1. Introduction

Tax transparency is a concept that underpins the relationship between the taxpayer and the State. The taxpayer should be transparent towards HMRC in order to allow the body to perform its functions, whilst HMRC should in turn be transparent towards the taxpayer and taxpayers generally in terms of how the body performs those functions. Thus a taxpayer should be transparent about the taxpayer’s dealings both in the UK and abroad,¹ including in respect of any beneficial interests,² whilst on the other hand HMRC will engage with taxpayers both individually³ and as a whole⁴ in order to communicate how the body will apply the underlying law and what information the body possesses about taxpayers.⁵ Tax transparency is also intertwined with issues of fairness and compliance. To this end, there is an increasing trend towards making information publicly available⁶ and using information to nudge taxpayers into fulfilling their obligations.⁷

Where changes in respect of tax transparency have been agreed at the international level, the UK has sought to respond swiftly with implementing legislation, for instance in respect of beneficial ownership registers⁸ and Country-by-Country (CbC) reporting.⁹ This is not only in instances which lead to a greater disclosure of information, but also in respect of agreements which seek to protect individual taxpayer’s interests such as in the case of the Data Protection Act 2018.¹⁰ This has all occurred against the backdrop of greater public salience on tax issues. Bulk leaks of data, as in the case of the Paradise Papers, Panama Papers and Luxleaks, along with stories about the rates of tax paid by multinationals routinely top the news agenda. Politicians have responded by regularly invoking the mantra that all taxpayers should pay their fair share,¹¹ increasing HMRC powers¹² and introducing legislation to counteract the perceived issues.¹³ The release of tax information to the public, without context, does of course carry risks. A tax settlement of £130m between HMRC and Google was announced in January 2016 and lauded by then Chancellor George Osborne.¹⁴ Subsequently, “the debate veered off into a discussion of what commentators thought Google had paid and should have paid under some non-existent ideal tax system”.¹⁵ The debate failed to articulate the nuance around the inherent uncertainty in calculating the “correct amount of tax”,

¹ See below Section 2.3.
² See below Section 4.3.
³ See below Section 2.2.1.
⁴ See below Section 4.1.
⁵ See below Section 3.3.
⁶ See below Section 2.5.
⁷ See below Section 4.3.
⁸ See below Section 4.3.
⁹ See below Section 2.3.
¹⁰ See below Section 3.3.
¹² See below Section 4.3.
¹³ See for instance HMRC, Diverted Profits Tax: guidance (30 November 2015).
particularly in the context of transfer pricing calculations, nor was there mention of the checks and balances within HMRC for such settlements.\footnote{Ibid.}

Against this background, the report will seek to articulate the issues which arise in the context of tax transparency in the UK. Section 2 investigates the procurement of taxpayer information by HMRC and how it is used. Section 3 analyses the protections in place for taxpayers in respect of their tax information. Section 4 finally looks at the transparency of HMRC.

2. Information procurement and data usage by HMRC

2.1. Which principle is pursued in respect of tax assessment?

The form of tax assessment in the UK will be determined both by the type of tax at issue and the particularities of the taxpayer. For instance, in respect of personal income taxes (Income Tax and National Insurance Contributions), employees pay through the “Pay-as-you-earn” (PAYE) system whereby employers deduct the taxes at source.\footnote{On which, see: Income Tax (Pay As You Earn) Regulations 2003/2682, in particular reg. 21. See also Social Security Contributions and Benefits Act 1992, Schedule 1, para. 6; The Social Security (Contributions) Regulations 2001, reg. 67.} Those who are self-employed are subject to self-assessment and submit tax returns to HMRC.\footnote{Taxes Management Act 1970, ss. 7-8.} In respect of Corporation Tax, self-assessment applies\footnote{Finance Act 1998, Schedule 18, para 7.} and those registered for VAT must submit tax returns usually every three months.\footnote{Value Added Tax Act 1994, Schedule 1, para 1(1).}

2.2. How does HMRC obtain information?

2.2.1. From the taxpayer

The information that HMRC receives from the taxpayer will be dependent upon the type of tax. As noted already for instance personal income taxes (for the self-employed) and Corporation tax are subject to self-assessment whilst VAT returns are submitted usually quarterly. In the case of employees, the information is submitted on their behalf by employers. In each event the relevant facts are passed to HMRC and the calculation of tax due is also performed by the transmitting party. The information allows HMRC to check that the appropriate amount of tax has been paid and that credits or benefits where applicable are being properly applied. However, this information may be used for other purposes and in certain circumstances information not strictly necessary for assessment is sought as noted below.\footnote{See below Section 2.5.}

The frequency with which the information must be transmitted, and the relevant timing, will depend upon the type of tax and decisions taken by the taxpayer. For instance, VAT returns must be submitted by those registered for VAT usually every 3 months\footnote{Value Added Tax Regulations 1995/2518, reg. 25.} and online.\footnote{See below Section 2.5.} Even where taxpayers are not required to register for VAT, such as in the case of a UK taxpayer with a turnover of under £85,000,\footnote{Value Added Tax Act 1994, Schedule 1, para 1(1).} the taxpayer may elect to register.\footnote{Value Added Tax Regulations 1995/2518, reg. 25A.} Income tax returns for the self-employed are due on the 31st of October of each year for paper returns, although those who submit their returns electronically have a deadline three months later of 31 January.\footnote{Value Added Tax Regulations 1995/2518, reg. 25A.} In respect of PAYE for personal income taxes, employers have regular reporting obligations and for instance must inform HMRC.
whenever a new employee is hired or whenever an employee’s circumstances changes materially, and must continually report information in each tax month on employees pay and deductions which is usually done online. HMRC is currently engaged in an ambitious project entitled “Making Tax Digital”, which seeks to render HMRC “one of the most digitally advanced tax administrations in the world”. The idea is to move to a fully digital tax system where taxpayers do not have to tell HMRC information that it already knows, time delays are eliminated with close to real time information updates, and taxpayers have access to digital accounts. The first step of the transformation will formally commence in April 2019 with businesses (above the VAT threshold) required to use the “Making Tax Digital for Businesses” system to meet their VAT obligations, by which businesses will be mandated to maintain their records digitally and provide quarterly updates to HMRC.

As with other countries, the UK has also adopted special procedures that allow HMRC to be better informed of the activities of certain taxpayers, which, because of their scale or the nature of their activities, are of particular concern to HMRC. For instance, the UK engages in co-operative compliance with the UK’s largest businesses. The idea is that this gives the taxpayer an incentive to voluntarily provide information to a greater extent and as early as possible to HMRC, allowing the authority to better focus resources on those with a greater tax compliance “risk” profile. In exchange, the tax office keeps the taxpayer in a timely manner informed about HMRC thinking on the taxpayer’s tax affairs. HMRC categorises large entities as either low risk or non-low risk. In order to be classed as low risk there a numerous obligations on the taxpayer, but the overarching requirement is that of comprehensive transparency towards HMRC. Those that fall into the low risk category can expect not to be subject to a Business Risk Review for three years and will not have its tax returns subject to challenge. For those that fall in to the non-low risk category, HMRC will carry out annual Business Risk Reviews, carry out regular analysis of their tax returns to identify areas of potential risk and carry out more regular interventions.

HMRC also provides rulings in certain circumstances. Rulings are pieces of advice issued to individual taxpayers setting out HMRC’s view on the tax implications of a specified transaction or arrangement. A single HMRC document entitled “Non-statutory clearance service guidance” provides information on when, how and on what taxpayers can get an informal ruling from HMRC. HMRC endeavours to respond to any application within 28 days. The taxpayer is free to disagree with an informal HMRC ruling, and the ruling has no impact upon statutory deadlines. Further, there is no general right of

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27 See for instance Income Tax (Pay As You Earn) Regulations 2003/2682, reg. 211, Table 10.
29 Income Tax (Pay As You Earn) Regulations 2003/2682, Chapter 4.
32 HMRC, Overview of Making Tax Digital, supra n. 30.
35 This is a collaborative exercise between the taxpayer and HMRC in which HMRC tries to calibrate a risk profile based on the inherent risk posed by the particular entity and the entity’s behaviour with respect to that inherent risk.
appeal against advice expressed by HMRC, but in some cases rights to appeal are set out in statute.\footnote{For instance, some VAT related decisions are classed as “appealable decisions” by statute. See generally, Value Added Tax Act 1994, s. 83.} Whilst in practice such informal rulings might be perceived as binding by either HMRC or by the relevant taxpayers (although as set out above a taxpayer is still free to depart from an informal ruling), the legal effect of such rulings is governed by remedies such as the doctrine of legitimate expectations.\footnote{On which, see: Stephen Daly, ‘Fairness in tax law and revenue guidance: R (Hely-Hutchinson) v HMRC’ (2016) 1 British Tax Review 18.}

As Loutzenhiser points out, there “is no general scheme whereby taxpayers can obtain advance rulings on the tax consequences of a particular transaction”.\footnote{Glen Loutzenhiser, Tiley’s Revenue Law (8th edn. Bloomsbury 2016), p. 54.} However, there are certain instances in which the legislation prescribes a clearance procedure, “usually as part of broad anti-avoidance legislation”.\footnote{Ibid 55.} These more formal rulings are distinct from informal rulings by reason of the fact that they have statutory force and are automatically legally binding provided that the statutory conditions are fulfilled. HMRC has a “Clearance and Counteraction Team” which handles requests where advance clearance is requested under particular statutory provisions, such as in relation to capital gains tax,\footnote{See for instance, Taxation of Chargeable Gains Act 1992, s. 138(1), s. 139(5), s. 140B and s. 140D.} purchase of own shares by unquoted trading companies,\footnote{Corporation Tax Act 2010, s. 1044.} and demergers.\footnote{Corporation Tax Act 2010, s. 1091.}

HMRC has also introduced the “Disclosure of Tax Avoidance Scheme” (DOTAS) regime as a means of tackling tax avoidance. The UK introduced this regime in 2004\footnote{See Finance Act 2004, Part 2 and Part 7.} and it broadly requires that, where a taxpayer has engaged in particular tax-planning schemes, this must be disclosed to HMRC. The introduction of the regime was justified on the basis that it would provide HMRC with early information on tax avoidance schemes, enabling effective risk-based investigations and would allow HMRC and HM Treasury to get to grips quickly with potential legislative loopholes so that these could be eradicated at the next available opportunity.\footnote{HMRC, Disclosure of Tax Avoidance Schemes (DOTAS) Consultation Document (9 December 2009), p. 4 available at: <http://webarchive.nationalarchives.gov.uk/20100711235311/http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_029990> accessed 22 June 2018.}

2.2.2. From other sources

In addition to information received as part of the assessment process from either taxpayers or persons transmitting the information on behalf of taxpayers (such as employers in the case of the PAYE system), information may also be sought from additional sources, leading to a claim from HMRC that it has enough information to produce an income and outgoings spreadsheet for every taxpayer in the country.\footnote{Mike Down, ‘TV review of HMRC’s enforcement activities: Catching the tax dodgers’ (August 2017) available at: <https://www.taxation.co.uk/Articles/2017/08/22/336869/tv-review-hmrc-s-enforcement-activities> accessed 22 June 2018.}

Various third-parties are under an obligation to transmit taxpayer information to HMRC. As noted already, employers are under continuing obligations to this end. In respect of PAYE for personal income taxes, employers have regular reporting obligations.\footnote{See above Section 2.2.1.} Further, regulated entities, such as accountants and banks,\footnote{See Proceeds of Crime Act 2002, Schedule 9, Part 1 and Terrorism Act 2000, Schedule 3A, Part 1.} are under an obligation to disclose “suspicious activity”, that is where there
is suspicion of money laundering or terrorist financing. Additionally, HMRC is equipped with various powers to compel third parties to supply information to HMRC about a taxpayer. Recently HMRC has acquired powers to request information from merchant acquirers, those companies that process card payment transactions, and business intermediaries, who facilitate transactions, in order to find out the number and value of transactions completed by a specific trader.

HMRC may also access information about taxpayers from central databases. For instance, HMRC may access the registries of the Driver & Vehicle Licensing Agency to check car purchases. HMRC may be transferred information from other government departments, such as the Department for Work and Pensions which is responsible for welfare and pension policy. To this end, the functions of the two departments at times overlap and the two will have a common interest in the same information.

The courts may transfer information to HMRC similarly. For instance, personal information, pertinent from a tax perspective, may be disclosed in ancillary relief divorce proceedings and the courts in exceptional circumstances may disclose that information to HMRC.

Even private stakeholders may pass information on to HMRC. Concerned citizens can pass on information about suspected tax fraud and evasion to HMRC. Some parties may even be paid by HMRC for the information. The media is another source which can transmit information to HMRC. The airing of a documentary about Fleet Street workers famously led to an investigation by HMRC into purported tax evasion by casual print workers. Further, the head of HMRC once gave an interview to journalists from The Times newspaper, with the journalists pledging to pass on information about tax avoidance schemes in return. HMRC may also acquire information from private stakeholders through international leaks, such as arose in respect of the “Panama Papers” scandal. Whether HMRC is prevented from using information leaked from a source outside the UK is a question of international rather than national law, as the laws of one country do not apply in this

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49 See Proceeds of Crime Act 2002, s. 330 and Terrorism Act 2000, s. 21A.
54 See Welfare Reform Act 2012, s. 127.
56 HMRC v Charmen [2012] EWHC 1448 (Fam), [2012] WLR(D) 165, para 22.
59 IRC v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617. See also: Inland Revenue Commissioners v Aken [1988] STC 69, appealed [1990] STC 497. A tax inspector watched an interview in which a prostitute discussed her earnings. The taxpayer was subsequently subjected to a tax assessment on these earnings.
60 R (Ingenious Media) v HMRC [2013] EWHC 3258 (Admin) [6], [2013] STI 3400 (Ingenious Media (HC)).
another country unless there is a specific provision providing that the second country allows itself to be so bound in certain circumstances. Thus, this might arise if there were a provision in the double tax treaty between the UK and Panama that it would not use confidential information. Whilst the Double Tax Convention between the two countries does contain provisions on the use of information exchanged between the two revenue authorities, it is silent on the issue of information provided by other sources in those countries.\(^{61}\) Thus, in the case of the Panama Papers, HMRC would not be legally impeded from using the information concerned.\(^{62}\)

The end game of all this information-gathering by HMRC is CONNECT, HMRC’s super computer which was launched in 2010 and brings together information from disparate sources in order to gain a fuller picture of UK taxpayers’ affairs.\(^{63}\)

\[\text{2.3. International exchange of information}\]

Whilst it was once trite law that the UK would not assist in the collection of foreign taxes,\(^{64}\) such a non-constructive approach to tax collection is no longer present. The UK assists in the collection of foreign taxes\(^{65}\) and it also engages in cross-border exchange of pertinent tax information with well over 100 countries.\(^{66}\) This is facilitated both by multilateral and bilateral instruments as covered in detail in the 2014 UK Report to the EATLP.\(^{67}\)

Even since 2014 however, there have been significant developments. In 2015, the OECD released the BEPs final report, with Action 13 recommending CbC reporting, and subsequently the EU amended the Council Directive on Administrative Cooperation 2011/15/EU to implement an EU version of the OECD recommendations.\(^{68}\) The UK was one of the first countries to formally commit to introducing CbC reporting\(^{69}\) and the detailed implementation of the OECD model for CbC reporting was given effect through Regulations that came into force on 20 March 2016.\(^{70}\) However, with the OECD releasing further guidance and with the amendment to the Council Directive on Administrative Cooperation 2011/15/EU, it was necessary for the UK to update the 2016 Regulations.\(^{71}\)

\[\text{2.4. Obstacles to information procurement}\]

The question of impediments to the procurement of information will inevitably arise. As noted already, entities such as banks are under an obligation to disclose certain information to HMRC, but


\(^{62}\) That is not to say that practical issues would not remain in respect of the evidence. See below section 2.4.


\(^{64}\) Government of India v Taylor [1955] AC 491.


\(^{67}\) See generally Bowler-Smith and Ostik, supra n. 50.


\(^{69}\) Finance Act 2015, s. 122 gave the Treasury the power to make regulations to implement the OECD’s guidance on CbC reporting.

\(^{70}\) The Taxes (Base Erosion and Profit Shifting) (country-by-Country Reporting) Regulations 2016.

banks also owe a duty of confidentiality to customers arising out of the contractual relationship between the parties. However, it is a qualified duty. Importantly then, the duty does not extend to preventing disclosure where there is a legal duty to do so; where there is a duty to the public to disclose; where the interests of the bank require disclosure; or where the disclosure is made by the express or implied consent of the customer. If HMRC accordingly is armed with a legal order such as a subpoena to give evidence and produce bank statements or relies upon myriad specific legal provisions to compel the bank to disclose taxpayer information (such as where the taxpayer is insolvent or engaged in suspicious activity), the duty will not be said to have been breached.

Where information of a confidential nature is leaked to HMRC a question may arise as to whether the body may use the information. Where the information is in relation to activities outside the UK as in the case of the Panama Papers leaks, Luxleaks and the Falciani files, then the question arises as to whether any international agreement that the UK has with the country in question precludes it from using the information. That is not to say however that there are no remaining practical or legal issues involved, for instance, in respect of both the admissibility of the evidence and the verification of its integrity.

Further, HMRC’s information gathering powers are subject to the rights set out in the European Convention on Human Rights (ECHR). The Human Rights Act 1998 (HRA 1998) incorporates the ECHR into UK law and where it is in play, the courts will seek so far as possible to interpret offending statutes so as to be compatible with Convention rights. Where actions of HMRC are concerned, section 6(1) provides that it is unlawful for the authority to breach a Convention right (unless by reason of primary legislation the body could not have acted any differently, or was simply giving effect to primary legislation). Relevant rights in respect of information gathering are some “qualified rights” such as the right to respect for private and family life (Article 8 ECHR), and the right to the enjoyment of possessions (Article 1 of the First Protocol to the ECHR). Persons and non-natural entities may invoke these provisions. These are “qualified rights” in the sense that interferences with them may be justified if HMRC can satisfy three conditions: i) the limitation is prescribed by or in accordance with the law; ii) the interference pursues a legitimate aim; and iii) the interference is necessary in a democratic society. It is the final criterion which introduces the proportionality test. Article 6 which protects the right to a fair trial may also be relevant.

75 Insolvency Act 1986, s. 236 and s. 366.
76 Proceeds of Crime Act 2002, s 330.
77 Police and Criminal Evidence Act 1984, s. 78 allows the trial judge discretion to refuse to allow evidence if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
78 HRA 1998, s. 3(1).
80 See for instance Ingenious Media (HC), paras 62-70. In respect of Article 8, the company claimed a breach of its right to reputation.
81 Lord Woolf et al., De Smith’s Judicial Review (7th Ed. 3rd Supplement, Sweet and Maxwell 2016) section 13-081.
2.5. Other uses of the information in the tax administration

In addition to collecting information for the purpose of correctly assessing tax due and applying credits and benefits where applicable, HMRC also collects information about taxpayers for instance to administer the National Minimum Wage and enforce import and export legislation. Information collected by HMRC also informs how the body operates, for instance by using it to calculate the tax gap which is a fundamental driver of HMRC strategy, in order to legislate to remove loopholes, and in order to allocate resources through recourse to risk management.

Taxpayer information in strict circumstances will also be anonymised and open to use for academic purposes. More generally, this opening up of HMRC’s databases is part of HMRC’s Open Data Strategy, by which HMRC seeks to publish information in a linkable and re usable format with the aim being to drive reform and improvement through transparency and citizen participation. Whilst some databases are only open to researchers, not-for-profit organisations or personnel in government, others such as the Data Catalogue, an initial inventory of the datasets HMRC holds and processes, are openly accessible on the government maintained site www.data.gov.uk, which was launched publicly in 2010, and on HMRC’s website. Individuals are already entitled to access the data that HMRC holds on them under the terms of the Data Protection Act 2018 (DPA 2018) and the General Data Protection Regulation (GDPR), but as part of the transparency push, HMRC is also seeking to make it easier for individuals to engage with HMRC, raise awareness and understanding of tax and improve the customer experience. For instance HMRC has launched a Personal Tax Statement, which details how much income tax and National Insurance contributions (NICs) the taxpayer has paid, the taxpayer’s average tax rates, and how this contributes to public spending.

Balancing against this transparency agenda is HMRC’s commitment to protect taxpayer confidentiality, which is underlined by the fact that data that is opened to the public must not include indentifying information. This is owed to the protections that taxpayers are guaranteed by

85 See above Section 2.2.1.
86 See above Section 2.2.1.
92 See for instance DPA 2018, s. 94. See below Section 3.3.
93 GDPR, Art. 15.
94 HMRC, Open Data Strategy, supra n. 88, p. 11.
statute and common law.\textsuperscript{96} The transparency drive must also be limited by the fact that releasing some data could harm operational capabilities and that sensitive information must not be released to those who seek to pervert the tax system.\textsuperscript{97}

3. Protection of the taxpayer

3.1. Constitutional law

The United Kingdom does not have a codified, written constitution, but rather the constitution is formed of Acts of Parliament, court judgments and constitutional conventions. An important pillar of the UK constitution is the principle that Parliament is sovereign, meaning that it has supreme legislative power and faces no legal limits on its law-making power, save the incapability to bind its successors.\textsuperscript{98} The courts then cannot strike down Parliamentary statutes for being “unconstitutional” but rather may only interpret them, which may nevertheless give the courts flexibility to construe legislation in a manner which militates against restricting individuals’ rights.\textsuperscript{99} Notwithstanding the fact then that various statutes provide protections for taxpayers accordingly, such as the HRA 1998, Parliament may legislate in opposition to such rights with express and clear wording.\textsuperscript{100} Whilst this might result in a conflict with the UK’s obligations at an international level (and so a disgruntled taxpayer could approach the European Court of Human Rights), the taxpayer does not have a domestic remedy. A UK court may issue a declaration of incompatibility, meaning there is an incompatibility between the UK statute and convention rights, but the matter essentially rests in Parliament’s hands as to whether it will decide to take any remedial action.

Protection for taxpayers are enshrined in a variety of statutes, such as the HRA 1998 and the DPA 2018, and at common law (which is the law developed by the courts). In their varying ways, these seek to protect the individual against the power of the State. Where a taxpayer claims that HMRC has breached a right or rights protected by law, the degree to which the court will intrude upon HMRC’s decision will be dictated by the nature and source of the particular right(s) in question.

Where the right is derived from EU law (as in the case of the GDPR), or where the right derives from UK legislation implementing EU law such as in the case of DPA 2018, the courts will engage in proportionality analysis.\textsuperscript{101} Where the HRA 1998 is concerned, the courts will seek so far as possible to interpret offending statutes so as to be compatible with Convention rights.\textsuperscript{102} Where actions of HMRC are concerned, section 6(1) provides that it is unlawful for a public body to breach a Convention right (unless by reason of primary legislation the body could not have acted any differently, or was simply giving effect to primary legislation). To this end, Article 6 and Article 8 of the ECHR, and Article 1 of Protocol 1 to the ECHR will act as protections for the taxpayer.

Where HMRC purports to act in a manner which might undermine basic rights, the common law may also step in to provide protection. There are a set of “common law rights” against which a statute purporting to permit HMRC actions must be interpreted. Unless there are clear and express words

\textsuperscript{96} HMRC, Open Data Strategy, supra n. 88, p. 9.
\textsuperscript{97} Ibid, p. 22.
\textsuperscript{98} Alison Young, Parliamentary Sovereignty and the Human Rights Act (Hart 2008) p. 19.
\textsuperscript{100} R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115, p. 131 E-G (Lord Hoffmann).
\textsuperscript{101} See R (Lumsdon) v Legal Services Board [2015] UKSC 41, [2015] 3 WLR 121. Note that the intensity of review will differ between these categories. See Lumsdon, paras 50-74.
\textsuperscript{102} HRA 1998, s. 3(1).
permitting for instance HMRC to override the right to legal privilege, access to justice, or immunity from interference by the state with property or privacy, the courts will intervene to prohibit the purported action.

3.2. Duty of confidentiality

A duty of confidentiality is not only owed by institutions such as banks to taxpayers, but is also owed by HMRC to taxpayers as a matter of common law and statute. Where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes. This is a “well established principle of the law of confidentiality” which gives rise to a common law duty of confidentiality in the hands of HMRC. The “purpose” of HMRC’s entitlement to receive and hold confidential information about a person or a company’s financial affairs is to enable the body to assess and collect (or pay) what is properly due from (or to) the taxpayer. This common law duty of confidentiality is enshrined in section 18(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA 2005), which provides that “officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs”. This is subject to a set of exceptions as set out in the legislation, such as where disclosure is necessary for cases against taxpayers (for instance where there are civil or criminal proceedings involving a tax matter, a court orders disclosure, or there is disclosure to a prosecuting authority), where the taxpayer consents, or where disclosure is in the public interest. The Act contains a further, less specific exception where disclosure “is made for the purposes of a function” of HMRC. This allows HMRC to disclose taxpayer information where this is reasonably necessary for HMRC to fulfil its primary function of collecting and managing taxes and credits. Exceptionally, such as where HMRC is engaged in an anti-smuggling operation that might be jeopardised by journalistic investigations, this would permit disclosure to the media. Disclosing specific taxpayer information to the media on the vague basis that this might assist in overall tax collection is not permitted. The statutory exceptions to the duty of confidentiality do not allow for a disclosure which would breach the data protection legislation and information

106 On common law rights, see: Lord Woolf et al., De Smith’s Judicial Review, supra n. 81, sections 11-057 – 11-069.
108 Ibid, para 17.
109 Ibid, para 17.
110 Ibid, para 23.
111 It should be noted that the common law also provides a range of exceptions, such as public interest, responding to a court order or the consent of the individual or entity concerned, but the legislation covers these in addition to providing further exceptions. For a good overview, see Paul Stanley, The Law of Confidentiality: A Restatement (Hart 2008), Part II.
112 CRCA 2005, s. 18(2)(c)-(d).
113 CRCA 2005, s. 18(2)(e).
114 CRCA 2005, s. 21.
115 CRCA 2005, s. 18(2)(h).
116 CRCA 2005, s. 20. See also, Public Interest Disclosure Act 1998, s. 1. For an account of a recent UK whistleblower who disclosed confidential taxpayer information, see: Osita Mba, In the matter of the Public Interest Disclosure Act 1998: HM Revenue & Customs procedures for settling tax disputes (HC 2010-12, 1531).
117 CRCA 2005, s. 18(2)(b)(i).
118 Ingenious Media (SC), para 23.
119 CRCA 2005, s. 5.
120 Ingenious Media (SC), para 35.
121 See Ingenious Media (SC), para 34.
122 CRCA 2005, s. 22.
which is prohibited from disclosure by virtue of section 18(1) in so far as it contains identifying information is “exempt information” for the purposes of the Freedom of Information Act 2000 (FOIA 2000); in other words it may not be disclosed in a Freedom of Information request.

Section 19 of the CRCA 2005 imposes a criminal sanction, with the possibility of a fine and imprisonment of up to 2 years, upon those who breach the duty by disclosing taxpayer information, unless the defendant can demonstrate that she reasonably believed that the disclosure was lawful or that the information had already been lawfully made available to the public. An HMRC official could hypothetically also be convicted of the common law offence of Misconduct in Public Office, which carries a maximum sentence of life imprisonment, but that is highly unlikely given that an offending official will already be prosecutable under section 19, thereby displacing the need for the common law offence in this instance. Concerning also for HMRC officials who breach the duty of confidentiality is that officials must sign a declaration stating that they understand and acknowledge the obligations of confidentiality imposed upon them. Breach will lead to disciplinary action. The Civil Service Code additionally, which forms part of the terms of employment of HMRC officials, precludes the disclosure of information without authority.

3.3. Data protection laws
Given that over two decades have passed since the EU Data Protection Directive was adopted, and given the overwhelming transformation in respect of information brought about by the continuing development of the internet in that time, it is unsurprising that its provisions became dated. To this end, the Directive has been superseded by the GDPR from 2018. The GDPR is designed to harmonize data privacy laws across Europe, to protect EU citizens’ data privacy, empower citizens and to reshape the way organizations across the region approach data privacy. Although the UK is set to leave the European Union, it is committed to the provisions of the GDPR and has introduced the DPA 2018 to inter alia give effect to the GDPR and provide details on how the GDPR will operate in the UK.

The data protection legislation is primarily concerned with regulating the processing of data by any “data controller” such as HMRC or “data processor”. Personal data means data relating to a living individual identifiable from the data. “Processing” is given a broad definition and ranges from collecting and storing data to disseminating and even destroying data. A data controller such as HMRC in turn must comply with six data protection principles.

The data protection legislation provides a number of rights for taxpayers, significant of which for present purposes is the right of a taxpayer to request information that HMRC holds in relation to

123 CRCA 2005, s. 23.
125 CRCA 2005, s. 3.
127 Constitutional Reform and Governance Act 2010, s. 5(8).
132 DPA 2018, s. 3(4); GDPR, Art. 4(2).
133 GDPR, Art. 5.
134 GDPR, Chapter 3.
them. 135 If information is inaccurate, the taxpayer is also entitled to request HMRC to rectify inaccurate data. 136 There are however a number of exceptions, as permitted by Article 23(1)(e) of the GDPR which allows for national derogations in the area of monetary, budgetary and taxation matters, and social security. 137 The UK government sought to preserve the effect of the exemptions used under the previous data protection legislation in the DPA 2018 to the extent permitted under the GDPR. 138 To this end, HMRC for instance is entitled to withhold information where the release would be likely to prejudice the prevention or detection of crime, 139 prejudice the apprehension or prosecution of offenders, 140 prejudice the assessment or collection of any tax or duty 141 or reveal the identity of another person, or information about them. 142

3.4. Compensation for damages and judicial protection

Taxpayers may seek legal remedies against either HMRC or other parties in respect of breach of the duty of confidentiality. Taxpayer may seek the remedy of injunction to prevent the continuation of the wrongful conduct, such as requiring discontinuation of the publication of the material, or pre-emptively to prevent breach of confidence. 143 Breach of an injunction amounts to contempt of court and can be punishable by fine or imprisonment. Whether a final injunction will be granted will be dictated by an array of considerations such as whether there is a present need for the grant of an injunction; whether damages would be an adequate remedy; whether the defendant has an equitable defence (such as delay or acquiescence); whether the court should take account of any other factors (such as the public interest). 144 In the UK, one may also apply for a “super-injunction”, which prevents even the disclosure that an action seeking an injunction has been sought, where disclosure would render the injunction itself nugatory. 145

Particular issues in respect of injunctions arise if the party seeks to prevent publication by the press as this engages Article 10 of the ECHR, on the right to freedom of expression, and the provisions of the HRA 1998. Section 12(3) of the HRA 1998 provides that no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. Section 12(4) provides that the court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims to be journalistic, the extent to which the material has or is about to become available to the public; or would be in the public interest for the material to be published.

Where there has been a breach of confidence, the aggrieved party may seek damages so as to put the person or entity back in the position they would have been in had the breach not occurred, whether that is in respect of commercial matters 146 (such as where the disclosure of information

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135 GDPR, Art. 15.
136 GDPR, Art. 16.
137 See DPA 2018, Sch. 2.
139 DPA 2018, Sch. 2, s. 2(1)(a).
140 DPA 2018, Sch. 2, s. 2(1)(b).
141 DPA 2018, Sch. 2, s. 2(1)(c).
142 GDPR, Art. 15(4).
144 See generally, John McGhee (ed), Snell’s Equity (33rd edn., Sweet and Maxwell 2016), sections 18-026 – 18-044.
146 Seager v Copydex (No.2) [1969] 1 W.L.R. 809 as noted in Roger Toulson and Charles Phipps, Confidentiality (3rd edn., Sweet and Maxwell 2012), section 9-043.
leads to the taxpayer losing business) or personal matters\(^{147}\) (such as distress and injury to feelings).\(^{148}\) A public authority such as HMRC may be liable for damages also by reason of breach Article 8 of the ECHR.\(^{149}\)

There are of course non-legal remedies which a taxpayer can pursue where there has been a breach of the duty of confidentiality by HMRC. Taxpayers can complain directly to HMRC, whereupon if it is accepted that HMRC have made a mistake, the body will seek to put the matter right, will consider refunding reasonable expenses and may make a small payment to compensate for distress.\(^{150}\) If unsatisfied, the taxpayer may go to the Adjudicator’s Office\(^{151}\) and if still unsatisfied may approach the Parliamentary Ombudsman (through their local Member of Parliament\(^{152}\)). The Adjudicator may recommend these remedies also to put things right,\(^{153}\) which HMRC may decide not to accept.\(^{154}\) The Parliamentary Ombudsman is entitled to recommend action which would remedy “injustice in consequence of maladministration”\(^{155}\) which can range from the issuance of an apology\(^{156}\) to financial compensation\(^{157}\) and even to recommendations in respect of broader systemic change.\(^{158}\) Again, HMRC is not strictly compelled to accept the Ombudsman’s recommendations, but the involvement of the referring politician is generally sufficient to ensure compliance.\(^{159}\) The case of \(R\) (\(Bradley\)) v \(Secretary\ of\ State\ for\ Work\ and\ Pensions\)\(^{160}\) however adds a legal edge to recommendations from the Ombudsman. Therein it was found that a government department could only reject an Ombudsman’s finding of maladministration “on cogent reasons”\(^{161}\) and that any decision to reject a finding may itself be judicially reviewed and quashed if judged to be irrational.\(^{162}\) By extension, it is arguable that the same applies in respect of recommendations from the Adjudicator’s Office.

Where there has been a breach of the Data Protection rules, the taxpayer may approach the courts or the Information Commissioner, a statutory body with powers in respect of the DPA 2018.\(^{163}\) Under Article 82 of the GDPR, a taxpayer may seek compensation through the courts for failure to comply with the obligations imposed by the Act on data controllers. Whilst in principle there is overlap

\(^{147}\) See \textit{Williams v Settle} [1960] 1 W.L.R. 1072; [1960] 2 All E.R. 806 as noted in Toulson and Phipps, supra n. 146, section 9-045.

\(^{148}\) It remains to be determined in the UK whether exemplary damages, which seek to punish and deter rather than simply compensate, may be awarded. Contrast Eady J in \textit{Mosley v News Group Newspapers Ltd} [2008] EWHC 687 (QB), [2008] EMLR 20, para 197 with Lord Mance in \textit{PJS v NGN} [2016] UKSC 26, para 42.

\(^{149}\) See HRA 1998, s. 8 although this is qualified by s. 6(1). There are an array of other remedies which may be available such as an account for profits, or obtaining a search order or discovery. See generally, Toulson and Phipps, supra n. 146, Chapter 9.


\(^{152}\) Parliamentary Commissioner Act 1967, s. 5(1)(b).


\(^{154}\) Ibid, para 2.24.

\(^{155}\) Parliamentary Commissioner Act 1967, s. 5(1)(a).

\(^{156}\) Parliamentary Commissioner for Administration, \textit{Third report of the parliamentary commissioner for administration} (HC 1973-74, 281), p. 12


\(^{158}\) Parliamentary Commissioner for Administration, \textit{Annual report for 1995} (HC 1995/96, 296), para 54.


\(^{161}\) Ibid, paras 51 and 72 (Sir John Chadwick).

\(^{162}\) Ibid, para 95 (Sir John Chadwick).

between the data legislation and the general law of confidentiality, the impact that the Act has had upon the common law has been limited. Phipps and Toulson hypothesized, albeit in the context of the previous data protection legislation, that this is due to the availability already of remedies for breach of confidence and the “daunting complexity” of the Act.¹⁶⁴

4. Transparency of HMRC

4.1. Publication habits of HMRC

Whilst HMRC is committed to transparency in respect of its databases, the UK tax authorities have since time immemorial published guidance to taxpayers,¹⁶⁵ which guide taxpayers as to their rights and obligations. This guidance can come in a variety of publication types, such as codes of practice, notices, lists of extra-statutory concessions, statements of practice or simply the general catchall category of “guidance”, with HMRC publishing new materials on an almost daily basis.¹⁶⁶ The logic behind such publication is that HMRC has long recognised that the effectuation of its primary duty to collect and manage taxes and credits is best achieved by engaging with taxpayers.¹⁶⁷ More recently, HMRC has opened up its internal manuals,¹⁶⁸ which are primarily directed to staff but have pertinence for taxpayers too.

HMRC engages in risk management as a matter of operational course¹⁶⁹ and manages compliance risk through a “three dimensional” approach: by customer group, by customer behaviour and by tax product.¹⁷⁰ In the case of large businesses the process is particularly transparent with comprehensive published HMRC guidance on the matter¹⁷¹ and also individual customer relationship managers for the largest businesses allowing for consistent contact and dialogue.¹⁷²

The UK does not have a comprehensive formal rulings system, but does provide informal rulings and in specific instances legislation provides for binding rulings.¹⁷³ There is no scheme however for the publication of either the informal or formal rulings. Similarly, where HMRC agrees to settle an outstanding tax dispute with a taxpayer,¹⁷⁴ the agreement is not published (including where Alternative Dispute Resolution has been undertaken).¹⁷⁵ Likewise, agreements reached by HMRC to resolve difficulties or doubts arising as to the interpretation or application of tax treaties in relation to large

¹⁶⁴ Toulson and Phipps, supra n. 146, section 8-032.
¹⁶⁵ See for instance Inland Revenue, A List of Extra Statutory Wartime Concessions given in the Administration of Inland Revenue Duties (October 1944) Cmd. 6559.
¹⁷³ See above Section 2.2.1.
¹⁷⁵ Adam Craggs and Nick Fernyhough, Alternative dispute resolution (ADR) in tax disputes (Practice Note for Thomson Reuters Practical Law).
to issues of a general nature which concern, or which may concern, a category of taxpayers are not published. 176 Finally, HMRC does not make available publicly an explicit centralised list of tax havens but at several points in its internal manuals mentions various countries that would be considered tax havens, such as the Channel Islands, Isle of Man, Bahamas, Barbados, Bermuda, British Virgin Isles, Cayman Islands, Cyprus, Gibraltar, Liechtenstein, Liberia, Netherlands Antilles, Panama, and Vanuatu. 177

4.2. Transparency towards the taxpayer

Taxpayers are entitled to access the data held by HMRC in relation to them as a right under the data protection legislation. 178 HMRC does not usually charge for these requests. 179 Requests can be in writing or online and will generally be complied with within 1 month. 180

The first a taxpayer should know about an HMRC investigation should be when the taxpayer receives a tax investigation letter. 181 HMRC is transparent about the process involved with its investigations and makes publicly available comprehensive guidance. 182 For instance, the body will mostly use the civil fraud procedure to deal with issues of criminality, and identifies chronologically and in detail how that process works. 183 However HMRC reserves the right to conduct a criminal investigation and will usually do so in particularly serious cases, such as where organised criminal gangs are involved. 184 Notably, HMRC has significant information gathering powers 185 which can be used to compel third parties to transmit information to HMRC about a taxpayer under investigation. The taxpayer should be informed, 186 although HMRC may ask a tribunal to disapply that requirement. 187 However, if information is simply transmitted to HMRC from third parties, for instance from banks issuing suspicious activity reports, 188 or from other governmental bodies through legal gateways, 189 then the

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178 GDPR, Art. 15.
179 HMRC, Make a subject access request to HMRC (23 May 2018), available at: <https://www.gov.uk/guidance/hmrc-subject-access-request> accessed 22 June 2018. See generally GDPR, Art. 12(5).
180 GDPR, Art 12(3).
185 See above Section 2.2.2.
186 Finance Act 2008, Schedule 36, part 1, para 4(1).
188 See above Section 2.2.2.
taxpayer will not be informed and indeed it is an offence to “tip off” the taxpayer in the case of a suspicious activity report. 190 Where HMRC seeks information from a foreign tax authority, it need not inform the taxpayer, but may choose to do so. 191 In the converse situation, the general rule is that HMRC can disclose to the taxpayer the minimum amount of information necessary in order to obtain the information. 192 If it is necessary for HMRC to use its power to compel information disclosure from a third party, the taxpayer must be notified unless a tribunal is satisfied that HMRC has reasonable grounds for believing that giving a copy of the notice to the taxpayer might prejudice the assessment or collection of tax. 193

4.3. Usage of information towards the public
HMRC, like many other tax authorities, engages in “naming and shaming” of non-compliant taxpayers as a means of “nudging” towards greater compliance. HMRC publishes details of deliberate tax defaulters, whether the taxpayer is an individual or business entity. 194 HMRC will publish enough information to identify the deliberate tax defaulter, the penalties imposed for their deliberate defaults, and the amount of tax on which those penalties are based. 195 Banks who fail to comply with the terms of the Code of Practice on Taxation of Banks, another nudging device which encourages banks to follow the letter as well as the spirit of the law in relation to tax planning, 196 may be named and shamed in HMRC’s annual report on the operation of the code. 197

There has been a considerable push towards greater transparency in recent years, which have led to notable developments such as CbC reporting. The UK government has been given the power to introduce rules allowing for the public sharing of CbC reports 198 but has not yet done so and is awaiting a multilateral deal on public CbC reporting before proceeding. 199 Meanwhile, the UK has also been keen to establish centralised registers detailing beneficial ownership. In terms of beneficial ownership of companies, the UK has established a public register. UK companies, Limited Liability Partnerships and Societates Europaeae are under an obligation to maintain a register of people with significant control (PSC register) and provide this to the UK registrar of companies. 200 The PSC register is accessible online. 201 The UK also has ambitions to be the first country to introduce a public register of the beneficial owners of overseas companies and other legal entities who own UK property. 202 In

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190 Proceeds of Crime Act, s. 333A.
194 Finance Act 2009, s. 94.
197 See: Finance Act 2014, ss. 285-288. There have been 3 reports so far, but HMRC has not found any bank to have breached the code. See the reports at: HMRC, The Code of Practice on Taxation for Banks (18 October 2017), available at: <https://www.gov.uk/government/collections/the-code-of-practice-on-taxation-for-banks> accessed 22 June 2018.
199 HC Deb 10 July 2017, vol 627, cols 34-35
200 See Companies Act 2006, Part 21A.
line with Article 31 of the Fourth Money Laundering Directive, the UK has also introduced a register for beneficial owners in express trusts, but this register is not publicly accessible. Charitable organisations, which are entitled to significant tax breaks, are required to be registered with the Charity Commission and their details are publicly accessible.

Access to more restricted tax data may also be permitted through other channels. Tax data may be used by members of academic institutions or other governmental departments for research purposes. Similarly, any person or organisation, regardless of links to the UK, may apply under the provisions of the FOIA 2000 to access recorded information held by public sector organisations. However, section 23 of the CRCA 2005 exempts from disclosure under the FOIA 2000 any information relating to identifiable HMRC customers (including legal entities, such as limited companies). There are a range of other exemptions also, such as where the cost of compliance with the request exceeds an appropriate limit. Pressure groups have also found it possible to get access to tax information, and to have that information made publicly available, through initiating court proceedings. For instance, “UK Uncut” took a case against HMRC in respect of a tax settlement the body arrived at with Goldman Sachs. Whilst the High Court found that HMRC had acted lawfully, the proceedings and judgment shone a light on the details of the particular settlement.

5. Conclusion
Before anything can actually be assessed, there must be information that can form the basis of the assessment. This is true in tax as it is in any other walk of life. A further question arises in respect of the source of that information. Should it be purely from taxpayers? Or should tax authorities be entitled to look at information gathered from other sources also? It seems clear that in order to crosscheck taxpayer’s information, the latter will be necessary. But to effectuate this end, it will be necessary for the tax authority to be granted the requisite powers, and wherever this occurs, the issue of taxpayer protections necessarily arises. James Madison recognised this as long ago as 1788 when he wrote: “you must first enable the government to control the governed; and in the next place oblige it to control itself”. For this reason additionally, the need for tax authorities themselves to act transparently towards taxpayers becomes obvious – it provides for control of the authority by providing clear evidence and means of investigation to concerned parties to either

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208 FOIA 2000, s. 1.


210 FOIA 2000, s. 12.


212 See Joined Cases C-203/15 and C-698/15 Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others (21 December 2016), Opinion of Advocate General Saugmandsgaard Øe, para 1.
ensure that the authority is acting within its prescribed limits or to obtain remedies where the body fails to act within them.

To this end, this report has elaborated upon the three prominent issues which arise in respect of tax transparency in the UK – the powers of HMRC to obtain and use taxpayer information, the protections for taxpayers and the transparency of HMRC towards taxpayers and the public generally. Whilst the nature and scope of these issues will undoubtedly change as our world becomes ever more transformed by technology, the basic issues themselves will remain – just as the nature and scope of the State has changed significantly since James Madison issued those words in 1788, but the core principles he pronounced then have not.

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