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MEASURING POLICY ON ACCESS TO JUSTICE AND TAXATION IN THE UNITED KINGDOM

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Bingham Centre Report 2015/01, March 2015
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About this document

Citation: This document should be cited as: J Beqiraj, J Stefanelli & N Patel, *Measuring Policy on Access to Justice and Taxation in the United Kingdom* (*Bingham Centre Report 2015/01*), Bingham Centre for the Rule of Law, BIICL, London, March 2015.

About this Research: This research was conducted and the report written by the Bingham Centre for the Rule of Law. This work was commissioned and funded by the Open Society Justice Foundations.

Acknowledgements: We are grateful to all those who generously gave their time and insights to us in interviews and other meetings.

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Executive Summary

Introduction

1. This report examines the UK's current policies on access to justice and aspects of taxation concerning anti-avoidance and identifies which indicators the UK Government uses to measure the success or failure of those policies.

Context, Aims and Methodology

2. The UK strongly advocates the importance of good governance and justice in improving development processes and outcomes in a variety of ways, including through its membership in the Open Government Partnership, its work with the G8, G20, OECD, the European Union, and its involvement in the Post-2015 development agenda and creation of the Sustainable Development Goals (SDGs).

3. In particular, the UK has promoted increased tax transparency and international cooperation to combat aggressive tax avoidance, and has actively campaigned for the inclusion of justice in the context of the SDGs. In both contexts, it has emphasised the need to create useful means of measuring justice and good governance at the national level.

4. However, this work has faced a variety of criticisms. These include criticisms of poor conceptualisation on the basis that improved access to justice and the rule of law do not improve growth and development; criticisms of on the basis that the targets will effectively constitute a return to aid conditionality imposed on developing countries by more developed countries – alternatively, greater securitisation of aid; and criticisms of impracticability on the basis that goals such as access to justice are extremely problematic from a measurement perspective.

5. This report considers the universality of the SDGs in the context of the UK experience with access to justice and taxation; it also seeks to explore how the UK presently measures the achievement of policy objectives in those two areas and what this means for UK efforts to achieve – and demonstrate achievement of - the SDGs.

6. This report is the product of desk-based research and a number of interviews with stakeholders. It consists of four parts in addition to this Executive Summary: (1) an introduction to the report; (2) access to justice policy and indicators; (3) tax policy and indicators; and (4) a conclusion.

Summary of Findings

Access to Justice

7. Taking a definition of access to justice which includes access to courts, access to legal advice and access to legal aid, the key UK Government policy objectives in this area are effectiveness, cost-efficiency and transparency. While there is no systematic approach to measuring progress against these objectives, a variety of indicators are used in different

parts of the system to measure different aspects of performance. A number of findings can be drawn from an assessment of those indicators and how they are used.

8. The UK primarily uses quantitative indicators to measure court activities and performance. These, however, only provide the institutional perspective on the effectiveness of the system and tell a limited story about individuals' experience of the justice system, or indeed, the rationale behind any changes in the institutional picture.

9. Data relating to the performance of the criminal justice system is also more readily available in the UK than data relating to the performance of other aspects of the court system or non-court-based mechanisms for resolving disputes. Since litigation in courts represents a comparatively small volume of disputes, this too provides a partial picture of access to justice.

10. Nonetheless, a significant public debate in the UK at the present time centres around access to legal representation and legal aid. While this debate is of most relevance to court-based mechanisms for resolving disputes, it remains the case that its significance will vary depending on the particular type of case and jurisdiction.

Taxation

11. The UK has developed a fairly sophisticated anti-avoidance strategy, which comprises measures that are constantly being reviewed and updated. It includes several approaches, such as general rules requiring the disclosure of avoidance schemes and an anti-abuse rule of interpretation for use by the judiciary and more specific policy tools to tackle particular problems such as Base Erosion and Profit Shifting and non-compliance in public procurement.

12. The UK currently employs four main indicators to assess its anti-avoidance policy: (1) compliance yield; (2) the number of open avoidance cases; (3) the number of DOTAS declarations; and (4) revenue collected from the accelerated payments scheme. These indicators are generally all qualitative in approach. There is limited information available on indicators used to measure the efficacy of more specific policy tools.

13. UK policy on tax transparency is in its infancy, following commitments made in the context of the OECD Global Forum on Tax Transparency and Exchange of Information. However, the UK has not yet developed clear domestic policies or indicators in this regard.

Conclusion

14. The findings in the area of access to justice highlight that the UK experience has some useful lessons for other countries. Firstly, there is a clear correlation between the UK Government's policy objectives in this area and measurement of progress against those objectives and the language of Goal 16 as well as many of the targets, which sit beneath it. Secondly, particular indicators, for example those of a quantitative nature, which are used to measure court performance around the objectives of effectiveness, cost-efficiency and transparency – particularly in the criminal justice context - are likely to be of specific relevance to other countries, notwithstanding differences in legal systems.

15. However, it also seems likely that the UK will have to put additional efforts and scale up the collection of relevant data in this regard. Particular effort is likely to be needed in relation to the non-criminal areas of the court system, non-court-based mechanisms for resolving disputes and related source of advice and assistance and in relation to the collection of more qualitative data generally.

16. In contrast, the findings in the area of tax avoidance highlight that the UK experience may be of less utility to other countries. Firstly, the UK Government's policy objectives in this area and measurement of progress against those objectives do not map neatly onto the SDGs, although there are elements which have some correspondence, for example in relation to progressivity of tax and collection of revenue data. Secondly, UK anti-avoidance policy is both nascent and complex; as a result, the relevant indicators are also quite complex and rely on certain data being collected, while others, although more simple in nature, remain linked to UK-specific policies.

17. Notwithstanding this, other states may be able to adopt similar measures and indicators. There also remains work for the UK to do in developing indicators in this area, particularly around the issue of tax transparency and in relation to greater use of qualitative data such as that based on perception surveys.

1. Introduction

The United Kingdom (UK) has played a leading role in advocating the importance of good governance and justice in improving development processes and outcomes. It has done this in a variety of ways, including through its membership in the Open Government Partnership, its work with the G8, G20, Organization for Economic Cooperation and Development (OECD), the European Union, and its involvement in the Post-2015 Development Agenda and in the definition of the Sustainable Development Goals (SDGs).

In particular, the UK has actively promoted increased tax transparency and international cooperation to combat aggressive tax avoidance in order to increase the tax productivity of tax systems globally. During the UK's Presidency of the G8 in 2013, the UK set an agenda for fairer taxes and increased transparency. The UK and the other G8 members agreed on several objectives as set forth in the Lough Declaration, including to automatically share tax information, change domestic rules allowing companies to shift profits across borders to avoid taxes and increase the capacity of developing countries to collect the taxes owed to them.

The UK has also actively campaigned for the inclusion of justice in the context of the SDGs, with Prime Minister David Cameron having stated that strong institutions, accountable governments and the rule of law are part of *"the golden thread"* of long-term development. Indeed, the UK co-chaired the High-Level Panel of Eminent Persons, a UN Secretary General ("SG") multi-stakeholder initiative consisting of representatives from civil society, the private sector, academia and local governments, alongside State representatives, which strongly recommended the inclusion of these elements in the Post-2015 Development Agenda.[1] Providing access to justice now figures as one of the SDGs (Goal 16) in the final report of the OWG and most recently, the UN Secretary-General has included justice among the six essential elements that would help frame and reinforce the transformative nature of a sustainable development agenda.

In addition to setting relevant policy objectives, the UK's approach to development has emphasised the need to create useful means of measuring justice and good governance at the national level. However, this work has been resisted by some as being too 'Northern' in its focus. The argument put forward by critics is that the goals proposed by the UN would be more easily achieved by Northern States because they have fewer problems in the areas covered by the SDGs and will not need to make many changes in that regard. Moreover, it has been argued by some that these goals will be difficult to measure.

This report therefore has a dual purpose. Firstly, it considers the universality of the SDGs by looking at UK policy objectives in the areas of access to justice and taxation – specifically anti-avoidance policy. Secondly, it considers UK practice regarding the measurement of progress against the policy objectives set in the areas of access to justice and tax avoidance. This includes investigating whether more appropriate and effective indicators are available or can be used to measuring success against the relevant objectives as well as the effect of any unintended consequences. The hope is that this report will provide the opportunity to improve

[1] The High-Level Panel submitted its report containing recommendations to the Secretary-General: High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, 'A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development' (2013).

the UK's own mechanisms for policy evaluation while also providing valuable information, which may inform practice in other states.

The content of this report is derived from desk-based research and interviews with key stakeholders. Desk-based research was undertaken with the following aims:

1. Ascertaining the stated Government policy objectives for access to justice and tax avoidance;
2. Identifying the indicators used by the UK Government to measure the success of those policies; and
3. Critically assessing both the policies and indicators.

Stakeholder interviews were held in order to test and evaluate the findings of the desk-based research, and to elicit any further information, with particular reference to the practice that sits beneath the measurement of policy that may not always be apparent from the material in the public domain.

25 organisations or individuals were approached to participate in interviews for this project. Among those approached were HRMC, the Ministry of Justice (MoJ), HM Treasury, the National Audit Office, a range of professional associations and civil society organisations (including the Bar Council, JUSTICE, Law Society, Public Law Project, Equality and Diversity Forum, Temple Tax Chambers, UK Administrative Justice Institute, TaxAid and the Chartered Institute of Taxation), and individuals who had formerly worked with or for those organisations. Positive responses were received from approximately half of those approached. Interviews were then conducted with a total of 13 people, including with several currently or formerly working in government. In all instances those participating did so on the basis that there would be some confidentiality or that comments would not be directly attributable. In several instances individuals would not participate in a formal research interview but were happy to meet and provide background, insights and views to inform the research.

2. Access to Justice

2.1 Defining Access to Justice: A Foreword

Ensuring access to justice serves two complementary overarching purposes. First, access to justice is an indispensable means of addressing injustices where they occur. For this to hold true, the system should be equally accessible to all and should lead to results that are individually and socially just. Secondly, guaranteeing access to justice for all groups of society, can serve the purpose of preventing injustices from arising in the first place.

Improving access to justice is generally among the core objectives of any legal system and a central one in the context of legal reforms. Nevertheless, a typical legislator does not normally provide a definition of access to justice and this can increase the challenge of identifying minimum threshold levels of access to justice in the context of particular policy objectives.

We adopt a comprehensive concept of access to justice that covers different stages of the process of obtaining a solution to civil, criminal or administrative justice problems. This concept begins with free access to information about the existence of rights enshrined in laws, which are ideally simple and understandable to the public. It then continues on to reflect the availability of, and access to, legal advice and representation, and access to complaints and dispute resolution mechanisms. Finally, the notion of effective access to justice extends to include the ability of such mechanisms to provide fair, impartial and enforceable solutions to legal problems.[2]

This first part of the report assesses the specific policy objectives and indicators of performance chosen by the UK government using conceptual framework that is based on this broader conception of access to justice.

2.2 The UK Legal System

Building on the broad definition of access to justice suggested above, an assessment of the indicators through which performance in this sector is measured needs to take into account at least three elements: access to legal advice, access to courts and other mechanisms, and access to legal aid. These are interrelated components of access to justice and must be considered as a whole.

The Organization of Courts and Tribunals

The formal legal system in the United Kingdom consists primarily of courts and tribunals. The court structure covers England and Wales in one system, and Scotland and Northern Ireland in two other systems, linked by the Supreme Court as the highest appellate court for all three

[2] Such a comprehensive approach is suggested by a number of studies: M Cappelletti and D Tallon, 'Fundamental guarantees of the parties in civil litigation' (1973); M Cappelletti et al, 'Access to Justice' Volume 1, Part one General report (1979); H Genn, 'Paths to Justice, What people do and think about going to law' (1999).

systems; the tribunals system, similarly, covers England and Wales in one system, and generally Northern Ireland and Scotland in separate systems. The data and comments in this part of the report focus on the court system in England and Wales.

Traditionally, tribunals were not part of the court system. They were set up on an ad-hoc basis to ease the burden of the increasing caseload on the courts. The tribunal system was established in response in order to provide a faster, cheaper and less formal process for challenging official administrative decisions on matters such as welfare benefits, taxes, and labour disputes between employers and employees.

In 2007, the Tribunals, Courts and Enforcement Act established a new unified structure for tribunals and recognized legally qualified members of tribunals as members of the judiciary of the United Kingdom. Today, tribunal members are therefore a mixture of judges, lawyers, experts and laypeople. The Act also created a First-tier Tribunal and an Upper Tribunal, where there is a right of appeal on a question of law and some limited jurisdiction for judicial review.

The tribunals are divided into "chambers" dealing with different groups of cases. Within the First-tier Tribunal level there are, for instance, the Health, Education and Social Care Chamber, the Tax Chamber, the Immigration and Asylum Chamber etc.; within the Upper Tribunal there are the Administrative Appeals Chamber, the Tax and Chancery Chamber and the Immigration and Asylum Chamber. Appeals lie from these chambers to the Upper Tribunal.

Cases decided by the Upper Tribunal can be appealed to the Court of Appeal, which consists of two divisions:

- The *civil division* hears appeals from the High Court of Justice (the more important and/or high value civil disputes) and from the County Courts (where 90% of civil proceedings are commenced and concluded). The High Court has a specific Family Division that deals with family-related disputes. It also has a judicial review jurisdiction over both administrative decisions of the Government and delegated legislation.
- The *criminal division* hears appeals from the Crown Court. However, 95% of all criminal cases in England and Wales are completed in the Magistrates' Courts, the decisions of which can be appealed to the Crown Court. The majority of magistrates are unpaid members of the public drawn from the local community, sitting on a part-time basis. However, more complex cases are dealt with by a smaller number of so-called District Judges (formerly known as Stipendiary Magistrates) who are solicitors or barristers holding full-time appointments.

The Supreme Court is the ultimate body of appeal. It started work in October 2009, taking over the functions from the Appellate Committee of the House of Lords.

The Legal Profession

An important characteristic of the UK system is the division of the legal profession into two separate branches. Traditionally, barristers have been advocates who work as self-employed individuals in buildings called Chambers as members of the Bar and of one of the four Inns of

Court (Lincoln's Inn, Gray's Inn, Middle Temple and Inner Temple). In contrast, solicitors have typically worked in partnerships and mainly performed legal work outside court, such as advising clients, undertaking negotiations, drafting legal documents and preparing witness evidence. There are, however, a growing number of exceptions in both cases as a result of the changes introduced by the Legal Services Act 2007.

In addition to this core distinction, there are other categories of lawyers that perform reserved or regulated legal activities, such as notaries and patent or trademark attorneys. Each category is organised on the basis of a self-regulatory system, consisting of a representative body (e.g. The Law Society for solicitors and the Bar Council for Barristers) and an independent regulatory body (e.g. the Solicitors Regulation Authority or the Bar Standards Board) which sets out the professional standards and practice rules for their membership.[3]

In response to the increasing concern over the fragmentation of the legal sector that arose from the self-regulatory system, the Legal Services Act (LSA) 2007 created a new Legal Services Board (LSB) which came into being on 1 January 2009 and became fully operational on 1 January 2010. Its mandate is to oversee the regulatory activities of all the bodies whose members offer legal services and to place the interests of the consumer at the heart of the legal system in the UK.

Funding of Legal Services: Legal Aid

The legal aid system for England and Wales was established in 1949 as a key part of the welfare state, comprising a comprehensive demand-led system of public funding for both criminal and civil cases. Under the new system, legal services continued to be provided privately by solicitors and barristers, however, the State could pay for those services on behalf of impecunious clients on a case by case basis. Legal aid was granted on the basis of means and merit tests (reasonable chances of success) and both those tests and the funds through which lawyers were paid for advice and representation were administered by the Legal Aid Board.

The increasing levels of Government expenditure in this sector throughout the years have prompted important changes to the system. A first tier of reforms was introduced under the Access to Justice Act 1999 (AJA). Two new funding schemes were established – the Community Legal Service (for civil legal aid) and the Community Defence Service (for criminal legal aid) – and the Legal Services Commission replaced the Legal Aid Board in the management of legal aid. Most importantly, the AJA put an end to the demand-led system of legal aid, by introducing a ceiling budget for civil cases, set annually.

A second tier of reforms was put forward in 2010 and gradually implemented over the following years. Between 2011-2012, the MoJ reduced fees paid to civil legal aid providers by 10% and further changes – introduced through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA) – have been implemented from 1 April 2013. These include a reduction of the range of issues for which civil legal aid is available and a restriction of the financial eligibility criteria for receiving legal aid. LASPOA has also replaced the Legal

[3] See http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/ (accessed 28/02/15).

Services Commission, which enjoyed a non-departmental public body status, with the Legal Aid Agency, an executive agency of the Ministry of Justice.
A third set of reforms to criminal legal aid and further changes to civil legal aid have been proposed by the MoJ and are still in progress.

2.3 Policy Objectives in Relation to Access to Justice

Objectives for the Judicial System

The Government's recent comprehensive spending review has proposed budget cuts across the justice system, including the judiciary. To achieve this, a new approach to delivering services has been put forward. In this context, the overarching policy objectives of the MoJ in the field of law and access to justice build on three interrelated components: effectiveness; cost – efficiency; and transparency of the justice system.[4] Governmental policy papers detail and shape these elements to address access to justice issues in specific legal areas, for example, criminal law, administrative law, civil law, legal aid and so on.[5]

Her Majesty's Courts and Tribunals Service (HMCTS) is the executive agency of the Ministry of Justice responsible for the administration of the criminal, civil and family courts and tribunals in England and Wales and non-devolved tribunals in Scotland and Northern Ireland. Its mission is to *"run an efficient and effective courts and tribunals system, which enables the rule of law to be upheld, and provides access to justice for all"*.

The objectives for the period 2011-2015 comprise:

- providing the supporting administration for a fair, efficient and accessible courts' and tribunals' system;
- supporting an independent judiciary in the administration of justice;
- driving continuous improvement of performance and efficiency across all aspects of the administration of the courts and tribunals;
- collaborating effectively with other justice organisations and agencies, including the legal professions, to improve access to justice; and
- working with Government departments and agencies, as appropriate, to improve the quality and timeliness of their decision making in order to reduce the number of cases coming before courts and tribunals.[6]

HMCTS is also the institution responsible for collecting statistical data regarding the functioning of the courts and the judiciary. The agency, however, publishes part of the statistics on the functioning of each court only on an intranet website.[7]

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[4] "Our vision is to deliver an efficient, fair and effective justice system, improving the services and outcomes we deliver for the public at the same time as reducing their cost to the taxpayer. We are also committed to ensuring a legal and rights framework that is clear and proportionate and upholds the rule of law" MoJ, 'Improvement plan' (April 2014) p. 3.
[5] Recent policy papers are published on the website gov.uk: http://bit.ly/18dTnmz (accessed 28/02/15).
[6] See: https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about

The MoJ also delivers its services through two other major executive agencies: the Legal Aid Agency and the National Offender Management Service, which is responsible for managing the prison and probation services system across England and Wales

Criminal Justice System

The Government's programme of reforms to the criminal justice system in England and Wales is set out in a White Paper published in July 2012.[8] The stated objective of the programme is to provide a justice system that is *"swift and sure"*. A swift system is defined as one which ensures that simple and uncontested cases, where a quick response is appropriate, are dealt with promptly and efficiently. A sure system implies reliability in delivering punishment and redress, fairly and in accordance with the law and public expectations.

To achieve these objectives, a series of measures that address delays and wastages, increase accountability and transparency, and improve public confidence on the system are proposed. These include:

- simplification measures (e.g. fast-tracking simple cases where a guilty plea is expected, and introducing digital technology to move away from a slow, paper-based system and improve service delivery);
- measures that open the delivery of criminal justice services to new providers (e.g. by introducing alternative models of delivery through new forms of partnership with the private sector; using restorative justice techniques to prevent problems escalating unnecessarily; and using a community based approach to tackle anti-social behavior in certain areas); and
- transparency measures, which are of crucial importance for victims of crime and witnesses, including mechanisms to allow communities to hold their local criminal justice services properly to account.

Administrative Justice System

In the area of administrative justice,[9] according to its most recent strategic objectives, the Government strives to guarantee the fairness, accessibility and efficiency of the system.[10] Success and improvements in this area are measured against those principles:

- fairness is guaranteed through impartial and timely procedures to obtain redress;

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[7] European Commission for the Efficiency of Justice (CEPEJ), 'Scheme for Evaluating Judicial Systems, Response by UK - England and Wales' (2013).

[8] MoJ, 'Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System' (July 2012) available at: https://www.gov.uk/government/publications/swift-and-sure-justice (accessed 28/02/15).

[9] The administrative justice in the UK covers matters such as mental health, payment of benefits, educational needs, asylum applications, but also claims between private parties, such as employment or property disputes.

[10] MoJ, 'Administrative Justice and Tribunals: A Strategic Work Programme 2013-16' (December 2012), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217315/admin-justice-tribs-strategic-work-programme.pdf (accessed 28/02/15).

- accessibility involves processes that are understandable and navigable to the lay person; and
- efficiency encompasses a two-tiered structure requiring, on the one hand, correct and sound decisions, especially in the first instance, and on the other delivery of cost savings.

Civil Justice System

As regards civil justice, the Government has set as a priority improvements in the family justice system.[11] Building on the acknowledgement that the system should work better for families and put children's needs first at all times, the overarching objective is to increase effectiveness in this sector.

In March 2012 the Family Justice Board was established to oversee improvements to the family justice system. Reform measures include:

- simplification, e.g. by ensuring that the same judge or magistrate hears a case from start to finish; by setting up an integrated IT system for family justice services; and by reducing the excessive use of expert reports); and
- promotion of other forms of resolution services, such as family mediation, especially at earlier stages as an instrument to prevent disputes.

Objectives for the Legal Services' System

With the exception of legal aid, the current Government's policy papers on law and access to justice issues do not establish strategic objectives relating to access to legal advice and representation. Objectives regarding the provision of legal services by lawyers practising in England and Wales were, however, set out in the Legal Services Act 2007, which also created the Legal Services Board, an independent oversight body in this sector.[12] Those regulatory objectives include:

- supporting constitutional principles of the rule of law;
- improving access to justice;
- promoting competition in the provision of services and encouraging independent and strong professional advice; and
- increasing public understanding of citizen's legal rights and duties, etc.

Objectives Concerning Legal Aid

[11] MoJ, 'Making the family justice system more effective' (April 2013) available at: https://www.gov.uk/government/policies/making-the-family-justice-system-more-effective (accessed 28/02/15).

[12] The Legal Services Board became fully operational on 1 January 2010. Its overriding mandate is to ensure that regulation in the legal services sector is carried out in the public interest; and that the interests of consumers are placed at the heart of the system. The Board is independent of Government and of the legal profession. It is responsible for overseeing the Approved Regulators (e.g. the Law Society, the Bar Council etc.) and the organization established to handle consumer complaints about lawyers - the Office for Legal Complaints. See also supra, section 2.2 – The Legal Profession.

Concerned by the expanding costs of legal aid, the Government has introduced, in recent years, measures *"to reduce unnecessary costs and make sure that legal aid helps those who need it"*. The purpose, in particular, is to make significant savings in the cost of civil legal aid. To achieve these ends, the Government has resolved to:

- reform the administration of legal aid so that it targets the highest priority cases and those who need it most;
- encourage the use of mediation, as a cheaper, quicker and less acrimonious instrument than court proceedings; and
- introduce price competition in criminal legal aid, to ensure value for money and long-term sustainability.

2.4 Monitoring and Evaluation: Indicators of Performance and Measurement Examples

We have been unable to locate any specific policy document laying down the precise indicators that the government uses to map the achievement of objectives outlined above and reporting the relevant results. However, on analysis, it has been possible to identify the relevant information in this regard from periodic reports on the performance of courts and tribunals and from other policy documents published on the Government's website.

Indicators of Performance and Quality of the Judiciary

The capacity, structure and operation of courts and tribunals have immediate effects on access to justice. HMCTS carries out regular assessments of the activity of courts in terms of both performance and output, on the basis of predefined performance and quality indicators and targets. Courts prepare annual activity reports that include information on the number of judges and administrative staff. There is also a regular monitoring system within individual courts, regarding court activities such as: the number of incoming cases; number of decisions delivered; number of postponed cases and length of proceedings.

Different types of courts operate on the basis of different performance indicators set by the MoJ. In some of the areas the purpose is to improve performance; in others, the focus is to maintain performance at reduced cost. Also, different indicators are employed in the courts and tribunals of England and Wales, and in those of Scotland and Northern Ireland. However, the four most common indicators are:

- incoming cases;
- length of proceedings (timeframes);
- closed cases; and
- and enforcement of decisions, in criminal cases.[13]

Indicators for the Criminal Law Sector

Current Indicators

[13] CEPEJ, 'Response UK' (n 7).

The speed through which cases are commenced and/or processed is used as a key indicator of the performance of the criminal courts, and of courts in other sectors as well.
For the Crown Court, the benchmark for good performance is to *commence* at least 75% of trials within 20 weeks of receipt.[14] On average, however, case progress is faster and there has been some improvement in the last years: timeliness improved from an average of 15.8 weeks in 2011-2012, to 14.3 weeks in 2012-2013.[15] For Magistrates' Courts, the target is to *complete* 75% of cases (adult/youth, charged/summoned) within four weeks of the first hearing.

The rate of ineffective trials (i.e. trials that did not go ahead on the established date) compared to cracked and effective trials is also an indicator of performance for both the Crown Court and the Magistrates' Courts. The target for 2013 was to maintain 2011-2012 performance.[16] In the Crown Court, the ineffective trial rate has grown from 12% in 2007 to 14% in 2011.[17] The main causes are court administrative problems and prosecution problems. The rate of these ineffective cases has slowly but steadily increased in the period 2007-2011, while the rate of ineffective cases caused by defendant-related problems (e.g. absent defendants, or the defence was 'not ready') has gradually diminished.

Service improvement is also measured in both arenas in terms of reduction of costs per sitting day, comprising staff and judiciary costs. These costs have decreased from £1677 in 2011-2012 to £1603 in 2012-2013 in the Crown Court and from £1204 to £ 1200 in the Magistrates' Courts in the same period.

Jury utilization is also an indicator of the efficiency of performance of the Crown Court. The *"Juror utilisation rate is the number of sitting days divided by the sum of sitting, non-sitting and non-attendance days"*.[18] The indicator measures the number of days jurors sit on trials as a percentage of all the days they are at court (sitting and non-sitting days) and on standby at home or work (non-attending days). The record has improved over the years increasing from 59.2% in 2007 to 70.2% in 2011.

Another indicator measures the timely communication of information concerning Crown Court cases to interested parties and/or involved public departments. Hearing information from the courtroom is registered and updated through a digital system called Xhibit, and is sent to police officers, victims and witnesses, probation Crown Prosecution Service, prisons, Magistrates' Courts, etc. From January 2013, the performance benchmark is to update 100% of registers within 6 working days.[19]

[14] Ibid.
[15] MoJ, 'Ministry of Justice Improvement Plan' (April 2014) p. 9.
[16] CEPEJ, 'Response UK' (n 7).
[17] MoJ, 'Judicial and Court Statistics 2011 – Tables', available at: http://bit.ly/1D3Coxi (accessed 28/02/15).
[18] Ibid. See also CEPEJ response England and Wales (n 7).
[19] The MoJ reports other similar initiatives involving the use of digital technology "to deliver more with less", e.g. the Prison to Court Video Link, aimed at increasing the number of hearings delivered via video. MoJ, 'Improvement Plan' (n 15)

At the level of Magistrates' Courts, a similar benchmark indicator measures the time taken to produce and send court results to the police. In 2013, 75% of registers resulted within 2 working days and in any case, 100% of them resulted within 6 working days.

Magistrates' Courts, also measure success of performance in light of the payment rate for financial penalties, which represent the most common sentence passed at criminal courts (almost two-thirds of all sentences).[20] The threshold for the payment rate of fines disposed by Magistrates' Courts in 2013 was 85%.

Commentary

It is notable that the indicators used to measure court performance are not standardised across the different segments of the court system. While this is to some extent an inevitable product of the different functions of the different courts, it also makes comparisons across the different segments difficult. The European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe (CoE) uses the clearance rate as an indicator of performance of judicial activity. It is obtained by dividing the number of resolved cases within the year by the number of incoming cases within the same period, multiplied by 100. A clearance rate above 100% indicates the ability of the system to reduce potential backlog.[21] This indictor allows court activities to be compared across the different law areas (criminal, civil, administrative) within the same system, as well as across countries, and could therefore be a valuable addition to the UK portfolio.

More might also be done in the area of transparency and accessibility of data. Key statistics on activities in the Criminal Justice System for England and Wales are published periodically on the internet. Currently, the Criminal Justice Statistics include a disproportionate number of tables: quarterly publications include 79 tables and the annual publication includes 169 tables. The information made available is comprehensive but it could better meet user needs and the dissemination of information could be improved.[22]

Finally, research shows that there is no regular monitoring of users' satisfaction with court experience, by contrast to the extensive publication of statistical data on court activities. Between 2007 and 2010, Ipsos MORI carried out surveys on behalf of the HMCS to monitor general court user satisfaction,[23] as well as witness and victim experience.[24] These surveys, however, were not continued in the following years. Interviews with civil servants from the MoJ confirmed that another extensive survey has been commissioned by the MoJ and the results are expected to be made public by mid-year.[25]

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[20] MoJ, 'Criminal Justice Statistics, Quarterly Update to September 2012, Statistics Bulletin' (21February 2013) p. 10.
[21] CEPEJ, 'Report on European judicial systems: efficiency and quality of justice', Edition 2014 (2012 data), 2014, p. 21.
[22] MoJ, 'Statistical Note and Consultation – changes to criminal justice statistics' (20 November 2014).
[23] HMCS, 'Court user survey 2009-10' (14 October 2010) available at: http://bit.ly/188Zyal.
[24] Ipsos MORI, 'Witness and Victim Experience Survey. Technical Report: cases closed in 2009–10' available at: http://bit.ly/1DFjbEU (accessed 28/02/15); Ramona Franklyn, 'Satisfaction and willingness to engage with the Criminal Justice System, Findings from the Witness and Victim Experience Survey, 2009–10', MoJ (2012).
[25] Interviews 3, 4, 5.

The general court user survey conducted by Ipsos MORI showed that a large majority of court users continue to express satisfaction (over the covered period) with their overall court experience.[26] There were, however, major differences in overall satisfaction levels across user types and court types. Professional users, for instance, were significantly more likely to be satisfied than public users (amongst whom, witnesses, victims, defendants and those in court to support a friend or relative are the least positive about their experiences); Crown and Magistrates' courts recorded the lowest levels of satisfaction while civil and family courts the highest. The report also underlined that the main factors driving overall satisfaction were waiting times and being treated fairly and sensitively by court staff. Having information available about court procedures and facilities also had a significant role in users' overall experiences.

The study on witness' and victim's experiences and their willingness to engage with the criminal justice system highlights the importance of providing them with a good information service. The findings also suggest that more could be done in terms of additional support for particular groups of victims and witnesses such as disabled persons and victims and witnesses of violence crimes. Again, more qualitative data could be useful in this regard.

Indicators for the Administrative Law Sector

Current Indicators

The length of time in which cases are disposed of is the main performance indicator employed in relation to the activities of the administrative courts and related tribunals. Different thresholds apply for different administrative law areas and court and tribunal levels.

As regards immigration and asylum cases, at the First-tier Tribunal level, the threshold period between receipt of the request and disposal ranges from 30 weeks in the case of family visit visas to 8 weeks in the case of asylum requests. The objective is to process 75% of the cases within the target time. Target times are shorter at the level of the Upper Tribunal.[27]

Similarly, in the mental health area, different time targets are set for different categories of claims. Targets range from 7 days in the case of applicants in need of an assessment in a hospital setting for a mental disorder, to 17 weeks in the case of persons already under a restriction order.

The target for social security and child support cases is to dispose of 75% of applications within 16 weeks (from receipt to final outcome). For employment cases, the first hearing should take place within 26 weeks from registration. More generally, the target for cases before the Administrative Appeals Chamber (Upper Tribunal) is to dispose of 75% of them within 20 weeks (from receipt of appeal to disposal).[28]

Commentary

[26] HMCS, 'Court user survey 2009-10' (n 23).
[27] CEPEJ, 'Response UK' (n 7).
[28] Ibid.

In view of the recent policy objectives established by the Government, the_reduction of the numbers of the cases brought to appeal before tribunals could be an additional indicator of successful performance. Most tribunals deal with appellate challenges by individuals about decisions made by Government departments, agencies or local authorities. Accordingly, the MoJ is working with other Government departments to improve their internal review mechanisms. Recent administrative statistics evidence a dramatic drop in the number of judicial review applications in 2014.[29] It is also reported that *"the proportion of all cases lodged found in favour of the claimant at a final hearing has reduced from 12% in 2000 to 1% in 2013 and has remained the same in 2014."* However, as one interviewee commented more generally, it is not clear to what extent similar trends are the result of 'first time right' successful practices, or are, rather, influenced by other reforms of the legal system, notably - but not only - those in the legal aid sector.[30]

At the same time, a range of mediation and ADR approaches are being piloted, so that a decision can be obtained as quickly as possible. There appears to be limited measurement of the success of these approaches. While there are certainly advantages in mediation and arbitration where parties choose to do so, concerns have been raised in the literature on the impact of mandatory privatization of justice upon the collective interest in the justice system.[31] There is an apprehension that, due to the particular characteristics of the justice system in the UK, the opportunity to vindicate rights will be replaced by the mere prospect of compromising them privately, and that there will be a loss by virtue of justice not being performed in public. In these regards, it has been highlighted that while *"the legal system assures quality through judicial selection and training, through procedural rules and a system of appeals"*, these are only partially guaranteed in the case of arbitrations (through the opportunity for review of arbitral awards, if available) and are, instead, missing in the case of mediation. Therefore, there can be unintended consequences of a mandatory recourse to ADR that need to be measured and evaluated, such as: standards and competence in the private process; the outcome and experience of users of private dispute resolution; whether the impact is the same on both parties and so on.[32]

The recent Immigration Act 2014 has severely reduced the number of immigration decisions that can be appealed. This is part of a general policy trend of reducing appeal rights where there are low rates of success, on the basis that appeal rights in these cases produce delays and costs for the justice system. Interviewees commented that this is a partial approach because it does not take into account the reasons for the low rates of success.[33] It was suggested that success rates should be evaluated together with the availability of legal advice and representation in order to get a comprehensive picture of the drivers of low rates of success. Looking at these issues in the context of immigration cases is particularly useful because immigrants quite often cannot effectively represent themselves due to poor language

[29] MoJ, 'Civil Justice Statistics Quarterly, England and Wales - October to December 2014' (5 March 2015), p. 16. The decline, however, is mainly attributed to an internal reorganization of the tribunal system.
[30] Interview 1.
[31] H Genn, 'Why the Privatization of civil justice is a rule of law issue', 36th F A Mann Lecture, Lincoln's Inn, 19 November 2012, available at: http://bit.ly/1zA2TXt (accessed 28/02/15).
[32] Ibid.
[33] Interview 1.

skills (both oral and written) or low levels of knowledge of the legal system, and this may, therefore, be a reason for low success rates.

Interviews also highlighted that a sound and effective judicial review system is both an instrument for addressing injustices when they occur, and a deterrent mechanism that prevents injustices and improves decision making by public bodies. Restrictions on judicial review amount to a reduction in levels of accountability and so produce a lack of confidence in the system.[34] This is an aspect of the impact of judicial review reforms that is not captured by the current assessment studies and that could emerge from perception surveys and the resulting qualitative data.

Indicators for the Civil Law Sector

Current indicators

The length of time in which cases are disposed of is also the main indicator employed to measure civil courts' performance. Separate civil justice statistics are now published for cases that involve family matters and other civil law cases. In this latter regard, at the level of county courts, the target is to dispose (from receipt to hearing) of 70% of small claims within 30 weeks, and 65% of other claims between 50 and 80 weeks. We were not able to identify similar targets applicable to the High Court, but in general, at upper levels the interval of time between receipt of the case and disposal is longer.

Timeliness of cases is also an important concern for courts in family cases where the interest of the child is involved. [35] The average time for care and supervision cases has dropped from 49 to 33 weeks between 2011 and 2013.[36] The new Children and Families Act 2014 introduced a statutory 26-week time limit (with discretion for the court to extend cases by up to eight weeks at a time) for completing care and supervision cases on the placement for children.

Commentary

In civil cases, litigants are generally required to pay a court fee to start proceedings. Fees cannot exceed the total cost of providing the service and cannot be set to make a profit. The civil and family courts and the employment tribunals are mainly self-funded with the majority of costs financed by court fees. The uncovered costs are met by the general taxpayer as part of the resource budget of the MoJ. The taxpayer's contribution integrates the potential fees foregone under the system of fee waivers (targeted to those who cannot afford to pay a fee) and the difference between the level at which fees are set to as not to prevent access to the courts and the full level of costs. The MoJ plans to reduce the burden on taxpayers by raising court fees for people using the civil, family and commercial courts. These proposals – to take

[34] Interview 1.
[35] From 22 April 2014, all family cases are now dealt with in the Single Family Court, which deals with cases such as: parental disputes, local authority intervention to protect children, matrimonial cases such as divorce petitions, the financial provisions for children after divorce or relationship breakdown, domestic violence remedies and adoption.
[36] MoJ, 'Improvement plan' (n 15) p. 9.

effect in April 2015 – have fuelled concerns over the expected impact on access to justice, deterring individuals, small businesses and others from using the system while prompting increased numbers of unrepresented litigants.[37] The MoJ has already introduced fees for employment tribunals and this has resulted in a significant drop in the number of cases.[38] Concerns were raised during the interviews that the measure is having a prominent effect on discrimination cases.[39] In order to investigate this phenomenon further, the ratio between average court fees and the minimum living wage could be used as a proxy, disaggregated by type of proceedings or by characteristics protected by the Equality Act 2010 in order to seek to capture any disproportionate impact on particular groups or types of case.

As highlighted above, there is no regular monitoring of users' satisfaction. One interviewee suggested that trends in the number of small claim cases brought before courts may be a proxy for measuring court users' perception of and confidence in the justice system.[40] The most voluminous type of proceedings in front of these courts are claims to recover unpaid debts, as opposed to divorce or criminal justice proceedings.[41] County courts' activity data relating to money claims show important reductions in the volume of court proceedings in the period 2000-2014.[42] In the case of small claims disputes a wider range of methods to solve a dispute are now available (including social and quasi-judicial mechanisms), therefore trends in the use of the court system may capture the public's confidence in the system and the ease of access to the courts rather than anything more concerning.

Indicators on Access to Legal Advice and Representation

Current Indicators

A recent report by the LSB highlights that prior to the LSA there were no indicators for measuring the performance of the legal services sector against the objective of improving access to justice.[43] Regulatory activity for lawyers mainly focused on maintaining a list of members of each of the individual professions.[44] Each regulatory body measured performance and advocated policy reforms on the basis of feedback from its membership. However, the legal sector suffers from the lack of *"an embedded culture of information collection and analysis"*.[45]

Commentary

[37] F Gibb, 'Massive increases in court fees 'threaten access to justice'', The Times (19 February 2015).
[38] Receipts of claims in April to June 2014 were 70% lower than in 2013. MoJ, 'Tribunals Statistics Quarterly, April to June 2014' (11th September 2014).
[39] Interview 9.
[40] Interview 1.
[41] LSB, Evaluation: How can we measure access to justice for individual consumers?, Discussion paper, September 2012, p.13, Figure 1.
[42] Ibid. See also http://bit.ly/1zSBwbw (accessed 28/02/15).
[43] LSB, 'Market impacts of the Legal Services Act – Interim Baseline Report' (April 2012) p. 7, available at http://bit.ly/1w8SPJf (accessed 28/02/15).
[44] "before 2009 and aside from the Law Society (TLS), little in the way of research was undertaken by these organisations" – Ibid.
[45] Ibid, p. 7.

The above-mentioned LSB report brings together a broad range of indicators, which would allow insight into longer-term trends in legal services in the UK.[46] The proposed indicators can be grouped into two broad areas: demand and supply of legal services. Each of them should be assessed from both a quantitative and qualitative perspective.

An indicator on the capacity of supply considered in context could measure:

- the number of agents of delivery compared to the population. Data could be drawn from the Approved Regulator annual membership lists and from the Office of National Statistics classification of economic activities annual reports;
- the range of categories of legal services offered by providers, drawn from the data collected by the approved regulators; and
- the proportion of agents of delivery in each local authority, in order to measure geographical location of services and assess changes over time.

As regards measurement of the demand for legal services, the LSB reports that the regulatory community does not collect information on the volume of cases undertaken by those they regulate. In the absence of any data on the actual volume of demand for legal services, the use of a set of proxy indicators is suggested.[47] These include for instance:

- total divorce petitions;
- Family Court proceedings;
- claims to NHS for negligence;
- police station advice;
- court and tribunal trials;
- trademark applicants using a lawyer;
- commercial property transactions; and
- commercial arbitration and mediation.

These, however, remain proxy indicators of demand and fail to capture information on some key issues. For instance, they do not show how consumers respond to legal problems: consumers may decide to handle the issue alone through self-representation or - in the case of large corporations and as regards the Government - may have recourse to legal services provided in-house.[48] At the same time, measuring the total number of court proceedings is a proxy because proceedings may not necessarily involve legal counsel. Moreover, a significant use of legal services involves provision of information and practical support, rather than dispute resolution and representation in court[49] and this is not captured by the proxy indicators listed above.

[46] Ibid.
[47] Report cited at n. 43, Figure 2, p. 22.
[48] A survey conducted between 2006-2009 shows that while individuals seek advice for their problems from a wide range of advisers, solicitors were the most commonly used source. In addition, Citizens Advice Bureaux and police officers were also frequently used. Moreover, use of the Internet for advice seeking was observed to have importantly increased from 2001 to 2009. Legal Services Commission, 'Report of the 2006-9 English and Welsh Civil and Social Justice Survey' (2010).
[49] The 2012 Legal Services Benchmarking Survey, available at: http://bit.ly/1CVDpoy.

The LSB evaluation framework underlines the need to assess outcomes from different perspectives - that of the service provider, of consumers and of the public in general - but it also acknowledges the lack of regularly updated perception studies and survey data in this regard.[50]

Indicators on Access to Legal Aid

Current Indicators

Activity in the legal aid system is measured in terms of workload and expenditure.[51]

Workload units measure the volume of cases involving access to legal aid in an attempt to reflect the fact that the provision of legal assistance and representation may vary in terms of complexity and speed. The basis on which case volumes are measured also varies between civil and criminal legal aid. Legal aid in criminal cases is disaggregated into 'crime lower' (covers primarily legal advice at police stations, Magistrates' Courts and advice to people already convicted of crimes) and 'crime higher' (covers legal advice and representation at the Crown Court or higher). Legal aid in criminal cases is measured at the end of activity on a case; instead, for other legal aid areas volumes are based on case starts.[52]

The Legal Aid Agency funds civil legal advice in two ways: face-to-face advice or telephone advice. The Agency funds the provision of legal advice by the third sector through contracts.

In both sectors, expenditure reflects the total value of payments made to legal aid providers in relation to the cases that are completed in the relevant period. The MoJ publishes regularly quarterly bulletins and annual reports on legal aid statistics.

Commentary

The National Audit Office (NAO) recently assessed the impact of the reforms to civil legal aid from the perspective of saving costs - the main stated objective of the MoJ.[53] It concluded that while the reforms are likely to reduce spending significantly on civil legal aid, they also have the potential to create additional costs both to the MoJ and to the wider public sector. The NAO report highlighted the following shortcomings that are also broadly confirmed by the civil society experts interviewed:

- the increase in self-representation as a consequence of legal aid cuts will likely increase Ministry's costs for additional support for litigants in person and there may be wider costs if people whose problems could have been resolved by legal-aid funded advice suffer adverse consequences to their health and wellbeing.[54] Lack of

[50] For a review of legal needs surveys in the UK and in other jurisdictions see: P Pleasence and N J Balmer, 'How People Resolve 'Legal' Problems' (Cambridge, May, 2014) p. 8.
[51] Legal aid statistics: July 2014 to September 2014.
[52] Interview 4.
[53] National Audit Office, Report by the Comptroller and Auditor General, *Implementing reforms to civil legal aid*, 20 November 2014.
[54] The point was also raised by interviewee 6.

quantification of these additional costs risks overstating the real outcomes of the reforms;

- the Ministry implemented the reforms without a good understanding of the reasons why people go to court to resolve their problems. An example in this regard is that despite a reduction in the amount of litigation in the areas of family law that were removed from the scope of civil legal aid, the expected increase in the use of mediation (funded through civil legal aid by the Ministry) as an alternative to courts did not occur. An analogous example made during the interviews regards the poor level of coordination between different governmental departments in policy planning. The Home Office through the Immigration Act 2014 reduced the number of appeals with the intent to divert most complex cases towards judicial review, however, shortly after that, the MoJ also announced its intention to reduce the number of judicial review cases;[55]
- the Ministry reduced the fees for legal services providers without a robust understanding of how this would affect the market, i.e. the extent to which lawyers will chose not to undertake civil legal aid work. Indeed, interviewees, including civil servants from the MoJ, generally agreed that there is a lack of available data on the amount of legal assistance provided pro-bono.[56] This is relevant because it can be expected that private markets will not continue to deliver public services if this becomes uneconomic and in the absence of financial incentives.

In general, the NAO concludes that the reforms will not be able to deliver better overall value for money for the taxpayer unless the Ministry improves its understanding of the impact of the reforms on the ability of both courts and the legal profession to meet demand for services. Cost reduction as a measurement of performance is a thin indicator and needs to be assessed against a quantification of adverse unintended consequences in other sectors (through projection models, statistical evidence or survey studies).

Another interviewee highlighted that a constant component of the proposed reform of the legal aid system that resulted in the adoption of the LASPOA (but which is also applicable to other recent reforms in the sector) was the commitment to guarantee compliance with rights protected under international law.[57] To that end, the LASPOA provides for an 'exceptional case funding' scheme that allows access to legal aid in cases not explicitly covered by the Act, but where a failure to do so would breach the individual's rights (ECHR rights within the meaning of the Human Rights Act 1998, or the right to the provision of legal services as an enforceable EU right).

Access to the exceptional case funding scheme has however been lower than planned in practice. In the year following the reforms, of the projected 5.000-7.000 applications the Legal Aid Agency received just 1,520 and only 5% of these were actually granted.[58] The application process is burdensome and the low success rate discourages further applications. There is no payment for completing an application unless it is successful, and self-completed applications for legal aid have a very low rate of success. The scheme was ruled as unlawful

[55] Ibid. See also consultation responses on Immigration Bill: http://justice.org.uk/immigration-bill/.
[56] Interviews 3, 4, 5, 8.
[57] Interview 2.
[58] National Audit Office, Report by the Comptroller and Auditor General, *Implementing reforms to civil legal aid*, 20 November 2014, p. 27.

by the High Court because it sets too high the threshold for granting legal aid but the MoJ has appealed this decision.[59] Regardless of the outcome of that appeal, continued monitoring of access to this funding would be valuable especially in the light of UK's international reporting obligations, including in the context of the UN Universal Periodic Review.

Increased pressure on local authority budgets combined with the loss of legal aid contracts following LASPOA reform has led to funding cuts for advice agencies and to an increasing use of telephone, internet or other technologies for the delivery of legal advice services.[60] Providers of civil legal advice warn that these developments may have a negative impact on quality and accessibility of services in some instances.[61] This is especially the case in complex cases with considerable documentation. Moreover, although the first post-implementation NAO review is rather positive on the telephone gateway,[62] studies conducted by civil society organizations have shown some shortcomings of this system especially on vulnerable groups.[63] This suggests that there may be a valuable role for measuring the effect of these changes on access to civil legal advice, both through experience surveys and in terms of trends in success rates in similar types of disputes.

Access to justice indicators often focus on procedural barriers relating to access to legal advice and representation and access to courts. However, as has already been underlined, the concept of access to justice does not only cover the notion of having recourse to courts. Alongside procedural guarantees, the substance of laws is equally important in guaranteeing access to justice. In this regard, one interviewee commented on the importance of clear and intelligible laws for access to justice and the value of assessing these.[64] This too could be assessed using experience surveys.

2.5 Conclusion

UN member states are currently involved in the identification of suitable and effective indicators to measure progress with regard to the achievement of the new SDGs and targets against which development progress will be tracked for the next 15 years.

Goal 16 of the draft SDGs commits States to *"promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels"* and more specifically, under Target 3, to *"promote the rule of law at the national and international levels, and ensure equal access to justice for all"*. In view of the reporting obligations involved in such commitments, some conclusions can be

[59] High Court of Justice, Queen's Bench Division, Administrative Court, Collins J in *Gudanaviciene & Ors v Director of Legal Aid Casework & The Lord Chancellor*, [2014] EWHC 1840 (Admin) [2014] WLR(D) 266.
[60] Equality and Human Rights Commission (EHRC), Response to the Consultation of the National Audit Office 'Changes to Civil Legal Aid', 21 July 2014, para. 13 ff.
[61] NAO consultation with civil legal aid providers, July 2014 in National Audit Office, Report by the Comptroller and Auditor General, *Implementing reforms to civil legal aid*, 20 November 2014. This conclusion was confirmed by interviewees 1, 2 and 6.
[62] Ibid.
[63] EHRC, Response to Consultation (n 58) para. 24 ff; Also interview 6.
[64] Interview 7.

drawn from the analysis of UK's experience with policy and measurement in the area of access to justice.

First, the UK primarily uses quantitative indicators to measure court activities and performance. While thresholds and benchmarks are of course context specific, in broad terms, the indicators of this kind which are currently used could be utilised in other jurisdictions as well. This is not only conceptually but also practically possible, because the data primarily used in the UK system to assess performance against such indicators (i.e. court resources - financial and human – and performance, such as timeliness) is collected and held in a broad range of jurisdictions.

Secondly, our analysis of the UK system confirms that statistical data relating to the criminal justice system are more well-developed and more easily accessible. For example, data regarding the measurement of violence (homicide and victims of violence data), the length of the different stages of proceedings and information on detention and prison facilities are both widely collected and measured in the UK as well as elsewhere. For reporting purposes, however, different state practices must be taken into account, for example, the fact that in the UK, detention includes administrative detention in the context of immigration and asylum procedures as well as criminal detention and that any data on detention in broad terms should therefore reflect as much.

Thirdly, analysis also shows that the indicators currently used tell little about the causes of changes in trends. In this regard, more qualitative data would be valuable in enabling the Government to go behind the functioning of the institutions to take into account concrete individual experiences of the justice system. Research in the UK context has shown that there is an increasing awareness of the need to combine objective indicators with more subjective experience and perception measurements. This also reflects a European trend towards the introduction and use of surveys to evaluate users' level of satisfaction and public confidence in courts and in the justice system more generally. Both qualitative and quantitative data are of crucial importance in making informed evidence-based policy decisions. An assessment of the delivery of the outcomes in relation to improvement on access to justice is only possible by triangulating the indicators from different perspectives (Government, legal services providers and the public) and by analysing trends and relationships between sectors of reform. However, analysis shows that additional effort needs to be made to collect quantitative data in the UK. Presently, there is no regular commissioning of surveys. Those which have been commissioned in the past have not been part of the official statics produced by the Government but have been commissioned externally and on an ad hoc basis. Surveyed samples as well as the specific questions in the surveys also differ across the various studies and this makes it difficult to monitor trends meaningfully.

Fourthly, research shows that an important part of the debate on access to justice in the UK relates to access to legal representation and legal aid. As has been underlined extensively in human rights instruments, these are certainly important indicators of access to justice. However, their concrete relevance in ensuring access to justice may depend on other specific features of the legal and judicial system. For instance, interviews highlighted that the role and importance of legal aid to ensure legal representation may differ between adversarial systems where the role of the judge is traditionally a passive one and inquisitorial systems where the

judge plays a more active and central role and can thus provide input to the case.[65] The specifics of the UK system in this regard need to be taken in due consideration. Equally, the importance of access to legal representation and legal aid increase where laws are complex, unclear and frequently reformed.[66]

Finally, the research carried out highlights that in trying to identify indicators for access to justice, an overlooked aspect is that litigation in courts represents a comparatively small volume of cases. This does not mean that justice is not a problem. A society may suffer acute problems of social injustice or access to resources that are not justiciable as such. One interviewee highlighted that there are certain cases, which cannot be brought before courts because litigation is not an appropriate or available remedy.[67] Ombudsman schemes (or similar complaint-handling schemes, even if they do not use the title 'Ombudsman') are becoming increasingly popular as a free and accessible means of achieving redress for recipients of public and private sector goods or services.[68] Accordingly, the availability of public interest law mechanisms, such as complaints commissions or Ombudsmen, is an important indicator and promoter of access to justice, including social justice.

[65] Interviews 2, 7. See also LSB, 'How can we measure access to justice for individual consumers' (2012) p. 32; CEPEJ report, p. 9.
[66] Interview 7.
[67] Interview 1.
[68] Ombudsmen in the UK include: the Parliamentary and Health Service Ombudsman who investigates complaints about government departments, including NHS hospitals or community health services; the Local Government Ombudsman who investigates complaints about local councils and some other local organisations; the European Ombudsman who can an investigate maladministration in the activities of the EU institutions; the Legal Ombudsman who deals with complaints about services provided by legal advisers; the Housing Ombudsman who can deal with complaints about maladministration in social housing; the Prisons and Probation Ombudsman, etc. Each of them produce annual reports available online.

3. Taxation

3.1 The UK Revenue System

Relevant Actors

Since 2004, Her Majesty's Treasury (HMT) and Her Majesty's Revenue and Customs (HMRC) have shared responsibility for tax anti-avoidance policy.[69] HMT is primarily in charge of policy-making and HMRC is responsible for implementation and monitoring.[70] HMT is also responsible for oversight of policy relating to anti-money laundering.

Within HMT, policy-making occurs within the Budget, Tax and Welfare Directorate, which is divided into three sub-directorates and teams responsible for strategy, budget delivery, and others relating to either the tax or labour market, or arranged according to specific sectors.[71]

The department within HMRC most relevant to anti-avoidance policy is Enforcement & Compliance, which is currently led by Jennie Granger. Within that department are a number of directorates which ensure the successful collection of taxes from UK taxpayers, and also work to identify and mitigate risks to tax collection. These directorates include Criminal Investigation, Data Exploitation, Local Compliance, Risk & Intelligence and Specialist Investigations. In addition, a newly-established counter-avoidance directorate brings together operational and policy staff in one team to better link overall anti-avoidance strategy.[72] It is being used to generate ideas of what to do differently, and what powers might be necessary to achieve their objectives.[73]

In addition to HMT and HMRC, the Comptroller and Auditor General at the National Audit Office is responsible for overseeing HMRC accounts to assess whether the department is adequately undertaking its revenue collection duties.[74] It publishes an annual report which sits alongside HMRC's annual accounts.[75] Finally, the Committee of Public Accounts in the House of Commons provides an additional layer of oversight, but its remit does not extend to

[69] T Bowler, 'Tax Policymaking in the UK' (2010) Institute for Fiscal Studies, TLRC Discussion Paper No 8, pp. 3-4.
[70] This is the result of a 2004 review of the revenue departments led by Gus O'Donnell ('Financing Britain's Future: Review of the Revenue Departments' (2004) Cm 6163, HM Treasury, London. This was also the point at which revenue and customs were merged to create HMRC. This has been criticised by some (see T Bowler, 'Tax Policymaking in the UK' (2010) Institute for Fiscal Studies, TLRC Discussion Paper No 8, ibid. , p. 5; CJ Wales and CP Wales, 'Structures, processes and governance in tax policy-making: an initial report' (2012) Oxford University Centre for Business Taxation, pp. 38-9).
[71] T Bowler, ibid, p. 5.
[72] An interactive organogram of HMRC is available at: http://reference.data.gov.uk/gov-structure/organogram/?dept=hmrc&post=CE1 (accessed 18/02/15). Information on the counter-avoidance directorate is available in para 4.6 of National Audit Office (NAO), Report by the Comptroller and Auditor General, 'Increasing the effectiveness of tax collection: a stocktake of progress since 2010' (2015).
[73] Interview 12.
[74] The legal basis for this is s 2 of the Exchequer and Audit Departments Act 1921.
[75] See, e.g., National Audit Office, 'Report by the Comptroller and Auditor General: HM Revenue & Customs 2012-13 Accounts' (2013).

consideration of the appropriateness of policy; it is focused on concerns such as efficiency and effectiveness.[76]

Relevant Taxation Basics

In 2013-14, HMRC brought in £492.6 billion in revenue. As has been the case for the past decade, more than half of this was made up of income tax, capital gains tax, and national insurance contributions (55%). Revenue also comprised of VAT (21%); corporation tax (8%); hydrocarbon oil duty (5%); stamp taxes (3%); tobacco and alcohol duties (4%); and other taxes (4%).[77]

The UK calculates its tax to gross domestic product (GDP) ratio based on an average of its GDP, which is calculated three different ways: (1) total spending; (2) total earning; and (3) total value added per year. Disaggregated information is also provided by HMRC.[78] In terms of the progressivity of UK taxation, in 2013-14, income tax made up 31.1% of UK revenue, and corporate tax comprised 8.7%.[79]

The UK taxes foreign income earned by UK tax residents (an individual that either spends 183 or more days in the UK during the tax year, or whose only home is in the UK[80]), but if the resident is already taxed abroad, it may be possible to get Foreign Tax Credit Relief.[81] Foreign income is typically taxed in the same way as UK income, except for pensions, rent from property and some types of employment income.[82] UK resident companies must also pay tax on foreign income. A company is resident in the UK if: (1) it is incorporated in the UK; (2) it is a small enterprise which transferred its registered office to the UK; (3) if it is a European Co-operative Society that has registered its office in the UK under European Union law.[83] In the latter two cases, the company does not necessary stop being a UK resident if it later transfers

[76] More information on the PAC is available at: http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/role/ (accessed 05/02/155).
[77] HMRC, 'Tax & NIC Receipts' (19 Dec 2014) p. 3.
[78] Ibid, pp. 8-14. Income tax, capital gains tax and national insurance contributions cash revenue as a percentage of GDP was 16.1% in 2013-14. VAT as a percentage of GDP was 6.4%. Corporation tax and bank levy receipts: just under 2.5%. Stamp taxes: just under 0.8%. Hydrocarbon oil cash revenue: 1.6%. Tobacco receipts: around 0.6% Alcohol receipts: around 0.6%.
[79] HMRC, 'A disaggregation of HMRC tax receipts between England, Wales, Scotland & Northern Ireland' (2014), p.) 11, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/372565/disag-main.pdf (accessed 09/03/15)..
[80] According to HMRC, "you must have owned, rented or lived in it for at least 91 days total – and you spent at least 30 days there in the tax year" (see HMRC, 'Tax on Foreign Income', para 2, at https://www.gov.uk/tax-foreign-income/residence) (accessed 16/03/15).
[81] UK residents who are permanently domiciled outside of the UK may also be exempt from paying UK tax on foreign income. 'Domicile' is usually the country an individual's father considered his permanent home when the individual was born (see HMRC, 'Tax on Foreign Income', para 3, at https://www.gov.uk/tax-foreign-income/non-domiciled-residents) (accessed 16/03/15).
[82] HMRC 'Tax on foreign income' at https://www.gov.uk/tax-foreign-income/paying-tax (accessed 09/03/2015). See also HMRC 'Foreign notes: tax year 6 April 2013 to 5 April 2014', available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/354350/sa106-notes.pdf (accessed 09/03/15)..
[83] Council Regulation 1435/2003/EC on the Statute for a European Cooperative Society (SCE).

its registered office from the UK.[84] Some companies are considered as non-UK residents under double taxation arrangements. To be considered as such, the company has to have successfully made a claim for relief under the arrangements in question.[85]

3.2 Anti-avoidance Policy, Tools and Indicators

General Anti-Avoidance Policy

Anti-avoidance policy has been on the agenda of HMT and HMRC for several years. At the outset, it is important to distinguish tax avoidance from tax evasion. The latter is concerned with non-disclosure or concealment, which may or may not be fraudulent, whereas avoidance is not criminal in nature. Tax avoidance uses legal methods of modifying a person's financial situation so that the amount of taxes owed is lowered. Although in the UK avoidance occurs with respect to several taxes, such as VAT, one interviewee explained that the UK Government is most concerned with the avoidance of income and corporation tax.[86] This is supported by various policy documents and speeches given by Chancellor of the Exchequer George Osborne, which often emphasise the importance of multinational businesses paying *"their fair share"*.[87]

The HMRC and HMT have elaborated upon the general policy objective of tackling tax avoidance in a number of official documents. Together, these documents set out the following main objectives for anti-avoidance policy:

- Maximising revenues by:
    - Promoting and designing good compliance into all systems and processes to make it easier for customers to accurately complete their tax returns;
    - Preventing non-compliance by making it difficult for people to make mistakes or deliberately cheat the system when they file tax returns or update their circumstances; and
    - Responding to non-compliance firmly by tailoring activity to maximise impact when HMRC has to intervene to assess compliance risk;
- Detecting tax avoidance activity early; and
- Preventing companies and individuals which take part in failed tax avoidance schemes from being awarded Government contracts.[88]

[84] Corporation Tax Act 2009 c 4, Part 2, Chapter 3.
[85] Ibid, s 18.
[86] Interview 12.
[87] The Rt Hon George Osborne MP, 'Autumn Statement 2014 speech', 2 December 2014, p 9. See also, 'Autumn Statement 2013 speech', 5 December 2013, pp. 9-10; 'Autumn Statement 2012 speech', 5 December 2012, pp. 9-10.
[88] HMRC Business Plan 2014-16, pp. 7, 9-10; HMRC Business Plan 2012-15, p. 14. The accuracy of these objectives has been confirmed in interviews.

The work of HMRC is ultimately aimed at closing the tax gap, which is the difference between tax that *is* collected, and tax that *should be* collected. In 2012-13 the tax gap was estimated at £34 billion, £3.1 billion of which is thought to have been due to tax avoidance.[89]

Key Policy Tools

Since 2012, the UK has implemented two main pieces of legislation to combat tax avoidance. The General Anti-Abuse Rule (GAAR) became applicable to certain taxes from 17 July 2013, including income tax and corporation tax, and as of March 2014, it also applies to national insurance contributions.[90] The GAAR is intended as a tool to assist HMRC in its anti-avoidance strategy, and attempts to define abusive tax arrangements. The GAAR provides that tax arrangements are abusive if:

> *"they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including—*
>
> a. *whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,*
> b. *whether the means of achieving those results involves one or more contrived or abnormal steps, and*
> c. *whether the arrangements are intended to exploit any shortcomings in those provisions."*[91]

The GAAR also provides examples of characteristics that might point toward abuse:

> a. *the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes,*
> b. *the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes, and*
> c. *the arrangements result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid,*
>
> *but in each case only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.*[92]

The National Audit Office recently indicated that, given that the GAAR only took effect in July 2013,[93] HMRC will likely consider its first cases using the GAAR in 2015. There are some concerns regarding the broad nature of the GAAR and the risk of legal uncertainty, however, since it has not yet been considered by the tax tribunal, the extent to which it will lead to uncertainty in practice cannot yet be estimated. Notwithstanding these concerns, one

[89] HMRC, 'Measuring tax gaps 2014 edition: Tax gap estimates for 2012-13 pp. 3-6.
[90] The GAAR is included within the Finance Act 2013 in Part 5 and Schedule 43, and in section 10 of the National Insurance Contributions Act 2014. It is accompanied by guidance, which is available on the HMRC website at: https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules (accessed 09/02/2015).
[91] Finance Act 2013, s 207(2).
[92] Ibid, s 207(4).
[93] For National Insurance contributions, the GAAR took effect from March 2014.

interviewee indicated that the GAAR is regarded as a good and appropriate step toward tackling avoidance,[94] but it is not clear that this is a view that is widely shared.[95]

In addition to the GAAR, the Disclosure of Tax Avoidance Schemes (DOTAS) regime provides a reporting framework for avoidance schemes for VAT, direct taxes (such as income, corporate, capital gains) and National Insurance contributions, and includes a number of penalties for non-disclosure. If a scheme is disclosable under DOTAS, it must be reported to HMRC by the promoter(s) of the scheme. Promoters typically include accountants, lawyers or banks. A scheme must be disclosed if certain conditions are fulfilled. For example, in relation to direct taxes, a scheme must be disclosed if: (1) it will or is expected to provide a taxpayer with an advantage, and (2) the advantage will be the main benefit. There are also a number of 'hallmarks' used to indicate whether the scheme is one that should be disclosed, such as keeping tax arrangements confidential from HMRC or competitor promoters, or where an arrangement is a loss scheme or a standardised tax product.[96]

DOTAS has its own set of policy objectives:

- To provide HMRC with information on avoidance schemes in enough time to enable HMRC to conduct risk assessment and develop legislation, where necessary, to close tax loopholes;
- To identify users of avoidance schemes to assist HMRC in its compliance work; and
- To reduce the availability of avoidance schemes.[97]

DOTAS was introduced in 2004, and has been labelled a "key and crucial tool for dealing with avoidance."[98] Although HMRC views DOTAS as being extremely successful, there has been some criticism from practitioners and scholars. For example, the test for disclosure described above is thought by some to be broad and therefore liable to catch legitimate tax planning arrangements, despite the existence of the hallmarks, and the hallmarks themselves have been criticised of being under-inclusive.[99] Moreover, the National Audit Office recommended in 2012 that HMRC needed to do more to detect undisclosed schemes, and HMRC is currently working on strengthening the regime.[100]

In addition to GAAR and DOTAS, HMRC has recently acquired new legal powers to assist with its anti-avoidance strategy. The most notable in this context is accelerated payment notices

[94] Interview 13.
[95] JN Stefanelli & L Moxham (Eds), Do Our Tax Systems Meet Rule of Law Standards? Conference Papers 20 November 2013 (Bingham Centre Working Paper 2014/06), Bingham Centre for the Rule of Law, BIICL, London, September 2014, pp 44-57, available at: http://www.biicl.org/documents/315_tax_booklet_-_final.pdf (accessed 16/03/15).
[96] The Tax Avoidance Schemes (Prescribed Description of Arrangements) Regulations 2006 (SI 2006/1543) Parts 2-3.
[97] HMRC, 'Lifting the Lid on Tax Avoidance Schemes' (2012) Annex C, p 31. See also HMRC Business Plan 2010-11, p 10.
[98] House of Lords Select Committee on Economic Affairs, 'The Finance Bill 2011', HL Paper 158 (2011), p 33.
[99] Oxford University Centre for Business Taxation, 'The Disclosure of Tax Avoidance Schemes Regime' (2012) 15-17.
[100] Interview 12.

(APNs).[101] APNs are aimed partially at ending the bias of most anti-avoidance policy toward taxpayers by requiring (in most cases) that any tax in dispute be paid up front to HMRC once an avoidance scheme is challenged.[102] If the scheme is judged to be legitimate, the money will be reimbursed to the taxpayer. There are two principal routes of getting to the issuing of an APN. One is through the identification of schemes through DOTAS and the other is through follower cases (described below). There has been some concern that APNs remove legal rights of taxpayers in terms of rights of appeal. If someone feels that they have been required to pay an incorrect amount, the only recourse is to either plead with HMRC to change it, or to pursue a judicial review case. The latter option is not ideal because of cost and length of proceedings (although there are a couple of cases before the Court of Appeal at present). An interviewee indicated, however, that it appears that HMRC has thus far been coming up with the correct figures, and where HMRC has not correctly calculated the figures, it has been willing to deal with it appropriately.[103]

HMRC has also recently been given the power to issue 'follower notices' to tackle avoidance schemes with multiple users. Follower notices help HMRC settle cases involving a particular avoidance scheme with similar facts. Follower notices are notices issued by HMRC to people involved in schemes that HMRC is testing in court. The notices require these people to settle, should HMRC win at the tribunal. Recipients of follower notices who refuse to settle and then lose their case will have to pay a penalty on top of any taxes owed.[104] As indicated above, follower notices are one of two routes toward the issuing of an APN. However, an interviewee pointed out that the other route (identification of DOTAS schemes) is more widely being used, as there are still thousands of schemes for HMRC to pursue.[105] Once they finish doing that, they will likely begin to issue more follower notices and focus on that method of enforcement. But for now, follower cases are not a large priority for HMRC.[106] There are similar concerns here regarding rights of appeal and judicial oversight as there are in relation to APNs.

Indicators

HMRC assesses all of its compliance policy by calculating what is called 'compliance yield'. The compliance yield is the additional revenue HMRC generates from its compliance activities. It is a rolling, ongoing calculation. Throughout the year, the compliance teams in HMRC estimate the impact of their interventions and record it internally. HMRC then aggregates the impact claims and reports the outcome annually at the end of the financial year. It comprises four separate figures:

- Cash collected: the estimate of additional tax collected by identifying and challenging non-compliance;

[101] The content of this section is derived from Interview 11, and also NAO, Report by the Comptroller and Auditor General, 'Increasing the effectiveness of tax collection: a stocktake of progress since 2010' (2015) 4.11.
[102] Finance Act 2014 s 223.
[103] Interview 13.
[104] Interview 12; NAO, Report by the Comptroller and Auditor General, 'Increasing the effectiveness of tax collection: a stocktake of progress since 2010' (2015) 4.11.
[105] Interview 13.
[106] Ibid.

- Revenue losses prevented: revenue that has been protected as a result of refusing or reducing repayment claims that are fraudulent or in error, or through the disruption of criminal activity;
- Future revenue benefit: estimate of revenues for the next five years generated as a result of behavioural change; and
- Product and process yield: the impact of legislation aimed at eradicating avoidance and of changes made by HMRC to its own processes that help reduce opportunities to avoid tax.[107]

In its most recent Accounts, HMRC reported cash collected as £9.18 billion; revenue losses prevented as £8 billion; future revenue benefit as £5.51 billion; and product and process yield of £1.23 billion.[108]

In addition to the compliance yield, HMRC uses the number of open or unresolved avoidance cases as a means of measuring the success of its policies. In 2012, this was estimated at around 40,000, but since then HMRC has improved the method by which it identifies open cases, and the number has since increased to around 65,000.[109] The number of open cases will be used as a measure of the success of HMRC's anti-avoidance policy, but it is not yet clear how formally or visibly it will be adopted as a performance indicator.[110]

HMRC has already calculated that it is likely to receive £7 billion from accelerated payments, and will track whether it receives that money and how quickly it comes in. An interviewee indicated that other indicators are likely to be developed, but as this power only entered into force with the Finance Act 2014, they are still under development.

Commentary

The National Audit Office recently assessed HMRC's use of compliance yield as an indicator for anti-avoidance activity to determine whether the way HMRC calculates compliance yield is reasonable, and whether HMRC has adequate processes in place to give validity to its estimates.[111] Specifically, the NAO considered whether this indicator:

- Reflects impact from the different types of compliance activities using the best evidence available;
- Is subject to processes aimed at assuring the quality of the data used as the basis for the yield;
- Allows for a comparison of performance over time; and
- Is reported in a way that is meaningful and understandable.[112]

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[107] HMRC, 'Annual Report and Accounts 2013-14' (31 March 2014) p 11.
[108] Ibid.
[109] Interview 12. See also NAO, Report by the Comptroller and Auditor General, 'Tax avoidance: tackling marketed avoidance schemes' (2012), Part 3; NAO (n 104) 4.7.
[110] Interview 12.
[111] National Audit Office, 'Report by the Comptroller and Auditor General' (3 July 2014), published alongside the 2013-14 HMRC Accounts, 2.3.
[112] Ibid, 2.16.

After analysing each of these standards separately, the NAO report concluded overall that HMRC's use of compliance yield as a measure for its compliance activities was *"sound"* and that it is a *"reasonable proxy"* for measuring beneficial impact.[113] However, it did offer some criticism regarding the need for HMRC to submit its compliance data for external scrutiny (beyond HMT) to boost quality, it also emphasised the need for consistency of the measure over time, and it urged HMRC to be more transparent in reporting on compliance yield and specifying what it includes.[114] The Committee of Public Accounts has also commented that *"an increasing proportion of HMRC's compliance yield is calculated using estimates and that these types of calculation are more subjective, more susceptible to errors and less certain."*[115]

In an interview, the Centre was told that although compliance yield is routinely used as an indicator of policy performance, whether it can be accurately measured is dependent on several factors, including the economic outlook at the time; whether businesses are finding new (legal) ways to do things differently; and whether new businesses have entered the market.[116] The same person explained that HMRC is constantly reviewing its chosen indicators, but that it has been difficult to find a better indicator than compliance yield. Moreover, it is important to stress that compliance yield is a rolling and ongoing calculation that is used to assess HMRC performance as a whole, i.e., it does not only take anti-avoidance strategy into account, but also includes anti-evasion strategy. It is calculated constantly by compliance teams to estimate the impact of their interventions, but is reported in the aggregate annually at the end of the financial year.[117] Another interviewee indicated that the calculation of compliance yield is essentially a guessing game, despite the calculations themselves being quite high-level and complex.[118] The same person also pointed out that there are actually no attempts to work out whether the amount of yield calculated turns out to match what was estimated. Therefore it would seem those making the calculations may have less incentive to ensure that their estimates are accurate.

Potential indicators are always considered at the proposal stage for new legislation, during the impact assessment. Not only is taxpayer impact reviewed (i.e. how the measure will affect compliance costs to businesses and taxpayers), but there is also an assessment of overall impact on revenue collection (i.e., whether additional tax will be collected or given up as a result of the measure at issue).[119] HMRC is responsible for undertaking all data analysis and measurement. Its approximately 300 analysts assess compliance using data that is routinely collected by HMRC, but compliance yield may be supplemented by additional research, such as a survey of businesses to gauge how they address a particular measure, its ease of application, and whether businesses have engaged in any planning to sidestep the measure. Analysis of compliance is not currently conducted according to a fixed schedule..

[113] Ibid, 2.15-2.41.
[114] Ibid, 2.30, 2.33, 2.40.
[115] House of Commons Committee of Public Accounts, 'HMRC's progress in improving tax compliance and preventing tax avoidance', HC 458 (18 November 2014), para 9.
[116] Interview 11.
[117] Interview 12.
[118] Interview 13.
[119] Interview 11.

Some academics have suggested alternative methods of analysis specifically regarding the DOTAS regime. In particular, it has been suggested that the impact of DOTAS cannot be properly measured without asking a series of questions, some of which include:

- How often have disclosed arrangements been challenged by HMRC on the ground that they fail as a matter of law without resorting to litigation?
- What is the success rate of such challenges?
- How many disclosures have led to litigation?
- How much tax has been recovered through such litigation?[120]

These questions focus on practical outcomes of legislative arrangements. They are questions designed to elicit information based on the success of enforcement activity through legislation and legal challenge, rather than by assessing purely the amount of tax collected as a result of compliance activities.

With regard to measuring performance of the GAAR, it may be possible to adopt a similar line of inquiry. For example, indicators might include:

- How often has the GAAR been used as a basis for challenging suspect tax arrangements?
- What has been the success rate of such challenges?
- How much tax has been collected as a result of finding arrangements abusive under the GAAR?

Finally, one interviewee suggested that it would be possible to measure compliance work by looking at the impact numbers produced by individual departments (which is done as part of the calculation of compliance yield), which are represented in the tax gap, published annually. It was stressed, though, that this would in no way be capable of being linked back to specific compliance measures; it would only measure the success of HMRC as a whole.[121] However, it was also suggested that measuring the impact of every piece of anti-avoidance legislation would be quite difficult considering that each year, 4-5 measures are typically put in place, and can often be quite particular. Because of the frequency of this legislation, HMRC does not even attempt to track its success. This is of course to be contrasted with larger legislative initiatives like DOTAS, which include clearly measurable attributes, such as the number of open cases and the revenue from accelerated payments.

Move toward upstream compliance

Most of the policies described above are effectively retrospective in nature, that is, they attempt to bring back tax that has not been paid. Recently there has been trend toward adopting policies aimed at incentivising taxpayers to act in a compliant manner through the exploration and adoption of deterrent measures. This has been done partly by changing public perception of avoidance (i.e. making it socially unacceptable), by publicising success of litigation, and by publicising new powers. More upstream efforts to deter non-compliance became an important part of the anti-avoidance agency in 2013 when the new Director General of Enforcement & Compliance, Jennie Granger, took over the position.

[120] Oxford University Centre (n 99), Appendix 1, Part C.
[121] Interview 13.

The move toward upstream compliance is positive in that it is aimed at creating an environment where HMRC no longer has to chase after loss revenue. However, it can be very difficult to measure the effect of deterrent activities because it essentially requires the measurement of a negative – the extent to which non-compliant behaviour is not engaged in by taxpayers. HMRC is currently working on new methods of testing the success of its deterrence activities.[122] Moreover, one interviewee cautioned that any attempts to change behaviour inevitably lead to changes in behaviour that are negative. For example, if you announce a new policy, some people will undoubtedly attempt to circumvent it as much as possible.[123]

Base Erosion and Profit Shifting (BEPS)

More common forms of tax avoidance by multinational enterprises include engaging in profit shifting to jurisdictions with more preferential tax rates than the UK. This is done through three main methods:

- Transfer price abuse: rather than operating according to the Arm's Length Principle, which means that any goods bought or sold between various parts of a multinational enterprise should be priced as they would be if bought or sold by an independent third party, such enterprises can manipulate the prices of sales between their constituent parts to reflect higher profits in lower tax jurisdictions and lower profits in the UK.
- Debt: because it is possible to deduct interest payments from taxable income, companies have an incentive to finance using debt rather than equity. A multinational may therefore take on debt through a British subsidiary in an attempt to avoid paying British corporation tax on the debt interest payments.
- Royalties: similar to the situation in transfer price abuse, a multinational can manipulate royalty fees so that costs can be spread among subsidiaries to ensure that subsidiaries located in lower tax jurisdictions are reporting higher profits (and therefore lower royalties paid).

The common denominator to each of these problems is that they are all mechanisms for allocating profit in a way that minimises taxable income. To combat these forms of corporate tax avoidance that seek to exploit the differences between national tax systems, the UK has actively sought to improve the international tax framework, in addition to its domestic framework (as will be discussed below). The present international framework is based on its use of bilateral double tax treaties and the Organization for Economic Cooperation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.[124] The UK has treaties in place with over 100 countries,[125] and it implemented the OECD Guidelines in 1998.[126] The UK is therefore clearly willing to engage with other countries on tax issues in order to tackle avoidance.

[122] Interview 12. See also NAO (n 104)) 4.13.
[123] Interview 12.
[124] The most recent edition is July 2010, and is available for download at http://bit.ly/1zOCrvx (accessed 09/02/15).
[125] All of the treaties are available on the HMRC website at: http://www.hmrc.gov.uk/taxtreaties/in-force/index.htm (accessed 09/02/15).
[126] The provision is now found in s 164 of the Taxation (International and Other Provisions) Act 2010.

Key Policy Tools

In 2013, the OECD produced an action plan on Base Erosion and Profit Shifting (BEPS).[127] Subsequently, the UK published a list of its priorities to combat BEPS.[128] The UK priorities are selected from actions set by the OECD in its 2013 document, and distributed across 2014 and 2015. Priorities for 2015 include:

- Strengthening Control Foreign Company (CFC) rules in the UK and abroad (these rules seek to prevent artificial distribution of profits to low-tax subsidiaries);
- Limiting base erosion through interest deductions;
- Preventing the artificial avoidance of permanent establishment status;
- Ensuring that transfer pricing rules attribute profit where value is created;
- Collecting and analysing data on BEPS and potential counteractions; and
- Developing a multilateral instrument.[129]

The UK has already taken action with respect to three of these priorities. CFC rules have been in place since 1984, and were then reformed in 2012, taking effect in their revised state from January 2013. The rules provide that if UK profits are diverted to a CFC, they will be allocated and charged to a UK corporate interest-holder that holds at least 25% interest in the company.[130] A number of companies are exempt from the CFC rules where it can reasonably be assumed that they are not involved in UK tax avoidance. This is based on the territory in which they operate and the nature of the income.[131] It is the position of HMT that its CFC rules are adequate and that no further action is necessary to combat profit shifting.[132]

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[127] OECD, 'Action Plan on Base Erosion and Profit Shifting' (2013), OECD Publishing, available at: http://www.oecd.org/ctp/BEPSActionPlan.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link (accessed 09/02/15).

[128] HMT and HMRC, 'Tackling aggressive tax planning in the global economy: UK priorities fort the G20-OECD project for countering Base Erosion and Profit Shifting' (March 2014).

[129] Ibid, Chapter 3.

[130] A CFC is defined as a non-resident UK company that is controlled by a UK resident person. 'Control' is determined by reference to (1) legal control; (2) economic control; (3) a joint venture test; and (4) accounting standards. See HMRC, 'INTM202010 – Controlled Foreign Companies: definitions', available at: http://www.hmrc.gov.uk/manuals/intmanual/intm202010.htm (accessed 09/03/15).. CFC rules are inserted into each year's Finance Act, which contains all the duties, exemptions, reliefs and tax rates for that particular fiscal year. The Finance Act 2014 includes CFC rules in Part 6 Other Provisions *International Matters,* which is to be inserted into Part 9A of the Taxation (International and Other Provisions) Act 2010 (but has not yet been). Note that CFC rules also apply to joint ventures where two or more persons control the CFC, one of whom is a UK resident company that controls at least 40%, and the other is a non-UK resident controlling between 40% and 55% of the CFC. See HMRC 'Draft Guidance: Overview of CFC rules' (16/05/2012).

[131] HMRC, 'INTM203020 – Controlled Foreign Companies: exemptions – excluded countries: Purpose of the list', available at: http://www.hmrc.gov.uk/manuals/intmanual/INTM203020.htm (accessed 09/03/15). The list of excluded countries is available at: http://www.hmrc.gov.uk/manuals/intmanual/INTM203130.htm. See also The Controlled Foreign Companies (Excluded Territories) Regulations 2012, SI 2012/3024. A number of other exemptions may also apply. For an overview, see HMRC, 'INTM200000 – Controlled Foreign Companies: Main

The UK is also currently preparing a law on taxation of diverted profits, which will apply a tax of 25% on diverted profits arising from 1 April 2015. Diverted profit tax will be applied where a foreign company abuses UK permanent establishment rules, and also where *"a UK company or a foreign company with a UK-taxable presence creates a tax advantage by using transactions or entities that lack economic substance."*[133] Before the tax is applied, HMRC must issue a notice explaining its reasons for applying the charge and the amount owed. The company then has 30 days to respond, and then HMRC will make its final decision.[134] One interviewee commented that this is an example of legislation that was politically expedient to enact, but which is likely to be problematic for everyone concerned because of the fact that thousands of companies are likely to be issued an initial notification by HMRC.[135]

In terms of limiting base erosion, the UK has introduced three types of rules aimed at restricting excessive interest deductions.[136] The first is an 'unallowable purpose rule', which assesses whether a company is party to a loan or debt instrument, a primary purpose of which is tax avoidance.[137] The rule prevents a company from bringing into account any debits or exchange gains from a loan relationship that is deemed to have an unallowable purpose, or any debits for interest paid as part of a scheme or arrangement wholly aimed at obtaining the debit for that interest. Once these debits or credits are disallowed, they cannot be brought into account for any other tax purpose. The other is a 'thin capitalisation rule' which addresses the situation described above regarding the financing of debt, where a company has far more debt than it would have been able to accrue if it was operating at an arm's length from the lender or guarantor.[138] The way in which this is determined is through an evaluation by HMRC of whether a third party would have made the loan for the same amount of money, or whether the same interest rate would apply. Anything determined to be excessive will not be allowed as a tax deduction. Finally, the UK makes use of the Worldwide Debt Cap, which aims at allocating debt interest across a group so that any tax relief on interest claimed in the UK does not exceed the total amount of interest attributable to the corporate group.

Regarding ensuring that transfer pricing rules attribute profit where value is created, HMT has commented that the UK makes use of the arm's length principle, which is effective as long as profit is allocated between company groups located in 'normal' tax jurisdictions, but that they may be inappropriate where a company is in a low-tax jurisdiction. To that end, the UK is very supportive of OECD examination of whether a more suitable principle should override the arm's length principle in these circumstances. However, it does not appear that the UK itself is

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Contents, available at; http://www.hmrc.gov.uk/manuals/intmanual/intm200000.htm (accessed 09/03/15)..

[132] HMT and HMRC (n 128) 3.5.

[133] HMRC, 'Diverted Profits Tax Guidance' (2014) paras 2-9, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385264/technical_note_measure_2148.pdf (accessed 09/03/15)..

[134] Ibid.

[135] Interview 13.

[136] HMT and HMRC (n 128) 3.8-3.16.

[137] Corporation Tax Act 2009 c 4, ss 441-443.

[138] Taxation (International and Other Provisions) Act 2010, Part 4.

undertaking any work in this regard, other than the work it has done with respect to strengthening Control Foreign Company rules.[139]

Indicators

We have been unable to locate any policy documents that specifically state how the UK measures the success or failure of its policies with regard to BEPS. Indeed, one of the UK priorities in this policy area is to conduct data analysis on BEPS and consider potential countermeasures. The relatively novel character of these policies is perhaps one reason for this lack of information. In many cases legislation has only just entered into force, or has not yet been proposed. Although it is the policy of HMRC and HMT to consider potential indicators at the outset of legislative development, perhaps it is not yet the case that a concrete set of indicators has been established. Two interviewees confirmed this hypothesis.[140]

Although it seems that at present, revenue collected from CFC rules is not tracked, we were told that, in theory, it should be possible for HMRC to determine how much tax revenue has been raised as a result of their application.[141] This would be more difficult in situations where a company agrees to pay a certain level of tax as a result of the threat of imposing measures in addition to CFC rules (i.e., it would be difficult to trace the source of the revenue in these cases). Moreover, once the diverted profits tax enters into force in April 2015, it should be possible to clearly measure its success based on the revenue it brings in.

The OECD itself is yet to develop methods of measurement. In August 2014, the OECD publicly requested information regarding the development of indicators of the scale and economic impact of BEPS and actions taken to address BEPS. Stakeholder comments were published in October that same year.[142]

Commentary

It is important to consider whether BEPS will have an actual impact in practice. One interviewee indicated that it certainly is a positive initiative with many useful and smart suggestions. However, even assuming that the BEPS project works well, there are two problems. First, BEPS is not legally binding. The reports issued by the OECD are only persuasive in nature. It is wholly up to each state's government to decide whether it will make changes to its tax laws. Although the member states have indicated their support, actually being the first to make these changes is quite a large step for states still wishing to be an attractive locale for investment. Second, even if a state changes its tax law, it will still offer tax incentives to companies wishing to invest. The result will therefore still be uneven in the sense that certain countries will remain more attractive to multinational company investors.

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[139] HMT and HMRC (n 128),, 'Tackling aggressive tax planning in the global economy: UK priorities fort the G20-OECD project for countering Base Erosion and Profit Shifting' (March 2014) 3.35-3.40.
[140] Interview 11; Interview 12.
[141] Follow-up to interview 12.
[142] The comments are available at: http://www.oecd.org/ctp/tax-policy/comments-published-on-beps-action-11-request-for-input.htm (accessed 18/02/15).

With regard to the action points described above and UK progress in relation to three of the six, it may be possible to develop general indicators based on the over-arching aims of the policies. For example, indicators might include:

- Tax revenue collected as a result of allocation to UK corporate interest-holders under CFC rules; and
- Tax collected as a result of a determination that the taxpayer is party to a loan or debt instrument with the primary purpose of avoidance.

In view of the extent to which the UK is party to international tax treaties, it may also be helpful to try and measure the amount of tax revenue collected as a result of each of the treaties. For example, the UK entered into a tax agreement with Switzerland in 2011 which generated £1.2 billion in tax from UK holders of Swiss bank accounts. HMRC estimates the tax yield in relation to this agreement annually as a means of assessing the impact of the agreement.[143] An interviewee indicated, however, that it is unlikely that many countries will be able to track the money derived from treaties because in many countries, the provisions of treaties are implemented in local government offices. Although it may be possible to extrapolate estimates of inflows, the estimates may be unreliable.[144] The interviewee also commented that the UK-Swiss agreement is unique, in that it was developed specifically to facilitate the UK's recovery of unpaid taxes on money held in Swiss bank accounts, which is why incoming monies are carefully tracked.[145]

Procurement Policy

In the March 2013 budget, the UK announced a new policy of using the public procurement process as a means of promoting tax compliance. From 1 April 2013 procurement for all government contracts over £5 million requires that bidders self-certify that they are tax compliant. In particular, a supplier must indicate whether:

- It has been subject to a criminal conviction for tax-related offences that are unspent (i.e., they must be disclosed according to law);146 and/or
- Any tax returns submitted after 1 October 2012 were found to be inaccurate because of:
  - A successful HMRC challenge under the GAAR or the Halifax abuse test;[147] or
  - A successful challenge in any jurisdiction in which the supplier is established under similar rules; or

[143] NAO (n 104)),5.8.
[144] Follow-up to interview 12.
[145] Ibid.
[146] See The Rehabilitation of Offenders Act 1974 for guidance as to what is spent and unspent.
[147] The Halifax Abuse test was developed by the Court of Justice of the European Union in Case C-255/02 *Halifax*. Referred to the EU Court from the UK VAT & Duties Tribunal, *Halifax* concerned a tax planning structure aimed at recovering input tax on building costs. The issue was whether the taxpayer had a right to deduct input tax where the underlying transactions were abusive in nature. The EU Court developed a two-prong test to identify abuse: (1) is there a tax advantage which is contrary to the purpose of the tax rules (considering EU and UK rules transposing the EU VAT directive); (2) was the essential aim of the transactions to obtain a tax advantage? Where an abuse is found, the situation that would have existed but for the abusive transactions has to be re-established through a re-defining of the transactions.

– The failure of an avoidance scheme used by the supplier in its tax return that was or should have been notified to HMRC under DOTAS (or similar scheme in any jurisdiction).[148]

If bidders are unable to certify that they are tax compliant, government departments may exclude them from the procurement process, at their discretion.

It should be noted that, although this policy was generally welcomed by the House of Lords Select Committee on Economic Affairs, it was concerned that applying the scheme only to companies seeking public contracts would present a problem with equal treatment under the law.[149]

Indicators

We were unable to identify any means of measuring the impact of this new procurement policy. However, given that the mechanics of this policy involve an evaluation of whether a given company is tax-compliant, relevant indicators might include:

- The extent to which bidders willingly engage in the self-certification process;
- The veracity of the self-certifications in practice; and
- The ratio of compliant to non-compliant bidders over time (assessed annually).

Transparency

Transparency, particularly with regard to measures to enhance exchange and/or availability of information, is a means of tackling avoidance, and is very much a part of the UK's general anti-avoidance strategy. Rules regarding transparency of company ownership, the exchange of account holder information and common reporting standards all ultimately assist HMRC in ascertaining the information it needs to recover the revenue it is owed, and prevent taxpayers from being able to obscure the extent to which they owe tax.

Key Policy Tools

The UK's policy on transparency largely tracks the initiatives of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, which was established in 2009. The aim of the Global Forum is to ensure that internationally-agreed standards regarding transparency and exchange of information are implemented among OECD states through a peer monitoring process.[150] In 2013, George Osborne included transparency as one of the

[148] Cabinet Office, 'Procurement Policy Note: Measures to Promote Tax Compliance' (25 July 2013) Action note 06/13. See also HMRC, 'Tax and Procurement' (14 Feb 2013), available at: http://webarchive.nationalarchives.gov.uk/20130404174620/http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032594 (accessed 11/02/15); HMT, 'Press release: New rules use Government buying power against tax avoidance' (14 Feb 2013).
[149] House of Lords Select Committee on Economic Affairs, 'Tackling corporate tax avoidance in a global economy: is a new approach needed?' (31 July 2013) HL Paper 48, paras 77-78.
[150] On the OECD Global Forum, see, e.g., 'Launch of a Peer Review Process: Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes'

top three priorities for the G7 improving international corporate tax rules, including reporting requirements.[151] Shortly after, HMT announced that it would be introducing company ownership rules to bring about *"unprecedented transparency"* and to make it more difficult for companies to avoid or evade tax, launder money or commit various other offences.[152] The UK also announced that it had persuaded all of the British Overseas Territories and Crown Dependencies to publish action plans regarding company ownership rules.[153]

The UK has entered into a number of automatic tax information sharing agreements with 25 other states.[154] These agreements oblige UK financial institutions to report account information to HMRC for transmission to the territories with which the UK has entered into an information sharing agreement. Not all of the agreements operate this way, however. Agreements with Overseas Territories other than Gibraltar are not reciprocal. That is, the UK will receive information, but it is not obliged to transmit it to the Territories.[155] Also, the tax agreement between the UK and Switzerland referenced above gives individuals domiciled in the UK with Swiss accounts the opportunity to disclose their income to HMRC and settle any tax due, or report their income to a Liechtenstein Disclosure Facility and pay a withholding tax, which is effectively equivalent to income tax. This allows such individuals to retain a certain level of secrecy by avoiding having their account details shared with HMRC.[156]

In addition, the UK hopes to enter into a number of 'Competent Authority Agreements' regarding the Common Reporting Standard (CRS) developed by the OECD in 2014. The CRS was approved by the G20 as the Global Standard for Automatic Exchange of Financial Account Information, and 45 states, including the UK, agreed to their early adoption.[157] In addition to the CRS, the framework includes a model Competent Authority Agreement, which consists of detailed rules on exchange of information. The CRAs require each state to implement laws requiring financial institutions to obtain and report account information of persons resident in partner states. As of February 2015, the UK had entered into one agreement with the Netherlands. In July 2014, HMRC issued a discussion document open for

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(2010); 'Launch of a Peer Review Process: Note on Assessment Criteria' (2010). Both are available at: http://www.oecd.org/tax/transparency/keydocuments.htm (accessed 11/02/15).

[151] The Rt Hon George Osborne MP and HMT, 'Chancellor sets out his three priorities for the G7' (10 May 2013), p 2.

[152] HMT and The Rt Hon Danny Alexander MP, 'G8 2013: new rules to bring unprecedented transparency on company ownership' (15 June 2013), p 1.

[153] Ibid.

[154] OECD, 'Exchange of Information Portal: United Kingdom', available at: http://www.eoi-tax.org/jurisdictions/GB#agreements (accessed 11/02/15).

[155] HMRC, 'Implementing Agreements under the Global Standard on Automatic Exchange of Information to Improve International Tax Compliance' (31 July 2014) 4. The reciprocal agreements are available at: https://www.gov.uk/government/publications/automatic-exchange-of-information-agreements-other-uk-agreements/automatic-exchange-of-information-agreements-other-uk-agreements (accessed 11/02/15).

[156] The agreement and other relevant documentation is available at: https://www.gov.uk/government/publications/uk-swiss-confederation-taxation-co-operation-agreement (accessed 11/02/15).

[157] The Standard for Automatic Exchange of Financial Account Information and CRS is available at: http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf (accessed 11/02/15). See also HMRC (n 155) 4.

comments on how best to implement these agreements, with a specific focus on their impact on UK financial institutions.[158] The outcome of this discussion has not yet been published.[159]

Company ownership issues have also been considered by the UK Department for Business Innovation & Skills (BIS).[160] In a recent policy paper, BIS reiterated that the UK put transparency on the international agenda through its work in the G8, and listed a number of policy objectives regarding in that regard:[161]

- Establishing a central registry of UK company beneficial ownership information that is publicly-accessible;
- Improving transparency of company ownership and control, including:
  - Abolishing bearer shares;
  - Prohibiting the use of corporate directors (with exceptions); and
  - Reducing the opaque control of companies through 'front' directors.

A 'bearer share' certifies that whomsoever bears it is entitled to the shares it represents. This means that they can be easily passed from one person to the other without any record of ownership or change thereof. Although these can be used legitimately, they have been identified as a source of risk, particularly with regard to criminal activity such as tax evasion and money laundering. Abolishing bearer shares would therefore put an end to bearers' ability to obscure information relating to who really owns the shares, thereby avoiding the payment of any applicable tax.[162]

A 'corporate director' is a company director that is a legal person, not a natural person. They are often employed to obscure details of who actually controls a company. They make it difficult for tax authorities to identify personal details and relationships necessary to determine who really controls or influences a company, which can ultimately obstruct law enforcement investigations. The current UK law regarding corporate directors is that they may be appointed as long as one of the company's directors is a natural person,[163] but the intention is to prohibit that practice in the future.[164]

'Front' directors present a problem similar to that of corporate directors. A 'front' director is someone listed as a company director who, in reality, has no control or responsibility for the

[158] HMRC (n 155), p. 4. The reciprocal agreements are available at: https://www.gov.uk/government/publications/automatic-exchange-of-information-agreements-other-uk-agreements/automatic-exchange-of-information-agreements-other-uk-agreements (accessed 11/02/15).
[159] The outcome will be published online at: https://www.gov.uk/government/consultations/implementing-agreements-under-the-global-standard-on-automatic-exchange-of-information (accessed 11/02/15). .
[160] BIS, 'Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business—Government Response' (April 2014).
[161] Ibid, pp. 18 et seq.
[162] Ibid, pp. 139-40.
[163] Companies Act 2006 s 155.
[164] BIS (n 160), pp. 167-174. Limited exceptions will apply where using corporate directors is of "higher value and lower risk". Ibid.

company, but whose presence helps to obscure details of those who really exercise control, and who should be held accountable for tax purposes.[165]

HMRC and HMT also refer to transparency and information exchange in relation to their work on BEPS. HMRC is dedicated to working with countries in the Joint International Tax Shelter Information Centre (JITSIC)[166] and the OECD to bring the model of enhanced exchange of information developed by the JITSIC to more countries, and to explore potential areas for collaboration regarding cross-border tax planning.[167] The UK also played an important part in developing a proposal for a country-by-country reporting template during its G8 presidency in 2013, which was included in the BEPS Action Plan developed by the OECD, and is aimed at enhancing transparency between business and tax authorities.[168]

Indicators

As was the case with regard to the work on BEPS, specific indicators relating to transparency measures were not found. This is likely because these policies are in their infancy, specifically with regard to exchange of information and Competent Authority agreements. No information was available regarding whether any specific indicators are being considered during the development of these policies.

Commentary

It seems that because of its nascent stage, there is little commentary regarding policies and/or indicators on transparency and exchange of information. However, the House of Lords Select Committee on Economic Affairs adopted testimony provided by a practitioner witness who was concerned that imposing shallow transparency measures without really heightening the level of available information would essentially result only in higher administrative costs and a feeling among UK companies that their confidential information may be subject to foreign predators.[169] The Committee supported automatic exchange of information agreements between tax authorities as *"more likely to reduce scope for tax avoidance by multinationals"*, and recommended that the UK actively promote the relevant G8 proposals. It also suggested that HMT look into the feasibility of requiring large companies operating in the UK to publicly disclose their tax returns.[170]

The Committee of Public Accounts in the House of Commons concluded in autumn 2014 that HMRC has not taken sufficient action to end the exploitation of international tax structures by companies in order to limit UK tax liability.[171] Although the UK has done work to improve transparency of company ownership rules, it has itself introduced some changes to the UK tax framework that have been criticised by the OECD and the European Union as being harmful

[165] Ibid, pp. 175-202.
[166] The JITSIC was formed in 2004 by Australia, Canada, the UK and the United States. A London JITSIC office opened in 2007; the other office is in Washington, DC.
[167] HMT and HMRC (n 128) 1.9.
[168] Ibid 2.29.
[169] House of Lords Select Committee on Economic Affairs (n 149), para 83.
[170] Ibid, para 86.
[171] House of Commons Committee of Public Accounts (n 115), para 6.

tax practices because they make it easier for multinational companies to avoid taxes in jurisdictions in which they are making a profit.[172]

In terms of developing indicators once policy is in place, the UK may wish to look to the OECD. In particular, the Forum on Harmful Tax Practices considers a lack of transparency and a lack of effective exchange of information as negative in the assessment of whether a tax practice is harmful.[173]

The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes uses three main indicators in its work on monitoring member states. The standards of transparency and exchange of information are spread across the three categories of:

- Availability of information;
- Access to information; and
- Exchanging information.[174]

These three categories are then broken down into ten "essential elements", including:

- Ensuring that ownership and identify information is available to relevant authorities;
- Ensuring that authorities have the power to obtain and provide information that is the subject of a request under an exchange of information agreement;
- Ensuring that information can be exchanged effectively (e.g., by providing for the exchange of information regarding all persons;
- Ensuring that information is provided in a timely manner; and
- Ensuring that the rights of taxpayers and third parties are respected (e.g., states should not be required to supply information that would disclose business secrets or material that is the subject of attorney-client privilege).[175]

These ten elements are further developed through explanatory text or sample scenarios. These indicators could be used by the UK in the drafting and/or implementation of exchange of information agreements or Competent Authority Agreements to assess their domestic transparency policies.

3.3 Conclusion

The main indicators used by the UK in connection with its anti-avoidance policy are: (1) compliance yield; (2) the number of open avoidance cases; (3) the number of DOTAS declarations; and (4) revenue collected from the accelerated payments scheme.

Viewing these indicators in light of the SGDs and what the UK might be asked to provide by way of reporting once they enter into force, presents varied results. The UK clearly considers that it is important to measure the performance of many of its anti-avoidance policies, and

[172] Ibid, para 6.
[173] OECD, 'Harmful Tax Competition: An Emerging Global Issue' (1998), available at: http://www.oecd.org/tax/transparency/44430243.pdf (accessed 11/02/15).
[174] OECD, TORs (n 150), OECD, para 8.
[175] The full list is available in ibid, pp. 4-9.

strives to formulate indicators from the outset of policy development. This can be evidenced especially by the creation of the DOTAS and accelerated payments programmes. These strategies lend themselves to clear methods of measurement. The UK focus on developing and improving its anti-avoidance law is also demonstrated by the fact that HMRC has established a counter-avoidance directorate composed of operational and policy staff to link up strategies and to develop new policies and indicators.

It does appear that there is still work for the UK to do in relation to the development of tax transparency policy and indicators. Although the UK played a leading role in the OECD Global Forum and is very supportive of the initiatives set forth in that context, its domestic policy on transparency is in its infancy. The UK has entered into automatic tax information sharing agreements with a number of other countries, and plans to enter into a number of Competent Authority Agreements regarding the OECD Common Reporting Standard. It also hopes to introduce company ownership rules. Although the UK has begun to consider how it might implement the automatic tax information sharing agreements, it seems that it is too early for the UK to consider relevant indicators for this and its other transparency policy goals.

Looking at the SDGs, specifically 10, 16 and 17, the UK could also consider developing indicators in the following areas, if it has not already. Because several of the targets developed in relation to the SDGs include considerations that are beyond the scope of the terms of reference for this study, the discussion below is merely suggestive in nature and does not represent a full consideration of UK policy.

Target 10.4 to *"adopt policies, especially fiscal, wage and social protection policies and progressively achieve greater equality"* suggests that the progressivity of tax is an indicator for the reduction of inequality within and among countries. The UK collects information regarding the composition of its total revenue. In 2013-14, income tax comprised 31.1% of the total revenue, and corporate tax made up 8.7%.

Target 16.4 aims, among other things, to *"significantly reduce illicit financial…flows"* for the promotion of peaceful and inclusive societies. In addition to its anti-avoidance policy, the UK also has a strong anti-evasion strategy, which is managed by HMRC, and which includes a substantial policy framework aimed at preventing and tackling offshore tax evasion. It largely aims to promote voluntary compliance by allowing people to declare what they owe, and to prevent non-compliance, where possible, and it relies substantially on its relationships with other countries through, for example, automatic exchange agreements to prevent offshore evasion.[176] It is clear that HMRC attempts to track the extent to which evasion is occurring, and that it intends to use offshore intelligence to assist in collecting relevant data. It is also clear that, at least with respect to international exchange agreements, the UK envisages that avoidance and evasion can be detected and combated through the use of similar strategies.[177] In that way, the data derived from evaluation of the UK's anti-avoidance policy might be relevant to this target.

[176] HMRC, 'No safe havens 2014' (2014), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/303012/No_safe_havens_2014.pdf.
[177] See, e.g., HMRC and HMT, 'Reducing tax evasion and avoidance' (2013, with 2015 update), available at: https://www.gov.uk/government/policies/reducing-tax-evasion-and-avoidance.

Finally, it appears that the data relied on by HMRC and HMT for analysis of its policies is data collected by the Government. The UK may wish to consider data based on the perception of the public in addition to the data it collects itself, including data from civil society organisations.

Whether the UK indicators for anti-avoidance policy might be suitable for use in other jurisdictions is subject to several observations, relating to the type of indicator.

Compliance yield is a quite complex and technical calculation of data that is routinely tracked and collected, not just for assessing anti-avoidance policy, but for use in relation to a number of other policies. It is made up of four separate calculations (cash collected, revenue losses prevented, future revenue benefit, product and process yield), each drawing from data on UK revenue. This type of data may be recorded in other states, or if not done so already, it should be possible to do so. However, given its complexity and the fact that it is not a dedicated method of measurement, compliance yield may not be the most suitable for implementation abroad.

Both the number of DOTAS declarations and revenue collected from the accelerated payments scheme are indicators which are particular to certain policies developed by HMT and HMRC. However, other states may be able to institute similar frameworks and adopt these indicators, both of which are relatively straightforward and easy to measure. A similar line of reasoning applies with regard to use of the number of open avoidance cases as an indicator. Again, this is a straightforward method of measurement that should be fairly simple to track.

It would seem that there have not yet been any unintended consequences of indicators used. Perhaps that is because they are still developing and in some cases have not been in operation long enough to draw any meaningful conclusions. Regarding policy consequences, it is important to reconsider the comments above regarding the potential for negative behavioural reactions to any new policies that are published ahead of their application. Inevitably, some people will attempt to adjust their behaviour in order to maintain avoidance activities. States should take this into account when developing policies and also when developing methods of measurement for these policies.

It is clear from the above that HMRC and HMT are actively attempting to tackle the problem of avoidance at the domestic and international levels. When policies are formulated, appropriate indicators are considered, but there is some confusion regarding the point of the process at which that occurs, as we have evidence that they are immediately considered at the outset of policy development, but yet there are still some policy areas for which we could not uncover any information about what indicators might be assigned to them, particularly with regards to measures to improve transparency. Overall, HMRC seems to have devoted much attention to improving its anti-avoidance policy and to refining the indicators used in that regard. This seems to have been done as a direct response to recommendations by the National Audit Office. We would suggest that HMRC take a more systemic approach to the development of indicators for its policies.

In relation to the SDGs, we reiterate that the content of this Report does not consider all of the actions envisaged by the UN, but that there is correspondence between UK tax policy and some of the SDG targets. There is work still to be done by the UK at the domestic level,

specifically regarding transparency, a relatively new policy initiative for the UK, but one that runs through several aspects of the SDGs. Finally, it is important to emphasise that the UK's move toward promoting upstream compliance, while positive, will present challenges regarding the development of indicators.

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