

Liability of Banks for Aiding Tax Evasion: A Comparative Analysis of German and UK Law

Malte WILKE* and Alisdair MACPHERSON**

This article compares the regulatory liability of German banks for aiding tax evasion under the German Act on Regulatory Offences with the UK corporate offences of failure to prevent the facilitation of tax evasion under the Criminal Finances Act (CFA) 2017. The study demonstrates that the approaches share some similarities; however, major differences are also evident. Unlike the German approach, the CFA provisions are designed as strict liability provisions, whereas the German regulatory offence requires an intentional or negligent omission to take the supervisory measures required to prevent contraventions of the law. Moreover, the scope of the offences under UK law is wider than the scope of their German equivalent. In addition, the CFA provisions do not place financial limits on the fines that can be imposed. Because of these differences, the CFA is likely to be more effective in preventing banks from aiding tax evasion than its German counterpart. Consideration should therefore be given to reforming German law to make it more like its UK equivalent, especially in the post-Panama Papers world.

I. INTRODUCTION

Since the leaking of the Panama Papers, tax evasion has received increased attention in the UK (and elsewhere). The recognition that banks and law firms had facilitated the evasion of taxes by their clients preceded the passing of the Criminal Finances Act 2017 (CFA).¹ Among other things, the CFA has introduced corporate offences of failure to prevent the facilitation of tax evasion, which explicitly address the aid to tax evasion provided by corporate bodies such as banks.

In Germany, corporate liability in relation to tax evasion has also been the focus of public and state attention in recent years. However, in comparison to the UK, corporate

* Dr iur Malte Wilke, LL.M. (Aberdeen) worked as a trainee lawyer at the German Embassy in Copenhagen and as a public prosecutor in Germany. Currently he is working as a legal advisor for Volkswagen Group. He is also a visiting lecturer at the University of Hanover. His email address is malte.wilke@gmx.de.

** Dr Alisdair MacPherson is a lecturer in commercial law at the University of Aberdeen. His email address is alisdair.macpherson@abdn.ac.uk.

¹ See eg Joanna Dawson et al, *Criminal Finances Bill (Bill 75 of 2016-17)*, House of Commons Library Briefing Paper No 07739 (2016) 4, 7. The paper is available at <researchbriefings.files.parliament.uk/documents/CBP-7739/CBP-7739.pdf> (accessed 6 March 2019). It should be noted that the introduction of the offences mentioned in this article was already on the UK government's agenda but the Panama Papers leak gave fresh impetus to this and was followed by the passing of the CFA in 2017.

criminal liability does not exist in Germany. There is only the possibility of imposing regulatory fines on corporate entities, including banks.

This article will first examine the German approach to liability of banks for aiding tax evasion before considering the UK corporate offences of failure to prevent the facilitation of tax evasion. The relevant German law will be covered in greater detail, as its content is likely to be less familiar to readers. This will be followed by a direct comparison of the respective laws, with particular focus on their effectiveness in various respects. Such analysis is of particular value at the present time, given that the reform of the German law has been announced in the 2018 coalition agreement of the governing parties.²

Clearly, the liability mechanisms used in the UK and Germany are forms of regulating the risk of tax evasion, due to its concomitant negative economic and social consequences.³ An effective regime of bank liability in this context ought to involve stringent internal procedures, which should help limit the possibility that a bank's services will be used by a party when evading tax. As such, comparing the German and UK regimes can help identify varying ways in which tax evasion risks can be managed and regulated, and enable us to ascertain the respective merits of these approaches.

II. GERMANY: THE REGULATORY LIABILITY OF BANKS FOR AID TO TAX EVASION

1. The concept of regulatory liability

German criminal law knows no criminal liability of legal persons, since it limits criminal liability to natural persons.⁴ The reason for the rejection of corporate criminal liability in German law stems from the attachment of criminal liability to the personal guilt of a natural person.⁵ Additionally, the concept of corporate criminal liability would not be compatible with the *nulla poena sine culpa* principle of German criminal law, since “innocent people, such as shareholders, may be forced to suffer the consequences of the corporate penalty along with, or instead of, the persons who were guilty of the offense.”⁶

However, although there is no corporate criminal liability in Germany, heavy fines can be imposed on entities under s 30 of the *Ordnungswidrigkeitengesetz*⁷ (OWiG). This provision states that the responsibility of the owner of a corporation for a regulatory

² See p 126 of the coalition agreement, available at < www.cdu.de/system/tdf/media/dokumente?file=1 > (accessed 6 March 2019). Simultaneously, an academic discussion has been taking place. See, for example, M Jahn and F Pietsch, “Der NRW-Entwurf für ein Verbandsstrafgesetzbuch. Eine Einführung in das Konzept und seine Folgefragen” [2015] 10 Zeitschrift für Internationale Strafrechtsdogmatik 1, 1 et sqq; K-H Krens, “Der NRW-Gesetzentwurf für ein Verbandsstrafgesetzbuch. Gesetzgeberische Konzeption und Konzeption” [2015] 10 Zeitschrift für Internationale Strafrechtsdogmatik 5, 5 et sqq.; M Pieth, “Braucht Deutschland ein Unternehmensstrafrecht?” [2014] 47 Kritische Justiz 276, 276 et sqq.; K Dawidowicz, “Tagungsbericht: Unternehmen ‘hinter Gittern’? Braucht Deutschland ein Unternehmens-strafrecht? 14.11.2013 in Berlin” [2014] 3 Neue Zeitschrift für Wirtschafts-, Steuer und Unternehmensstrafrecht 6, 6 et sqq.

³ For consideration of the notions of “risk” and “risk regulation”, see eg M Weimer, “The Origins of ‘Risk’ as an Idea and the Future of Risk Regulation” (2017) 8 EJRR 10; C Scott, “Regulation and Risk Today” (2017) 8 EJRR 24; and the other contributions to that issue.

⁴ M Brender, Die Neuregelung der Verbandstäterschaft im Ordnungswidrigkeitenrecht (Schäuble Verlag Rheinfelden 1989) 29 et sqq.

⁵ M Böse, “Corporate Criminal Liability in Germany” in M Pieth and R Ivory (eds), Corporate Criminal Liability: Emergence, Convergence and Risk (Springer 2011) 227, 230.

⁶ Böse, *supra*, note 5, 231.

⁷ This can be translated into English as the (German) Act on Regulatory Offences.

offence causes the law to attribute the offence to the company,⁸ which is the reason why a fine can be imposed against the corporation. In comparison to criminal offences, regulatory offences do not allow for the imprisonment of offenders and involve less ethical disapproval and moral stigma.⁹ Given certain prominent examples of corporate misbehaviour in Germany in recent times, the relative blameworthiness of regulatory and criminal offending is a live issue but cannot be pursued further within the confines of this article. It should be noted, however, that the OECD has recommended that Germany should take measures to improve the deterrent effect of its regulatory sanctions.¹⁰ In any event, the German law can serve as a case study regarding how a jurisdiction without corporate criminal liability may utilise functionally equivalent administrative (or regulatory) sanctions to address the facilitation of tax evasion by banks.¹¹ Recent scholarship in fact indicates a trend towards the “intertwining of fines of criminal and administrative nature” across a number of jurisdictions.¹² In addition, for efficiency reasons, a number of systems have departed from criminal sanctions in favour of “parallel enforcement regimes”, especially those involving administrative law.¹³ However, all systems have in common that they want to persuade companies to implement organisational structures designed to prevent the commission of corporate offences. It is clear that the potential sanctions motivate companies to improve their compliance structures in order to avoid the imposition of those sanctions.¹⁴

⁸ For the general law regarding the German stock corporation (*Aktiengesellschaft* (AG)), see *Aktiengesetz* (AktG), and for the German limited liability company (*Gesellschaft mit beschränkter Haftung* (GmbH)), see *GmbH-Gesetz* (GmbHG). These entities are broadly the equivalent of, respectively, the Public Limited Company (plc) and Private Limited Company (Ltd) in UK law.

⁹ Cf s 1(1) OWiG and s 12 StGB (German Criminal Code).

¹⁰ OECD-Bericht der Arbeitsgruppe für Bestechungsfragen im Internationalen Geschäftsverkehr vom 17 March 2011, available at < www.oecd.org/daf/anti-bribery/anti-briberyconvention/48967037.pdf > (accessed 6 March 2019); G Dannecker and C Dannecker, “Europäische und verfassungsrechtliche Vorgaben für das materielle und formelle Unternehmensstrafrecht” [2015] 4 *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 162, 163, however, rightly point out that the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions does not include an obligation to introduce criminal fines as long as regulatory fines have a deterrent effect; C Schmitt-Leonardy, “Zurück in die Zukunft? Zur neuen alten Diskussion um die Unternehmensstrafe und den immer noch unzureichenden Verständnis des Problems” [2015] 10 *Zeitschrift für Internationale Strafrechtsdogmatik* 11, 11.

¹¹ It has to be highlighted, however, that, major German corporations adjust their actions primarily to the requirements of US laws, such as the US Foreign Corrupt Practices Act, see M Kubiciel, “Die deutschen Unternehmensgeldbußen: Ein nicht wettbewerbsfähiges Modell und seine Alternativen” [2016] 5 *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 178, 179.

¹² K Ligeti and S Tosza, “Challenges and Trends in Enforcing Economic and Financial Crime: Criminal Law and Alternatives in Europe and the US” in K Ligeti and S Tosza (eds), *White Collar Crime: A Comparative Perspective* (Hart 2018) 14 et sqq; M Engelhart, “Verbandsverantwortlichkeit – Dogmatik und Rechtsvergleichung” [2015] 4 *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 201, 203 with further references; Dannecker and Dannecker, *supra*, note 10, 163; MJ Hilf, “Grundkonzept und Terminologie des österreichischen strafrechtlichen Verbandsverantwortlichkeitsgesetzes (VbVG)” [2016] 5 *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 189, 189 et sqq with regard to the Austrian approach. Austrian criminal law largely aligns with German criminal law, which is why the difference between both approaches is particularly interesting. Hilf argues that the Austrian law is not unconstitutional, although this is not undisputed. In this respect see also W Wohlers, “Der Gesetzentwurf zur strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden” [2016] 45 *Zeitschrift für Gesellschafts- und Unternehmensrecht* 364, 374.

¹³ Ligeti and Tosza, *supra*, note 12, 17. An overview of the handling in the EU member states is available at < www.bundestag.de/blob/539400/9f7fe461015429dc5f71c4c3d2816704/wd-7-070-17-pdf-data.pdf > (accessed 6 March 2019).

¹⁴ Wohlers, *supra*, note 12, 367. This trend can be observed in Germany and the UK – see below. For the view that the introduction of corporate criminal liability in Germany would lead to greater preventative impulses, see G Wagner,

In this respect, the most relevant regulatory offence in the German context is, without question, s 130(1) of OWiG. This provision states:

“Whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.”¹⁵

Consequently, s 130(1) OWiG is an omission offence. Furthermore, both the negligent and the intentional violation of supervisory duties may result in the imposition of a fine.¹⁶

In general, the “owner” in s 130(1) OWiG means the proprietor of a business. Notwithstanding this, in the case of banks, which are mostly organised as stock corporations, the term “owner” relates to its executive committee (otherwise known as its management board).¹⁷ According to s 76(1) *Aktiengesetz* (AktG)¹⁸ the executive committee is to manage the affairs of the company on its own responsibility. A regulatory liability requires a wilful or negligent failure to take supervisory measures. This in turn triggers the regulatory liability of the company under ss 30 and 130(1) OWiG. It follows from this that a bank is not vicariously responsible for the acts of its employees within this context, but is instead liable because their executive committee has made violations of law possible by neglecting its supervisory duties. Any employee of the corporation could be a violator of the law. External collaborators can also be relevant offenders, provided that they are in charge of company matters and the company has a right to give them instructions.¹⁹ At the same time, it is necessary that the delinquent employee has acted for the corporation and not as a private individual in his own interest.²⁰ Accordingly, regulatory liability of the bank for the actions of its employee is excluded if the employee acted in his own self-interest and obviously

(F'note continued)

“Sinn und Unsinn der Unternehmensstrafe. Mehr Prävention durch Kriminalisierung?” [2016] 45 *Zeitschrift für Gesellschafts- und Unternehmensrecht* 112, 151 et sqq. However, Wagner argues that subsidiary corporate criminal liability can be legitimated if it covers cases of diffuse responsibilities within a company that cannot be attributed to any individual. See M Wilke and H Rüping, “Strafbarkeitsrisiken für ausländische Unternehmen gemäß §§ 45, 46 UK Criminal Finances Act” [2018] *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 479, 480, with regard to the handling of this in the UK.

¹⁵ See also D Bock, “Aufsichtspflichten, §§ 130, 30 OWiG” in K Beckemper and T Rotsch (eds), *Handbuch der Criminal Compliance* (Nomos 2015) 264, 266 and Wagner, *supra*, note 14, 116.

¹⁶ Bock, *supra*, note 15, 264, 280; L Niesler, “§ 130 OWiG” in JP Graf, M Jäger and P Wittig (eds), *Wirtschafts- und Steuerstrafrecht* (CH Beck 2011) recital 5.

¹⁷ G Manz, B Mayer and A Schröder, *Die Aktiengesellschaft* (7th edn, Haufe 2014) 493. Stock corporations in Germany have a dual board structure, consisting of a management board (*Vorstand*) and a supervisory board (*Aufsichtsrat*) – see ss 76 et sqq AktG.

¹⁸ Stock Corporation Code.

¹⁹ M Lemke and A Mosbacher, *Ordnungswidrigkeitengesetz: Kommentar* (2nd edn, Müller 2005) § 130 recital 5; Bock, *supra*, note 15, 281 with further references.

²⁰ Federal Supreme Court of Germany, Court decision from 30 July 1996 – 5 StR 168/96 – published in [1997] 17 *Neue Zeitschrift für Strafrecht* 30.

against the interests of the entity.²¹ Yet the law enforcement authorities do not have to investigate the actual offender, if it is obvious that it is one of the employees of the company who has committed the violation of law. This violation of law can result from a variety of legal obligations under various laws. However, as far as banks are concerned, aid for tax evasion under s 370(1) *Abgabenordnung*²² (AO) in conjunction with s 27 of the *Strafgesetzbuch*²³ (StGB) is of the greatest relevance for the purposes of this article.²⁴

2. The criminal liability of bank employees for aid to tax evasion

a. Principles of criminal liability for aid

It must be highlighted that aiding in the sense of s 27(1) StGB is any action that objectively promotes the accomplishment of the offender's crime. Moreover, the criminal liability of the accomplice under s 27(1) StGB presupposes a criminal act of the offender, which must have at least been attempted.²⁵ It would therefore be sufficient for criminal liability of the accomplice, if he promoted the offender's crime in its preparatory stage.²⁶ At the same time, the aiding of the accomplice does not need to be causally responsible for the success of the offender's crime.²⁷

Furthermore, the required conditional intention of an accomplice can be assumed if he knows the criminal act of the offender in its essential characteristics and if he acts in the knowledge that his conduct promotes the crime of the offender.²⁸ Notwithstanding this, it is not necessary for the accomplice to know every detail of the crime.²⁹ And it is irrelevant whether the accomplice seeks the success of the crime or if he does not want it to be committed.³⁰ The only relevant aspect is that his aid facilitates the offender's crime, and that the accomplice is aware of this.³¹ As a result of those considerations, it can be noted that it is sufficient for the criminal liability of the accomplice if his aid proves to have increased the risk of the realisation of the offence.³² However, if the accomplice

²¹ *ibid*; E Müller, Die Stellung der juristischen Person im Ordnungswidrigkeitenrecht (CF Müller 1985) 77 et sqq.

²² This can be translated as the (German) Fiscal Code.

²³ (German) Criminal Code.

²⁴ D Bock, "Strafrechtliche Aspekte der Compliance-Diskussion - § 130 OWiG als zentrale Norm der Criminal Compliance" [2009] 4 Zeitschrift für internationale Strafrechtsdogmatik 68, 72; K Rogall, "Dogmatische und kriminalpolitische Probleme der Aufsichtspflichtverletzung in Betrieben und Unternehmen (§ 130 OWiG)" [1986] 97 Zeitschrift für die gesamte Strafrechtswissenschaft 573, 606; V Behr, "Die Strafbarkeit von Bankmitarbeitern als Steuerhinterziehungsgehilfen bei Vermögenstransfer ins Ausland" [1999] 18 *Wistra* 245 et sqq.

²⁵ T Fischer, *Strafgesetzbuch mit Nebengesetzen* (62nd edn, Beck 2015) § 27 recital 3.

²⁶ BGHSt 8, 390; 42, 135; Federal Supreme Court of Germany, Court decision from 26 October 1984 – 3 StR 438/84 – published in [1985] 38 *Neue Juristische Wochenschrift* 1035; Federal Supreme Court of Germany, Court decision from 01 August 2000 – 5 StR 624/99 – published in [2000] 20 *Strafverteidiger* 492 – [2000] 53 *Neue Juristische Wochenschrift* 3010.

²⁷ BGHSt 2, 130; 54, 140.

²⁸ Federal Supreme Court of Germany, Court decision from 07 February 2017 – 3 StR 430/16 – published in [2017] 37 *Neue Zeitschrift für Strafrecht* 274; C Heuking and S von Coelln, "Berufsneutrale Handlungen an der Grenze zur Beihilfe im Wirtschaftsstrafrecht" [2017] 6 *Journal der Wirtschaftsstrafrechtlichen Vereinigung e.V.* 157, 158.

²⁹ BGHSt 42, 135; Federal Supreme Court of Germany, Court decision from 20 January 2011 – 3 StR 420/10 – published in [2011] 31 *Neue Zeitschrift für Strafrecht* 399.

³⁰ Federal Supreme Court of Germany, Court decision from 09 May 2017 – 1 StR 265/16 – published in [2017] 70 *Neue Juristische Wochenschrift* 3798.

³¹ BGHSt 42, 135.

³² Federal Supreme Court of Germany, Court decision from 07 February 2017 – 3 StR 430/16 – published in [2017] 37 *Neue Zeitschrift für Strafrecht* 274, 275.

does not know that his actions are being used by the offender to commit an offence, his assistance might not be considered as aid under s 27(1) of StGB.³³ An exception to this exists if the accomplice has recognised that the risk of the commission of an offence is very high. In this respect, the accomplice must have made an effort to assist an offender who was apparently willing to commit a crime in order for the accomplice to make himself criminally liable.³⁴

b. Criminal liability of bank employees for aid to tax evasion

(i). *The problem of neutral actions.* However, the question arises whether employees of a bank can be prosecuted in the context of their professional activity for aiding tax evasion. In particular, it has proved to be problematic whether aid to tax evasion can also be met by neutral behaviour, such as everyday services like the transfer of money on foreign accounts.³⁵ The courts consider that an extensive interpretation of externally neutral aid would lead to legal uncertainty and this is also the prevailing view among commentators.³⁶ It is for this reason that they link the punishability of neutral actions, which are typical of the occupation, to the inner volition of the accomplice.³⁷ Thus, the one who is performing a neutral act with the intent to promote the crime of the offender makes himself criminally liable as an accomplice.³⁸

(ii). *The rulings of the Federal Supreme Court (Bundesgerichtshof).* Apart from these considerations, the offender must have made a false tax return to be criminally liable for tax evasion under s 370(1) of AO. However, a bank and its employees are not involved in preparing the offender's tax return. It is the responsibility of each taxpayer to decide whether or not to disclose all tax-relevant facts in his or her tax return.³⁹ Irrespective of this, employees of banks can provide aid to tax evasion of their clients. The decisive factor is that aid to tax evasion can be provided by employees of banks in a preparatory stage.⁴⁰ In particular, the *Bundesgerichtshof* (BGH) ruled that a bank employee who assisted a taxpayer in disguising his cash payments from a German bank account to a

³³ *ibid.*

³⁴ Federal Supreme Court of Germany, Court ruling from 20 September 1999 – 5 StR 729/98 – published in [2000] 20 *Neue Zeitschrift für Strafrecht* 34; Claus Roxin, *Strafrecht Allgemeiner Teil – Band 2: Besondere Erscheinungsformen der Straftat* (Beck 2003) § 26 recital 218 et sqq; Heuking and von Coelln, *supra*, note 28, 162.

³⁵ C Trzaskolik, "Die Strafrechtspflege und das Steuerrecht – Zu der Durchsuchungsaktion bei einer Großbank" [1994] 47 *Der Betrieb* 550, 550; B Tag, "Beihilfe durch neutrales Verhalten" [1997] 72 *Juristische Rundschau* 49, 49 et sqq; W Wohlers, "Hilfeleistung und erlaubtes Risiko – zur Einschränkung der Strafbarkeit gemäß § 27 StGB" [2000] 20 *Neue Zeitschrift für Strafrecht* 169, 169 with further references; Behr, *supra* note 24, 247 et sqq.

³⁶ BGHSt 29, 99, 101; 46, 112; Federal Supreme Court of Germany, Court decision from 14 February 1985 – 4 StR27/85 – published in *Strafverteidiger* [1985] 279; Federal Supreme Court of Germany, Court decision from 20 September 1999 – 5 StR 729/98 – published in [2000] 20 *Neue Zeitschrift für Strafrecht* 34; Tag, *supra*, note 35, 50; C Baumgarte, "Die Strafbarkeit von Rechtsanwälten und anderen Beratern wegen unterlassener Konkursanmeldung" [1992] 11 *Wistra* 41, 43 et sqq.

³⁷ Nevertheless, the courts will also take objective behaviour of the accomplice into consideration, see BGHSt 50, 331; Heuking and von Coelln, *supra*, note 28, 162, 164.

³⁸ Federal Supreme Court of Germany, Court decision from 22 January 2014 – 5 StR 468/12 – [2014] 3 *Neue Zeitschrift für Steuer-, Wirtschafts- und Unternehmensstrafrecht* 139, 141 et sqq.

³⁹ Section 370(1) German Fiscal Code refer to the violation of the obligation to disclose all tax-relevant facts.

⁴⁰ Federal Supreme Court of Germany, Court decision from 8 November 2011 – 3 StR 310/11 – published in [2012] 32 *Neue Zeitschrift für Strafrecht* 264; BGHSt 14, 123; Behr, *supra*, note 24, 247.

foreign account would be criminally liable, if he knew that the customer wanted to evade taxes in this way.⁴¹ Notwithstanding this, the bank employee would not be liable to prosecution if he only considers it *possible* that the bank client wants to evade taxes. A bank employee would, nevertheless, be criminally liable if he thought it highly likely that the bank client wanted to evade taxes and he assisted him anyway.⁴² In this regard, reference can be made to a decision of the BGH from last year.⁴³ The BGH decided in this appeal that the decision of the district court Frankfurt/Main, which had sentenced employees of Deutsche Bank (for aiding a tax evasion) to imprisonment, was lawful. The district court had sentenced them because they had organised extensive trading in emission rights in 2009 and 2010, in which a group of offenders had evaded sales taxes to the value of hundreds of millions of Euros. The court ruled that the employees of Deutsche Bank would have realised that the offender group wanted to evade taxes, if they had carried out an adequate risk analysis.

3. Compliance system as opportunity for exculpation

As a result, it is decisive for the avoidance of fines under ss 130(1) and 30 OWiG that the banks have taken measures that are necessary to make aiding tax evasion more difficult.⁴⁴ In other words, it is up to the banks to implement efficient criminal compliance systems to prevent or immediately detect crimes committed by their employees.⁴⁵ The criminal compliance system must identify and assess criminal liability risks and embrace a risk avoidance strategy. Moreover, the criminal compliance system must continuously monitor the corporate activities of the bank staff for criminal conduct.⁴⁶ However, the executive committee does not have to guarantee complete monitoring. The scope of the monitoring obligations is determined by the reasonableness and the practical feasibility of the monitoring.⁴⁷ Nonetheless, the executive committee must secure regular spot checks.⁴⁸ Finally, the executive committee needs to set up a whistle-blowing system to encourage employees to report criminal conduct.⁴⁹

⁴¹ Federal Supreme Court of Germany, Court decision from 01 August 2000 – 5 StR 624/99 – published in [2000] *Neue Juristische Wochenschrift* 3010; A Rischer, “Die Selbstanzeige im Lichte der Bankendurchsuchungen” [1998] 52 *Betriebs-Berater* 1341 et sqq.

⁴² Federal Supreme Court, Court decision from 20 September 1999 – 5 StR 729/98 – published in [1999] 18 *Wistra* 459, 460; Federal Supreme Court of Germany, Court decision from 15 May 2018 – 1 StR 159/17 – published in [2018] *Neue Zeitschrift für Strafrecht Rechtsprechungs-Rundschau* 257.

⁴³ Federal Supreme Court of Germany, Court decision from 15 May 2018 – 1 StR 159/17 – published in [2018] *Neue Zeitschrift für Strafrecht Rechtsprechungs-Rundschau* 257.

⁴⁴ Bock, *supra*, note 15, 269 et sqq; D Bock, *Criminal Compliance* (Nomos 2011) 459 et sqq.

⁴⁵ In this regard, the District Court of Munich has ruled most recently that members of the executive committee of a corporation have to ensure, that the company is supervised in such a way that no violations of the law, such as bribes to officials of a foreign state or to foreign private individuals occur. Moreover, the court stated in its ruling that the members of the executive committee only fulfil their supervisory obligations if they set up an effective compliance system. See District Court of Munich I, Court decision from 10 December 2013 – 5 HK O 1387/10 – published in [2014] 17 *Neue Zeitschrift für Gesellschaftsrecht* 345.

⁴⁶ Bock, *supra*, note 15, 264, 270 et sqq.

⁴⁷ Higher Regional Court of Düsseldorf, Court decision from 12 November 1998 – 2 Ss (OWi) 385/98 – (OWi) 112/98 III – published in [1999] 19 *NStZ-RR* 151.

⁴⁸ Bock, *supra*, note 15, 277.

⁴⁹ Bock, *supra*, note 44, 732 et sqq.

In this regard the BGH has ruled that an effective criminal compliance system can significantly reduce any possible fine under s 30 OWiG, even if an employee has committed an offence. However, in order to be subject to a reduced fine, the executive committee must rigorously eliminate the weaknesses in the company's compliance system following the disclosure of legal violations of employees.⁵⁰

a. Fines for violations of supervisory duties

In principle, a fine up to €1,000,000 might be imposed on a corporation under s 130(3) sentence 1 OWiG, if the executive committee *intentionally* violated its supervisory duties under s 130(1) OWiG.⁵¹ Compared with this, a fine up to €500,000 might be imposed on a corporation, if the executive committee *negligently* violated its supervisory duties.⁵² Yet it is possible for fines for intentional or negligent violations to be higher still. Section 130(3) sentence 2 OWiG refers to s 30(2) sentence 3 OWiG, and the latter provision states: "If the Act refers to this provision, the maximum amount of the regulatory fine shall be multiplied by ten for the offences referred to in the Act". Accordingly, a fine up to €10,000,000 can be imposed on a corporation if the executive committee intentionally violated its supervisory duties under s 130(1) OWiG. In the case of a negligent violation of supervisory duties, the maximum amount of the fine is €5,000,000. However, the particular amount of the fine to be imposed is determined in accordance with s 130(3) OWiG. The decisive factor for the scope of the fine is the individual allegation against the executive committee of the corporation, whereby the severity of the violation of the duty of supervision is accorded pivotal importance. In the light of the purpose of s 130(1) OWiG, the execution, the significance and seriousness of the violation must also be taken into account.⁵³ Another factor for determining the amount of the fine is the financial situation of the company. In particular, the amount of the fine must not threaten the existence of the company.⁵⁴

To give just one recent example: The district court of Düsseldorf has ruled in a significant decision that a fine can be imposed under s 130(1) OWiG⁵⁵ against a bank, which has trained its employees to help the bank's clients with their tax evasion. The decisive issue in this court ruling was the fact that a member of the executive committee knew about this practice and approved it. The district court imposed a fine of €149,000,000 on the bank in this regulatory proceeding. However, it must be stressed that the actual fine was only €1,000,000. The remaining balance of €148,000,000 is only a levy on the financial benefits that the Bank has acquired as a result of its violation of its supervisory duties under s 130(1) OWiG.⁵⁶ In this respect s 17(4) OWiG states:

⁵⁰ Federal Supreme Court of Germany, Court decision from 09.05.2017 – 1 StR 265/16 – published in [2017] 70 Neue Juristische Wochenschrift 3798.

⁵¹ According to s 30(2a) sentence 1, a fine can even be imposed in the event of a universal succession or of a partial universal succession by means of splitting under s 123(1) German Reorganisation Act. The regulatory fine under ss 130 (3) sentence 2, 30(2) sentence 3 OWiG might be imposed on the legal successor.

⁵² Section 17(2) OWiG.

⁵³ Federal Supreme Court of Germany, Court decision from 24 April 1991 – KRB 5/90 – published in [1991] 10 Wistra 268.

⁵⁴ Böse, *supra*, note 5, 242.

⁵⁵ In combination with ss 17(4) and 30(1), (2) sentence 1 No 1, (3) OWiG.

“The regulatory fine shall exceed the financial benefit that the perpetrator has obtained from commission of the regulatory offence. If the statutory maximum does not suffice for that purpose, it may be exceeded”.

III. UK: CORPORATE OFFENCE OF FAILURE TO PREVENT THE FACILITATION OF TAX EVASION

1. General

The UK CFA 2017, ss 45 and 46, which came into force on 30 September 2017, punish the failure to prevent the facilitation of tax evasion.⁵⁷ These two criminal offences,⁵⁸ which are designed as strict liability offences, seek to circumvent difficulties prosecuting companies under the background criminal law due to the shortcomings of the identification doctrine.⁵⁹ This doctrine requires that a company can only be liable for a crime if the necessary acts and state of mind of the crime can be imputed to those who were the “directing mind and will” of the company at the relevant time.⁶⁰ This is a particularly difficult test to meet for the prosecution of large companies, including banks.⁶¹ By utilising strict liability, the CFA provisions make it simpler to prosecute banks and other corporate entities that are complicit in the evasion of taxes. In particular, ss 45 and 46 enable the courts to impose fines on bodies corporate and partnerships if their employees have aided third parties with tax evasion.

The domestic variant provided by s 45 CFA covers the failure to prevent facilitation of UK tax evasion offences. Notwithstanding this, the imposition of a corporate fine does not require that the company being sanctioned is based in the UK.⁶² Foreign companies can also be sanctioned pursuant to s 45 CFA if they evade UK taxes.⁶³ By contrast, s 46 CFA deals with the failure to prevent facilitation of foreign tax evasion offences, and can be referred to as the foreign variant. For this latter offence, there must be a particular connection with the UK: that the body is incorporated (or partnership formed) under the law of any part of the UK; that the entity carries on business or part of a business in the

⁵⁶ District Court of Düsseldorf, Court ruling from 21 November 2011 – 10 KIs 14/11 – published in [2013] 33 *Wistra* 80.

⁵⁷ As noted by A Ashworth, “A new generation of omission offences?” [2018] *Criminal Law Review* 354, these are examples of a growing number of omission offences in English law. See also C Wells, “Corporate failure to prevent economic crime – a proposal” [2017] *Criminal Law Review* 426.

⁵⁸ Strictly speaking, it can be contended that the provisions only extend liability for existing offences rather than introducing new ones: T Corfield and J Schaefer, “The taxman cometh: the criminal offences of failure to prevent tax evasion” [2017] 23 *Trust and Trustees* 1030, 1030.

⁵⁹ J Wheeler and E Proudlock, “Commentary: UK corporate offence of failure to prevent the facilitation of tax evasion” [2018] 19 *Business Law International* 178, 178.

⁶⁰ See eg *Tesco Supermarkets v Natrass* [1972] AC 153. For a brief summary of the relevant law, see eg N Ryder, “Too scared to prosecute and too scared to jail?” A critical and comparative analysis of enforcement of financial crime legislation against corporations in the USA and the UK” [2018] *Journal of Criminal Law* 245, 257–258; Wilke and Rüping, *supra*, note 14, 480.

⁶¹ See eg Ashworth, *supra*, note 57, 359.

⁶² See s 44(2).

⁶³ As noted by Wheeler and Proudlock, *supra*, note 59, 180, entirely non-UK conduct by a non-UK entity can constitute the offence if it is directed towards evading UK tax. However, they identify enforcement difficulties in such a context. See also K Laird, “The Criminal Finances Act 2017 – an introduction” [2017] *Criminal Law Review* 915, 938.

UK; or any conduct constituting part of the foreign tax evasion facilitation offence takes place in the UK.⁶⁴

2. The domestic variant under s 45 CFA

Section 45(5) CFA provides that “UK tax evasion facilitation offence” means an offence under the law of any part of the UK consisting of:

- (a) being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax by another person;
- (b) aiding, abetting, counselling or procuring the commission of a UK tax evasion offence, or
- (c) being involved in and part in the commission of an offence consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax.

A relevant body, such as a bank or other body corporate,⁶⁵ is guilty of an offence of failing to prevent the facilitation of UK tax evasion if a person acting in the capacity of a person associated with the relevant body commits a UK tax evasion facilitation offence.⁶⁶ The person associated with the relevant body may be a natural or legal person.⁶⁷ A person acts in the capacity of a person associated with an entity if the person is: (a) an employee of the entity who is acting in the capacity of an employee; (b) an agent of the entity (other than an employee) and is acting in the capacity of an agent; or (c) any other person who performs services for or on behalf of the entity who is acting in the capacity of a person performing such services.⁶⁸ The relevant body will not, however, be liable if the person is acting outside the context of the relationship with the relevant body on a “frolic of their own” in facilitating someone else’s tax evasion.⁶⁹ Relevant associations are especially likely to arise in situations involving financial advisers, financial brokers, legal entities and individuals providing tax-related advisory services or conducting transactions, since ss 45 and 46 CFA clearly have within their sights law firms, banks and tax consultants dealing with third-party tax matters. It is not decisive for the question of association whether the person is employed by the company or integrated in its organisational structure. The question of association must rather be determined on a case-by-case basis and depends on the capacity in which the person is acting, not just on the formal position held.⁷⁰ Nevertheless, if an associated person has acted only in self-interest, then this will need to be proved to negate the association and thereby show that the person was not acting for the entity and consequently that there is no criminal liability under s 45.⁷¹

⁶⁴ Section 46(2).

⁶⁵ Or partnership. See s 44(2).

⁶⁶ Section 45(1).

⁶⁷ Section 44(4).

⁶⁸ Section 44(4).

⁶⁹ See CFA Explanatory Notes, para. 302. For discussion of when a party may be acting outside the capacity of their relationship with the relevant body, see Laird, *supra*, note 63, 931 et sqq.

⁷⁰ Ashworth, *supra*, note 57, 360; Laird, *supra*, note 63, 931 et sqq.

Section 45(2) CFA provides that it is a defence to the s 45 offence to prove that when the UK tax evasion facilitation offence was committed, the entity, such as a bank, “had in place such prevention procedures as it was reasonable in all the circumstances to expect [the entity] to have in place”, or that “it was not reasonable in all the circumstances to expect [the entity] to have any prevention procedures in place.” The company must, therefore, show that it has taken sufficient measures to prevent associated persons facilitating the tax evasion of third parties. Consequently, the company must provide evidence that it has implemented a suitable criminal compliance system.⁷² The question that always arises in this respect is which criminal compliance system is suitable. According to the HMRC Guidance, each company has to consider the risks in relation to its own business.⁷³ Companies must assess which persons associated with them have the possibility of facilitating tax evasion of third parties. Furthermore, companies must conduct a risk analysis of their financial products and services. Where appropriate, companies are also obliged to carry out a tax risk analysis with regard to their clients’ residences, the location of their clients’ investment capital and the country of destination of the respective investments.⁷⁴ Subsequently, companies must take the necessary preventive measures as a result of their risk assessment, insofar as they are considered proportionate. There are six guiding principles provided by the HMRC with respect to the development of measures to prevent facilitation: (i) the proportionality of risk-based prevention procedures; (ii) top level commitment; (iii) risk assessment; (iv) due diligence; (v) communication; and (vi) monitoring and review.

In addition, the explanatory notes accompanying the CFA state that “only reasonable or proportionate procedures, as opposed to fool-proof or excessively burdensome procedures (...)” are required.⁷⁵ However, there is still a significant amount of uncertainty as to what is reasonable or proportionate in a given context.⁷⁶ Aside from this, the companies are obliged to continuously monitor their compliance systems.⁷⁷ Perhaps the greatest consequence of the legislative provisions is the introduction of compliance systems by banks and other major corporate entities, which should assist in minimising their complicity in tax evasion.

In the event that an entity is found guilty of an offence under s 45, the entity is liable to pay a fine and this is without limit for a conviction on indictment.⁷⁸ Given that the

⁷¹ Ashworth, *supra*, note 57, 360; Laird, *supra*, note 63, 931 et seq.; Criminal Finances Bill – Explanatory Notes, para. 302.

⁷² For some discussion of related issues, see eg Laird, *supra*, note 63, 934 et seq.

⁷³ See HMRC, *Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion* (2017).

⁷⁴ A Srivastava et al. “Financial crime update” [2018] Compliance Officer Bulletin 1, 11; Wheater and Proudlock, *supra*, note 59, 182 et seq; Corfield and Schaefer, *supra*, note 58, 1032 et seq.

⁷⁵ Explanatory Notes, para 304.

⁷⁶ This is despite the guidance and examples given in HMRC, *Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion* (2017).

⁷⁷ L Campbell, “Corporate liability and the criminalisation of failure” [2018] 12 Law and Financial Market Review 57, 61; Wheater and Proudlock, *supra*, note 59, 182 et seq.

⁷⁸ Section 45(8). As noted by Wheater and Proudlock, *supra*, note 59, 184, orders for confiscation of assets and deferred prosecution agreements (DPAs) may also be used. DPAs enable a prosecution to be suspended for a period of time so long as particular conditions are met. There are also potentially regulatory sanctions that can result from relevant behaviour by corporate entities: see Corfield and Schaefer, *supra*, note 58, 1032.

legislation was only recently introduced, there is not yet any case law to flesh out the particular factors that will be taken into account when considering appropriate levels of fines.

3. The foreign variant under s 46 CFA

As noted above, s 46 CFA involves failure to prevent facilitation of foreign tax evasion offences. According to s 46(5) CFA, a foreign tax evasion offence means conduct which:

- (a) amounts to an offence under the law of a foreign country,
- (b) relates to a breach of a duty relating to a tax imposed under the law of that country, and
- (c) would be regarded by the courts of any part of the United Kingdom as amounting to being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of that tax.

In other respects, the conditions within s 45 CFA also apply to s 46. This includes with respect to the required involvement of an associated person, the defence available and the penalty for the offence. However, two additional factual conditions must be fulfilled for liability under s 46. The respective company must have a nexus with the UK and there must exist dual criminality. The required nexus between a company and the UK can be assumed if the foreign entity is incorporated under UK law, operates from the UK or has a UK branch.⁷⁹ It can also be assumed if a person associated with a foreign company has carried out the facilitation of tax evasion in the UK.⁸⁰ With respect to dual criminality in the sense of s 46(5) CFA, this requires that the tax evasion is punishable under the tax criminal law of the respective foreign state and that the tax evasion would be punishable under UK law if the tax evasion concerned UK taxes and not foreign ones.⁸¹ Nevertheless, the application of liability to entities for failing to prevent the facilitation of foreign tax evasion is broad in its scope and a welcome means by which the UK is showing its willingness to recognise the problems caused by tax evasion on a global scale.

IV. COMPARISON BETWEEN THE GERMAN AND UK APPROACHES

1. Points of similarity

Based on the discussion above, it will be apparent that there are various ways in which the relevant UK and German law already align. First of all, the German and UK approaches make the imposition of fines subject to the violation of the respective bank's own supervisory duties. Although in Germany, in contrast to the UK, no corporate criminal liability exists, the attribution of employees' punishable behaviour to their employers leads to similar results. In this respect, it must be emphasised that no vicarious responsibility (in the strict sense) applies in either country. Liability does not arise

⁷⁹ Laird, *supra*, note 63, 936.

⁸⁰ *ibid.*

⁸¹ For discussion, see Corfield and Schaefer, *supra*, note 58, 1032.

merely because of the attribution of an employee's punishable behaviour to the company. Instead, as already mentioned, the imposition of fines in both countries is linked to the violation of the company's own supervisory duties. At the same time, in both legal systems banks have the opportunity to exculpate themselves through an effective criminal compliance system. In the UK, only proportionate or reasonable steps are required to be taken. This means that corporate criminal liability cannot be assumed if the bank could have prevented the facilitation to tax evasion only with disproportionate effort. The same approach basically applies in Germany, where the BGH has already ruled that the subsequent elimination of weaknesses of a criminal compliance system following the disclosure of legal violations committed by employees can significantly reduce possible fines.⁸²

Apart from this, German and UK tax crime law make similar demands as regards aiding tax evasion.⁸³ Interestingly, the requirements for association of employees with their employers are also in line in both countries. This becomes clear especially with regard to collaborators. An association can be affirmed in Germany if the external collaborators are in charge of company matters and the bank has a right to give them instructions. The same requirements apply in the UK. Simultaneously, it is necessary in both countries that delinquent employees acted for the company and not for themselves. If an employee acted only in his own interest, an association with the company is insufficient to confer liability on the company in both jurisdictions.

2. Points of divergence

On the other hand, there are also some significant differences between the approaches. First, the fines that can be imposed in Germany are limited. The maximum amount of a fine is €10,000,000. In this respect, it has to be stressed that the traditionally low fines in Germany have proven in the past to be of little suitability to prevent quasi-criminal behaviour in companies.⁸⁴ In contrast, unlimited fines can be imposed in the UK against banks for their failure to prevent the facilitation of tax evasion. Obviously, this should increase the willingness of banks to implement effective criminal compliance systems and help prevent the facilitation of tax evasion.

Even more decisive, however, is the fact that the scope of s 46 CFA is well beyond that of ss 30 and 130(1) OWiG, since s 46 CFA allows the sanctioning of the evasion of foreign taxes, if both the UK nexus and dual criminality requirements are met. Sections 30 and 130(1) OWiG, on the other hand, sanction only the evasion of German taxes, which is due to the fact that the territorial scope of the OWiG is limited to German

⁸² Federal Supreme Court of Germany, Court decision from 09 May 2017 – 1 StR 265/16 – published in [2017] 70 *Neue Juristische Wochenschrift* 3798.

⁸³ See S Schott, "§ 370 Abgabenordnung" in S Hüls and T Reichling (eds), *Steuerstrafrecht* (CF Müller 2016) 41, 55 et sqq, with further information about the requirements for aid to tax evasion in Germany.

⁸⁴ See for example district court of Munich I, Court ruling from 04 October 2007 – 5 KLs 563 45994/07 and S Wolf, "Die Siemens-Korruptionsaffäre – ein Überblick" in P Graeff, K Schröder and S Wolf (eds), *Der Korruptionsfall Siemens* (Nomos 2009) 9 et sqq, about the Siemens case of bribery. The most recent example involves searches carried out on 29 November 2018 by the public prosecutor's office against Deutsche Bank, due to money laundering suspicions. See <www.faz.net/aktuell/wirtschaft/unternehmen/geldwaesche-verdacht-ermittler-durchsuchen-deutsche-bank-15915583.html> (accessed 6 March 2019).

territory.⁸⁵ In this regard, the wide scope of the UK corporate offences of failure to prevent the facilitation of tax evasion seems to be more appropriate in the post-Panama Papers world, as those documents revealed that national approaches to tackling tax evasion by globally operating companies may be ineffective in a number of respects.

3. Reform of German law on the UK model?

The question arises, therefore, whether the German position should be reformed in line with the UK approach. In this respect, it would appear reasonable to extend the territorial applicability of the OWiG in a manner similar to the CFA. The Panama Papers have exemplified that a less domestically limited approach is desirable. At the same time, an increase in the maximum amount of fines should be considered, since an increase might promote the effective execution of criminal compliance systems in corporations.⁸⁶ This demand also corresponds to the position of the OECD.⁸⁷

Concerning these two matters, the UK approach could serve as a model.⁸⁸ Notwithstanding this, the concept of strict liability is no model for German law. In German law, it is irrevocable that the imposition of a fine requires guilt. An objective responsibility that disregards subjective guilt would be unconstitutional in Germany.⁸⁹ Furthermore, despite the suitable extra moral opprobrium that may accompany a crime rather than regulatory liability, it is not possible to impose criminal liability on a bank itself under German law, in the manner that exists in UK law.

However, the imposition of criminal liability on a bank itself is not necessarily required. According to our view, it would instead be suitable if the OWiG were adapted in the above-noted ways.⁹⁰ Apart from this, it would also be desirable if new forms of sanctions were introduced to the OWiG. Sanctions in the form of official instructions or

⁸⁵ OWiG, s 5(1).

⁸⁶ At present, the coalition government is already considering an increase in the maximum amount of fines. The coalition states in its agreement: "Wir werden sicherstellen, dass bei Wirtschaftskriminalität grundsätzlich auch die von Fehlverhalten von Mitarbeiterinnen und Mitarbeitern profitierenden Unternehmen stärker sanktioniert werden". See p 126 of the coalition agreement, available at <www.cdu.de/system/tdf/media/dokumente?file=1> (accessed 6 March 2019).

⁸⁷ OECD-Bericht der Arbeitsgruppe für Bestechungsfragen im Internationalen Geschäftsverkehr vom 17 March 2011, supra, note 10.

⁸⁸ There is, however, some uncertainty regarding what precise factors will determine the appropriate amount of a fine in the UK in any given case.

⁸⁹ This line of reasoning was opposed by the US Supreme Court more than one hundred years ago. It stated in *NY Railroad v US* (1909) 492: "If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down irontracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously and virtuously". However, in Germany this argument would still be unconstitutional, see Federal Supreme Court, Court decision from 18 March 1952 – GSSt 2/51 – published in [1952] 7 Neue Juristische Wochenschrift 593; Court decisions of the Constitutional Court of Germany 9, 169; 20, 331; 23, 132; 25, 285; 45, 259; 96, 140; 123, 267; Schünemann, "Die aktuelle Forderung eines Verbandsstrafrechts – Ein kriminalpolitischer Zombie" [2014] 9 Zeitschrift für internationale Strafrechts-dogmatik 1 (2). It follows from this, that the common law approach is not an option for Germany, see B Schünemann, "Strafrechtliche Sanktionen gegen Wirtschaftsunternehmen?" in U Sieber and G Dannecker (eds), *Strafrecht und Wirtschaftsstrafrecht, Dogmatik, Rechtsvergleich und Rechtstatsachen – FS für Klaus Tiedemann zum 70 Geburtstag* (2008) 429 (431). Also see Ligeti and Tosza, supra, note 12, 2 et sqq, for discussion of the applicability of ECHR to administrative proceedings.

⁹⁰ See Dannecker and Dannecker, supra, note 10, 163 and Engelhart, supra, note 12, 203 with further references. It would also be reasonable if Germany introduced a central corruption register as proposed by the OECD: OECD-Bericht der Arbeitsgruppe für Bestechungsfragen im Internationalen Geschäftsverkehr vom 17 March 2011, supra, note 10; C Heuking and S von Coelln, "Die aktuelle Diskussion um Buße oder Strafe für Unternehmen" [2014] 69 Betriebs-Berater 3016, 3020.

the exclusion of tax benefits or subsidies would be acceptable.⁹¹ Moreover, the imposition of a time limited operating ban on responsible company divisions would also be an appropriate sanction. Thus, additional incentives would be created for corporations to comply with the law.⁹² With regard to banks, these sanctions are expected to prove more effective than regulatory fines. This already follows from the fact that the current regulatory fines do not have a particularly deterrent effect in view of potential high profits through criminal activities.⁹³ However, these considerations are not limited to Germany, they also apply to those states that have a concept of corporate criminal liability, such as the UK.

Another relevant aspect is the deepening of international cooperation in order to tackle tax evasion effectively. Tax offences often have an international dimension, eg if assets are hidden abroad. It is for this reason that an effective fight against tax evasion requires a global approach. Most noteworthy in this respect are the reform initiatives of the OECD. The OECD is calling for an international agreement to cooperate on the exchange of information, the submission of documents, the collection of evidence and the transfer of persons for questioning. At the same time, the OECD advocates the implementation of arrangements for the freezing and confiscation of assets and joint investigations.⁹⁴ Council Directive 2011/16/EU on administrative cooperation in the field of taxation and the OECD Convention on Mutual Administrative Assistance in Tax Matters can be seen as initial steps to achieve these goals.⁹⁵ Notwithstanding this, the Panama Papers and other more recent developments have made it clear that there is still a long way to go before tax evasion can be successfully combatted on a global level.⁹⁶

V. CONCLUSION

Certain aspects regarding the liability of banks for aiding or failing to prevent the facilitation of tax evasion in German and UK law are comparable. Fines are imposed

⁹¹ T Kutschaty, "Unternehmensstrafrecht: Deutschland debattiert, der Rest Europas handelt" [2013] Deutsche Richterzeitung 16, 17.

⁹² Wagner, *supra*, note 14, 122 points out that the main difference between the failed North Rhine-Westphalian draft law on the introduction of a corporate criminal liability and the current legal situation was in terms of the legal consequences. The draft bill would have allowed for a more dynamic sanctioning in each individual case.

⁹³ M Kubiciek, "Menschenrechte und Unternehmensstrafrecht – eine europäische Herausforderung", available at < www.jura.uni-augsburg.de/lehrende/professoren/kubiciek/downloads/koelner_papiere/menschenrechte_unternehmensstrafrecht.pdf > (accessed 6 March 2019) points out that the regulatory fines frame has a higher sanctioning effect on small and medium-sized companies.

⁹⁴ OECD, Bekämpfung der Steuerkriminalität: Die zehn zentralen Grundsätze, OECD, Paris, available at < www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.htm > (accessed 6 March 2019). Moreover, the OECD study "International Co-operation against Tax Crimes and Other Financial Crimes: A Catalogue of the Main Instruments" provides a good summary of the achieved so far and the further required measures. The study is available at < www.oecd.org/ctp/exchange-of-tax-information/international-co-operation-against-tax-crimes-and-other-financial-crimes-a-catalogue-of-the-main-instruments.pdf > (accessed 6 March 2019).

⁹⁵ See < www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm > (accessed 6 March 2019).

⁹⁶ See < www.oecd.org/tax/kampf-gegen-steuerhinterziehung-ist-globale-aufgabe.htm > (accessed 6 March 2019); UN Department of Economic and Social Affairs, International tax cooperation and sovereign debt crisis resolution: reforming global governance to ensure no one is left behind, available at < www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/CDP-bp-2018-41.pdf > (accessed 6 March 2019); < www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs > (accessed 6 March 2019).

when banks have failed to fulfil their duties and adequate compliance regimes can enable those banks to escape liability. Banks are well placed to manage the risk of associated persons providing services in a way that could enable others to evade tax. The regulatory environments in Germany and the UK require banks to adopt appropriate measures for dealing with the relevant risk, which should diminish the opportunities that other parties have for evading taxes.

Yet, in a number of respects, the liability of banks under the equivalent laws in Germany and the UK appear highly divergent. There is no *criminal* liability for corporate entities under German law nor strict liability. By contrast, both of these elements are part of the UK law. The fact that ss 45 and 46 CFA are strict liability provisions facilitates investigation and prosecution. Unlike the UK position, many proceedings for violations of supervisory duties under ss 30 and 130(1) OWiG are put to an end in the preliminary stage by paying a fine. This is due to the reason that the subjective facts of the offence are difficult to prove. The UK approach has a wider scope and can be expected to be more effective to prevent aid to tax evasion committed by bank employees and other associated persons. The reasons for this are the availability of unlimited fines and the potentially global scope of ss 45 and 46 CFA.

The reform of the German law is currently being considered and the approach in the UK can serve as a model of reform to a limited extent. Although it is not possible to introduce corporate criminal liability or strict liability due to wider German law, removing restrictions on fines and extending the scope of liability under German law to tax evasion of non-German taxes would be possible. Given that it has proved highly problematic to obtain international consensus regarding liability for tax evasion, it is desirable for major jurisdictions like Germany and the UK to at least have wide-ranging liability for banks' involvement in facilitating tax evasion.