there are few incentives to do so. In a global market, transnational corporations have vast options for investing funds, allowing them to avoid U.S. taxes by, for example, purchasing foreign companies, paying foreign workers, securing loans, and financing foreign investments.[135]

The supranational dimension of aggressive corporate tax minimization schemes explains the almost insurmountable obstacles that states face in tackling these phenomena. Similar barriers confront the establishment and enforcement of anti-corruption laws when states decide to counter corrupt practices perpetrated by strategically important corporate entities. These states may inevitably suffer a dual competitive disadvantage: (1) if their own domestic business entities are subject to more stringent anti-corruption regulations and fines than the those applicable in other jurisdictions; and (2) if foreign multinational corporations, being transnational in nature, exit that enforcing jurisdiction by transferring their main operations abroad.[136] Prosecutorial defeats in landmark cases of corporate corruption[137] and increasing use of settlement

Ryder eds., 2019).

130. *See* Ring, *supra* note 29, at 40.

131. *See generally id.* (exploring tensions between the fact that the vast majority of tax rules are "domestic" and the inherent international nature of tax practice).

132. *See Offshore Profit Shifting and the U.S. Tax Code*, *supra* note 99, at 7 (statement of Sen. Carl Levin, Chairman, Permanent Subcommittee on Investigations) ("[I]n 2012, [Apple] shifted $36 billion in worldwide sales income away from the United States and paid no U.S. tax on any of it.").

133. Alex Cobham & Petr Janský, *Measuring Misalignment: The Location of US Multinationals' Economic Activity Versus the Location of their Profits* 22 (Int'l Ctr. for Tax & Dev., Working Paper No. 42, 2015), www.ictd.ac/publication/measuring-misalignment-the-location-of-us-multinationals-economic-activity-versus-the-location-of-their-profits [https://perma.cc/G6D3-AS75].

134. GABRIEL ZUCMAN, HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 106 (Teresa L. Fagan trans., Univ. of Chi. Press 2015) (2013).

135. *Id.* For a discussion of US multinationals' effective foreign tax rates, see Patrick Driessen, *GILTI's Effective Minimum Tax Rate is Zero or Lower,* 164 TAX NOTES FED. 889 (Aug. 5, 2019).

136. *See* JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 22 (2015) (explaining how "[b]y leveraging their freedom from the bonds of location, corporations could now dictate the economic policies of governments.").

137. *See e.g.*, Pietro Maria Sabella, *Eni & Shell Acquitted in Italian Bribery Court Case*, CORP. CRIME OBSERVATORY (July 23, 2022), www.corporatecrime.co.uk/post/eni-shell-bribery-italy [https://perma.cc/4U3N-8B4G] (explaining that the legal systems of Western democracies are ill-equipped to attribute criminal liability to corporations in transnational corruption cases). *See also* ORG. FOR ECON. CO-OPERATION & DEV., IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION -

agreements—which allow legal entities to negotiate their way out of the criminal process through deals that lack adequate transparency and foster a "pay to perpetrate crimes culture"[138]—are emblematic of such significant challenges. A reluctance to challenge the underlying criminal phenomena supporting the privileges for sweetheart deals may seem warranted from a narrow national interests' perspective, but it cannot be considered a fair and just policy consistent with rule of law and democratic values. Even in the case of entities whose operations are of unique importance to the jurisdiction, acceptance of their problematic conduct is not the only option. For example, solutions that enforce some transparency in granting special treatment could serve to safeguard fundamental values while simultaneously meeting strategic national needs.

Sweetheart tax deals present an additional enforcement complication. Given that these deals are negotiated with the acquiescence of authorities, they become substantially unchallengeable within the jurisdiction in which they have been concluded. The political support accorded by the national government makes domestic redress impracticable. The affected society will become stuck in a negative equilibrium that may be nearly impossible to disrupt internally. Only external pressure, such as that exerted by other states impacted by the tax deal—perhaps through tax base erosion or other burdens—may challenge the deal and the jurisdiction that penned it. However, for such a challenge to be successful, that other state would need to possess sufficient economic or political clout, or both. Even that may not be enough. If the state poised to issue a challenge is the home jurisdiction of the multinational corporation involved in the deal, then that state may face internal resistance as the multinational corporation musters all available political power to prevent home jurisdiction intervention into the sweetheart deal abroad.

This insight provides a key to understanding the radical shift in U.S. lawmakers' attitude towards Apple's conduct. Previously indignant at Apple's tax planning, U.S. leaders became Apple defenders following the European Commission's decision in the Apple case.[139] This shift highlights the limits of national capacity to monitor problematic tax deals and the potential importance of supranational checks—for example, in the EU, a supranational court detached from the economic interests of single Member States and less susceptible to

PHASE 4 REPORT: ITALY 33 (2022), www.oecd.org/corruption/anti-bribery/italy-phase-4-report.pdf [https://perma.cc/QMP8-QX9G] (explaining how, in Italy, court decisions raise serious concerns because of the high rate of dismissal in foreign bribery cases due to the extremely onerous burden of proof imposed to prosecuting authorities).

138. Costantino Grasso, *Concerns Regarding or Improvement to the UK Anti-Money Laundering Regime* (written evidence submitted to the House of Commons Treasury Committee), U.K. PARLIAMENT (2020), https://committees.parliament.uk/writtenevidence/17591/pdf [https://perma.cc/8NDG-MWLQ]. *See* also GARRETT, *supra* note 41, at 7–8 (explaining the lack of transparency around decisions not to prosecute corporations).

139. *See* Rappeport, *supra* note 102 ("American lawmakers have for years been assailing companies for dodging taxes with overseas maneuvers. But now that the European Union has done something about it by trying to wrest billions of dollars from Apple, those officials have offered a response viewed by many as rife with hypocrisy: collective outrage.").

corporate pressures.[140] Research findings from the VIRTEU project corroborate these observations and concerns regarding realistic enforcement outcomes. When the experts participating in the Expert Survey[141] were asked to express their expectations about the impact and effectiveness of the European Public Prosecutor's Office (EPPO)[142] in the fight against tax crimes, they assessed it as "high."[143] During the National Workshop focused on Bulgaria, the experts acknowledged how an external intervention such as that from the European Public Prosecutors Office or the U.S. sanction system implemented through the Global Magnitsky Act[144] may help resolve the impasse resulting from capture at the domestic level.[145]

However, given the global dimension of multinationals' tax abuse, for a response to be both effective and immune to charges of partisanship,[146] it should be established at the international, rather than regional, level.[147] Absent that, powerful multinational corporations will continue to exert pressure on national governments extracting special advantages and destabilizing international stability and relations—a prospect reflected in the context of Brexit. Just as Brexit proponents argued that leaving the EU was necessary to allow the United Kingdom to "take back control" of its economy, some suggested post-Apple verdict that Ireland should leave an "interventionist, anti-sovereignty" European

140. *See* Costantino Grasso, *The European Court of Justice as a Bastion of Democracy and Rule of Law*, OPENDEMOCRACY (Sept. 20, 2018), www.opendemocracy.net/en/can-europe-make-it/european-court-of-justice-as-bastion-of-democracy-and-rule-of-l [https://perma.cc/3RZM-LW45] (explaining how the European Court of Justice is not bound by typical political pressures).

141. The Expert Survey represents qualitative empirical research carried out during the VIRTEU project: observation and measurement of the interconnections between tax abuses and corruption drawn from opinions gathered anonymously from 29 experts with expertise in tax crime, tax enforcement, or anti-corruption from 10 different jurisdictions. *See generally* COSTANTINO GRASSO & STEPHEN HOLDEN, CORP. CRIME OBSERVATORY, EXPERT SURVEY REPORT: THE INTERCONNECTIONS BETWEEN TAX CRIME AND CORRUPTION (Sept. 2022), www.corporatecrime.co.uk/virteu-expert-survey [https://perma.cc/UFK9-FLWG] (providing a comprehensive report on the survey).

142. The European Public Prosecutor's Office (EPPO) is the new independent public prosecution office of the European Union, responsible for investigating and prosecuting crimes against the financial interests of the Union including tax crimes, money laundering, and corruption. *See Mission and Tasks*, EUR. PUB. PROSECUTOR'S OFF., www.eppo.europa.eu/en/mission-and-tasks. *See also* Valeria Sico, *VIRTEU International Final Conference, Day 1 – Panel 2*, CORP. CRIME OBSERVATORY, at 14:45 (June 26, 2022), www.corporatecrime.co.uk/virteu-final-conference-day1-panel2 [https://perma.cc/5WXH-2PLT] (providing a discussion of the functions and role of the EPPO).

143. GRASSO & HOLDEN, *supra* note 141, at 25.

144. Under the Global Magnitsky Act individuals and entities from any part of the world may be designated and sanctioned in the US for involvement in corruption or serious human rights abuse. *See generally* Global Magnitsky Human Rights Accountability Act, 22 U.S.C. §§ 10101–10103 (2018).

145. Ruslan Stefanov, *VIRTEU National Workshop – Bulgaria – Session 2*, CORP. CRIME OBSERVATORY, at 1:13:01 (June 29, 2021), www.corporatecrime.co.uk/virteu-workshop-bulgaria [https://perma.cc/88RL-AD5W].

146. *See* Houlder et al., *supra* note 74 (explaining that, although the European Commission is acting as a "watchful referee of how national rules are implemented," this situation "threatens to upset US-EU relations").

147. *See* Lorena Bachmaier Winter & Donato Vozza, *Corruption, Tax Evasion, and The Distortion Of Justice: Global Challenges and International Responses*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 96 (proposing the establishment of an international convention against tax crime).

Union.[148] Voices like those of Nigel Farage, the outspoken Brexit leader who declared the EU "anti-democratic" and "doomed" and asked, "[w]hy are our laws being made somewhere else?," prompted Turkey's deputy prime minister to seize the moment of regional tension.[149] The prime minister then urged Apple to relocate from Ireland to Turkey, a jurisdiction outside the EU and one that is "happy to provide more generous tax incentives."[150]

IV

TAX ABUSE AND CORRUPT PRACTICES: A NATIONAL STORY

Having explored how tax abuse and potentially corrupt practices may produce adverse effects at the supranational level, this Part turns the focus to the national level and uses the opportunity to investigate how corruption may lead to tax abuse. The combined effect of corruption and tax abuse impacts the political decision-making process; it also impacts administrative and enforcement functions, and can erode the social fabric and tax compliance culture.[151] Thus, not only are tax abuse and corruption linked by their common characteristics, as highlighted by the examples of shared traits in Part III, they are linked through their ability to reinforce and facilitate each other, as revealed by the examples here in Part IV. Of course, both types of connections between corruption and tax abuse—their parallel features and their overlapping operation—exist in national and global level stories.

Research activities carried out during the VIRTEU project[152] reveal how taxation is negatively affected by unethical and corrupt practices. Such undue interference appears to be the result of a series of questionable practices that, although not commonly criminalized by national legal frameworks, undoubtedly represent enabling factors of corruption. Specifically, this study has identified the undue influence wielded by powerful firms, the revolving door phenomenon, as well as the role played by tax professionals as enablers of tax abuses as among the most relevant, problematic, and potentially harmful practices in taxation. As argued below, these practices are problematic not only individually but collectively through their integrated influence. The risk may be especially pronounced due to the level of technical complexity that characterizes the tax sector and the high level of expertise and specialization commonly required to implement or audit convoluted tax arrangements.

148. Max Bearak, *How the E.U.'s Ruling on Apple Explains why Brexit Happened*, WASH. POST (Aug. 30, 2016), www.washingtonpost.com/news/worldviews/wp/2016/08/30/how-the-e-u-s-ruling-on-apple-explains-why-brexit-happened/ [https://perma.cc/Q53V-HN7L].

149. *Id.*

150. *Id.*

151. *See* Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 IOWA L. REV. 1153, 1192 (2021) (explaining that "governmental misspending or corruption justifies cheating on tax payments" and that "[t]he lack of enforcement of the tax laws places an unfair burden on honest taxpayers" disincentivizing tax compliance).

152. *See supra* note 17 (explaining the VIRTEU project).

A. Distortions to The Political Decision-Making Process

At the national level, questionable and potentially corrupt practices may lead to a situation of "state capture," defined as a condition in which industry molds the government's policy agenda and decisions to benefit private players rather than the public.[153] Such capture is present where business actors use the regulatory process to secure private economic advantages, for example, by erecting barriers to entry that generate economic rents.[154] Although state capture is inherently intertwined with corrupt practices, it may be distinguished from instances of bribery in that it is characterized by a recurring or lasting effect that is the result of phenomena including unethical lobbying, asymmetric exchange of favors, or threats of economic, political, or legal retaliation.[155]

A situation of state capture may derive from the action of "influential firms" which, without resorting to direct financial or other advantages to public officials, may exert corrupting influence on public institutions.[156] Such capture can be extremely difficult to divine so that even the institutions or agencies subject to it may not be entirely aware of the extent to which their decision-making process has affected.[157] These broadly defined corrupt practices represent what is commonly labeled as grand corruption or political corruption.[158] They entail the misuse of public office at higher levels within the state through the involvement of a relatively small number of powerful players seeking favorable legislation, beneficial regulations, government contracts, or other privileged treatments.[159] These forms of political corruption exploit the structure of the state, which is characterized by discretionary powers conferred to politicians and civil servants who may be tempted to use them to put themselves, members of their families, or their clients in an advantageous position.[160] In the worst-case scenario of political corruption, high-level politicians and public officials join forces with private actors in order to use the state as a vehicle for private income.[161]

This Part will explore distortions in the political decision-making process that are particularly relevant for taxation. It will focus on the undue influence that corporate power may wield on the way in which the national legal frameworks are designed and discuss how undue pressure may limit the criminalization of

153. Pamela J. Clouser McCann et al., *Measuring State Capture*, 2021 WIS. L. REV. 1141, 1145 (2021).

154. *See* Daniel T. Ostas, *Endogenous Tax Law: Regulatory Capture and the Ethics of Political Obligation*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 49.

155. Daniel Carpenter & David A. Moss, *Introduction*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1, 18 (Daniel Carpenter & David A. Moss eds., 2014).

156. Joel S. Hellman et al., *Seize the State, Seize the Day: State Capture and Influence in Transition Economies*, 31 J. COMP. ECON. 751, 753 (2003).

157. *Id.*

158. SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 11 (2016).

159. *Id*.

160. Susan Rose-Ackerman, *Corruption and Democracy*, 90 AM. SOC'Y INT'L L. PROC. 83, 83 (1996).

161. CARL DAHLSTRÖM, BUREAUCRACY AND CORRUPTION, *in* ROUTLEDGE HANDBOOK OF POLITICAL CORRUPTION 110, 111 (Paul M. Heywood ed., 2015).

forms of tax abuses or offer powerful players an exit path from the criminal process.

The conflation of national and corporate interests, the backing of political campaigns, as well as the funding of scientific studies and expert reports which are partisan in nature, are all techniques which might broadly be described as unethical "lobbying" practices. They represent measures by which major corporate actors may use their economic and political power to change and shape the regulatory framework within which they operate. Such pervasive influence may be exerted by multinational corporations individually or through the actions of non-profit organizations created for such a purpose.[162] The way in which legal frameworks are designed constitutes an integral part of the "capital" that corporations have at their disposal.[163] Therefore, it should not be surprising that powerful taxpayers continually seek to shape the law to reduce their taxes and create value for themselves even where the wellbeing of the wider society and the democratic environment are at stake.[164] A criminogenic environment develops when the applicable legal frameworks are shaped in ways that foster opportunities or strengthen motivations for illegal conduct.[165]

Since the 1990s, the blended effects of globalization[166] and neo-liberalist policies of de-regulation[167] have positioned corporations as the most influential economic and political players in western democracies, since they have the capacity to exert an impact at the global level. The adverse consequences of unrestrained and unchecked corporate power on how countries are administered, and on society generally, were already observed long ago. In 1776, in his work

162. *See e.g.*, Costantino Grasso, *Corporate America and Mass Shootings: A Tale of Corporate Social Irresponsibility,* CORP. SOC. RESP. & BUS. ETHICS BLOG (Mar. 2, 2018), https://corporatesocialresponsibilityblog.com/2018/03/02/mass-shootings-and-csr/ [https://perma.cc/4S4G-DVEJ] (discussing irresponsible use of lobbying practices aimed at opposing the introduction of any limitation on the commercialization of firearms that the gun industry pursued through the National Rifle Association of America).

163. *See generally* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2020) (suggesting that capital is made from two ingredients: an asset and the legal code).

164. *See id.* at 3 (explaining that, thanks to the assistance of lawyers acting as "code's master," affluent individuals are able to shield their assets from taxes generating a level of inequality that threatens the social fabric of our democracies).

165. *See* Lorenzo Pasculli & Stuart Maclennan, *"The Producers" of Tax Abuse: The Corrupting Effects of Tax Law and Tax Reliefs in the UK Film Industry*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 109–10.

166. In this study, "globalization" refers to the economic process by which products and capital markets have become increasingly integrated since the Second World War. *See* ALAN DIGNAM & MICHAEL GALANIS, THE GLOBALIZATION OF CORPORATE GOVERNANCE 90–91 (2009) (analyzing the different meanings often assigned to "globalization" to derive an appropriate definition).

167. For the purposes of this work, neo-liberal policies are intended as rational views of democracy, with an emphasis on representation and a minimization of state participation. *See generally* Joy Marie Moncrieffe, *Reconceptualizing Political Accountability*, 19 INT'L POL. SCI. REV. 387, 396 (1998). For an analysis of how neorealism and neoliberalism have served as drivers of international relations in taxation, see Ring, *supra* note 29, at 91 (outlining the factors emphasized most by the neorealism and neoliberalism frameworks).

The Wealth of Nations, Adam Smith observed that when a corporation enjoys exclusive privileges it "necessarily weakens the force of [its members] discipline."[168] In 1934, during his famous debate with Merrick Dodd, Adolf Berle labeled the idea that corporate managers were enlightened individuals that deserved to be trusted as a mere "pious wish."[169] Foucault effectively depicted the phenomenon by which the bourgeoisie, with its economic power, had managed to shape state policies so as to gain privileged treatment.[170] The main difference is that the era of the bourgeoisie has been overtaken by the era of corporations. Similar to events at the end of the eighteenth century,[171] the evolution has entailed a process of transforming the exercise of state power.[172] By the end of the twentieth century, with governments shaped by corporations through lobbying power, a general and increasing awareness developed of the dangerous mix of power and unaccountability wielded by major corporations.[173] In the United States, the situation intensified in the wake of the historic 2010 U.S. Supreme Court decision, *Citizens United*,[174] which constrains government's ability to set limits on corporate spending for political advertising. In an interview published by the New York Times, then President Barak Obama underlined how, as a consequence of increasingly aggressive corporate lobbying, "ordinary Americans are shut out of the [political] process" and stressed the reasons why "we've seen a breakdown of just normal routine business done here in Washington on behalf of the American people."[175]

Such a pervasive phenomenon appears to reflect two forces. On the one hand, multinational corporations may *directly* exert enormous pressure on the authorities. Quoting U.S. Senator Sheldon Whitehouse, "corporations of vast wealth and remorseless staying power have moved into our politics, to seize for themselves advantages that can be seized only by control over government."[176] On the other hand, thanks to their immense economic power, they can *indirectly* influence the public sector so that authorities may tend to grant them privileges or favorable treatment merely to avoid undermining the profitability or placing at a competitive disadvantage a prized producer in the economy.

168. ADAM SMITH, THE WEALTH OF NATIONS 146 (Liberty Classics ed. 1981) (1776).

169. Adolf Augustus Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365, 1368 (1932).

170. *See* FOUCAULT, *supra* note 42, at 87.

171. Traditionally, the French revolution marks the moment when the capitalist bourgeoisie overthrew the feudal aristocracy to remake society. See *French Revolution*, ENCYC. BRITANNICA (last updated Oct. 18, 2022), www.britannica.com/event/French-Revolution [https://perma.cc/CV26-P8QB].

172. *See* JOHN MIKLER, THE POLITICAL POWER OF GLOBAL CORPORATIONS 3 (2018) (highlighting that globalization literature often analyses "who controls" between the state and markets).

173. BAKAN, *supra* note 136, at 27.

174. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

175. N.Y. Times, *Obama on Citizens United Ruling*, YOUTUBE (Oct. 9, 2013), www.youtube.com/watch?v=O8ApHBsP5Z0 [https://perma.cc/7WZP-MJZZ].

176. SHELDON WHITEHOUSE, CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY xix (2017).

B. Undue Influence in The Area of Taxation

Forms of undue influence assume distinctive characteristics in the area of taxation given its technical complexity. From VIRTEU project research activities, it emerged that undue corporate influence is related to the pervasiveness and profitability of the tax advising industry, which includes big accounting and law firms as well as financial institutions and auditors. These corporate actors play a significant role in either acquiescing to the perpetration of economic crime or even directly participating in such criminal activities.[177] In 2018, the U.K. government called for a sweeping review of Britain's auditing industry—dominated by the "Big Four" firms—because of systemic and inherent conflicts of interest.[178] The move was prompted by a series of economic crime scandals in which corporate auditors were enmeshed.[179] A small group of accounting firms continue to operate simultaneously as both auditors and advisors.[180] As auditors, they play the quasi-regulatory role of crucial watchdog; as financial advisors, they assist the same clients in minimizing their tax liability—for example, by designing aggressive tax avoidance schemes.[181] The Big Four are also very active in the development of the legal framework for taxation, as well as the regulatory environment for corporate accounting and auditing.[182] The pervasive and obscure ways[183] in which these firms may adversely influence the development of anti-tax abuse strategies emerged from a 2018 report published by the Corporate Europe Observatory. The report detailed how the firms are embedded in EU tax policy-making and that, as a result, EU tax policies appear to be "informed by an advisory system littered with conflicts of interest."[184] The

177. Richard Brooks, "*The Professionals: Dealing with the Enablers of Economic Crime*," CORP. CRIME OBSERVATORY, at 32:50 (July 21, 2021), www.corporatecrime.co.uk/virteu-symposium-the-professionals [https://perma.cc/U26Y-QSAS].

178. George Parker & Jonathan Ford, *UK to Press for Shake-up of Big Four Auditors: Business Secretary Greg Clark Asks CMA to Consider Probe Into Industry*, FIN. TIMES (Sept. 28, 2018), www.ft.com/content/73a7bb34-c338-11e8-8d55-54197280d3f7 [https://perma.cc/QSB7-ZXKS].

179. *Id.*

180. *See* Middleton, *supra* note 34, at 20:24 (highlighting the power of the Big Four accounting firms to operate as financial advisors to companies).

181. *See id*. at 20:42 (highlighting that the audit process uniquely positions accountants to learn about a company's business and advise on tax avoidance schemes as a means to generate savings for their clients and revenues for their firms). For an analysis of the dual role played by powerful accounting firms during the financial crisis of 2008, see Patricia J. Arnold, *Global Financial Crisis: The Challenge to Accounting Research,* 34 ACCT., ORG. & SOC'Y 803, 807 (2009).

182. Prem Sikka & Hugh Willmott, *The Tax Avoidance Industry: Accountancy Firms on the Make*, 9 CRITICAL PERSP. ON INT'L BUS. 415, 416 (2013).

183. The way in which these firms try to silence potential disclosures is illustrative of such level of opaqueness. *See* Madison Marriage, *Betrayed by the Big Four: Whistleblowers Speak Out*, FIN. TIMES (Nov. 20, 2019), www.ft.com/content/78f46a4e-0a5c-11ea-bb52-34c8d9dc6d84 [https://perma.cc/HVH8-RLZA] (illustrating how the Big Four adopted a disturbingly common pattern of harassment, bullying, and discrimination in terms of how whistleblowers were treated: "most initially felt ignored, then isolated and were eventually pushed out").

184. *Accounting for Influence: How the Big Four are Embedded in EU Policy-making on Tax Avoidance*, CORP. EUR. OBSERVATORY (July 10, 2018), https://corporateeurope.org/en/power-lobbies/2018/06/tax-avoidance-industry-embedded-eu-tax-policy [https://perma.cc/DA9Y-QRNC].

presence of this troublesome level of potential bias was highlighted by Alex Cobham, Chief Executive of the Tax Justice Network: "the 'big four' accounting firms . . . are not the guardians of financial probity they purport to be. They bring technical expertise, . . . but that expertise is bought and sold . . . ."[185]

The ability of powerful market players to direct the political process to their goals was examined by panelists of the VIRTEU Roundtable on institutional corruption. Panelists emphasized how politicians may be subject to various degrees of "cognitive capture," a form of psychological standardization of key policy makers that places them at risk of "becom[ing] . . . puppets that just serve their masters' interests."[186] The landmark case of British multinational bank HSBC reveals how pervasive such capture can be. In 2012, HSBC admitted to anti-money laundering and sanctions violations—having laundered through its U.S. subsidiary ill-gotten gains originating from Mexican drug cartels and other criminal sources. Notwithstanding the opposition of several prosecutors,[187] the global financial institution successfully negotiated a deferred prosecution agreement[188] with the U.S. authorities, forfeiting 1.25 billion USD.[189] Panelists also noted that U.S. regulators conducted a "paper audit" without actually reviewing any of the records, suspicious activity reports, or any of the documentation that was produced by a bank.[190] Furthermore, the British Chancellor of the Exchequer and the British Prime Minister reached out to Washington to lobby on behalf of HSBC and try to prevent the Department of Justice from moving forward with a prosecution.[191] In 2020, the FinCEN leak

185. Alex Cobham, *KPMG and the False Objectivity of the 'Big Four'*, TAX JUST. NETWORK (Sept. 18, 2017), https://taxjustice.net/2017/09/18/kpmg-false-objectivity-big-four [https://perma.cc/CLY9-5UML].

186. Prem Sikka, *Institutional Corruption and Avoidance of Taxation*, CORP. CRIME OBSERVATORY, at 29:35 (Mar. 12, 2021), www.corporatecrime.co.uk/virteu-institutional-corruption [https://perma.cc/FZ8N-2SEA].

187. *See* Carrick Mollenkamp & Brett Wolf, *RPT-INSIGHT-U.S. Probe of HSBC Tangled up in Bureaucracy, Infighting*, REUTERS (Sept. 26, 2012), www.reuters.com/article/hsbc/rpt-insight-u-s-probe-of-hsbc-tangled-up-in-bureaucracy-infighting-idUSL1E8KPME620120926 [https://perma.cc/BM32-GNX3] (explaining that the West Virginia U.S. Attorney experienced a breakdown in relationship with the Department of Justice and was instructed to stand down as they prepared to indict HSBC for as many as 175 counts of money laundering).

188. *See infra* note 266 (providing an overview of Deferred Prosecution Agreements).

189. *See HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement*, U.S. DEP'T OF JUST. (Dec. 11, 2012), www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations [https://perma.cc/G9SU-54SW] (noting that the bank forfeited $1.256 Billion in a Deferred Prosecution Agreement).

190. Brandon Garrett, *Institutional Corruption and Avoidance of Taxation*, CORP. CRIME OBSERVATORY, at 32:33 (Mar. 12, 2021), www.corporatecrime.co.uk/virteu-institutional-corruption [https://perma.cc/4ABQ-HD6J]. *See also HSBC and the Price of Technical Compliance: Is Cutting Regulatory Corners Potentially Worth $1 Billion?*, CTR. FOR L. MKTS. & REGUL., https://clmr.unsw.edu.au/article//hsbc-and-the-price-of-technical-compliance%3A—is-cutting-regulatory-corners-potentially-worth-%241-billion%3F [https://perma.cc/UWM5-SBDA] (explaining that the Department of Justice report stressed the systemic failures of HSBC's regulator, the Treasury's Office of the Comptroller of the Currency, in the face of evidence of risky banking).

191. John Christensen, *Institutional Corruption and Avoidance of Taxation*, CORP. CRIME

scandal renewed attention to the HSBC case,[192] when leaked documents included dozens of HSBC's suspicious activity reports (SARs).[193] These reports, which had been confidentially submitted to the Financial Crimes Enforcement Network (FinCEN),[194] showed that the global bank continued to provide banking services to "alleged criminals, Ponzi schemers, shell companies tied to looted government funds, and financial go-betweens for drug traffickers" even when under the "surveillance" of an independent compliance monitor as provided by the terms of the 2012 agreement.[195] The leaked HSBC's suspicious activity reports showed that between 2013 and 2017, HSBC's U.S. compliance staff filed reports lacking crucial customer information on sixteen shell companies that had processed nearly 1.5 billion USD in over 6,800 transactions involving shell companies linked to alleged criminal networks.[196] The FinCEN files raised new questions about the Department of Justice's 2012 decision to forgo indicting HSBC or any of its executives. Additionally, the new data undermined regulator decisions not to launch investigations on the basis of the SARs HSBC submitted to FinCEN. Equally worrisome, two years on from the FinCEN scandal, progress on the U.S. corporate ownership registry system enacted in 2021 has been slow.[197] Although

OBSERVATORY, at 36:26 (Mar. 12, 2021), www.corporatecrime.co.uk/virteu-institutional-corruption [https://perma.cc/4QRQ-UR8F]. *See also* REPUBLICAN STAFF OF THE COMM. ON FIN. SERVS., 114TH CONG., TOO BIG TO JAIL: INSIDE THE OBAMA JUSTICE DEPARTMENT'S DECISION NOT TO HOLD WALL STREET ACCOUNTABLE 14, app. at 42–43 (July 11, 2016), https://republicans-financialservices.house.gov/uploadedfiles/07072016_oi_tbtj_sr.pdf [https://perma.cc/JRQ5-5TFP] (noting that "before DOJ could announce at the September 11th interagency call whether its senior leaders had approved AFMLS's recommendation to prosecute HSBC, George Osborne, Chancellor of the Exchequer, the UK's chief financial minister, intervened in the HSBC matter . . .").

192. For an analysis of the effects of the FinCEN scandals through a corporate governance lens, see Florencio Lopez-De-Silanes et al., *Corporate Governance and Value Preservation: The Effect of the FinCEN Leak on Banks*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 248.

193. Suspicious Activity Reports (SARs) include information natural and legal persons operating in regulated sectors (e.g., financial institutions and lawyers) are required to submit to alert law enforcement to potential economic crime. *See Suspicious Activity Reports*, NAT'L CRIME AGENCY, www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/money-laundering-and-illicit-finance/suspicious-activity-reports [https://perma.cc/N5TD-R28V].

194. FinCEN is an intelligence office within the U.S. Treasury Department, which collects and analyzes information about financial transactions in order to combat domestic and international money laundering, terrorist financing, and other financial crimes. *See Mission,* FIN. CRIME ENF'T NETWORK, www.fincen.gov/about/mission [https://perma.cc/WF47-VLGV].

195. Spencer Woodman, *HSBC Moved Vast Sums of Dirty Money After Paying Record Laundering Fine*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Sept. 21, 2020), www.icij.org/investigations/fincen-files/hsbc-moved-vast-sums-of-dirty-money-after-paying-record-laundering-fine [https://perma.cc/DNN5-QQLM].

196. *Id*.

197. *See, e.g.,* Spencer Woodman, *New US Company Owner Database 'Taking Way Too Long' to Implement, Experts Warn*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Sept. 20, 2022), www.icij.org/investigations/fincen-files/new-us-company-owner-database-taking-way-too-long-to-implement-experts-warn/ [https://perma.cc/W5SY-WVWN] (noting the two-year delay in implementing the registry). The beneficial ownership registry was enacted in the Corporate Transparency Act (CTA). *See* Title LXIV, § 6401 of the National Defense Authorization Act (H.R. 6395), Pub. L. No. 116-283, § 6401, 134 Stat. 3388, 4604 (2019). Proposed regulations under the CTA were issued in December 2021 but were not finalized until the end of September 2022. *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010).

the beneficial ownership regime is not a product of the tax system, it is expected to serve as an important next step in fighting tax abuse.[198] From this perspective, a matter of concern emerges from a recent decision of the European Court of Justice, which limited the public accessibility of data included in the beneficial ownership registers within the European Union.[199]

The recent "Uber Files" scandal represents another example of such interactions between powerful corporations and authorities. The investigation led by the Guardian and the International Consortium of Investigative Journalists unveiled Uber's efforts to thwart regulators and law enforcement, and to encourage prominent world leaders to influence legislation and help the firm avoid taxes in several countries.[200] As Uber expanded its footprint around the globe, it developed tax abuse mechanisms to save millions of dollars in taxes by routing profits through tax havens.[201] At the same time, in an effort to confine the demands of tax authorities, the company promoted regular interactions between its managers and public officials designed to encourage the latter to collect taxes from its drivers and steer attention away from its corporate tax liabilities.[202]

C. Professional Enablers of Tax Abuses

As detailed above, the complexity of tax systems[203] places tax professionals and, in particular, large accounting and law firms, in a dominant position that can be exploited to unduly influence the political decision-making process. The role played by some tax professionals has become morally questionable because it fosters a "criminogenic" environment that undermines regulatory and prosecutorial enforcement.[204] But tax professionals are not unique; the same dynamic appears in other forms of economic crime characterized by the presence

198. *See* Diane M. Ring, *The 2021 Corporate Transparency Act: The Next Frontier of U.S. Tax Transparency and Data Debate*s, 18 PITT. TAX REV. 249, 271 (2021) (stating "the newly enacted CTA marks a major step for the United States in joining other countries in adopting beneficial ownership reporting and registries.").

199. *See* Joined Cases C 37/20 and C 601/20, WM and Sovim SA v. Luxembourg Business Registers, ECLI:EU:C:2022:912 (admitting that the EU measures seek to prevent money laundering and terrorist financing by enhancing transparency but, at the same time, stating that such measures should be limited to what is strictly necessary and proportionate to the objective pursued).

200. Harry Davies et al., *Uber Broke Laws, Duped Police and Secretly Lobbied Governments, Leak Reveals*, GUARDIAN (July 11, 2022), www.theguardian.com/news/2022/jul/10/uber-files-leak-reveals-global-lobbying-campaign [https://perma.cc/3RKC-APSA].

201. Scilla Alecci, *Uber Shifted Scrutiny to Drivers as It Dodged Tens of Millions in Taxes*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (July 11, 2022), www.icij.org/investigations/uber-files/uber-tax-havens-dodge-drivers [https://perma.cc/Q8VE-54ZB].

202. *Id.*

203. *See* GRASSO & HOLDEN, *supra* note 141, at 11 (illustrating that the vast majority of participating experts considered their national tax system as "complex," with the experts from Italy, Portugal, and Estonia rating it as "very complex").

204. *See* Elaine Doyle, *Encouraging Ethical Tax Compliance Behaviour: The Role of the Tax Practitioner in Enhancing Tax Justice*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 138 (discussing how tax professionals are frequently the architects of complex transactions that exploit loopholes in domestic legislation to reduce clients' tax burdens).

of illicit financial flows. Enablers, including banks, financial institutions,[205] and professionals, regularly assist powerful criminal actors in injecting ill-gotten gains into the international financial system—creating an intricate financial web of transactions to conceal the original source and ownership of the illegal funds. It becomes extremely difficult to decipher such complex scenarios when the jurisdictions typically involved are characterized by a high level of financial secrecy. These jurisdictions include not only relatively small countries such as Switzerland (FSI value 1,167; Secrecy Score 70/100), Luxembourg (FSI value 804; Secrecy Score 55/100), and Cyprus (FSI value 510; Secrecy Score 62/100), but also more powerful economic players such as the United States (FSI value 1,951; Secrecy Score 67/100), Germany (FSI value 681; Secrecy Score 57/100), and various British overseas territories like the British Virgin Islands (FSI value 621; Secrecy Score 71/100).[206] Several investigations conducted primarily by investigative journalists and international NGOs have shown how the immense economic interests at stake, along with the consequent intense competition among jurisdictions, serve as major obstacles in the fight against these pervasive forms of corrupt practices.[207]

Individuals and organizations engaging in tax abuse lack the expertise to design and obfuscate complex financial tax schemes autonomously. Accordingly, they tend to seek out the services of professionals to benefit from their expertise in setting up companies to be used for illicit purposes and to obtain advice regarding ways to engage corporate vehicles—for example, off-shore companies, foundations, or trusts—in their fraudulent schemes.[208] During the VIRTEU Expert Survey,[209] the frequency with which tax professionals functioned as enablers or facilitators of tax abuse was considered "worrisomely high."[210] Accountants and lawyers were the most relevant categories of professionals

205. For an investigation on the role that banks and financial institutions play as enablers of economic crime, see generally BILL BRADLEY & JAMES HENRY, THE BLOOD BANKERS: TALES FROM THE GLOBAL UNDERGROUND ECONOMY (2005) and DAVID ENRICH, DARK TOWERS: DEUTSCHE BANK, DONALD TRUMP, AND AN EPIC TRAIL OF DESTRUCTION (2020).

206. *The Financial Secrecy Index 2022*, TAX JUST. NETWORK, https://fsi.taxjustice.net/ [https://perma.cc/W92M-ATEX]. The FSI value indicates how much financial secrecy the jurisdiction supplies internationally, and the Secrecy Score, where "0" means no secrecy and "100" full secrecy, indicates how much financial secrecy the jurisdiction's laws allow.

207. *See*, *e.g.,* Michael Oswald, *The Spider's Web: Britain's Second Empire*, YOUTUBE (Sep. 14, 2018), www.youtube.com/watch?v=np_ylvc8Zj8 [https://perma.cc/3HFL-48W6] (documenting an investigation into the world of Britain's secrecy jurisdictions and the City of London).

208. *See* GOUNEV & BEZLOV, *supra* note 28, at 119 ("The professional services industry, in particular law-firms, accounting firms, and trust and company service providers (TCSPs) might play an important role in facilitating money laundering and white-collar crime."). For an example of how offshore trust company may enable tax dodging and money laundering see Nicky Hager, *Huge New Tax Haven Leak Reveals Specialist Money-Laundering Company*, EUR. INVESTIGATIVE COLLABORATIONS, https://eic.network/blog/huge-new-tax-haven-leak-reveals-specialist-money-laundering-company [https://perma.cc/5WKN-GR88] (describing financial services company La Hougue's practice of creating trusts and companies that might be used for tax dodging and money laundering).

209. *See generally* GRASSO & HOLDEN, *supra* note 141.

210. *Id.* at 37.

involved in these practices, followed by financial advisors, and auditors (external and internal).[211]

Such findings were corroborated by other VIRTEU project research.[212] Although the role of both accountants and lawyers appears crucial in setting up tax abusive schemes, the precise ways in which these two groups serve as enablers or facilitators differ. As the literature has emphasized, accountants—especially the ones operating in big accounting firms—may be considered the architects of these tax schemes that are designed and advertised as firm products.[213] Meanwhile, lawyers appear to offer crucial legal support by, for instance, establishing shell companies or managing the legal relationships between the taxpayers, intermediaries, and figureheads.[214] Furthermore, lawyers operate in another subtle way thanks to the internal organization of law firms. They work semi-autonomously and with limited oversight, exploiting the confidentiality regime that covers communications between them and their clients.[215] This practice was also underscored by the public prosecutors participating in the VIRTEU National Workshop that focused on the Netherlands.[216]

The proximity of professional enablers and public authorities makes the interactions between them inherently problematic: accountants and lawyers serve as professional intermediaries between public officials and tax abusers. A research project funded by the European Commission identified how the professional services industry—in particular, law firms and accounting firms—may facilitate economic crime through corrupt practices when acting as middlemen between authorities and criminal entrepreneurs.[217] Unscrupulous

211. *Id*. at 38.

212. *See e.g.,* Dimitrios Voulgaris, *VIRTEU National Workshop – Greece – Session 2*, CORP. CRIME OBSERVATORY, at 02:39 (July 16, 2021), www.corporatecrime.co.uk/virteu-national-workshop-greece [https://perma.cc/4JJ4-AKXD] (arguing that, although due to their knowledge of tax law and tax mechanisms, the role of both accountants and lawyers is crucial in arranging tax abusive schemes, and the role of accountants is fundamental in that, without them, it would not even be possible for the organizers to assess the profitability of a tax evasion scheme).

213. TANINA ROSTAIN & MILTON REGAN, CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 5 (2014).

214. Lloydette Bai-Marrow, *VIRTEU National Workshop – United Kingdom – Session 2*, CORP. CRIME OBSERVATORY, at 10:17 (July 23, 2021), www.corporatecrime.co.uk/virteu-workshop-uk [https://perma.cc/Y423-C5WM].

215. ROSTAIN & REGAN, *supra* note 213, at 5–6. The issue was recently discussed before the European Court of Justice. *See* C 694/20, Orde van Vlaamse Balies and Others v. Eur. Comm'n, 2019 ECLI:EU:C:2022:963 (confirming that combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute objectives of general interest recognised by the European Union but also ruling that the EU law rule designed to discourage aggressive tax planning arrangements by imposing reporting requirements on tax intermediaries in cross-border taxation matters is not applicable, as a matter of exception, to lawyers because of rights to privacy, and the right to a fair trial, and the confidentiality of the relationship between the lawyers and their clients).

216. *See* Martin Lambregts, *VIRTEU National Workshop – The Netherlands – Session 2*, CORP. CRIME OBSERVATORY, at 43:19 (Oct. 19, 2021), www.corporatecrime.co.uk/virteu-workshop-netherlands [https://perma.cc/27HY-624F] (explaining how in the Netherlands attorney-client privilege and the relating rules may significantly slow down tax crime investigations).

217. See GOUNEV & BEZLOV, *supra* note 28, at 119.

lawbreakers may take advantage of the fact that these professionals often have the same educational and social background, and in many cases the same professional background as the public servant they seek to influence; for example, they may have been former members of the same public department.[218] The case study on Spain revealed that tax advisers and law firms specializing in tax are among the intermediaries that organized crime most often uses to corrupt authorities.[219] These findings were corroborated by VIRTEU research activities. During the National Workshop focused on Italy, the participating Lieutenant Colonel of the Italian Tax Police explained how very recent investigations have unveiled an alarming level of systemic corruption that has involved officials of the Italian Tax Authority and tax professionals—including lawyers and accountants—who participated in the corrupt schemes as intermediaries between the public officials and their clients.[220]

Finally, a particularly subtle and usually undetected form of facilitating tax abuse reported in the VIRTEU research is one concerning high-level tax experts, especially academics, who simultaneously serve as consultants in the private sector and experts in the public sector. It is common practice for academic experts to work as consultants for large private organizations such as accounting and law firms. At the same time, the government and courts may rely on these academic experts, as well as on senior lawyers and accountants from top firms, to provide guidance or otherwise unravel intricate and opaque tax schemes. But when an academic expert who provides consulting services to private organizations, or an expert who works for a tax advisory firm, is *also* requested to consult for the government—for example, in order to support a change in legislation or regulation—or to serve as an expert witness in judicial proceedings, an inherent conflict of interest may exist. The expected independence of the expert's opinion or witness testimony may be impaired if the expert anticipates that private sector clients or employers would be displeased with certain positions the expert might take in public. This risk is not limited to academics and other experts who work for the industry as "guns for hire," directly supporting their private interests even to the detriment of public ones.[221] Latent conflicts of interest that are difficult to identify may also operate as enabling factors of potentially corrupt practices.[222] Such conflicts of interest may also lead to instances of self-censorship and political conformism concealed under the myths of academic or professional objectivity and neutrality.[223] Additionally, the seniority of academic and other tax

218. *Id.* at 107.

219. *Id.* at 197.

220. Samuel Bolis, *VIRTEU National Workshop – Italy – Session 2*, CORP. CRIME OBSERVATORY, at 04:15 (Feb. 9, 2022), www.corporatecrime.co.uk/virteu-national-workshop-italy [https://perma.cc/3ASH-222T].

221. Jason MacLean, *VIRTEU International Final Conference, Day 2 – Panel 1*, CORP. CRIME OBSERVATORY, at 44:27 (June 26, 2022), www.corporatecrime.co.uk/virteu-final-conference-day2-panel1 [https://perma.cc/6TW7-2JEB].

222. *Id*. at 47:23.

223. *Id.*

experts selected by the authorities contributes to the gravity of the situation because it makes it extremely difficult to challenge potentially biased legal opinions. This danger was raised and illustrated during the VIRTEU National Workshop: the Netherlands by two Dutch public prosecutors who specialize in tax crime and corruption investigations.[224]

A related source of concern recognized during the VIRTEU research is the juxtaposition of professionals acting as enablers or facilitators of tax abuse with a system of woefully inadequate responses as measured by sanctions and disciplinary measures.[225] The findings reinforced a generalized distrust of the ability of government and independent professional associations to regulate, investigate, and punish the involved professionals. Ultimately, professional enablers pose significant risks to the tax system through the confluence of expertise, conflicting roles, high economic stakes, questionable oversight, and the ubiquitous tax advice industry.[226]

D. The Phenomenon of The Revolving Door

The "revolving door," which describes career pathways navigated by public sector officials looking to join the private sector and vice versa,[227] may increase the magnitude of potentially corrupt practices in tax. Frequent examples include instances of individuals working in public regulatory agencies and cultivating relationships with private sector organizations subject to their control in the hopes of subsequently securing lucrative positions. Future career prospects may directly and implicitly incentivize public officials to alter their approach to those organizations, whether by offering reduced sanctions, not pursuing specific avenues of investigation, or by limiting the scope and scale of actions against them.[228] When public officials join the private sector, their intimate knowledge of the internal investigatory operations and strategies may allow them to provide the private organization with non-public information and insights that may assist in: (1) lobbying government for the adoption of favorable regulation, (2)

224. Martin Lambregts & Josien Pauwelussen, *VIRTEU National Workshop – The Netherlands – Session 2*, CORP. CRIME OBSERVATORY, at 20:50 (Oct. 19, 2021), www.corporatecrime.co.uk/virteu-workshop-netherlands [https://perma.cc/Z4W5-7BYU].

225. *See* GRASSO & HOLDEN, *supra* note 141, at 39–40 (illustrating the discrepancy between the frequency of tax professionals' involvement in tax crimes and the disciplinary responses imposed by professional organizations).

226. Benjamin Carl Krag Egerod, *VIRTEU National Workshop – Denmark – Session 2*, CORP. CRIME OBSERVATORY, at 03:12 (March 28, 2022), www.corporatecrime.co.uk/virteu-workshop-denmark [https://perma.cc/Q3P2-VLAX]; Pascal Bonnet, *VIRTEU National Workshop – The Netherlands – Session 2*, CORP. CRIME OBSERVATORY, at 03:18 (Oct. 19, 2021), www.corporatecrime.co.uk/virteu-workshop-netherlands [https://perma.cc/Z6LP-NQQC].

227. Elisa Wirsching, *The Revolving Door for Political Elites: Policymakers' Professional Background and Financial Regulation* 1 (Eur. Bank for Reconstruction & Dev., Working Paper No. 222, 2018).

228. PETER WILKINSON, TRANSPARENCY INT'L, WISE COUNSEL OR DARK ARTS? PRINCIPLES AND GUIDANCE FOR RESPONSIBLE CORPORATE POLITICAL ENGAGEMENT 26 (2015), www.transparency.org.uk/publications/wise-counsel-or-dark-arts-principles-and-guidance-for-responsible-corporate-political-engagement [https://perma.cc/79XK-GQQD].

designing tax avoidance structures, and (3) avoiding enforcement detection.[229] Moreover, through the connections and relationships established during their time in the public sector, they may also be able to provide access to key public officials who are further able to shape the regulatory and legal landscape. Similarly, private sector employees may seek senior roles within government departments, bringing with them a greater level of sympathy for corporate interests and they may implement strategies that disproportionately benefit the vested interests of their former employer and colleagues.

As recent studies have highlighted, although this phenomenon is often perceived as a major example of institutional capture, systematic evidence of how these public-private career changes affect public policy and enforcement efforts remains inadequate.[230] VIRTEU research corroborates that awareness of the nuanced concerns posed by revolving doors is limited, even among tax crime and anti-corruption experts. Yet at the same time, it is possible to identify a reluctance to speak about these practices and confront their potentially dramatic negative implications.[231] The presence of widespread conflicts of interest affecting this highly specialized sector may be one of the reasons behind such reluctance.

E. The Adverse Consequences of Corrupt Practices in Taxation

The misuse of corporate political and economic power, the actions of professional enablers, and revolving door practices all create a dangerous cocktail that may support and facilitate corrupt practices and tax abuses. In particular, the combination of these factors poses enhanced risks of institutional capture. At the political level, it may reinforce a culture of self-regulation[232] that curbs effective state intervention. A veneer of independent oversight can undermine efforts to adopt transparency and other practices that could more meaningfully combat the flow of ill-gotten gains and other forms of economic

229. *See* Michael Savage, *Anger as Serious Fraud Office Head Says She's Proud of 'Revolving Door' between Regulator and Law Firms*, GUARDIAN (Aug. 7, 2022), www.theguardian.com/law/2022/aug/07/revolving-door-as-serious-fraud-office-are-poached-by-law-firms [https://perma.cc/ULQ4-ANJ8] (illustrating the problematic aspects of inside knowledge used to assist investigated companies after the movement of senior figures from the UK prosecuting authority to the private sector). *See also* Bonnet, *supra* note 226, at 13:28 (explaining from the perspective of a member of the Dutch Fiscal Information and Investigation Service Department that he participated in investigations where top executives of the Big Four accounting firms, who were close to top members of the administration, including ministers, "used their good old friends, the good old boys' network, to write a letter to that administrating office saying something is being investigated that shouldn't be investigated, please drop it. That's also a problem that you get into when you work with people that are with this high-level background.").

230. Wirsching, *supra* note 227, at 1.

231. GRASSO & HOLDEN, *supra* note 141, at 42–43. *See also* Marco di Siena, *VIRTEU National Workshop – Italy – Session 2*, CORP. CRIME OBSERVATORY, at 19:45 (Apr. 29, 2021), www.corporatecrime.co.uk/virteu-national-workshop-italy [https://perma.cc/N8LS-NEJD] (acknowledging that this phenomenon may lead to corruption while stressing the idea that "in the French Republic it is not necessarily seen as a strongly pathological phenomenon").

232. *See generally* David Kershaw, *Corporate Law and Self Regulation*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 869 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (analyzing the ways in which the state and market interact to produce corporate law and regulation).

crime. Reliance on advice offered by conflicted experts may contribute to expansion of the "gray areas" of tax abuse because the relevant industries may use those same experts to influence the design of regulatory frameworks.[233] Even when not characterized by outright criminal activities, the presence of conflicts of interest that may compromise the decisions or actions of professional tax advisers eventually leads to a system of "sophisticated dishonesty."[234] Research in business ethics reveals that when tax professionals start to enter the gray area—where their behavior is potentially legal but not ethical—they run the risk of sliding down a slippery slope. Over time, they take additional steps down the slope that are almost indiscernible and adopt a mindset characterized by ethical fading in the decision-making process, which eventually leads them to increasingly serious violations.[235]

Over the course of the last decade, a long series of scandals have illustrated the nature and extent of corporate involvement in tax crimes and the role played by tax professionals,[236] as well as the increasing level of public awareness of such issues.[237] Examples include the Offshore Leaks of 2012, the Swiss scandal that led to the adoption of the U.S.-Swiss Bank Program in 2013, as well as journalistic investigations such as the one conducted by the BBC that found that many U.K. corporate service providers were "willing to facilitate tax evasion and turn a blind eye to criminal activity."[238] Against this backdrop, it should not be surprising that in 2018, twelve countries in the EU blocked a proposed new rule that would have forced multinational companies to reveal how much profit they make and how little tax they pay within the Union.[239] Similar observations were reached during the VIRTEU Symposium "*The Professionals: Dealing with the Enablers of Economic Crime*." A former U.S. Department of Justice trial attorney illustrated how the former IRS Chief Counsel became extremely antagonistic toward the Tax Whistleblower Program[240] just before he left government for the private

233. MacLean, *supra* note 221, at 44:25.

234. Middleton, *supra* note 35, at 10:15.

235. Ann E. Tenbrunsel, *VIRTEU Roundtable Session 2: CSR, Business Ethics, and Human Rights in the Area of Taxation*, CORP. CRIME OBSERVATORY, at 14:28 (Feb. 12, 2021), www.corporatecrime.co.uk/virteu-csr-business-ethics [https://perma.cc/ME7C-PR78].

236. *See* Oei & Ring, *supra* note 50 (detailing the nature and extent of corporate involvement in tax crimes and the role played by tax professionals in those crimes).

237. Rita de la Feria, *Tax Fraud and Selective Law Enforcement*, 47 J.L. & SOC'Y 240, 241 (2020).

238. *See* Sam Bourton & Nicholas Ryder, *Corrupt Corporations and the Facilitation of Tax Crimes: A Review of the United Kingdom's Enforcement Mechanisms*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 217–18.

239. Rupert Neate, *12 EU States Reject Move to Expose Companies' Tax Avoidance*, GUARDIAN (Nov. 28, 2019), www.theguardian.com/business/2019/nov/28/12-eu-states-reject-move-to-expose-companies-tax-avoidance [https://perma.cc/SCL6-4KZQ].

240. The Tax Whistleblower Program may be inadequate and merely "a shadow of what lawmakers imagined when they created the whistleblower office in 2006." *See* Molly Redden, *This IRS Program for Catching Wealthy and Corporate Tax Cheats is Broken*, HUFFPOST (Sept. 29, 2022) www.huffpost.com/entry/irs-whistleblower-office-broken_n_633374b6e4b0e376dbf08aac/amp [https://perma.cc/9ZUE-4VJE] (explaining that, notwithstanding the excellent quality of the disclosure received, investigations move at a very slow pace, with IRS top officers "resent[ing] that Congress had

sector.[241] In another striking example, a recent *New York Times* investigation, documented how the largest U.S. accounting firms have, for decades, "perfected a remarkably effective behind-the-scenes system to promote their interests in Washington."[242]

The massive expansion of the "gray areas" of tax abuse skillfully navigated by unscrupulous tax advisers allows powerful individuals and entities to exploit the multitude of legal gaps in the tax regime to eliminate their tax liability. A blurring of legal boundaries makes criminalization of these practices impracticable, frustrating prosecution of even blatant cases of tax abuse.[243] VIRTEU research suggests that such forms of undue pressure on the tax administration could not only be used to shield aligned firms or individuals from investigations but also to let the tax administration focus its investigative efforts on competitors or political opponents as a form of punishment or to cause them trouble.[244] Questions regarding the prospect of using the tax administration as an instrument of power recently arose in the United States where the former F.B.I. director and his deputy, both of whom former President Trump wanted prosecuted, were selected for an extremely rare—and theoretically random—audit program.[245]

Norway's Transocean case reflects the pervasiveness of this phenomenon. The world's largest offshore drilling company, Transocean, was enmeshed in one of the most significant tax abuse cases in Norwegian history. In 1999, the Norwegian authorities began asking questions about Transocean's internal rig sales. In 2012, Transocean was accused by Økokrim, the Norwegian police unit investigating economic crime, of having underpaid taxes by up to 1.8 billion USD. The alleged underpayments stemmed from the sale of twelve oil rigs by Transocean's Norwegian subsidiary to related entities in the Cayman Islands. Transocean, originally incorporated in Delaware with operative headquarters in

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forced them to work with people they saw as unscrupulous").

241. Paul D. Scott, *VIRTEU – The Professionals: Dealing with the Enablers of Economic Crime – Panel 3: The Solutions*, CORP. CRIME OBSERVATORY, at 57:16 (July 21, 2021), www.corporatecrime.co.uk/virteu-symposium-the-professionals [https://perma.cc/4JES-GDT7].

242. Jesse Drucker & Danny Hakim, *How Accounting Giants Craft Favorable Tax Rules from Inside Government*. N.Y. TIMES (Sept. 19, 2021), www.nytimes.com/2021/09/19/business/accounting-firms-tax-loopholes-government.html [https://perma.cc/4ZH7-3U97].

243. *See* Bonnet, *supra* note 226, at 15:50 (illustrating how one member of the Dutch Fiscal Information and Investigation Service Department experienced "a corporate income tax investigation that was blocked," "an insider trading violation that was hampered," and "some issues with financial institutes where we through that they were doing something wrong and then the Ministry of Finance stepped in").

244. Petar Tsankov, *VIRTEU National Workshop – Bulgaria – Session 2*, CORP. CRIME OBSERVATORY, at 25:51 (June 29, 2021), www.corporatecrime.co.uk/virteu-workshop-bulgaria [https://perma.cc/JGY7-CMSQ].

245. Michael S. Schmidt, *Comey and McCabe, Who Infuriated Trump, Both Faced Intensive I.R.S. Audits*, N.Y. TIMES (Jul. 6, 2022), www.nytimes.com/2022/07/06/us/politics/comey-mccabe-irs-audits.html [https://perma.cc/Q235-SHQ4]; *Opinion: Comey, McCabe and IRS Audits: Suddenly, There's Interest in Possible Abuses by the Tax Agency*, WALL ST. J. (July 7, 2022), www.wsj.com/articles/james-comey-andrew-mccabe-and-irs-audits-charles-rettig-taxes-donald-trump-11657231499 [https://perma.cc/4JNM-BLE6].

Houston, changed the registration of its formal residency to the Cayman Islands in 1999. The move reduced its overall global tax rate from thirty-one percent to less than seventeen percent, resulting in savings of nearly two billion USD in U.S. taxes. In 2008, the Cayman Islands came under increasing pressure from U.S. authorities. As a result, after becoming the world's largest drilling contractor via three acquisitions of rivals worth twenty-seven billion USD, the company re-domiciled again in 2009, this time in Zug, a low-tax canton in Switzerland. In the intervening period, the company shifted assets between subsidiaries regularly.[246]

Prosecutors argued that Transocean's plan to concentrate ownership of its Norwegian company in entities registered in the Cayman Islands was motivated merely by tax abuse objectives. The case focused on one rig in particular, the Polar Pioneer, which was owned by a Norwegian Transocean subsidiary and operated almost continuously on the Norwegian continental shelf. The rig was towed outside Norway's territorial waters for eight hours and fifteen minutes in May 1999, during which time it was sold through a series of internal group transactions to Transocean International Drilling, which was registered in the Cayman Islands. By moving out of Norwegian waters, the country's tax jurisdiction no longer applied, and the sale escaped Norwegian tax. This strategy is not uncommon, and ships are often sold "outside of harbor," but Transocean's assets had been located in Norway for a considerable amount of time, and Norwegian authorities argued it was unlikely that the deal was arranged and concluded during that eight-hour window.[247] Consequently, Norwegian authorities indicted two companies owned by the offshore drilling rig contractor Transocean Ltd and three tax advisers over suspicions of tax fraud. In the indictment, Økokrim affirmed: "From 1996/97, the Transocean Group's master plan was to concentrate the ownership of the Group's Norwegian rigs in companies registered in the Cayman Islands."[248] The authorities also accused some Ernst & Young tax advisers of allegedly aiding and abetting in providing incorrect or incomplete information regarding tax liabilities and payments.[249]

From the company's perspective, taxes had always been a key part of Transocean's strategy because its rigs move between jurisdictions. Moreover, the firm asserted that such a tax avoidance strategy was common in the oil rig business. Transocean denied the allegations and said it intended to clear its name in court, affirming that: "The indictment is based on an inadequate

246. *See* DON HURBERT, PUBLISH WHAT YOU PAY, MANY WAYS TO LOSE A BILLION: HOW GOVERNMENTS FAIL TO SECURE A FAIR SHARE OF NATURAL RESOURCE WEALTH 46, www.pwyp.ca/resources/many-ways-to-lose-a-billion [https://perma.cc/3J9B-JEQT] (detailing Transocean's history of shifting assets).

247. *See The 50 Biggest Influences in Tax*, INT'L TAX REV. (Nov. 1, 2011), www.internationaltaxreview.com/article/2a69eom839rpvz4x2c2yo/the-50-biggest-influences-in-tax [https://perma.cc/9C4P-77TA] (summarizing the argument made by Morten Eriksen, Okokrim's senior public prosecutor, in the Transocean case).

248. *Transocean Caught Up in Norway's Biggest Ever Tax Scandal*, INT'L TAX REV. (June 30, 2011), www.internationaltaxreview.com/article/2a69fqw9mn3obcqmwwiyo/transocean-caught-up-in-norways-biggest-ever-tax-scandal [https://perma.cc/3G9C-F7R4].

249. *Id.*

comprehension of the facts . . . . Moreover in our opinion Økokrim base their conclusions on a peculiar and original interpretation of Norwegian and international tax legislation."[250] In July 2014, Transocean and the tax advisers were acquitted of tax fraud in connection with shifting assets between subsidiary companies. The Oslo court dismissed the prosecution's demand for damages and instead asked the Norwegian state to pay defendants' costs.[251] In January 2017, the Court of Appeal confirmed the lower court's decision acquitting Transocean and its advisors on most charges. The Norwegian authorities decided not to proceed with the remaining charges and fired the lead prosecutor, Morten Eriksen, who was accused of being on a crusade. The case sparked intense political debate. Representatives of the Socialist Left party contended that such forms of aggressive tax avoidance—aimed at nullifying corporate tax liabilities—pose a threat to the tax base and to nationally anchored businesses in the country and make it *de facto* impossible to enact rules that effectively respond to such unethical practices. Conservative politicians countered that it could not be considered immoral when companies do their best to adapt themselves to the tax regime.[252] Such divergent political opinions about corrupt practices and state capture may map onto the political spectrum. Although it is beyond the scope of this article to investigate, there are interesting examples and existing research to support an inquiry.[253] For example, research carried out in the United States

250. Petter Gottschalk, *White-Collar Crime Lawyers: The Case of Transocean in Court*, 6 INT'L J. PRIV. L. 383, 390 (2013).

251. *See Transocean Advisers Acquitted of Tax Fraud in Norway Trial*, REUTERS (July 3, 2014) www.reuters.com/article/transocen-tax-norway/transocean-advisers-acquitted-of-tax-fraud-in-norway-trial-idINL6N0PE27E20140703 [https://perma.cc/K7V8-T9RH].

252. *See Transocean Tax Case Fallout Continues*, NEWS IN ENG. (Jul. 8, 2014), https://www.newsinenglish.no/2014/07/08/transocean-case-fallout-continues/ [https://perma.cc/63QF-KQ69].

253. For example, the Pennsylvania Office of the State Inspector General (OSIG) created in 1987 by Governor Robert Casey (Democratic) to "deter, detect, prevent, and eradicate fraud, waste, misconduct, and abuse in the programs, operations, and contracting of executive agencies." *Office of State Inspector General*, PA. GOV'T, www.osig.pa.gov [https://perma.cc/HTC5-B2BP]. After taking over as governor in 1994, Thomas Joseph Ridge (Republican) stripped the OIG of independence: before investigating a state agency, the office had to obtain permission from that agency and approval from the governor's office. The special investigators staff was cut and the office became a façade. *See* TOM MULLER, CRISIS OF CONSCIENCE: WHISTLEBLOWING IN AN AGE OF FRAUD 12–13 (2019). Ridge tried to thwart a corruption investigation that OSIG investigator Allen Jones was conducting into Johnson & Johnson, Janssen Pharmaceutical, the State's Chief Pharmacist of Pennsylvania (USA), Steve Fiorello, and the Director of the Texas Department of Mental Health and Mental Retardation. *Id*. at 7. Jones was intimidated and eventually fired in 2004 for acts of insubordination. In 2012, Jones was named "whistleblower of the year" by Taxpayers Against Fraud. *See TAF Names Allen Jones 2012 Whistleblower of the Year*, CORP. CRIME REP. (Oct. 26, 2012), www.corporatecrimereporter.com/news/200/allenjoneswhistleblowerofthеyear10262012/ [https://perma.cc/43Q3-NUZE] (celebrating Jones' after his whistleblowing led to multi-billion-dollar awards and settlements against J&J). *See also J&J Settles Most Risperdal Lawsuits, with $800 Million in Expenses*, REUTERS (Nov. 1, 2021), www.reuters.com/business/healthcare-pharmaceuticals/jj-settles-most-risperdal-lawsuits-with-800-million-expenses-2021-10-30/ [https://perma.cc/J4PF-F2RP]. The case typified how multinational enterprises exploit the corporate-state nexus, direct regulators and policymakers, thwart anti-corruption efforts, and manufacture consensus in highly specialized sectors undermining scientific integrity. *See* U.K. HOUSE OF COMMONS HEALTH COMM., THE INFLUENCE OF

demonstrates that corporate investments and commitments towards socially responsible behaviors may be dependent on chief executive officers' political views. Corporate executives who align themselves to the more progressive side invest more in corporate social responsibility (CSR) on a committed basis, whereas the more conservative executives are more reluctant to do so consistently.[254]

Institutional capture—as broadly understood—may also help explain the growing practice of using "corporate settlement agreements"[255] to address corporate economic crime in virtually all areas including antitrust, fraud, domestic bribery, tax evasion, environmental violations, and foreign corruption cases.[256] The trend demonstrates that the legal systems of many Western democracies face major, and in many cases insurmountable, obstacles in prosecuting and convicting powerful corporate players and their executives through traditional criminal law instruments.[257] The ability of corporations to avoid criminal liability is part of a more general transformation in the way states interact with corporations, characterized by a shift from a punitive to a collaborative approach.[258] Italian prosecutors' recent failure in one of the oil industry's biggest international bribery court cases—which involved two energy sector multinationals (Eni S.p.A. and Royal Dutch Shell plc), some of their top managers, the Nigerian government, and several intermediaries—demonstrates the pervasiveness of the enforcement challenge.[259]

THE PHARMACEUTICAL INDUSTRY: FOURTH REPORT OF SESSION 2004–05 – VOLUME II FORMAL MINUTES – ORAL AND WRITTEN EVIDENCE 78 (Mar. 22, 2005), https://publications.parliament.uk/pa/cm200405/cmselect/cmhealth/42/42ii.pdf [https://perma.cc/FR5R-W9LY].

254. Tenbrunsel, *supra* note 235, at 27:15. *See also* John W. Cioffi & Martin Höpner, *The Political Paradox of Finance Capitalism: Interests, Preferences, and Center-Left Party Politics in Corporate Governance Reform*, 34 POL. & SOC'Y 463 (illustrating how in United States, Germany, France, and Italy "center-left political parties were the driving force behind corporate governance reform and the institutional adjustment to finance capitalism, while right-of-center parties resisted reform to protect established forms of managerialism and organized capitalism").

255. COSTANTINO GRASSO ET AL., COUNCIL OF EUROPE, LIABILITY OF LEGAL PERSONS FOR CORRUPTION OFFENCES 76 (2020), https://rm.coe.int/liability-of-legal-persons/16809ef7a0 [https://perma.cc/AQ6Q-7J2C] ("'Settlement' refers to a wide range of legal tools, also known as 'non-trial resolutions,' that consist of an agreement between a company and a prosecuting authority to resolve corporate criminal matters without a full court proceeding"). *See also* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Tina Søreide & Abiola Makinwa eds., 2020) (providing a general overview of these legal instruments).

256. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015).

257. *See* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 700 (2020) (explaining how settlement agreements are favorable to corporations because they impose lower sanctions but do not trigger collateral consequences that can follow a formal conviction, such as debarment or delicensing).

258. *See* Branislav Hock, *Policing Corporate Bribery: Negotiated Settlements and Bundling*, 31 POLICING & SOC'Y 950, 951 (2021) (explaining that due to these new legal instruments, corporations and prosecutors are incentivized to work together).

259. *See* Sabella, *supra* note 137.

The evolution of anti-corruption efforts in the United Kingdom offers a valuable case study. Before the adoption of the 2010 Bribery Act, anti-corruption legislation had been a "neglected backwater"[260] for decades. Only one company had been prosecuted for bribery since the United Kingdom adopted bribery legislation in 1906 and that conviction was overturned on appeal.[261] The primary enforcement barrier was the "identification doctrine," which requires prosecutors to demonstrate that the "directing mind and will of a company"—for instance, its chief executive officer, board of directors, or assembly of shareholders—had been directly involved in the criminal activity in order to attribute criminal liability to the firm.[262] The 2010 Bribery Act was enacted as a response. Specifically, the Act introduced a new offense: the "failure of commercial organisations to prevent bribery."[263] This is a form of corporate liability that does not require knowledge, intention, or recklessness, and occurs when the commercial organization has failed to prevent conduct that would amount to the commission of bribery.[264]

While the new offense significantly eased the hurdles prosecutors face in investigating and prosecuting complex corporate bribery cases, the new criminal provision was not used for more than three years.[265] After the 2013 Crime and Courts Act introduced deferred prosecution agreements (DPAs)[266] in the English legal system, several investigations based on the 2010 failure to prevent bribery offense began but, unsurprisingly, they resulted in DPAs and not criminal proceedings.[267] This decision, even if driven by an assessment of the entity's

260. Alldridge, *supra* note 9, at 1183.

261. WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, ORG. FOR ECON. CO-OPERATION & DEV., UNITED KINGDOM: PHASE 2*BIS* 19 (Oct. 16, 2008), www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf [https://perma.cc/HYF2-A5KR].

262. *See* Bourton & Ryder, *supra* note 238 (providing a comprehensive analysis of the issue).

263. Costantino Grasso, *Peaks and Troughs of the English Deferred Prosecution Agreement: The Lesson Learned from the DPA between the SFO and ICBC SB Plc*, 5 J. BUS. L. 388, 390–91 (2016).

264. *Id.*

265. *See* Costantino Grasso, *The English Experience of DPAs in Bribery Cases: It is Time for Taking Stock*, INST. OF ADVANCED LEGAL STUD., at 1:05:26 (Dec. 2020), https://youtu.be/bt_yxqT09Zs?t=3926 [https://perma.cc/2GQG-8NA8] (debating how the presence of this time lag between the introduction of the new offense and its use casts doubt on the reasons behind such an interval).

266. "Deferred Prosecution Agreements" (DPAs) are non-trial resolution instruments consisting of suspension, deferral, or withdrawal of prosecution, subject to the fulfilment of a set of specific conditions specified in the terms of the agreement reached with the prosecuting authorities. *See* GRASSO ET AL., *supra* note 255, at 78, 80.

267. *See* COLIN KING & NICHOLAS LORD, NEGOTIATED JUSTICE AND CORPORATE CRIME: THE LEGITIMACY OF CIVIL RECOVERY ORDERS AND DEFERRED PROSECUTION AGREEMENTS v (2018) (discussing how the practice of settling corporate criminal cases is not an unqualified good because it allows offending organizations to negotiate their way out of the criminal process and spreads the perception that they are buying their way out of prosecution).

critical role in the economy,[268] raises thorny issues about equality before the law[269] and the rule of law.[270] Determining which legal entities have economic or strategic importance may inevitably lead to unconstrained judicial choices that grant some special advantages.[271]

Explicitly tax-based enforcement efforts experience similar pressures. Italy's example highlights the difficulties in establishing effective corporate tax crime regimes.[272] The corporate liability regime introduced in Italy through the enactment of Legislative Decree 231/2001 established a list of predicate offenses from which corporate liability may derive. It is only possible to attribute liability to the entity if a corporation is involved in a listed criminal activity. Although the list of covered offenses was extensive, the legislature excluded tax evasion and other tax crimes—even well-recognized and recurring categories of corporate misconduct. The legislature's deep unwillingness to hold corporations liable for tax crimes was openly criticized by Italian prosecuting authorities.[273] Ultimately, the EU obliged all Member States to attribute liability for such crimes to corporations; however, even then the Italian legislature was very selective and did not include all tax crimes in their revised predicate offense list. Italy is not alone. In Chile, corporations can be liable for several economic crimes such as bribery, money laundering, and terrorist financing; they cannot be punished for tax crimes, however, except for "fraudulent obtaining of tax benefits," which is a predicate offense to money laundering.[274] Similarly, in the Republic of Georgia, the criminal code provides that legal persons shall be criminally liable "only if so prescribed under the relevant article" of the code.[275] This condition is met for

268. *See e.g.,* Serious Fraud Office v. Rolls-Royce Plc, Approved Judgment, Case No: U20170036 ¶ 56 (Jan. 17, 2017), www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf [https://perma.cc/Q296-CFHX] (illustrating how the judge in highlighting the potential collateral effects of a criminal proceeding took into considerations factors like the adverse effect on the UK defence industry, the consequential financial effects on the supply chain, the impairment of competition in a highly concentrated market, a potentially significant fall in share price, and the possible group-wide redundancies and/or restructuring).

269. *See generally* Winter, Jr., *supra* note 105 (discussing the notion of equality before the law).

270. Grasso, *supra* note 138.

271. *See* James A. Grant, *The Ideals of the Rule of Law*, 37 OXFORD J. LEGAL STUD. 383 (2017) (illustrating how the rule of law is best understood as being opposed to decisions that are unconstrained by law).

272. *See* Pietro Sorbello & Stephen Holden, *Developing a Working Model to Fight Fiscal Corruption: The Nexus at Which Tax Crimes and Corruption Meet*, 85 LAW & CONTEMP. PROBS., no. 4, 2022, at 204.

273. *See* PUBLIC PROSECUTOR AT THE COURT OF MILAN, PROCURA DELLA REPUBBLICA PRESSO IL TRIBUNALE DI MILANO, BILANCIO DI RESPONSABILITÀ SOCIALE 2017 86–87 (2017), www.procura.milano.giustizia.it/files/brs-procura-mi-2017.pdf [https://perma.cc/6L4R-7UYN]. *See also* Sorbello & Holden, *supra* note 272, at 208.

274. *See* Carlos E. Weffe, *Chile: Corporate Crime List Widens, But Most Tax Crimes Are Still Not Included*, CORP. CRIME OBSERVATORY (Sep. 24, 2022), www.corporatecrime.co.uk/post/chile-corporate-liability [https://perma.cc/9C8T-RA59].

275. Law of Georgia - Criminal Code of Georgia - General Part, art. 107(2), LEGIS. HERALD OF GEORGIA, https://matsne.gov.ge/en/document/download/16426/157/en/pdf [https://perma.cc/7JG5-Q9PP].

commercial bribery[276] but not tax evasion.[277] Tracking the observation offered in Part III, a supranational check—like the one Italy faced with the EU—may help overcome an impasse created by conflicts of interests or other forms of political capture. Promisingly, in the area of anti-corruption, bribery is commonly included in the offenses for which corporations may be liable because of international legal instruments such as the UNCAC and the OECD Anti-Bribery Convention.[278] In September 2022, the President of the European Commission, Ursula von der Leyen, declared that in the coming year the Commission will update the EU legislative framework for fighting corruption, affirming: "we will raise standards on offenses such as illicit enrichment, trafficking in influence and abuse of power, beyond the more classic offenses such as bribery."[279] In that regard, a series of recent decisions of the European Court of Justice appear to go against the above-mentioned meritorious trend.[280] However, the European judiciary's hesitation seems driven by structural limits that affect the European Union's competences and reinforces the idea that the establishment of effective supranational checks may significantly help counter abuse, unfairness, and injustice in taxation.

V

CONCLUSION

All countries must reckon with the burden that corruption and tax abuse impose on their ability to sustain a solid revenue stream collected according to democratic principles of justice and equity. But to confront this challenge, states must develop a sufficiently rich and nuanced understanding of the forces at play. This article, which launches the symposium on "Tax Evasion, Corruption and the Distortion of Justice," makes two primary contributions in service of this global challenge: first, to advocate and articulate the need for an expanded conception of both corruption and problematic tax conduct; second, to begin identifying the precise ways in which corruption and tax abuse are interconnected and what that means for any serious policy response.

The expanded definitions, though not unproblematic, prove critical in appreciating how systems facilitate corruption and enable tax abuse. By limiting their focus to bribery and currently defined tax crimes, states miss the vast set of

276. *Id.* at art. 221 ("For the act provided for by this article, a legal person shall be punished by liquidation or with deprivation of the right to carry out a particular activity and with a fine").

277. *Id.* at art. 218.

278. *See generally* Bachmaier & Vozza, *supra* note 147 (exploring the asymmetric approaches to the anti-corruption and anti-tax crime areas at the international level and the way in which they affect the national legal frameworks).

279. Ursula von der Leyen, *2022 State of the Union Address by President von der Leyen*, EUR. COMM'N (Sept. 14, 2022), https://ec.europa.eu/commission/presscorner/detail/en/speech_22_5493 [https://perma.cc/4WV3-F3EW].

280. *See* Donato Vozza, *EU Court Of Justice: Steps Backward in Preventing Tax Abuse and Money Laundering?*, CORP. CRIME OBSERVATORY, (Dec. 14, 2022), www.corporatecrime.co.uk/post/ecj-limits-aml-tax-abuses [https://perma.cc/P8DM-P3ZN].

practices that inappropriately shrink their revenue stream, shift tax burdens, and undermine good governance. Parts III and IV introduced global and national examples that not only bolster the call for expanding definitions, but also offered a window on to the interconnections between corrupt practices and tax abuse. Given the many parallels between the practices, the greater, though still limited, advances made in combatting corruption might be adapted to preventing tax abuse. The cases also illuminate the reinforcing power that corrupt practices and tax abuse exert on each other—a dynamic that must be acknowledged by legal systems as a distinctly powerful phenomenon.

But many questions remain. The expanded definitions begin to bump up against accepted features of democratic society, including ongoing dialogue between government and the regulated. When does communicating with a member of Congress or with agency regulators cross the line? Bribery offers a confident bright line; the inclusion of more attenuated, indirect, and non-simultaneous "exchanges" would potentially create a wide and blurry border between permitted and disallowed conduct. However, states have an extensive array of tools at their disposal beyond criminalization. Some inappropriate behavior might not be criminalized; rather, the state could adopt structural changes or protocols to reduce the ability to execute indirect exchanges. Rules that limit the matters on which attorneys may work as they shift into and out of the public sector are well-known examples of such design features. The very difficulty that states face in blocking tax abuse and corrupt practices is precisely why they flourish unimpeded. Yet enforcement difficulties can no longer justify ignoring these burdens on democratic society. The solution will not be wholly obvious, easy, or risk free—but the documented harms from failure to act should galvanize researcher, policymakers, and government actors to embrace the challenge.