
Tax evasion, money laundering and tax transparency in the EU Overseas Countries and Territories

Ex-Post Impact Assessment

STUDY

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Authors: Isabelle Ioannides and Jan Tymowski

Ex-Post Evaluation Unit

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Study

At their meeting of 12 October 2016, the coordinators of the European Parliament's Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (PANA) took the decision to request from the Directorate General for European Parliamentary Research Services (EPRS) to produce the following study: 'Assessment of the legal, political and institutional framework on offshore practices related to tax evasion, money laundering and tax transparency in the EU Overseas Countries and Territories (OCT), as defined in Annex II (TFEU), and the relations of the OCTs with EU Member States.'

The opening analysis was prepared in-house by the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within EPRS, whereas the specific contributions on individual Member States were commissioned from external experts.

It is hoped that this analysis will feed into ongoing discussions in the PANA inquiry committee on the effective implementation and enforcement of EU law in relation to money laundering, tax avoidance and tax evasion in and by Member States and their associate and dependent territories.

Abstract

This study aims to present the legal, political and institutional framework governing offshore practices in the Overseas Countries and Territories (OCTs) of the European Union, which fall under the sovereignty of four Member States: Denmark, France, the Netherlands and the United Kingdom. It contains an opening analysis that defines the key concepts, including *tax evasion*, *money laundering* and *tax transparency*; outlines the scope of the study (to differentiate the OCTs from other places often mentioned within the context of offshore financial services); and briefly describes the particular case of Greenland. In addition, a comparative analysis of the legal, political and institutional framework governing EU relations with and within the respective OCTs is complemented by an overview of the EU framework and opportunities for action. This aspect can be of significance, especially in view of the UK's announced withdrawal from the European Union. The detailed annexed contributions covering the OCTs under French, Dutch and British rule, and which constitute a basis for this analysis, were written by external experts.

AUTHORS

Dr Isabelle Ioannides and Jan Tymowski, Ex-Post Evaluation Unit

To contact the Unit, please email: EPRS-ExPostImpactAssessment@ep.europa.eu

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Executive summary

The release of the Panama Papers has triggered additional efforts – including by the European Parliament – to understand the relationship, on the one hand, of the Overseas Countries and Territories (OCTs), some of which are commonly considered as tax havens, and, on the other, of the EU Member States to which they are related (Denmark, France, the Netherlands and the United Kingdom). Notwithstanding the importance of according equal attention to other outermost regions, including those that are of concern in the areas of financial services and taxation, this study limits its analysis to the OCTs listed in Annex II of the Treaty on the Functioning of the European Union (TFEU).

With regard to the OCTs' legal status, the situation differs between the individual Member States and between the territories subject to their sovereignty. While some of them, including those active in financial services that 'belong' to the UK and three countries of the Kingdom of the Netherlands (Aruba, Curaçao, and Sint Maarten), seem to have reached a status of quasi-independent countries with significant freedom for self-governance, others (especially the French OCTs) remain formally autonomous but under the clear and tight control of the Member State. In the case of Greenland, which is the only OCT associated with Denmark, its decision to withdraw from the EU might eventually lead to full independence once the economic situation allows.

The institutional arrangements of OCTs with the relevant EU Member States directly affect the possibility to establish policies and adopt regulations, including on taxation and money laundering. In some of them (especially in the UK OCTs in the Caribbean), the non-existent, or very low, corporate taxation and the presence of rules allowing the creation of complex offshore structures, have led to an important increase in the number and scale of registrations and financial operations, now subject to alleged practices of tax avoidance and/or worse. As for the anti-money laundering legislation, rules in those OCTs that remained largely dependent on their continental authorities, seem to be more aligned with those of the EU (which are themselves currently under revision). In addition, the relatively high tax burden in Greenland and the French OCTs does not offer the conditions that would lend them to becoming potential tax havens.

As the EU Treaties do not contain specific legal obligations for the Member States to ensure the application of the relevant EU law in their respective OCTs, ensuring that international tax cooperation rules and anti-money laundering are respected becomes a political responsibility for the four Member States (Denmark, France, the Netherlands and the UK). Because they rely economically on financial services, and in order to avoid being blacklisted, the OCTs have adopted various international standards, such as the OECD's automatic exchange of information in tax matters. In addition, the sovereign power of the UK government has influenced at least some regulatory improvements of offshore practices in Bermuda, the Cayman Islands and the British Virgin Islands. However, the specific realities that underpin relations between the UK and its OCTs, particularly the fact that most of them enjoy budgetary self-sufficiency, mean that in practice the UK's political leverage is more limited than may be thought.

Beyond the regulatory framework, which for some of the OCTs is more or less similar to that of the EU *acquis communautaire* and in line with international standards, implementation of the law by the local authorities is of concern for a number of the UK and Dutch OCTs. This is particularly the case for OCTs with smaller populations, such as in the Caribbean countries of the Kingdom of the Netherlands, where insufficient financial and human resources can create problems of enforcement.

The EU could use the opportunity of its direct relations with those countries and territories (especially through the framework of the Overseas Association Decision and the separate agreements with Greenland), to pressure those OCTs that do not respect international standards of tax cooperation and transparency to do so. This could be particularly important in the case of the Caribbean countries of the Kingdom of the Netherlands, where the central government of the Netherlands (in The Hague) has limited possibilities to intervene. The improvement in local oversight capacity and mitigation of budgetary limits on human resources in all the OCTs could also help tackle the challenges of combating tax evasion and money laundering.

It remains to be seen how the relationship of the EU with the British OCTs will change following the Brexit negotiations, but the global context might suggest that the same requirements that the Union could ask of third countries considered as tax havens, could also potentially apply to the UK.

Acronyms

AEOI	Automatic exchange of information
AML	anti-money laundering
BEPS	Base erosion and profit shifting
BVI	British Virgin Islands
CBCR	country-by-country reporting
CCCTB	Common consolidated corporate tax base
CJEU	Court of Justice of the European Union
EU	European Union
EVAL	Ex-Post Evaluation Unit, European Parliament
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
GCEFSL	Groningen Centre for European Financial Services Law
GDP	gross domestic product
MCAA	Multilateral Competent Authority Agreement
OAD	Overseas Association Decision
OCTA	Association of the Overseas Countries and Territories of the European Union
OCTs	Overseas Countries and Territories
OECD	Organisation for Economic Cooperation and Development
PANA	European Parliament Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion
PWP	Partnership Working Parties
SRA	Self Rule Act
TAXE 2	Special European Parliament Committee on Tax Rulings
TFEU	Treaty on the Functioning of the European Union
UNODC	United Nations Office for Drugs and Crime
USA	United States of America
VAT	value added tax

1. Introduction

The release of the so-called Panama Papers in April 2016 added a sense of urgency to the need for tackling the issue of offshore tax havens, including in some of the EU Member States' Overseas Countries and Territories (OCTs). The leak of 11.5 million files from the database of Mossack Fonseca, the world's fourth-largest offshore law firm, highlighted in particular the role played in the offshore financial sector by UK Overseas Territories in the Caribbean, placing the spotlight on the British Virgin Islands (BVI), Bermuda and the Cayman Islands. More than half of the 200 000 companies for which Mossack Fonseca acted as a registered agent were based in the British Virgin Islands.¹ It should be kept in mind that these records pertain to the activities of only one law firm in one country. Therefore, it is difficult to judge what share of the 'market' for such services they constitute.

In line with the public outcry against tax avoidance and tax evasion² and demands for tightening the offshore sector in the OCTs, point 1.14 of the PANA Committee's mandate, concerning the investigation of potential breach of the duty of sincere cooperation, specifically refers to '*Member States and their associate and dependent territories*'.³

Each of OCTs of the EU has a special relationship with one of four EU Member States: Denmark, France, the Netherlands or the United Kingdom. They are listed in Annex II of the Treaty on the Functioning of the European Union (TFEU), according to its Article 198, and the updated list is included in section 4.2 of this study. The EU Treaties do not contain any specific legal obligations for Member States to ensure the implementation of EU law – including laws relevant to countering tax evasion and money laundering and boosting tax transparency – in their OCTs. Therefore, the *acquis communautaire* does not automatically apply to them. However, the special relationship that the aforementioned Member States have with the OCTs is an argument often used to call on the political responsibility of Member States to play a role in this area.

2. Objectives of the study

Against this background, the main objective of this study is to contribute to understanding how Denmark, France, the Netherlands and the United Kingdom are potentially able to influence their OCTs in the fight against offshore practices. To that end, the study examines and assesses the effectiveness of the legal, political and institutional framework on offshore practices in the OCTs of these four Member States with regard to tax evasion, money laundering and tax transparency. Accordingly, it asks:

¹ Caribbean Tax Haven Scrutiny Will Bring Little Reform, *Oxford Analytica Daily Briefing*, 27 April 2016.

² The difference is explained in point 4.1.

³ [European Parliament decision of 8 June 2016](#) on setting up a committee of inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion, its powers, numerical strength and term of office, P8_TA(2016)0253; *nota bene*: only Member States are mentioned in Article 4(3) of the EU Treaty.

- From a *legal perspective*, what are the regulations framing the relationship between Member States and the OCTs on these issues, and what are their strengths and weaknesses?
- From an *institutional perspective*, how do these regulations apply – if at all – and how does the organisational set-up in the OCTs facilitate (or not) their implementation?
- From a *political perspective*, what effect – if any – can the relevant Member States have in terms of guiding, encouraging and/or persuading the OCTs to counter tax evasion and money laundering and boost tax transparency? What are the limits of Member States' political leverage?

The analysis also attempts to suggest possible options for improved or fail-safe regulations, legislation and institutional arrangements to ensure that offshore practices related to tax evasion and money laundering are countered and tax transparency is respected in the OCTs.

3. Methodology and structure of the study

This study consists of an opening analysis and synthesis of findings, drafted in-house by the Ex-Post Evaluation Unit (EVAL), followed by external contributions for three of the four EU Member States that are linked to Overseas Countries and Territories, as identified in Annex II TFEU.⁴

The opening analysis, which precedes these three external contributions, seeks to:

- define and contextualise the problem related to tax evasion, money laundering and tax transparency in the EU OCTs;
- examine the legal, political and institutional framework of relations between Greenland and Denmark relevant to tax evasion, money laundering and tax transparency;
- provide a comparative analysis of the strengths and weaknesses of the legal, political and institutional framework of the three cases examined externally, with regard to the relevant aspects of the topic at hand;
- explain the EU policy framework governing the control of tax evasion and the countering of money laundering to assess the possibility for and potential of EU action in the OCTs on these issues; and,
- identify possible options for improving the fight against tax evasion and money laundering and encouraging tax transparency in the OCTs linked to Member States.

The three annexed contributions were prepared by experts from the countries of the specific case studies who are specialists in the institutional and legal systems of their own

⁴ The three more complex case studies – France, the Netherlands and the United Kingdom – have been outsourced to experts in those countries. Denmark, which has only one OCT (Greenland), is examined in the opening analysis under section [5](#).

countries and more specifically the relationship between their country and its OCTs. They were also able to conduct research in the language of the Member State in question and consult primary documents in that language.

These external contributions, from which the authors of the study have drawn substantially to draft the comparative analysis in this introductory part, were prepared as follows:

- The French case study ([Annex I](#)) was written by Prof. Dr A. Maitrot de la Motte of the University of Paris-Est Créteil, France;
- The Dutch case study ([Annex II](#)) was written by Prof. Dr H.E. Bröring, Prof. Dr O.O. Cherednychenko, Prof. Dr H.G. Hoogers and G. Karapetian LL.M. from the Department of Constitutional Law, Administrative Law and Public Administration and the Groningen Centre for European Financial Services Law (GCEFSL), University of Groningen, the Netherlands;
- The British case study ([Annex III](#)) was written by Dr P. Clegg from the Department of Health and Social Studies of the University of the West of England, Bristol, UK.

Since these contributions were prepared by different experts, they cover relevant issues to differing degrees and according to the particular needs of each of the case studies. Nevertheless, they all address the following aspects:

- they analyse the legal, institutional and political framework of the relationship between the EU Member State and its OCTs;
- they assess the extent to which this framework allows the EU Member State in question to exercise its influence on its OCTs in combating money laundering and tax evasion and promoting tax transparency;
- in doing so, they provide an overview of the most relevant legislation that is applicable on these issues in the OCTs and examine whether or not it is actually applied;
- where possible, they identify options for strengthening the control of tax evasion and money laundering, and enhancing tax transparency in the OCTs.

To address these questions, the authors and external experts conducted a systematic analysis of relevant EU and national legislative instruments, European and national case law, legislative history, international standards, the academic literature and studies as well as commentaries prepared by expert communities and relevant stakeholders.

4. Key concepts

This chapter explains the main concepts related to the attractiveness of offshore financial centres, and clarifies which territories are included in the 'OCT' category (and which are not).

4.1. Definitions of tax evasion, money laundering and tax transparency

The disclosure of the Panama Papers by the international consortium of investigative journalists was not the first time that taxation matters were discussed in the context of the global mobility of capital. Even though tax matters are largely left under the competence of the EU Member States,⁵ various attempts to limit the financing of terrorism and money-laundering, and improve the exchange of information between competent authorities, have already gained momentum and continue to feature prominently on the agendas of the European and other international institutions.

It is also important to stress, as already mentioned in Houben's analysis on the mandate of the PANA Committee, that *'there is nothing unlawful about offshores and advising on and assisting in the setting up and management of offshores as such'*.⁶ In that context, a differentiation needs to be made between tax avoidance (legal act) and tax evasion (illegal act), although it is often only possible to categorise a specific case after a thorough investigation (which is not the aim of the present study).

'Tax evasion' is defined as an illegal act of evading taxes by concealing income, earned either legally or illegally, from detection and collection by the tax authorities. This can be done, for instance, through a false tax declaration, or by placing in a foreign bank money earned through a legal activity.⁷

Tax evasion differs from **tax avoidance** which is the use of legal methods to modify an individual's or a company's financial situation so as to lower the amount of income tax owed. This is generally accomplished by claiming the permissible deductions and credits and through sound financial planning techniques, such as phasing the sale of assets over a period long enough to effect maximum exemption from capital gains tax.⁸

'Money laundering' refers to acts involving the processing of proceeds of crime to conceal their illegal origin and bring them back into the legal economy. This criminal activity takes place without the knowledge of the authorities (tax authorities and others, depending on the nature of the operations).⁹ This definition is in line with the one used by the Financial

⁵ Articles 110-112 TFEU essentially concern the prohibition of additional taxes between Member States, while Article 113 imposes an obligation of unanimity in the Council for any harmonisation.

⁶ Robby Houben, [Mandate of the Panama Inquiry Committee](#), PE 587.327, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies, European Parliament, Brussels, November 2016, p. 8.

⁷ For a more thorough analysis of tax evasion and its impact on financial services, see Isabelle Ioannides, [The Inclusion of Financial Services in EU Free Trade and Association Agreements: Effects on Money Laundering, Tax Evasion and Avoidance](#), PE 579.326, European Parliamentary Research Service, European Parliament, Brussels, June 2016, p. 9.

⁸ [Tax Avoidance](#), Investopedia, 2017.

⁹ Isabelle Ioannides, [The Inclusion of Financial Services in EU Free Trade and Association Agreements: Effects on Money Laundering, Tax Evasion and Avoidance](#), PE 579.326, European Parliamentary Research Service, European Parliament, Brussels, June 2016, p. 9. For a detailed explanation of the

Action Task Force (FATF), the international organisation responsible for anti-money laundering (AML) standard-setting. For the purposes of this study, illegally obtained money or investments (through an outside party) is transferred through different financial intermediaries so that its original source is concealed from the taxation or other regulatory authorities, and is made to appear legal. Money laundering works in three phases: cash from predicate offence¹⁰ is: (a) deposited into accounts ('placement'); (b) moved into other institutional units (e.g., through bank transactions) to obscure the origin ('layering'); and (c) used to acquire legitimate assets (e.g. through the use of casinos, fake supermarkets) ('integration').¹¹

Tax transparency is seen as a way to reduce the possibility for tax evasion. The aim is to help populations of resource-rich countries to hold their governments accountable for these proceeds. To that end, it provides for the exchange of non-resident financial account information with the tax authorities in the account holder's country of residence. Participating jurisdictions that implement automatic exchange of information (AEOI) send and receive pre-agreed information each year, without having to send a specific request.¹² A large number of jurisdictions have announced their plan to implement the new standard. Around 50 jurisdictions will work towards having their first information exchanges by September 2017; and many more will follow in 2018. These commitments can be found in the [OECD Joint Statement by the Early Adopters Group](#), the [OECD Declaration on Automatic Exchange of Information in Tax Matters](#) and the [G20 Finance Ministers and Central Bank Governors' Communiqué](#). To bring these initiatives together, the [Global Forum on Transparency and Exchange of Information for Tax Purposes](#) has undertaken a commitment process to ascertain its members' implementation timelines.¹³

In addition, the [OECD's Base erosion and profit shifting \(BEPS\)](#) initiative includes 15 proposals for action, a number of which are designed to enhance transparency towards and between tax authorities by exchange of information. BEPS Action 13 is particularly relevant from the angle of corporate transparency, as it contains features of country-by-

transposition of the definition of money laundering in the relevant legislation in the EU Member States, see Brigitte Unger et al., [The Economic and Legal Effectiveness of Anti-Money Laundering and Combatting Terrorist Financing Policy, Final Report](#), ECOLEF Project, Project funded by DG Home Affairs, European Commission, JLS/2009/ISEC/AG/087, Utrecht University, the Netherlands, February 2013.

¹⁰ According to Article 2 of the [United Nations Convention against Transnational Organized Crime](#), a 'predicate offence' refers to any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention (i.e., the criminalisation of the laundering of proceeds of crime). In that sense, a predicate offence is a crime that is usually committed in preparation of a bigger and more serious crime. For instance, in the context of this study, a predicate crime would be to produce a fake ID card in order to withdraw money from someone's bank account or open a bank account (therefore concealing one's real identity).

¹¹ Eurostat and United Nations Office for Drugs and Crime (UNODC), *Handbook on the Compilation of Illegal Economic Activities Statistics in National Accounts and Balance of Payments* (forthcoming).

¹² OECD, [Standard for Automatic Exchange of Financial Account Information in Tax Matters](#), Paris, July 2014.

¹³ See the OECD's [Global Forum on Transparency and Exchange of Information for Tax Purposes](#).

country reporting (CBCR), even if the disclosure will be done on a confidentiality basis to tax administrations. The same BEPS Action also provides a guiding framework on transfer pricing documentation and CBCR, a model legislation, and proposes a multilateral competent authority agreement (MCAA) on the exchange of CBCR.¹⁴

4.2. Identifying the Overseas Countries and Territories

As already explained, the content of Annex II TFEU is decisive in the qualification of a certain country or territory as an OCT, to which the provisions of Part IV of the TFEU apply. Table 1 below presents the list – updated in the view of the fact that one of the French OCTs (Saint-Barthélemy) was added in 2010, and another one (Mayotte) withdrawn in 2012, in accordance with Article 355(6) TFEU.¹⁵ For comparison, only the estimated number of permanent residents and GDP figures are shown here.¹⁶ The last column can serve as a quick way to identify those OCTs that are concerned by the debate on financial services.

Table 1: Key data on the EU Overseas Countries and Territories

EU Member State	Territory	Permanent population	GDP per capita (in €)	Main sectors of economic activity
Denmark	Greenland	55 847	30 020	Fishing, mining, tourism
France	Saint-Barthélemy	9 131	35 700	Tourism, buildings and public works, non-financial market sector, trade
	New Caledonia and Dependencies	268 000	28 931	Mining activities, trade, construction, tourism
	French Polynesia	271 800	16 000	Services, tourism
	French Southern and Antarctic Territories	None	n/a	n/a
	Wallis and Futuna Islands	12 200	10 100	Agriculture, non-merchant services (education, health and public services), trade
	Saint Pierre and Miquelon	6 081	28 327	Public administrations and merchant services

¹⁴ For further information, see OECD, [Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report](#), OECD/G20 Base Erosion and Profit Shifting Project 2015, Paris, 2015.

¹⁵ Only Denmark, France and the Netherlands are mentioned in that provision, while the list of UK's OCTs seems not to be subject to change without the modification of the Treaty itself, especially according to the second sentence of Article 355(2) TFEU.

¹⁶ For further information on the size and location of the OCTs, see the respective tables and maps in the three Annexes.

EU Member State	Territory	Permanent population	GDP per capita (in €)	Main sectors of economic activity
Kingdom of the Netherlands	Aruba	110 309	27 134	Tourism
	Bonaire	19 408	20 545	Tourism
	Curaçao	158 986	21 219	Tourism, oil refinery
	Saba	1 947	20 075	Tourism, medical school
	Sint Eustatius/ Statia	3 193	24 673	Tourism, oil storage terminal
	Sint Maarten	39 410	14 447	Tourism
United Kingdom	Anguilla	16 318	18 763	Tourism, construction, financial services
	Cayman Islands	58 238	55 966	Financial services , tourism
	Falkland Islands	2 562	89 941	Fisheries, agriculture, tourism
	South Georgia and the South Sandwich Islands	None	n/a	n/a
	Montserrat	4 922	11 160	Construction, tourism, agriculture, banking
	Pitcairn	54	n/a	Subsistence fishing, horticulture, and sale of handicrafts
	Saint Helena and Dependencies	5 134	6 378	Tourism, coffee, stamp sales
	British Antarctic Territory	None	n/a	n/a
	British Indian Ocean Territory	None	n/a	n/a
	Turks and Caicos Islands	33 740	20 868	Tourism, construction, financial services
	British Virgin Islands	29 537	30 124	Financial services , tourism
	Bermuda	65 091	80 441	Financial services , tourism

Source: Data taken from respective tables in the Annexes (*apart from Greenland*).¹⁷

¹⁷ See [Greenland in Figures 2016](#); for some OCTs, US\$ was converted to € by a factor of 0.94.

As the above table shows, it is a number of the British OCTs that are particularly active in offshore financial practices. This sector is extremely important to their economies, in terms of both GDP and employment. For example, around 60 % of the British Virgin Islands' annual revenue is derived from offshore financial services. Bermuda and the Cayman Islands also have sizeable interests in the sector. Each territory serves a particular niche. That is, Bermuda is the third-largest centre for re-insurance in the world and the second-largest domicile of captive insurance (where the insurance company is owned and controlled by its insurers), while the Cayman Islands is the world's leading centre for hedge funds. Overall, the British Virgin Islands are the leading domicile for international business companies.¹⁸ (See [Annex III](#).)

4.3. Which territories are *not* examined

Before entering into the analysis of the Overseas Countries and Territories covered by this study, it is also vital to understand which 'countries' and/or territories will not be covered in detail, even though they may appear in multiple documents related to financial services in general and in the Panama Papers more specifically.

4.3.1. OCTs with exceptional circumstances

Understandably, this study does not examine the overseas territories that do not have a permanent population. These include Clipperton, in the Northern Pacific Ocean, the French Southern and Antarctic Territories that are French OCTs, and the British Antarctic Territory and British Indian Ocean Territory that are UK OCTs.

4.3.2. Outermost regions

Contrary to the OCTs, the outermost regions (OMR) are territories to which the European legislation does apply, even if there are exceptions (including fiscal rules) due to their remoteness and other factors, as listed in Article 249 TFEU. The current list of OMR is slightly different from the original one provided for in Article 355(1) TFEU, since the status of Saint-Barthélemy was changed to OCT in October 2010 (and is therefore covered in this study), while that of Mayotte was changed to OMR in July 2012. Other French OMR are Guadeloupe, French Guiana, Martinique, Reunion, and Saint Martin. Portugal has two OMR (the Azores and Madeira), while Spain has one (the Canary Islands).

In addition to describing the applicability of state-aid and (direct and indirect) taxation rules in these territories, Guersen argues in his conclusion that '*the French OMR [...] are not known/(in)famous for offering off-shore tax structures*'.¹⁹ While Madeira has become an offshore finance centre based on low corporate taxation,²⁰ the economy of the Azores is

¹⁸ Caribbean Tax Haven Scrutiny Will Bring Little Reform, *Oxford Analytica Daily Briefing*, 27 April 2016.

¹⁹ Wessel Guersen, [Influence of EU Law on Taxation in the EU Member States' Overseas Territories and Crown Dependencies](#), PE 578.989, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies, European Parliament, Brussels, June 2016, p. 18.

²⁰ A short description is available here: <http://www.offshorebanksdirectory.com/en/offshore-banks/madeira-banks-portugal/>

dominated by traditional sectors (e.g., agriculture and fishing) and tourism.²¹ For their part, the Canary Islands, that share with the French OMR the fact that they are not subject to the EU VAT regime, are still able to attract foreign companies (with favourable conditions mixed with some requirements that are claimed to bring advantages to the local economy),²² but without the negative connotation of 'tax haven'.²³

In accordance with Article 355(1) TFEU, the provisions of the Treaties shall apply to OMR, and thus, apart from any exceptions included in the relevant legislative acts, the *acquis communautaire* constitutes the legal framework in those territories, as in EU Member States.

4.3.3. UK Crown Dependencies

It is important to understand that the UK's Crown Dependencies (also referred to as the Channel Islands and the Isle of Man) are a separate category. As a result – just like the OMR, Gibraltar (see below) and a few other territories – they are not listed in Annex II to the TFEU. They are often mentioned alongside the OCTs in the context of offshore financial services, but their governance structure is different, and will only be described here briefly for the clarity of differentiation.

In short, the Crown Dependencies are the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man.²⁴ The UK government is responsible for defence and international representation of the Crown Dependencies. However, since taxation matters are arranged according to their autonomous status, the agreements on tax information exchange within the OECD framework are concluded by their governments directly. Formally though, it is the Crown (that is, currently, the British Queen), acting through the Privy Council, who bears ultimate responsibility for ensuring the Dependencies' good governance. As in the assessment made in [Annex III](#) concerning British OCTs, '*the independence and powers of self-determination of the Crown Dependencies are*', in the view of the Members of the House of Commons, '*only to be set aside in the most serious circumstances*'.²⁵

Offering advantageous financial services on an international scale has allowed the UK Crown Dependencies to develop significantly as offshore financial centres (making up a large part of the local economy), and brought increased prosperity. In a special report presented to the UK Home Secretary in late 1998, it was considered that their broad regulatory approach was '*to follow UK styles of regulation, with adjustments for particular needs*

²¹ Nevertheless, a certain reduction in tax rates was considered as unlawful state aid by the European Commission Decision 2003/442/EC, later up-held by the CJEU in Case C-88/03.

²² Such conditions include a minimum number of local employees and a guarantee of investment. See Pedro da Cruz, [Shelter your Wealth in the Canary Islands](#), *The Telegraph*, 29 November 2011.

²³ See Laura Secorun Palet, [The Rise of Europe's Unlikeliest Tax Haven](#), *The Daily Dose*, 30 September 2015.

²⁴ The Bailiwick of Guernsey includes the separate jurisdictions of Alderney and Sark and the islands of Herm, Jethou and Lihou. The island of Brecqhou is part of Sark. For further details, refer to the UK Ministry of Justice at <https://www.gov.uk/government/publications/crown-dependencies-jersey-guernsey-and-the-isle-of-man>.

²⁵ UK House of Commons, [Justice Committee - Eight Report of Session 2009-2010](#), p. 45.

*and risks of centres serving mainly non-resident customers; and to comply wherever appropriate with international and EU standards’.*²⁶ In a 2009 review of British offshore financial centres, the Crown Dependencies were considered to be best performers in quality and extent of financial planning, while a general recommendation for all jurisdictions was to ensure that ‘*governance arrangements in their regulatory authorities are sufficient to maintain the integrity and independence of all decisions taken’.*²⁷

Whereas the OCTs are subject to the provisions of and arrangements made under Part IV of the TFEU, Article 355(5)(c) states that ‘*the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands’*, as set out in the Accession Treaty of 1972.²⁸ As those islands are not part of the UK’s territory, but are Her Majesty’s possession, specific arrangements were indeed made under Protocol 3 to the Act of Accession,²⁹ *inter alia* including them under the Union Customs Code and ensuring the application of EU law only with regard to trade in agricultural products. As Guersen explains in his study for the TAXE 2 Committee, the state aid offered to the Channel Islands and the Isle of Man with regard to offshore tax constructions is thus outside the control of the European Commission.³⁰ He also holds, in relation to the EU legislation on financial services, that the status of Crown Dependencies is that of ‘third countries’. Interestingly, the perspective of Brexit seems not to have significantly affected those territories so far. They will aim to maintain the current arrangements with the rest of Europe.³¹

4.3.4. Gibraltar

Although it is not mentioned explicitly in Article 355 TFEU, its point 3 covers Gibraltar, and no other territories, by stating that the ‘*provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible’*. In effect, the EU law applies directly in that territory, but an exception was made in the UK Act of Accession to the effect that Gibraltar is excluded from the common customs area. Today, apart from being an attractive tourist destination and the location of a British military base, it is also – as a result of the relatively low corporate taxation – an important centre for financial services (including funds and insurance).³² The applicability of EU law to Gibraltar can be shown by the cases brought to the Court of Justice of the European Union (CJEU) in relation to its state-aid decisions, examples of which are enumerated in Guersen’s study mentioned

²⁶ See [Review of Financial Regulation in the Crown Dependencies](#), point S26.

²⁷ See [Final Report of the Independent Review of British Offshore Financial Centres](#), pp. 13-14.

²⁸ When Denmark, Ireland and the UK joined the then European Community.

²⁹ [Acts of Accession of Denmark, Ireland and the United Kingdom](#), *Official Journal* L 73, 1972, p. 14.

³⁰ Wessel Guersen, [Influence of EU Law on Taxation in the EU Member States’ Overseas Territories and Crown Dependencies](#), PE 578.989, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies, European Parliament, Brussels, June 2016, p. 18.

³¹ See, for example, the official statements referred to in Kirsten Hastings, [No Change for Crown Dependencies’ Financial Services Sectors](#), *International Advisor*, 27 June 2016.

³² Offers, such as those made on this website: <http://www.gibraltaroffshore.com/index.htm>, confirm that ‘offshore’ remains a positive adjective in some quarters.

above.³³ Following the UK referendum on Brexit in June 2016, the government and businesses of Gibraltar are considering various options to maintain a special status and its advantages.³⁴

5. The case of Greenland

In addition to the French, Dutch and British OCTs, Annex II TFEU also lists Greenland, which is the only overseas territory of the Kingdom of Denmark.³⁵ The biggest island in the world was part of the EU between 1973 and 1985, but changed its status after a referendum held in 1982.³⁶

With a population of less than 60 000 inhabitants (and almost 90 % of them at least partially of local origin), Greenland is still – despite its large size and harsh climate – comparable to other islands that are associated with the European Union under the Overseas Association Decision (OAD). (See section [7.2.1](#).) Greenland's economy is based on the fisheries industry, mineral resources (including uranium), tourism and some land-based industries. Public finances are still largely dependent on grant support from Denmark (constituting more than half of the annual budget), but also on its association with the EU.

Greenland's current legal status is outlined by the Self Rule Act (SRA) of 2009.³⁷ This act enumerates the areas of responsibilities that can be transferred by the Kingdom of Denmark to the Greenlandic government, including financial regulation and supervision. A transfer was already made with regard to direct taxation. The key initiatives of a three-party coalition government that was established in the end of 2014 included improving access to financing for new businesses and enhancing Greenland's corporate tax competitiveness.³⁸ However, with an income tax rate of 30 %, it can hardly be expected to become a tax haven comparable to some of the other territories covered by this study. The new coalition governing Greenland since October 2016 has declared that an *'analysis must be undertaken of the introduction of lower corporation tax with a view to improving Greenland's competitiveness, self-sufficiency and raising the degree of processing [fish]'* and also promised to consider cash flows between Greenland and Denmark, and evaluate the establishment of an own bank for Greenland.³⁹

³³ Wessel Guersen, [Influence of EU Law on Taxation in the EU Member States' Overseas Territories and Crown Dependencies](#), PE 578.989, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies, European Parliament, Brussels, June 2016, p. 29.

³⁴ See, for example, Angus Berwick and Carolyn Cohn, [Gibraltar Looks to Reinvent Itself after Brexit](#), *Reuters*, 23 September 2016.

³⁵ Denmark is also sovereign over the Faeroe Islands, which are *expressis verbis* excluded from the application of EU law by Article 355(5)(a) TFEU.

³⁶ 52 % of voters decided then to change Greenland's relation with the EU.

³⁷ See [English translation](#).

³⁸ US Department of State, [2015 Denmark Investment Climate Statement](#), p. 7.

³⁹ [Coalition Agreement 2016-2018 - Equality, Security, Development](#), pp. 5-6.

Instead of being fully covered by the instrument related to all OCTs (the 11th European Development Fund),⁴⁰ Greenland is eligible for EU funding through a separate EU-Greenland Partnership, itself based on the relevant Council decision.⁴¹ An amount of € 217.8 million was foreseen for this cooperation in 2014-2020, and the programming document,⁴² signed in October 2014, concentrates on education as the best way to ensure a diversification of economy and lead to sustainable growth and – possibly – self-sufficiency. Additionally, a joint declaration on the relations between EU and Greenland/Denmark, signed in March 2015, established common objectives, indicated that the OCT framework is appropriate, and supported regular dialogue and consultations.⁴³

In accordance with Article 355(2) TFEU, Greenland (among other OCTs listed in Annex II to the Treaty) is subject to the provisions of Part IV (on association of the overseas countries and territories). The additional reference is Article 204 TFEU and Protocol No 34 mentioned there, which deals exclusively with fishing arrangements.

While Denmark itself is considered a country with an adequate AML system, its laws do not apply automatically in Greenland.⁴⁴ The local government is responsible for updating its legal framework to international conventions and ensuring full implementation of relevant resolutions (for example, on combating the financing of terrorism). On the basis of the SRA, Greenland is also authorised to conclude international agreements; it has already signed, in December 2015, the OECD's Multilateral Competent Authority Agreement, which aims to allow automatic exchange of information on financial assets held by non-residents.⁴⁵ In recent years, Greenland also signed several bilateral agreements facilitating the exchange of information relating to tax matters with other OCTs (especially the UK and Dutch ones) and with the UK Crown Dependencies, as well as certain third countries.⁴⁶ From the perspective of private business, Greenland is considered a low-risk country, including the aspects of financial markets and tax policy.⁴⁷

⁴⁰ Where Greenland is eligible only under the regional thematic component.

⁴¹ [Council Decision 2014/137/EU of 14 March 2014 on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other](#), *Official Journal* L 76, 15 March 2014, pp. 1-5.

⁴² See [Programming Document for Sustainable Development of Greenland 2014-2020](#).

⁴³ [Joint Declaration by the European Union, on the one hand, and the Government of Greenland and the Government of Denmark, on the other, on relations between the European Union and Greenland](#), Brussels, 19 March 2015.

⁴⁴ Interestingly, when Member States declared to ensure the application of the Savings Directive in some of their OCTs, it was not done for Greenland.

⁴⁵ See [OECD's Automatic Exchange Portal](#).

⁴⁶ For the list of those agreements, see <http://aka.gl/da/Borger/SKAT/Skatteaftaler> - the links provided on this official website direct to the relevant documents in EN. The main reason that at least some of the countries and territories signed agreements with Greenland might have been a formal improvement in their OECD standing, related to the number of agreements signed.

⁴⁷ Arctic Cluster of Raw Materials, [Greenland Benchmarking Report 2016](#), pp. 35-36.

The future of Greenland might be further autonomy or even independence, as declared in the coalition agreement signed by the new coalition in October 2016.⁴⁸ It remains to be seen if any negotiations with Denmark '*to ensure that Greenland itself can safeguard its own interests in international negotiations*' will affect financial services and put this OCT on the global stage. Apart from its interests in fishing, which were at the origin of Greenland's change of status in 1985, the increased availability of natural resources of this island and the competition for rights over the Arctic region, might be decisive in this process.

Regardless of any further changes to the status of Greenland, the text of recital 13 of the aforementioned Council Decision 2014/03/137 might be an inspiration for continued cooperation with the European Union: '*Union financial assistance, allocated through the partnership, should bring a European perspective to the development of Greenland and should contribute to the strengthening of the close and long lasting ties with it, while strengthening the position of Greenland as an advanced outpost of the Union, based on the common values and history which links the partners.*'⁴⁹ In fact, the same could be said in relation to other OCTs (under the sovereignty of France, the Netherlands and the UK), including those that matter in offshore financial services.

6. Comparative analysis of the case studies

This chapter analyses the framework for offshore practices in the OCTs of the EU, taking into account the information provided in the three annexed country cases. It is important to underline that this chapter concentrates on those elements that can lead to some general comparative conclusions, while data necessary for an in-depth assessment of questions regarding each specific country or territory can be found in the Annexes themselves.

6.1. Legal framework

This section shows that not all OCTs have the same status, either within a particular Member State or across Member States. As this section goes on to demonstrate, the legal status of a given OCT also defines the power and leverage that the Member State can have on influencing decisions, including on tax evasion, money laundering and tax transparency.

6.1.1. Status of overseas countries and territories

Each EU Member State that currently exercises authority over an overseas country or territory, must have taken a decision at some point as to how much autonomy it grants to former colonies or areas that it controlled in another form in the past. The legal status of EU OCTs also differs among the OCTs of a given Member State. This is important because, as will be shown in the next section, the content of any EU law – including that pertaining

⁴⁸ [Coalition Agreement 2016–2018 - Equality, Security, Development](#), p. 2.

⁴⁹ [Council Decision 2014/137/EU of 14 March 2014 on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other](#), *Official Journal* L 76, 15 March 2014, pp. 1-5.

to combating tax evasion and money laundering – is applicable to a different extent in the different OCTs of a given Member State.

In practice, this means that the UK OCTs (at least those that are concerned by the Panama Papers) and three of those of the Kingdom of the Netherlands (the countries of Aruba, Curaçao and Sint Maarten) seem to have reached a status of quasi-independent countries, with formal links of a constitutional nature (largely un-used for the political reasons mentioned below) leaving significant freedom for self-governance.

This, however, is not the case for the three Caribbean territories of the Country of the Netherlands (Bonaire, Sint Eustatius/Statia and Saba), which are also OCTs of the Kingdom of the Netherlands.⁵⁰ They are more dependent on the decisions taken in the continental capital, The Hague. Similarly, Greenland, the status of which permits a delegation of a number of policy areas to self-determination, remains for the time being largely in the realm of Danish regulation.

In the case of France, the arrangements made with its colonies either resulted in independence or in being subject to the French policy of decentralisation, with three major categories of delegated powers. The first (with most limited powers) applies to the territories qualified as OMR by the TFEU (see section [4.3.1](#) above). The second and third category (the one referred to as '*collectivités d'outre-mer*' in the French Constitution and the other being New Caledonia with its dependencies) are OCTs with limited legal autonomy. However, it should be noted that autonomy varies amongst cases. Overall, the decentralised local authorities of the French OCTs are not completely autonomous and have no sovereignty. On the contrary, they tend to be rather controlled by Paris (the central government).

6.1.2. Legislative authority

Directly linked to the legal status of the OCTs, is the degree of their legislative freedom. For the first group mentioned above (UK OCTs and the countries of the Kingdom of the Netherlands), this freedom is more extensive and only formally limited by the possibility of the EU Member State's intervention (this point is exemplified in the three Annexes). Bermuda is the most 'independent' of the UK OCTs, with limited powers for the government in London even in comparison to other territories.

In contrast, as developed in [Chapter VI of Annex II](#), the Caribbean territories, which as explained are part of the Country of the Netherlands, are subject to Dutch law and oversight by the Dutch institutions. In that sense, the Dutch government at the level of the Country of the Netherlands has significant leverage on the Caribbean territories, including on issues related to tax evasion, money laundering and tax transparency.

In general, those OCTs that have less autonomy in legislation, including with regard to control over financial services, can more easily claim to have the same level of regulation

⁵⁰ The governance set-up of the Kingdom of the Netherlands is explained in a comprehensive manner in [chapter II of Annex II](#).

as the rest of the European Union – albeit with the standard caveats and disclaimers as to its implementation and effectiveness (see section [6.3.3](#)).

6.1.3. Standards related to financial services

This study would not have been requested had there been no concerns regarding various standards applicable to financial services and company law, in general, in at least some of the OCTs. Indeed, the possibility of avoiding taxation was created by favourable business conditions in those territories, such as the 0 % corporate income tax in the British Virgin Islands, the Cayman Islands and Bermuda.

It could be argued that these conditions were created to balance out the disadvantageous situation resulting from their geographical location and/or limited resources in the local economy. Nevertheless, these very same conditions also drew the attention of those interested in tax evasion and money laundering and – more importantly – were possibly used by them. In effect, as shown in detail in [Annex III](#), the companies established in the British Virgin Islands hold assets worth probably more than US\$ 600 billion, and the assets of banks in the Cayman Islands reach US\$ 1.4 trillion. To complement the picture, Bermuda (which does not permit offshore banks or shell companies) became the world's 'largest reinsurance centre', and three other OCTs (Anguilla, Montserrat, and Turks and Caicos Islands) are also attractive locations for the provision of financial services.

Yet, admittedly not all OCTs that have been under loose control of the EU Member State concerned, have engaged in tax evasion and money laundering. In the case of the Kingdom of the Netherlands (see [Annex II](#)), the legislation pertaining to tax evasion, money laundering and tax transparency can generally be considered modern in all six OCTs (and that regardless of their legal status). It is based on relevant international and European standards. Rather, it is the implementation and supervision of the law that is a key problem for these OCTs, which will be discussed in section [6.3](#) on the institutional framework.

For those countries and territories that have remained largely dependent on their central government on the European continent (the EU Member States), the legislation in place seems to be more aligned with that of the EU (which, *nota bene*, is in constant progress and is linked to international developments). Less transparent rules, or laws that protect the secrecy of bank accounts, company registers and financial transactions, are to a large extent in place in those OCTs that, according to their legal status (see section [6.1.1](#)), have been given more autonomy.

In contrast, the French OCTs – with the exception of Saint-Barthélemy and Wallis and Futuna Islands – have such a high tax burden that they do not offer favourable conditions for becoming tax havens. In fact, the compulsory tax rates charged by the French OCTs (except for the two above-mentioned) are close to the average of the rates observed in the OECD (33.8 %) and the European Union.⁵¹ This is further compounded by the fact that non-residents are subject to the taxes due in their country of residence, which means that they may be subject to double taxation. In contrast, in Saint-Barthélemy and Wallis and Futuna

⁵¹ See [chapter 2 in Annex I](#), p. I-55.

Islands, the weaknesses of direct taxes and the relative absence of tax audits may encourage tax avoidance or tax evasion. (See [chapter 2 in Annex I](#).)

Already before the disclosure of the Panama Papers, even the more autonomous OCTs were subject to growing pressure with regard to the regulation of offshore capital. Consequently, they all modified their legislation accordingly (in some cases thanks to intervention of the Member State nominally responsible) in order to introduce the provisions related to agreements with the USA (FATCA) or EU Member States and to meet OECD standards. The example of the Savings Tax Directive 2003/48/EC, which was eventually imposed on the Cayman Islands, is illustrative of the way in which the UK government, on the one hand, threatened to use the legal instrument formally permitted by the constitutional arrangement, but, on the other, also offered compensation for possible negative effects of implementing this EU act. Other laws, which are seen as making a territory more attractive for offshore finances (e.g., limited access to beneficial ownership information), are still defended by the OCTs that have them (i.e., the British Virgin Islands and the Cayman Islands).⁵²

6.2. Political framework

In order to put the analysis in context, this section briefly considers the historical links between the Member States and their OCTs, their relationship today, and the economic development in these overseas countries and territories.

6.2.1. Historical background

The history of relations between the Member States concerned and their OCTs is important for understanding their present situation, beyond legal provisions. In the case of the UK OCTs, although their number equals the total number of those related to the other three EU Member States put together, only the remains of the former British Empire included numerous other territories. As explained in [Annex III](#), other countries have in the meantime gained full independence from the UK (today's OCTs). While the terminology used in the acts constituting the OCTs' relations with the UK still contains the word 'colony', there has been a tendency to give them as much self-sufficiency as possible.

In order to harmonise its remote overseas territories along geographic lines and to try and re-organise them along cultural affinities, the Kingdom of the Netherlands abolished the Netherlands Antilles in 2010 and created two new countries: Sint Maarten and Curaçao. The three remaining islands – Bonaire, Sint Eustatius/Statia and Saba – became part of the Country of the Netherlands. As a result, the Kingdom of the Netherlands today has six OCTs, within the current constitutional set-up of the Kingdom, which fall into one of two categories:

⁵² In support of this argument, Chris Blackhurst in his article entitled Britain's Island Tax Havens Need Action, which appeared in the *London Evening Standard* on 2 December 2015, argues: 'the Government has asked the Overseas Territories to publish a central register of corporate ownership. [Prime Minister] Cameron said it was vital for improving transparency and meeting 'the urgent challenges of illicit finance and tax evasion'. He was told where to go'.

1. the Caribbean countries of the Kingdom of the Netherlands (i.e. Aruba, Curaçao and Sint Maarten); and
2. the Caribbean territories of the Country of the Netherlands (i.e. Bonaire, Sint Eustatius/Statia and Saba). (See [chapter II of Annex II](#).)

A key feature in the analysis of the French OCTs, and their relations among themselves and with mainland France, is their remoteness. These territories are located in two distinct geographical regions: the Pacific Ocean (where one finds New Caledonia, French Polynesia and the Wallis and Fortuna Islands) and the Atlantic Ocean (where Saint-Barthélemy and Saint-Pierre-and-Miquellon are located). Both of these regions are far away from the central government in Paris. Moreover, all these territories share a common colonial past, which followed the French administrative model, whereby only French officials from the central administration in mainland France held high local functions. (See introduction of [Annex I](#).)

6.2.2. Current relations

The formal oversight of the British OCTs' affairs is undertaken by the UK Foreign and Commonwealth Office and regular contacts are established between the relevant authorities. The Joint Ministerial Council is the highest political forum, bringing together UK ministers, elected leaders and representatives of the OCTs *'for the purpose of providing leadership and shared vision for the Territories'*.⁵³ However, the local authority may often resist the practical exercise of Member States' sovereignty over the OCTs. A case in point is the accusation of the UK acting as a *'colonial power of old'*.⁵⁴ The British government is thus reluctant to use its constitutional powers, and even in the area of financial services – where in some of the OCTs the Governor has responsibility – consensus and persuasion is preferred (see [chapter 4 in Annex III](#)). Importantly, the perspective of the UK's withdrawal from the European Union resulted in the creation of a separate Joint Ministerial Council on European Negotiations, as announced in the communiqué from the meeting in November 2016.⁵⁵

Similarly, in the case of the Kingdom of the Netherlands, the relationship between the Country of the Netherlands and the Caribbean countries of the Kingdom is difficult. This is illustrated in [chapter V of Annex II](#), in the example of efforts to establish an Integrity Chamber in the Country of Sint Maarten so as to improve the integrity of the entire Sint Maarten government apparatus. Despite efforts by the Country of the Netherlands to push for the creation of such a structure, since cooperation is voluntary and based on goodwill, the project was ultimately shelved following a decision by the Constitutional Court of Sint Maarten that declared the Integrity Chamber as unconstitutional.

Notwithstanding the constitutional changes that have taken place in the status of the French OCTs since the abolition of the French overseas law in 1946, French law is still

⁵³ The official website of the [UK overseas territories](#) provides inter alia a series of notes signed in 2016, concerning the sharing of beneficial ownership information.

⁵⁴ See chapter [3.2](#) in Annex III, p. III-158.

⁵⁵ [UK-Overseas Territories Joint Ministerial Council - 2016 Communiqué](#), London, 15 November 2016.

underpinned by a logic of decentralisation. This implies that the powers of the unitary central state (in Paris) transfer powers and financial resources to the non-sovereign local authorities. (See [Annex I](#)).

6.2.3. Economic context

The formal dependence of OCTs on the relevant EU Member States has an obvious economic aspect, which must be considered in the assessment of their situation. The variety of available local resources, geographic location influencing the possibilities of commerce, tourism and other sectors, as well as the size and skills of local populations, all contribute to big differences between the levels of economic development of EU OCTs. Those territories that took the path of developing offshore financial centres have done rather well in comparison to the others, and their current reliance on such sectors of the economy is an issue which cannot be easily ignored by regulators and policy-makers. At the same time, the reassurance of stability is important for tourists and investors alike.

In the case of the UK, only three OCTs with a permanent population (Montserrat, Pitcairn and Saint Helena with dependencies) receive budgetary aid from London. Furthermore, the GDP per capita of Bermuda and Cayman Islands is only exceeded by the Falkland Islands (a special case in itself, but not because of offshore finance). From the perspective of the UK government, there is clearly a perception of a trade-off between self-rule and budgetary matters, which also sustains the status quo. Moreover, there are important advantages for the City of London (being a major centre of financial services in its own right) in operations with UK OCTs.

All six OCTs of the Kingdom of the Netherlands depend strongly on tourism. They receive EU financial aid, which during the period of 2010-2014 has concentrated on non-financial sectors (e.g., renewable energy, education, water and sanitation, and social development/youth). Their financial services do not appear to be developed, certainly not to the same extent as the UK OCTs. Further quantitative data on this topic can be found in [chapter II of Annex II](#).

Similarly, the French OCTs seem not to currently have either the economic grounding or the necessary infrastructure to favour tax evasion or money laundering activities. Moreover, the banking sector in the French OCTs is insufficiently developed to allow for such activities to flourish. As in the Dutch case, the main sectors of the economy are non-financial: tourism, public works, commercial activities, and mining activities. (See introduction of [Annex I](#).)

6.3. Institutional framework

This section analyses the financial oversight in the OCTs, which essentially constitutes the institutional backbone through which the relevant legislation is implemented. It also assesses its effectiveness. In doing so, this section also points to both structural and functional limitations in the OCTs on the governance of offshore practices.

6.3.1. Financial oversight and international standards

As already mentioned above, increased international pressure led the EU OCTs to actively address concerns with offshore financial centres, such as those revealed by the Panama Papers. Monitoring the respect of international standards on combating money laundering, as, for example, is done through the Financial Action Task Force (FATF) recommendations, also applies to the Caribbean territories of the Country of the Netherlands. Equally, it is argued in [Annex I](#) that all the French OCTs meet EU standards in the fight against tax evasion and money laundering and in the enhancement of tax transparency. French laws and conventions between these OCTs and the French central government foresee tax cooperation (automatic exchange of information) at standards that meet international requirements.

Among the UK OCTs concerned, in three (Anguilla, Montserrat, and Turks and Caicos Islands) the Governor is directly responsible for the oversight of the financial sector. In the other territories, however, this is the role of Financial Services Commissions, which in turn are in contact with the UK government (see [chapter 3.4 in Annex III](#)). Notwithstanding the agreements between OCTs and the USA (FATCA), individual territories' agreements with the UK itself provide the tax authorities (but not the public) with access to an increasing amount of data on offshore accounts. Even more importantly, the OCTs' commitment to implementing the OECD's Standard for Automatic Exchange of Financial Account Information - Common Accounting Standards, should lead to an improved situation already in 2017. (See section [6.1.3](#).)

As concerns the supervision of the compliance with legislation aimed at combating money laundering and tax evasion and at promoting tax transparency, this partly lies in the hands of central banks. According to [Annex II](#), in the case of the Caribbean territories of the Country of the Netherlands, the supervisory tasks are performed by the authorities of the European Netherlands since their governance is centralised. Thus, financial supervision is conducted by the Dutch Financial Intelligence Unit, the Dutch Central Bank and the Netherlands Authority for the Financial Markets.

In contrast, the supervision in the Caribbean countries of the Kingdom of the Netherlands, which enjoy a certain autonomy, is undertaken locally by the Central Bank of Aruba and the Central Bank of Curaçao and Sint Maarten. There, however, the quality of financial supervision and enforcement of legislation relating to money laundering, tax evasion and tax transparency, are areas of particular concern. In fact, the increasing concerns regarding the functioning and integrity of the Central Bank of Curaçao and Sint Maarten has led *'the Dutch Central Bank to expand its prudential supervision activities in these overseas countries'*. Nevertheless, cooperation between the Caribbean countries and the Kingdom is voluntary and, in practice, problematic, as explained in section [6.2.2](#). In order to influence these countries, the Dutch government tends to *'resort to soft tools, such as dialogue with local authorities or the provision of expert advice'*.⁵⁶

⁵⁶ [Annex II](#), p. I-110 and II-111.

Regarding the French OCTs, the fight against money laundering is largely based on reports of suspicions made by professionals (e.g., financial institutions, accountants, notaries and lawyers) to the national supervisory authorities. However, very few submissions are received. This is partly due to the weakness of controls and on-site inspections. The absence of proper oversight and the limited availability of data also means that French authorities have difficulties in keeping track of tax evasion and money laundering. (See [chapter 3 of Annex I.](#))

6.3.2. Structural limitations

Notwithstanding the improvements made to the regulatory framework in the relevant OCTs (especially those under UK sovereignty, where the financial services are a key economic sector), there are still regulatory gaps which maintain those territories' fiscal attractiveness on the global market. In the UK case, the structural position of the Governor, who reports to the Secretary of State in London as head of the local government, can create a dilemma: on the one hand, it can be a means of introducing further measures to boost the transparency of capital operations and, on the other, it allows the choice to continue existing business practices.

Similarly, the Caribbean countries of the Kingdom of the Netherlands have faced structural weaknesses related to the poor implementation of good governance principles. While the Kingdom could in principle safeguard good governance in these OCTs in the framework of financial oversight, public-private cooperation, and the private sector of the OCTs, in practice this does not translate into concrete power. Rather, oversight is narrowly interpreted on issues relating to tax evasion and money laundering, making it very difficult for the government of the Kingdom of the Netherlands to regulate or supervise the financial sectors of Aruba, Curaçao and Sint Maarten (See [chapter IV of Annex II.](#))

Regarding the French OCTs, as already explained, the laws concerning tax evasion, money laundering and tax transparency that are applicable, are very similar to those of mainland France; therefore, they comply with EU requirements. However, the extent and number of controls as to whether these laws have been applied and enforced, and whether they function, are insufficient. In addition, limited and inconsistent data relating to this issue is available both to the oversight authorities and to the public. (See [chapter 3 in Annex I.](#))

6.3.3. Functional limitations

In addition to the economic considerations mentioned above, the implementation of recently established rules can also pose significant problems in all OCTs. With regard to the oversight of the financial services, including those in the Cayman Islands, the low number of successful prosecutions by local authorities could be an indication that some rules simply remain on paper.⁵⁷

⁵⁷ An argument to the contrary is made by an interested party (Cayman Finance), in Dorothy Scott, Sharing Financial Information: The Cayman Story Worth Telling, *Mondaq Business Briefing*, 14 March 2017.

Even the best rules on AML may be ineffective if the OCTs lack enough officials, who also have the necessary competences, and relevant instruments, to enforce these laws. In the Caribbean countries of the Kingdom of the Netherlands, for example, insufficient administrative capacity of the relevant authorities, including limited financial and human resources, have been pointed out as possible functional weaknesses in the system. These are compounded by the insufficient experience and knowledge of those working in the relevant structures. Thus, for instance, despite some improvements in recent years, the local authorities of Bonaire, Sint Eustatius/Statia and Saba still seem to be rather weak due to a shortage of money and expertise, but also as a result of a culture of favouritism. Overall, there is an absence of checks and balances in the system (apart from the judiciary). (See [chapters II](#) and [VI](#) of Annex II.)

Equally, the administrative services responsible for carrying out control operations on tax evasion and anti-money laundering activities in the French OCTs lack the necessary financial resources to work effectively. Moreover, as with the Dutch case, officials and local professionals working in the French OCTs for the relevant services are not sufficiently aware of the risks at stake. (See [Annex I](#).)

7. The EU framework

As explained above, the EU Treaties do not contain any specific legal obligation for the Member States to ensure the application of the relevant EU law in their OCTs, with the political responsibility and instruments varying among specific cases. It is also worth noting that a high level of complacency towards these jurisdictions has already been criticised in the Financial Action Task Force (FATF) recommendations.

Notwithstanding the limited (but existing) responsibility of the relevant Member States with regard to the regulation of financial services in their respective OCTs, it is important first to outline the standards that have been put in place at the European level, and second to analyse the possibility of direct relations between the countries and territories concerned, on the one hand, and the EU institutions on the other.

7.1. EU initiatives on tax evasion, money laundering and tax transparency

7.1.1. Data exchange

Since 2005, the Savings Directive (Directive 2003/48/EC)⁵⁸ requires the automatic exchange of information between Member States on private savings income by allowing tax administrations better access to information on private savers. It has enabled interest payments made in one Member State to residents of other Member States to be taxed according to the laws of the state of tax residence. This directive was last amended in March 2014 to reflect changes to savings products and developments in investor behaviour that

⁵⁸ Dorothy Scott, Sharing Financial Information: The Cayman Story Worth Telling, in *Mondaq Business Briefing*, 14 March 2017.

have taken place since it came into force in 2005. However, on 10 November 2015, Council repealed the directive to address the significant overlap that had developed with other legislation in this field.⁵⁹

In December 2014, the Council adopted Directive 2014/107/EU amending provisions on the mandatory automatic exchange of information between tax administrations. It extended the scope of that exchange to include interest, dividends and other types of income. Very importantly, it provided for the comprehensive automatic exchange of financial account information, and included specific provisions for the identification of the individuals behind intermediary structures.⁶⁰ However, the directive only entered into force in January 2016, with the first exchanges of information only taking place by September 2017. Therefore, although a significant step forward, its effectiveness cannot yet be evaluated.

In the framework of the EU tax exchange package,⁶¹ the automatic exchange of information between Member States on their tax rulings was introduced. In that framework, contextual information (turnover, number of employees and nature of activities) is considered essential in enabling an informed analysis, as is their disclosure to every country in which a company is active, as well as for those tax jurisdictions that do not abide by tax good governance standards ('tax havens'). Aggregate figures need to be provided for operations in other tax jurisdictions in the rest of the world.

Tax transparency in and between EU Member States is also assured through country-to-country reporting, which constitutes a framework where businesses in the extractive and logging industries have to publish their payments to governments relating to the exploitation of natural resources. Developed in the framework of the EU '[action plan on corporate taxation](#)', it focuses on measures to make corporate taxation fairer and more efficient within the single market, including a re-launch of the common consolidated corporate tax base (CCCTB) and ideas for integrating new OECD/G20 actions to combat BEPS at EU level.⁶²

In the meantime, as explained in its communication of 5 July 2016 on further measures to enhance transparency and the fight against tax evasion and avoidance,⁶³ the European Commission has proposed further modifications to the directive for a better monitoring of

⁵⁹ Council of the European Union, [Savings Taxation Directive Repealed](#), press release, 796/15, 10 November 2015.

⁶⁰ [Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation](#), *Official Journal* L 359, 16 December 2014, pp. 1-29.

⁶¹ European Commission, [Combatting Corporate Tax Avoidance: Commission Presents Tax Transparency Package](#), Press release, IP/15/4610, Brussels, 18 March 2015.

⁶² See [Public Country-By-Country Reporting / Corporate Tax Transparency](#), Banking and Finance, European Commission, 23 November 2016.

⁶³ European Commission, [Communication on Further Measures to Enhance Transparency and the Fight against Tax Evasion and Avoidance, Communication from the Commission to the European Parliament and the Council](#), COM(2016) 451 final, Strasbourg, 5 July 2016.

the information to be exchanged, and has also issued a proposal to amend the fourth Anti-Money Laundering Directive (2015/849/EU) (discussed in section 7.1.2) and the first Company Law Directive (2009/101/EC) with a view to enhancing transparency in financial transactions.

The amendments proposed by the European Commission seek to further improve and reinforce the legal and practical tools made available to the authorities in their fight against tax fraud and tax evasion. In addition, the European Commission organised a consultation to gather views on the best possible approach for increasing oversight of tax planning and ensuring that effective disincentives apply for promoters and enablers of aggressive schemes.⁶⁴

7.1.2. Anti-money laundering

Already in 1997, in its 'action plan to combat organised crime', the EU set an obligation on the EU Member States *'to take action and provide adequate defences against the use by organised crime of financial centres and offshore facilities, in particular where these are located in places subject to their jurisdiction'*.⁶⁵

In line with this objective, the EU has developed an Anti-Money Laundering (AML) Directive, which is currently being revised for the fourth time. Already, the fourth AML Directive of 20 May 2015 has empowered the EU to identify third countries with strategic deficiencies in the area of anti-money laundering or countering terrorist financing (known as the EU 'list of high risk third countries') and obliges EU Member States to apply enhanced due diligence measures on financial flows coming from and going to these listed countries.⁶⁶ The action plan against terrorist financing that followed, called on Member States to bring forward the date for effective transposition of the directive by the end of 2016.⁶⁷

The fifth AML Directive, proposed by the European Commission following the Panama Papers leak, promises to reinforce the previous directive. More specifically, it argues for:

- Full public access to the beneficial ownership registers of companies and business-related trusts of Member States.
- Direct interconnection of the registers to facilitate cooperation between Member States.
- Extending the information available to authorities to existing, as well as new, accounts for due diligence controls. It is hoped that this measure will prevent accounts that are potentially used for illicit activities from escaping detection.

⁶⁴ The results are not yet available. See European Parliament, Answer given by Mr Moscovici on behalf of the Commission, parliamentary questions, [E-007427/2016](#), 1 December 2016.

⁶⁵ [Action Plan to Combat Organised Crime](#) (Adopted by the Council on 28 April 1997), *Official Journal* C 251, 15 August 1997, p. 6.

⁶⁶ [Directive \(EU\) 2015/849 of 20 May 2015](#), *Official Journal* L 141, 5 June 2015, pp. 73-117.

⁶⁷ European Commission, [Communication from the Commission to the European Parliament and the Council on an Action Plan for Strengthening the Fight Against Terrorist Financing](#), COM/2016/050 final, Strasbourg, 2 February 2016.

Passive companies and trusts, such as those highlighted in the Panama Papers, will also be subject to greater scrutiny and tighter rules.

Overall, this revised AML proposal concentrates on facets of tax transparency that could help tackle tax evasion in those OCTs that are under tight control of the EU Member States. The above-mentioned measures aim, among other things, to stop financial transactions escaping Member States and being hidden in offshore tax havens, including the OCTs. As Collovà argues, however, it is unclear whether the impacts of the European Commission's fifth AML proposal 'could differ according to whether entities are based in a third country – either in Europe (Switzerland, Monaco) or elsewhere; in Overseas Countries and Territories of a Member State (such as the British Virgin Islands, the Cayman Islands and Anguilla); in the UK Crown Dependencies (Isle of Man, Guernsey and Jersey) – or in a Member State'.⁶⁸

7.2. EU influence on the OCTs

The influence of EU law on taxation was already the subject of an in-depth analysis prepared for the TAXE 2 Committee, in June 2016.⁶⁹ In view of Article 355 TFEU, the direct application of EU law to the OCTs is limited to the association regime of Part IV TFEU and the Overseas Association Decision (OAD) – currently in its eighth version, as adopted by Council Decision 2013/755 on 25 November 2013.⁷⁰ Thus, the material EU rules, such as those on the internal market and state aid, do not apply.

Nevertheless, as demonstrated in the annexed contribution on the case study of the Kingdom of the Netherlands ([chapter III of Annex II](#)), the recent OAD has equipped the EU not only with soft tools but also with hard instruments. It foresees, for example, that the European Commission has the power to withdraw or reduce financial aid to the OCTs. In this way, the EU is given some leverage (i.e. impact) on the OCTs on issues related to money laundering and tax evasion.

7.2.1. Obligations of the OCTs under the Overseas Association Decision

It is important to note that the Overseas Association Decision (OAD) also covers financial services, with a rationale explained in point 31 of its preamble:

'Cooperation in the area of financial services between the Union and OCTs should contribute to building a safer, sounder, more transparent financial system that is essential to enhance global financial stability and to underpin sustainable growth. Efforts in that area should focus on convergence with internationally agreed standards and approximation of OCTs legislation with EU

⁶⁸ Claudio Collovà, [Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing](#), Initial appraisal of a European Commission impact assessment, PE 587.354, European Parliamentary Research Service, European Parliament, Brussels, October 2016, p. 7.

⁶⁹ Wessel Guersen, [Influence of EU Law on Taxation in the EU Member States' Overseas Territories and Crown Dependencies](#), PE 578.989, Department A: Economic and Scientific Policy, Directorate General for Internal Policies, European Parliament, Brussels, June 2016.

⁷⁰ *Official Journal* L 344, 19 December 2013, p. 1.

acquis communautaire on financial services. Adequate attention should be paid to strengthening administrative capacity of OCTs authorities, including in the area of supervision'.⁷¹

The relevant articles (Articles 70-73) of the OAD provide for cooperation on international financial services, between regulatory and supervisory authorities, as well as on taxation matters. With regard to regulatory alignment, it is stated that '*the Union and the OCTs may make efforts to promote greater alignment of OCTs legislation with Union Legislation on financial services*' (Article 71 OAD). The in-depth analysis mentioned above also proposed that Member States voluntarily commit to ensure that their OCTs do not become tax havens.⁷² However, since this article actually reads '*when it is appropriate to do so, or at the request of the OCTs concerned, the Union and the OCTs may make efforts...*', the experts who drafted the case study on the case on the Kingdom of the Netherlands argue that it is up to the Council to clarify when it seems appropriate to promote greater legislative alignment between the EU and OCTs, since the OAD is a Council decision.⁷³

7.2.2. Obligations under the Association of the Overseas Countries and Territories of the European Union

The EU, OCTs and Member States have a shared interest in addressing jointly the challenges and opportunities raised by globalisation and the need to support sustainable development and cooperation strategies, as underlined in the 2011 OCT-Member States joint position paper.⁷⁴

An increasing number of European policies affect the interests of the OCTs. Political and technical dialogue between EU policy-makers and the OCTs contributes to the EU-OCT relationship. The OAD provides for a broad-based dialogue to enable the EU, all the OCTs and the Member States to which they are linked, to consult each other on the principles, detailed procedures and results of the association. This dialogue takes, *inter alia*, the form of an OCT-EU forum for dialogue, referred to as 'the Forum', which meets annually to bring together OCT authorities, representatives of the Member States and the European Commission.⁷⁵

The 'partnership working parties' (PWP), set up under the former OAD, are part of the policy dialogue mechanisms foreseen under article 13 of the new OAD that came into force

⁷¹ Official Journal L 344, 19 December 2013, p. 1.

⁷² Wessel Guersen, [Influence of EU Law on Taxation in the EU Member States' Overseas Territories and Crown Dependencies](#), PE 578.989, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies, European Parliament, June 2016, p. 24.

⁷³ [Annex II](#), p. II-108.

⁷⁴ [Joint Position Paper of the Governments of the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and the Overseas Countries and Territories on the Future of Relations between the Overseas Countries and Territories and the European Union](#), Noumea, 28 February 2011.

⁷⁵ See the website of the [Association of the Overseas Countries and Territories of the European Union](#), not dated.

on 1 January 2014. Their strength has been that they allow the participation and engagement of all relevant stakeholders, including from the OCTs.

The PWP on financial services is a forum for discussions on new legislation on taxation and money laundering that brings together OCT financial services experts, EU-based representatives of OCTs, staff of the technical assistance team of the Association of the Overseas Countries and Territories of the European Union (OCTA), and representatives of the Commission (DG Market, DG TAXUD and the Task Force OCT), as well as overseas financial services experts (e.g. from Anguilla, BVI, and Greenland).

For instance, more concretely, at their meeting of 22 January 2014, the financial services PWP informed the OCTs of the significant changes that would be brought to the EU's AML Directive. Participants also examined the European Commission's proposal for a new Savings Directive and the EU 'action plan to strengthen the fight against tax fraud and tax evasion'.⁷⁶ It was also underlined that OCTs can influence the decision-making process on the directive through their Member States who are represented in the Council. There was also a discussion on setting up a consultation mechanism between the OCTs and the European Commission services at expert level with the objective of furthering cooperation and exchange in the field of financial services.⁷⁷

7.3. Openings for a more pro-active EU

Arguably, the new OAD includes specific provisions for cooperation in financial services, which stipulate that they will only take place if the OCT so wishes. In that framework, it is difficult for the EU to expect the OCTs to comply with the Decision beyond the FATF recommendations.

Nevertheless, the new OAD, through its Article 90(1), confers on the European Commission the power to withdraw or reduce financial aid to the OCTs, a leverage that could be used to encourage OCTs to combat money laundering and tax evasion and enhance tax transparency more effectively. The primary responsibility for the financial supervision of EU funds lies with the OCTs. In that sense, as explained by the experts who drafted the case study on the Netherlands, *'these developments in EU overseas law demonstrate a move away from the traditional paradigm of the relationship between the EU and OCTs based on one-sided classic development and aid cooperation towards a more reciprocal partnership between the two parties'*.⁷⁸

As part of the EU package to combat tax avoidance, the first steps were taken towards producing a list of non-cooperative tax jurisdictions, to be completed by the end of 2017. At its meeting of 8 November 2016, the European Council (of Finance Ministers) agreed on

⁷⁶ European Commission, [*An Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion, Communication from the Commission to the European Parliament and the Council \[SWD\(2012\) 403 final\] \[SWD\(2012\) 404 final\]*](#), COM(2012) 722 final, Brussels, 6 December 2012.

⁷⁷ Association of the Overseas Countries and Territories of the European Union, [*Working Party Meeting on Financial Services*](#), 8 May 2014.

⁷⁸ [*Annex II*](#), p. II-112.

the criteria for the upcoming 'blacklist' of non-cooperative tax jurisdictions. The blacklist was drawn up as a 'scoreboard' of third country jurisdictions (including OCTs linked to EU Member States) and were assessed by neutral indicators: their economic ties with the European Union, their financial activity and stability factors. They were then attributed risk factors, such as their level of transparency and potential use of preferential tax regimes.⁷⁹ Of the ten jurisdictions flagged on the scorecard for their low tax rate, four are UK OCTs, namely Anguilla, Bermuda, the British Virgin Islands, and the Cayman Islands. Discussions are under way as to sanctions that the EU could impose on countries included in the final list. Options being discussed include the introduction of additional taxes, known as 'withholding taxes', or the removal of tax deductions.⁸⁰

Furthermore, the experts who drafted the contribution on the OCTs of the Netherlands demonstrate that the case law of the CJEU has progressively expanded the potential applicability of EU law to the OCTs to include other parts of the Treaty. More specifically, they showed that Article 276 TFEU on preliminary rulings is applicable to the OCTs and that the rights conferred on EU citizens under Part II of the TFEU also apply to OCT citizens who have the nationality of one of the Member States. (See [chapter III of Annex II](#).)

8. Conclusions: the way forward

The EU Treaties do not contain specific legal obligations for the Member States to ensure the application of the relevant EU law in their OCTs, but their political responsibility is present in all four cases (Denmark, France, the Netherlands and the UK).

The history of these countries and territories has resulted in different levels of actual dependence, with some OCTs enjoying large regulatory freedom (used in some cases to create conditions that have allowed the growth of offshore financial services), and others remaining under the tighter control of European capitals. In the case of the former – especially the UK OCTs that focus their economic activities in specific sectors of the financial markets – certain international standards were introduced in recent years, also as a result of pressure from their sovereign Member States. Still, numerous legislative gaps, as well as limitations due to economic considerations and the challenges of practical implementation, are issues of concern.

Although some of the EU overseas countries and territories constitute offshore financial centres, the OCT category is not *per se* a sufficient condition for such activities, and thus for the increased risk of tax evasion and/or money laundering. The growth of the financial services sector in those OCTs that appear in the Panama Papers and that have been named

⁷⁹ European Commission, [Common EU List of Third Country Jurisdictions for Tax Purposes](#), DG Taxation and Customs Union, Brussels, 6 April 2017.

⁸⁰ Simon Bowers, [UK Overseas Territories Could Be Affected by EU Tax Crackdown](#), The Guardian, 15 September 2016.

in other publications on offshore practices,⁸¹ was largely due to low (or non-existent) corporate income taxation, significant levels of secrecy with regard to the ownership of companies and/or bank accounts, and the ease with which funds can be transferred regardless of their origin.

In the annexed contribution on the OCTs of the Kingdom of the Netherlands, it is suggested that the EU as a whole should use the opportunity of its direct relations with those countries and territories (especially the OAD framework), to pressure those OCTs that do not respect international standards of tax cooperation and transparency to do so. This could be particularly important in the case of the Caribbean countries of the Kingdom of the Netherlands, where the Kingdom itself has limited possibilities to intervene. That risk would of course be much lower, if other countries concerned (fully independent from the EU Member States as such) did not offer tax haven opportunities to businesses and individuals worldwide. By extension, the EU could use the same methods with regard to Greenland through the separate agreements that the EU has signed with it.

In the annexed contribution on the French OCTs, the case is made that France could be a model for the OCTs of other Member States. The French OCTs are not fully autonomous yet enjoy a decentralised governance system, and therefore EU directives and European and international standards should apply. In that respect, the Country of the Netherlands could play a major role in ensuring the effective implementation and enforcement of the relevant legislation in the Caribbean territories (Bonaire, Sint Eustatius/Statia and Saba), which are its constituent parts.

Other frequently proposed solutions include the establishment of an international register of the beneficiaries of shell companies and more systematic sharing of national lists. The need to automatically expand the agreement to exchange tax information, which is set to be introduced in 2017, to as many countries as possible beyond the approximately 100 states that have agreed to participate, has also been stressed. Any country, within or outside the EU, refusing to share information, would face being put on a blacklist. What is important is to have global solutions to the global problem of tax havens. Merely controlling the flow of investment and money to the EU's OCTs would be equivalent to simply shifting the problem elsewhere. Tax evaders and money launderers would find new methods and offshore havens located in wealthy countries, such as certain US states⁸² and EU Member States,⁸³ to benefit from such a situation.

⁸¹ See, for example, Esmé Berkhout, [*Tax Battles - The Dangerous Global Race to the Bottom on Corporate Tax*](#), Oxfam, December 2016.

⁸² See, for example, Isabelle Ioannides, [*EU-US Trade and Investment Relations: Effects on Tax Evasion, Money Laundering and Tax Transparency, Ex-Post Impact Assessment*](#), PE 598.602, European Parliamentary Research Service, European Parliament, Brussels, March 2017.

⁸³ See, for example, Brigitte Unger, [*Offshore Activities and Money Laundering: Recent Findings and Challenges*](#), PE 595.371, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies, European Parliament, Brussels, March 2017, p. 22. Also see, Manon Aubry and Thomas Dauphin, [*Opening the Vaults: The Use of Tax Havens by Europe's Biggest Banks*](#), Oxfam International, 27 March 2017.

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ANNEX I

In-depth analysis evaluating the legal, political and institutional framework concerning offshore practices related to tax evasion, money laundering and tax transparency in the Overseas Countries and Territories (OCT) of France, as defined in Annex II of the Treaty on the Functioning of the European Union (TFEU), and the relations of France with those OCTs

AUTHOR

This study has been written by **Prof. Alexandre Maitrot de la Motte** of the University of Paris-Est Créteil, at the request of the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

CONTACT

Université Paris-Est Créteil
61, avenue du Général de Gaulle
94010 Créteil Cedex
FRANCE
Office: + 33 (0)1 45 17 65 33
Mobile: +33 (0)7 63 66 03 15
maitrotde la motte@u-pec.fr

RESPONSIBLE ADMINISTRATOR:

Dr Isabelle Ioannides, Ex-Post Evaluation Unit
To contact the Unit, please email: EPRS-ExPostImpactAssessment@ep.europa.eu

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Executive summary

In the fight against international tax evasion and money laundering, and in tax transparency, the regulations applicable in the French OCTs (St. Barthélemy, Saint-Pierre-and-Miquelon, Wallis-and-Futuna Islands, French Polynesia, and the whole of the four territorial authorities of New Caledonia) meet the standards of the European Union. The examination of these regulations, but also of the manner in which they are implemented, shows that, in the end, the French OCTs pose little risk for the other Member States of the European Union.

With few exceptions, the tax burden of these OCTs is sufficiently heavy to ensure that they are not considered to be tax havens. In addition, European anti-money laundering rules have been largely implemented by French law. Finally, French law and conventions between these OCTs and the French central state mean that administrative tax cooperation (exchange of information) is organised in ways inspired by the best international standards.

In a transverse way, it can be noted that the French OCTs are not totally autonomous and have no sovereignty. These decentralised local authorities are relatively controlled by the central state, which can depending on circumstances, grant them more or less autonomy. In the areas covered by this study, such autonomy is relatively weak.

Moreover, neither the economic context nor the infrastructure favour tax evasion or money laundering activities in the French OCTs. In particular, the banking sector is insufficiently developed to allow local engagement in these reprehensible practices.

Given the administrative means used to implement the abovementioned legal framework and the specificities of the OCTs concerned, there is of course room for progress. Upstream, there is too little data available to assess the actual effectiveness of the implementation of the regulation. Moreover the reliability of this data is not complete.

Consequently, the administrative services responsible for carrying out control operations could benefit from more resources. This would allow for more controls and more data. At the same time, local professionals could be more aware of risks.

Nevertheless, these negative aspects must be put into perspective. Given their economic, social and geographical situations on the one hand, and the structures (in particular banking) made available to citizens on the other, the French OCTs generally do not favour the development of international fraud.

It follows that the French OCTs can serve as a model for the OCTs of the other Member States. Without questioning the competences and the autonomy of the latter, it would perhaps be appropriate that, as with the French OCTs, regulations similar to the European regulations and standards should apply with regard to the fight against money laundering and to administrative cooperation.

1. Introduction

This introduction will conduct an institutional presentation of the five French Overseas Countries and Territories (hereafter 'OCTs'), followed by an economic and social presentation of the latter.

Two preliminary clarifications can already be made: they concern the identification of the territories concerned and their status.

First clarification: identification of the five territories concerned. Under the law of the European Union, the French OCTs are:

- St. Barthelemy,
- Saint-Pierre-and-Miquelon,
- Wallis-and-Futuna Islands,
- French Polynesia,
- and the group constituted by the four territories of New Caledonia (hereinafter 'New Caledonia').

These are territories belonging to two geographical zones which are very remote from one another: the Pacific Ocean for New Caledonia, French Polynesia and the Wallis-and-Futuna Islands; the American border of the Atlantic Ocean for St. Barthelemy and Saint-Pierre-and-Miquelon. These territories are also characterised by their remoteness from mainland France and the European continent: Saint-Pierre-and-Miquelon is 4,270 km from Paris, St. Barthelemy is 6,800 km away, and French Polynesia and New Caledonia are respectively 15,700 km and 16,700 km away.

Second clarification: French OCTs are decentralised local authorities (not sovereign), not independent entities. For the rest of this study, it is important to note that, unlike other OCTs, the French OCTs are not completely independent or even autonomous. And they do not have sovereignty. They are only local authorities: like all French local authorities, they are decentralised and exercise the powers that the state gives them (and can take over) within the framework of a unitary state.

In addition to these OCTs (which correspond in French constitutional law to '*Collectivités d'Outre-Mer*' ('overseas local authorities'): hereinafter 'COM'), French overseas territories are composed of overseas local authorities called '*Départements d'Outre-Mer*' (hereinafter 'DOM' for 'overseas departments'), that have been regionalised (hereinafter 'ROM' for '*Régions d'Outre-Mer*': 'overseas regions'). These include Guadeloupe, Martinique, Guyana, La Réunion and Mayotte. To the extent that EU law applies, the DOMs and ROMs (which are not OCTs in EU law) are excluded from the scope of this study. The same applies to the local authorities that do not have a permanent population: Clipperton and the French Southern and Antarctic Territories.

It should be noted that French constitutional and administrative laws employ the words '*collectivité territoriale*' to designate these decentralised administrative communities. According to the usages, they will hereinafter be called 'local authorities'.

The French Overseas Territories as a whole, whether the OCTs covered by this study ('COM' in French law) or other local authorities excluded from it ('DOM', 'ROM', and local authorities without permanent population) can be located by means of the map below. This shows their great geographical heterogeneity. The remainder of this study will show a great legal, economic and social heterogeneity.

Figure 1: Map of the French Overseas Territories



1.1. Institutional presentation of French OCTs

French OCTs and European Union law. Annex II to the Treaty on the Functioning of the European Union states that the fourth part of the Treaty applies to the OCTs, which it lists. The French OCTs listed in the initial version of the Treaty are New Caledonia and its dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis-and-Futuna Islands, Mayotte and Saint-Pierre-and-Miquelon.

Since then, St. Barthelemy has been added to this list and Mayotte has been withdrawn. Indeed, following a decision of 29 October 2010 of the European Council, the local authority of St. Barthelemy now falls under the status of the OCTs.⁸⁴ For its part, since 2014 Mayotte is no longer an OCT, but rather an ultra-peripheral region. These changes of status in European Union law were requested by France following changes in its internal order (see the box below, entitled 'Historical background').

French OCTs and French constitutional law. This shows that there is coherence between the European statute and the national status of French overseas local authorities. The local authorities which have the status of an overseas '*département*' (DOM) and '*région*' (ROM)

⁸⁴ See decision of the European Council on the basis of Article 355(6) TFEU; 2010/718/EU: European Council Decision of 29 October 2010 amending the status with regard to the European Union of the island of St. Barthelemy (Official Journal 2010, L325/4).

under French law are, under Union law, ultra-peripheral regions. And the local authorities which have under French law the status of '*Collectivité d'Outre-Mer*' (COM) are, with the exception of Saint-Martin, OCTs in Union law.⁸⁵

Historical background

The distinction made by French law between the DOMs and the ROMs on the one hand, and the COMs on the other, is the result of historical considerations. It should be noted that from 1946 onwards, French overseas law ceased to govern colonies. Unlike other states, the French model of colonisation that existed before 1946 was based on an application in the colonies of the French administrative model and on the exclusive use of French agents for the higher local functions.

In 1946, each former colony was governed by one of the following two statuses, depending on whether it had acceded to independence:

- Under the 1946 Constitution, states under protectorate and new states born of the decolonisation movement were able to join the 'French Union', with the status of a state (first status);

- For their part, territories which had not attained independence have become overseas local authorities (second status) protected by the constitutional principle of the free administration of local authorities. These local authorities had themselves been divided into two categories:

1° The overseas '*départements*' ('DOM') envisaged by Article 73 of the 1946 Constitution, which were been created by a law of 19 March 1946 applying to the four old colonies of the seventeenth century (Guadeloupe - then including St. Barthelemy and Saint-Martin -, Martinique, French Guiana and Reunion) ;

2° The overseas territories ('TOM') envisaged by Article 74 of this Constitution, that included the former colonies of Saint-Pierre-and-Miquelon, Africa, Madagascar and Oceania.

This general scheme (two statutes corresponding to the association with the outside and the decentralisation in the interior) was then taken up by the Constitution of the Fifth Republic (1958). Under the principle of the free determination of peoples, each overseas territory (excluding the French Southern and Antarctic Territories, lacking a permanent population) benefited in 1958 from a double possibility allowing them:

- either to become independent and then to have a secondary option: to remain (twelve TOMs from Black Africa and Madagascar made this choice) or not to remain (Guinea made this choice) in the French Community which no longer exist today;

⁸⁵ Saint-Martin has long been a subdivision dependent on the overseas department of Guadeloupe. It was separated in 2007 and became a '*Collectivité d'Outre-Mer*' under French law. In Union law, it has remained an ultra-peripheral region.

- or to remain within the French Republic as a local authority with a secondary option: to remain an overseas territory (TOM) or to become an overseas department (DOM). Five TOMs decided to remain within the French Republic, retaining their status as TOM: Saint-Pierre-and-Miquelon, French Somaliland, Comoros, French Polynesia and New Caledonia. In accordance with Article 53, paragraph 3, of the 1958 Constitution, some of these local authorities were subsequently able to achieve independence, as was the case in the three northern islands of the Comoros archipelago in 1975 and in the French territory Afars and Issas (formerly French Somali Coast) in 1977.

The decentralisation laws of 1982 then complicated the French administrative organisation, since they created overseas regions (hereinafter 'ROM' for 'Régions d'Outre-Mer') which manage the same territories as the French overseas departments, but with separate institutions that are somewhat superimposed. In terms of general organisation, these laws did not, however, upset the organisation of the 'TOM'.

Changes in status are of course possible, and result in requests for change of European status. As a result:

1. Until 2007, St. Barthelemy was a commune and a district of Guadeloupe, which is an overseas department (DOM). Guadeloupe and St. Barthelemy were then separated: Guadeloupe remained a French DOM under internal law and retained its status as an ultra-peripheral region in European Union law; St. Barthelemy has become a COM in domestic law, and has acceded to the status of OCT in European Union law.

2. Mayotte (a group of islands in the Comoros archipelago) became French in 1841. With the rest of Grande Comore, Mohéli and Anjouan, it took the form of a protectorate in 1886, and of a 'TOM' at the end of the Second World War. In 1974, France organised a referendum in the whole of the Comoros archipelago to decide on possible independence: unlike the other parts of the Comoros territory, the population of Mayotte voted to be maintained within the French Republic. A second referendum organised only in Mayotte in 1976 then confirmed this choice, so that Mayotte remained a 'TOM'. Following the local referendum in 2009, Mayotte then became a department and an overseas region (DOM and ROM) with a single deliberative assembly. Consecutively, Mayotte changed its European status, becoming an ultra-peripheral region in 2014.

The French OCTs vis-à-vis the other categories of French overseas local authorities: aspects of governance. The constitutional law of 28 March 2003 and that of 23 July 2008 modified the rules applying to the French territorial authorities resulting from this history. This being so, it is important to note that notwithstanding the changes that have taken place, French law is still governed by a logic of decentralisation: the French state remains a unitary state which has transferred powers and financial resources to non-sovereign local authorities.

In the case of overseas territories, these constitutional laws have on the one hand allowed for the French DOMs and ROMs to evolve towards the status of a single local authority

intended to take the place of the department and the region.⁸⁶ And they have on the other hand transformed the 'TOM' into 'overseas local authorities' ('COMs', for 'Collectivités d'Outre-Mer'), enabling them to become DOMs. It follows that in the current state of French constitutional law, there are now three categories of French overseas local authorities:⁸⁷

- 1 The first category comprises five overseas territorial authorities, both departments and regions, which are decentralised and subject to the principle of legislative and regulatory assimilation (the principle that metropolitan laws and regulations, which necessarily respect European law, apply). Governed by Article 73 of the Constitution, these are, on the one hand, former colonies historically endowed with the status of overseas departments (Guadeloupe and Reunion, which are still DOMs with ROMs, and Martinique and Guyana, which became single local authorities in 2015) and Mayotte, which, following the local consultation organised on 29 March 2009, has become an overseas department with, moreover, regional powers.
- 2 The second category comprises five other decentralised local authorities, which are referred to as COMs by Article 74 of the Constitution, the first subparagraph of which provides that they have 'a statute which takes into account the interests of each of them within the Republic'. These are former TOMs (Saint-Pierre-and-Miquelon, the Wallis-and-Futuna Islands and French Polynesia), but also former subdivisions of DOMs (Saint-Martin and St. Barthelemy). Beyond their former status, these authorities are not homogeneous and can only be defined in domestic law in a strictly negative way: they are the overseas territorial authorities which are not departmentalised or regionalised (see *supra* 1) and which are outside Caledonian territory (see *infra* 3). The fact that the first paragraph of Article 74 of the Constitution mentions 'each of them' shows the lack of homogeneity of these different authorities. As the following institutional summary shows, while some of these local authorities are subject to the principle of legislative assimilation, others practise the principle of legislative specialisation (the principle that metropolitan laws are locally applicable only if, after consultation of the territorial assemblies, they expressly decide it).
- 3 Finally, the third category consists of the four territorial authorities of New Caledonia (New Caledonia proper and the three Caledonian provinces: North,

⁸⁶ See new Articles 72(4) and 73 para. 7 of the [French Constitution](#).

⁸⁷ Article 72(3) of the [French Constitution](#), as drafted and in force since the adoption of Article 37 of Constitutional Law No 2008-724 of 23 July 2008, provides that :

'The Republic recognises, among the French people, the populations of overseas, in a common ideal of freedom, equality and fraternity.

Guadeloupe, Martinique, Réunion, Mayotte, St. Barthelemy, Saint-Martin, Saint-Pierre-and-Miquelon, the Wallis-and-Futuna Islands and French Polynesia are governed by article 73 for the departments and the regions and the local authorities established pursuant to the last paragraph of section 73, and by section 74 for the other local authorities.

The status of New Caledonia is governed by Title XIII.

The law determines the legislative scheme and the particular organisation of the French Southern and Antarctic Territories and Clipperton'.

South and Loyalty Islands). They are also decentralised and governed by a transitional and specific constitutional arrangement. Their legal framework is covered by a special title in the Constitution (Title XIII, which is composed of Articles 76 and 77). They may adopt local laws (called '*lois de pays*') subject to the control of the Constitutional Council. As it stands, the constitutional system applying to it has broad similarities with the status of the five local authorities mentioned above under 2.

Institutional summary. A presentation of this complex constitutional and political situation is set out in the summary table below:⁸⁸

Table 1: Schematic institutional presentation of the French Overseas Countries and Territories

	DOM	ROM	SA	COM	Other	UPR	OCT
Guadeloupe	C	C				C	
Martinique			C			C	
Guyana			C			C	
Reunion	C	C				C	
Mayotte	C	C				C	
St. Barthelemy				C/as.			C
Saint-Martin				C/as.		C	
Saint-Pierre-and-Miquelon				C/as.			C
Wallis-and-Futuna				C/sp.			C
French Polynesia				C/sp.			C
New Caledonia					C/sp.		C

Legend: DOM : *Département d'Outre-Mer* ; ROM : *Région d'Outre-Mer* ; SC : Single Authority; COM : *Collectivité d'Outre-Mer* ; UPR : Ultra-Peripheral Region; OCT : Overseas Country or Territory ; C : current ; as.: legislative assimilation ; sp. : legislative specialisation.

⁸⁸ Update of the table presented in Olivier Gohin, Michel Degoffe, Alexandre Maitrot de la Motte and Charles-André Dubreuil, *Droit des collectivités territoriales*, Editions Cujas, 2nd edition, 2015, p. 272.

1.2. Economic and social presentation of the French OCTs

Heterogeneity of the economic and social situation. It has already been stated that the French OCTs are relatively far from metropolitan France (between 4,270 km and 16,700 km away).

It is important to note the remoteness of their most important economic partners. 'Moreover, for reasons related to their geography as much as to their particular history with metropolitan France, they have difficulties for some to fit into international or even regional trade flows. In particular, their participation in regional structures aims to alleviate these difficulties. These (...) overseas local authorities and New Caledonia do not form a homogeneous whole. They correspond in fact to very different realities, be it in demographic, geographical, economic or social terms'.⁸⁹

To be convinced, it is sufficient to refer to the table below. The latter highlights the diversity and complexity of the studied territories.

Table 2: Main economic and social data for French OCTs

Territory	Population	Size	GDP	GDP per capita	Unemployment rate	Key economic sectors	French budgetary aid
St. Barthelemy	9 131 (2012)	24 km ²	€319 million (2010)	€35 700 (2010)	4.3 %	Tourism; Buildings and Public Works; Non-financial market sector; trade	€2 million
Saint-Pierre-and-Miquelon	6 081	242 km ²	€172 million	€28 327	8.7 %	Public Administrations and Merchant services	€77 million
Wallis-and-Futuna	12 200	142 km ²	€150 million	€10 100	8.8 %	Agriculture; Non Merchant services (education, Health and public services); trade	€106 million

⁸⁹ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 14.

Territory	Population	Size	GDP	GDP per capita	Unemployment rate	Key economic sectors	French budgetary aid
French Polynesia	271 800	4 167k m ²	€4 346 billion (2012)	€16 000 (2012)	21.8 %	Services; Tourism.	€1 192 million
New Caledonia	268 000	18 576 km ²	€7 105 billion (2010)	€28 931 (2010)	13.85 % (2009)	Mining activities (nickel); trade; construction; tourism	€1 217 million

Source: Data published in the [2015 reports of Institut d'Emission d'Outre-Mer](#)

It is in this context that the risks posed by the French OCTs to the European Union and its Member States in relation to tax evasion, money laundering and lack of fiscal transparency can be analysed. It appears that they are extremely variable from one OCT to another.

This is due to the diversity of these OCTs, in terms of institutions, geographical location, demography, natural assets and natural weaknesses, economic and financial conditions, financial, administrative and tax systems, infrastructure, quality of their administrations, etc.

This diversity will necessarily be taken into account at each stage of the present study, in order to avoid falling into inaccurate generalisations.

2. French OCTs and tax evasion

Summary and plan. Despite the weakness of the available data and their unreliability (2.1.), it is possible to say that French OCTs can hardly be used by European taxpayers implementing tax evasion strategies (that is, strategies for escaping taxes by dissimulating their income or wealth).

In certain OCTs there are several factors which are however likely to favour this avoidance: the weakness of direct taxes and the relative absence of tax audits can be pointed out in this respect (2.2.).

But in any case, French OCTs are by no means the most attractive for taxpayers who wish to avoid tax by dissimulating their income or wealth. Whatever the French OCT concerned, non-residents remain subject to the taxes due in their country of residence, and may even be subject to double taxation; the French OCTs are often far from their countries of residence; and it is rare for the local economy and local banking systems to reach the level of development necessary to make the French OCTs attractive for tax evasion purposes (2.3.).

2.1. The lack of reliable public data

Insufficient data. Upstream of the question of whether there is significant international tax evasion via the French OCTs, it is important to underline the difficulty for local administrations to produce reliable data. In a report which it devoted to overseas tax autonomy in 2013, the French National Audit Office noted that 'The production of the statistical data required for a relevant tax policy is late and incomplete, in particular as regards GDP or the level of compulsory levies'.⁹⁰ It then added that 'the results of tax administrations in terms of efficiency and effectiveness are mixed and could all be significantly improved. In this respect, only New Caledonia has put in place performance indicators for its tax activity'.⁹¹

Awareness of this inadequacy. The fact that the National Audit Office has alerted the public authorities to this point and has officially advocated strengthening the quality of local production of economic and fiscal statistics, in particular in terms of the deadline for making them available, suggests further improvements. Hopefully it will soon be inaccurate to write that 'many problems, always in close connection with a relative lack of means, have been noted. The identified disruptions range from simple technical dysfunctions to more serious deviations with regard to equity and the fundamentals of taxation'.⁹²

Lack of a real reaction from the French authorities. However, these improvements are slow to be made. In a referral by the first President of the National Audit Office dated 16

⁹⁰ Cour des comptes, *L'autonomie fiscale en Outre-Mer*, November 2013, p. 43.

⁹¹ Cour des comptes, *L'autonomie fiscale en Outre-Mer*, November 2013, p. 74.

⁹² Cour des comptes, *L'autonomie fiscale en Outre-Mer*, November 2013, p. 75.

February 2017, the persistence, at the central level, of administrative and supervisory defects in overseas policies (which do not exclusively concern tax policy) has thus been underlined.⁹³

Resulting methodological difficulties. The author of this report notes that the collection of data on the application of tax law in the French OCTs was extremely difficult. While the tax departments of each local authority have a website⁹⁴ where it is easy to find the applicable (often codified) regulations, the declarative obligations and the corresponding forms or procedures, as well as information on the general administrative organisation (names and powers of the services), the latter never indicate the number of agents and their distribution in the services, the number of tax audits carried out or the results of these audits.

Similarly, data on the OCTs are never included in the documents published by the central administrations. Neither the annual statistical yearbooks published by the Directorate-General for Public Finance⁹⁵ nor the Tax Atlas of France⁹⁶ posted by the same Directorate contain data specific to OCTs. Although these documents contain a great deal of reliable and well-presented information, they combine the overseas data with the metropolitan data.

And if one should expect to find data in the reports published annually by the *Institut d'Emission d'Outre-Mer*, it must be noted that these reports, although very rich, contain no data on taxation in the OCTs.⁹⁷ In particular, no information can be found for the purpose of determining the number of tax officers, their assignments or the results obtained. Similarly, the Ministry of Overseas does not publish any data on these points.

Therefore, the main source available remains the report entitled '*L'autonomie fiscale en Outre-Mer*' ('Overseas tax autonomy'), which was published in November 2013 by the French National Audit Office (*Cour des comptes*)⁹⁸ with the support of the Regional and Territorial Audit Offices. In view of the means and prerogatives available to the National Audit Office, the methods it traditionally uses, its independence and its seriousness, the data contained therein are reliable and relevant, even if the Office has stated that it had

⁹³ Cour des comptes, [*Référé du premier président*](#), 16 February 2017.

⁹⁴ This is the case for the following OCTs:

- [New Caledonia](#) ;
- [French Polynesia](#) ;
- [Wallis-and-Futuna](#) ;
- and [Saint-Pierre-and-Miquelon](#).
- St. Barthélemy does not have a website specific to tax matters. These are nevertheless addressed on [the general website of this OCT](#).

⁹⁵ These [yearbooks are available online](#).

⁹⁶ This [atlas is available online](#).

⁹⁷ Those [reports are available online](#).

⁹⁸ Cour des comptes, [*L'autonomie fiscale en Outre-Mer*](#), November 2013.

sometimes been difficult to obtain them or to obtain recent data. In these circumstances, it is regrettable that since then, only the Territorial Audit Office of French Polynesia has published a report containing relevant data on the taxation of this OCT.⁹⁹ For their part, the other regional or territorial offices have not published any report making it possible to ascertain the tax reality of the territories concerned.¹⁰⁰

2.2. The factors favouring tax evasion through certain French OCTs

Weakness of direct taxes and effectiveness of tax audits. In the French OCTs, two factors are likely to favour international tax evasion: the low level of direct taxes and the relative lack of fiscal controls.

2.2.1. The low level of direct taxes

General level of tax pressure in the French OCTs. The tax burden of the French OCTs is, on the whole, not very far from that which can be seen in the least taxed Member States of the European Union.

In a recent report, the French National Audit Office, in the light of the available local statistics, published data which are given in the table below.¹⁰¹ Given the lack of significant tax reform and the economic stability since its publication,¹⁰² these data remain relevant to ascertain the tax burden on taxpayers in the French OCTs.

⁹⁹ Chambre territoriale des comptes de Polynésie française, *Rapport d'observations définitives – Collectivité de la Polynésie française – Gestion budgétaire et financière – exercices 2011 et suivants*, 23 November 2015.

¹⁰⁰ The reports published by the Territorial Audit Office of New Caledonia concern only the municipalities of this territory and do not apprehend tax evasion, which is not at stake for them. See [https://www.ccomptes.fr/Publications/Recherche-avancee/\(offset\)/50/\(limit\)/10/\(sort\)/attr_date_filter_dt;desc/\(filters\)/root-jurisdiction_s:Nouvelle-Calédonie](https://www.ccomptes.fr/Publications/Recherche-avancee/(offset)/50/(limit)/10/(sort)/attr_date_filter_dt;desc/(filters)/root-jurisdiction_s:Nouvelle-Calédonie). For its part, the Regional and Territorial Audit Office in St. Barthelemy has a relatively low level of activity in this area since only one report (which does not address the issue of tax evasion) can be reported : See *Rapport d'activité 2015 des chambres régionales et territoriales des comptes des Antilles et de la Guyane*. Finally, no report from the Territorial Audit Office of Saint-Pierre-and-Miquelon concerns taxation. See [https://www.ccomptes.fr/Publications/Recherche-avancee/\(limit\)/10/\(sort\)/attr_date_filter_dt;desc/\(filters\)/root-jurisdiction_s:Saint-Pierre%20et%20Miquelon](https://www.ccomptes.fr/Publications/Recherche-avancee/(limit)/10/(sort)/attr_date_filter_dt;desc/(filters)/root-jurisdiction_s:Saint-Pierre%20et%20Miquelon).

¹⁰¹ Cour des comptes, *L'autonomie fiscale en Outre-Mer*, November 2013, p. 25.

¹⁰² In this sense, see the reports published in 2013, 2014 and 2015 by [Institut d'émission d'outre-mer](#).

Table 3: Level of compulsory levies in the French OCTs (in millions of euros and in %)

	New Caledonia	French Polynesia	St Barthelemy	Saint-Pierre-and-Miquelon	Wallis-and-Futuna
Reference Year	2011	2011	2005	2012	2008
OCT (a)	1 233	888	37	20	17
Sub-territorial local authorities (b)	36	56	0	8	0
Various bodies of local government (c)	39	17	0	1	0
Social security (d)	1 056	607	30	24	7
Compulsory levies (e)	2 364	1 568	67	53	24
GDP (f)	7 105	4 346	235	172	151
Rate of compulsory levies (e/f)	33 %	36 %	29 %	31 %	16 %
Tax pressure (a+b+c)/f	18 %	22 %	16 %	17 %	11 %
Rate of social levies (d/f)	15 %	14 %	13 %	14 %	5 %

Source: Cour des comptes, [L'autonomie-fiscale-en-outre-mer](#)

Compared to other states, few French OCTs offer taxpayers a low tax rate. With the exception of Wallis-and-Futuna, the compulsory tax rates charged by the French OCTs are close to the average of the rates observed in the OECD (33.8 %) and the European Union (38.4 %). Moreover, as indicated by the French National Audit Office, 'the levels of levies charged by the (...) local authorities concerned are of the same order as those of the states which are situated in their geographical area'.¹⁰³

¹⁰³ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 25.

And if there are any differences concerning the total level of compulsory levies between mainland France and New Caledonia,¹⁰⁴ French Polynesia¹⁰⁵ and Saint-Pierre-and-Miquelon,¹⁰⁶ these are due mainly to the social levies and not to the tax levies.¹⁰⁷

Weight of indirect taxation in the French OCT and consequent risk of international tax evasion. A qualitative approach, however, shows that direct taxation is relatively low in St. Barthélemy and Wallis-and-Futuna (developed below), which is a factor for tax evasion. When a territory does not levy direct taxes, there is no declarative obligation for taxpayers. Both their incomes and their fortunes may be easily concealed. In other words, the absence of direct taxes may encourage non-resident taxpayers to locate assets in these territories and hence to hide them from their states of residence. They may consequently avoid taxes on their income (profits, interest, dividends, capital gains, etc.) and their wealth (holding and, where applicable, inheritance or gift).

St. Barthélemy. The local authority of St. Barthélemy is certainly the one which, with regard to this last series of considerations, presents the most risks in terms of international tax evasion. A reading of the relevant tax code shows that direct taxation is virtually non-existent.¹⁰⁸ The tax revenues of this territory come mainly from land registration and registration fees, as well as wharfage fees. At first glance, this OCT presents, under its tax legislation, the most important risks in terms of international tax evasion. Given the rules applicable to non-residents and 'neo-residents' (see below, point 2.3), this risk must be put into perspective.

Wallis-and-Futuna. Direct taxation is also very low in Wallis-and-Futuna. There is no form of taxation of the income of residents and non-residents, who are not subject to any income tax or to any social levy of a fiscal nature (generalised social contribution, contribution to the reimbursement of the social debt, and additional levies). Similarly, there is no corporate income tax or income tax on securities. In theory, therefore, this OCT presents under its tax legislation, significant risks in terms of international tax evasion. However, they have to be particularly put into perspective in view of the weakness of the banking system of this local authority whose economy is essentially subsistence and domestic. According to William Gilles, this is what limits the possibilities of fiscal resources and the possibility of any direct taxes.¹⁰⁹

¹⁰⁴ According to the [European Commission](#), New Caledonia is nevertheless considered a tax haven by Bulgaria, Latvia and Lithuania.

¹⁰⁵ According to the [European Commission](#), French Polynesia is nevertheless considered a tax haven by Portugal.

¹⁰⁶ According to the [European Commission](#), Saint-Pierre-and-Miquelon is nevertheless considered a tax haven by Latvia, Lithuania and Portugal.

¹⁰⁷ Cour des comptes, *L'autonomie fiscale en Outre-Mer*, November 2013, p. 28.

¹⁰⁸ The 'Code des contributions' is available [on line](#).

¹⁰⁹ William Gilles, 'La fiscalité à Wallis-et-Futuna. Entre Faiblesse, Paradoxe et Apparence', In Xavier Cabannes, *Regards sur la fiscalité dans le Pacifique sud*, Journal de droit comparé du pacifique, volume hors série No XVIII, 2015, spec. pp. 46-47.

The three other French OCTs. In the three other French OCTs, the tax structure is less unbalanced. While indirect taxes account for 52 % of tax revenues in New Caledonia, 55 % in Saint-Pierre-and-Miquelon and 60 % in French Polynesia,¹¹⁰ direct taxes are levied on all types of income and are theoretically difficult to escape.

In French Polynesia, there is a territorial solidarity contribution which taxes all forms of income of individuals (salaries, wages, pensions, life annuities and various allowances, but also financial income and other income from patrimony). This contribution is a progressive one, without family quotient. This tax is levied at source and (like the generalised social contribution) finances social protection. In addition, there is a tax on transactions, which applies to all beneficiaries of income other than wages or agricultural income.¹¹¹ In other words, all personal incomes (on a worldwide basis for residents and on a territorial basis for non-residents) are taxed. The fact that some of them are levied at source makes it difficult to avoid tax.

For its part, New Caledonia introduced an income tax in the early 1980s, the characteristics of which are very close to mainland France's income tax. All personal income (including income from capital movements and capital gains) is therefore taxed, whether collected by residents or non-residents. Again, most financial income is collected at source, which does not favour international tax evasion.¹¹²

Similarly, New Caledonia, Saint-Pierre-and-Miquelon and French Polynesia levy direct taxes on the profits of businesses. These taxes are payable irrespective of the state of residence of the shareholders. Their bases include financial income and some of the capital gains they realise. And the rates charged are relatively high, since the corporate tax rate is 35 % in French Polynesia (40 % until 2013), ranges from 30 % to 35 % in New Caledonia and reaches 33.33 % in Saint-Pierre-and-Miquelon. In these three OCTs, further contributions are added.

Finally, although property taxation is low in these three OCTs,¹¹³ the weaknesses noted concern only local properties. Properties that are located on the territory of other states may indeed be taxed by the latter (income and wealth taxes), both when they are owned by residents and non-residents of the OCTs. Since few international tax treaties govern the relations between OCTs and other states, there is in practice a considerable risk of double taxation.

General assessment. Under these conditions, the risks of international tax evasion linked to French Polynesia, New Caledonia and Saint-Pierre-and-Miquelon are relatively measured. Beyond the questions already presented, account must be taken of the fact that the relative weakness of direct taxes is not the result of a desire for attractiveness but of

¹¹⁰ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 47.

¹¹¹ See [Code des impôts de Polynésie](#).

¹¹² See [Code des impôts de la Nouvelle-Calédonie](#).

¹¹³ For a detailed analysis, see Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, pp. 53-54.

‘historical sedimentation’.¹¹⁴ The systems currently in place date essentially from the 1970s or 1980s, *i.e.* the development of the phenomenon of international tax evasion which they neither provoked nor accompanied. Often neglected, the role of customs must also not be ignored and partly explains the structuring of the tax systems of the French OCTs.¹¹⁵

In the end, the tax system of the OCTs does not pose a risk to metropolitan France or to other states, but to the OCTs themselves. The main beneficiaries of the advantages given by their tax systems are indeed their natural residents, whose contributions are ultimately not being received by the French OCTs. On the other hand, there is little danger of the tax systems of the French OCTs being used by residents of third states for the purposes of international tax evasion. As will be explained below (point 2.3.), the banking system, the standard of living of the population, the cost of living linked to indirect taxation and the remoteness of other states are, moreover, not incentives in this respect.

2.2.2. The lack of tax audits

A weakness linked to the lack of resources implemented. In four of the five French OCTs (New Caledonia, French Polynesia, St. Barthélemy and Wallis-and-Futuna), the weakness of tax audits is likely to favour tax evasion. This situation is known by the taxpayers and their advisors: therefore, those who want to hide their income or fortune may have an interest in locating them in these OCTs if they know that the risk of control is low or non-existent.

The weakness of the tax inspections suffered by certain French OCTs is mainly due to the lack of resources available to the local authorities concerned, which are the main victims of tax evasion when their own resources are at stake. However, these weaknesses are not uniform in that the means available to the OCTs vary, depending in particular on the statutory framework of each local authority.

Given the statutes endowed by the central state, the freedom of organisation is total in the case of Polynesia and New Caledonia, and the means employed are essentially those of the local authorities.¹¹⁶ In the other three OCTs, government services are more involved and obtain better results. The French National Audit Office notes, on the one hand, that ‘the greatest difficulties have been pointed, notably in French Polynesia, where the main part of the administration of the tax is carried out by the local authority’¹¹⁷ and, on the other hand, that ‘Saint-Pierre-and-Miquelon, which relies on the services of the state to ensure

¹¹⁴ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 47.

¹¹⁵ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 48.

¹¹⁶ In this respect, the French National Audit Office (‘Cour des comptes’) pointed out that in New Caledonia, ‘However, the state participates in the administration of the tax through the local public finance management within the framework of a management agreement dealing solely with the recovery of certain tax revenues, through and the regional customs directorate in the context of the provision of personnel. All other missions are carried out by the local authority itself, from the production of the standard to the tax audit’ (Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 76).

¹¹⁷ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 74.

its fiscal missions, is the only overseas local authority to benefit from adapted resources, and for which monitoring, recovery and fiscal control are carried out under satisfactory conditions'.¹¹⁸

The most autonomous OCTs are of course aware of this situation and are trying to make the necessary improvements. Since 2010, New Caledonia and French Polynesia have reinforced the staff of their tax departments and have put in place internal controls and steering tools.¹¹⁹ This reinforcement of resources immediately gave rise to positive results.¹²⁰ But they remain insufficient.

Weak tax audits in New Caledonia, French Polynesia, St. Barthélemy and Wallis-and-Futuna. Thus, outside of Saint-Pierre-and-Miquelon, the French OCTs still have important weaknesses in terms of tax audits.

It should be noted, for example, that in New Caledonia, the rate of tax audits is still too low: 3.77 % for individuals, 3.78 % for professionals, and 5.8 % for companies liable to corporation tax. The same is true in French Polynesia where the levels of control are not better, 'because with only five 'category A' agents, the external tax audit section cannot easily fulfil all of its missions. However, since 2009, the temporary detachment of a senior inspector from the Directorate General of Public Finance has led to an increase in the recalled duties and penalties. Similarly, in 2011, the temporary reinforcement of four auditors and a senior inspector resulted in a doubling of the number of checks and a ten-fold increase in the recalled fees'.¹²¹ In other words, the weakness of tax audits essentially results from a lack of resources, that is to say, from a lack of political will of the authorities concerned, but also of the central state.

This is borne out by the fact that 'In St. Barthélemy, no management agreement has been signed with the state, in spite of the solicitations of the local authority since 2008. The means devoted to the tax administration have remained modest: one 'category A' agent and one 'category C' agent'.¹²² It follows that between 2007 and 2013, no field supervision was organised outside the questions of the visitor's tax. Similarly, the management of the declaratory procedure applicable to the wharf right did not start until 2011, since no customs officer was assigned to this task before that date.¹²³

¹¹⁸ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 74. In this sense, see also p. 78: 'In general, the Territorial Audit Offices have found that when this responsibility is assured by the local authority's own resources, it is more difficult for it to devote resources adapted to the stakes'.

¹¹⁹ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 78.

¹²⁰ In this sense, see footnote No 88 of the report published by Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 78.

¹²¹ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 83.

¹²² Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 84.

¹²³ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 84.

The situation is not better in Wallis-and-Futuna. It will be noted that, in addition to the lack of administrative means, this local authority suffers from the fact that its tax system does not include any penal sanctions. But if they existed, would such sanctions be applied?

This results in poor knowledge of tax bases by local tax administrations. The French National Audit Office has thus been able to point out that 'In French Polynesia and New Caledonia, the tax administration has a limited knowledge of the incomes of self-employed professions, traders, artisans and professions (...). In these two local authorities, regulations and the state of cadastres and real estate files also hamper the development of effective real estate taxation'.¹²⁴ By way of illustration, the Office noted, for example, that in French Polynesia, there were in 2010 approximately 36,000 taxpayers subject to property tax, while 76,000 homes were declared. More generally, the Office concluded that reporting obligations in overseas local authorities, with the exception of Saint-Pierre-and-Miquelon, are not always well respected.

The satisfactory level of tax audits carried out in Saint-Pierre-and-Miquelon. The situation of these four OCTs contrasts with that of Saint-Pierre-and-Miquelon, where tax services are those of the state and where efforts have been made in terms of staff and procedures. In 2007, on-the-spot controls were added to the document controls: they take place at a frequency similar to that in mainland France.¹²⁵

2.3. The factors putting into perspective the risks of tax evasion through French OCTs

Three factors. For three reasons, the risks of tax evasion via the French OCTs must be put into perspective. Non-residents of the French OCTs remain subject to taxation in their state of residence and may even be subject to double taxation; the French OCTs are often far from their states of residence; and the local economy and local banking systems rarely reach the level of development necessary to make French OCTs attractive for tax evasion purposes.

2.3.1. The tax regimes applicable to non-resident taxpayers in the French OCTs

The principle of taxation of non-residents of French OCTs by their states of residence. In accordance with the principles set out in Article 4A of the French General Tax Code, which are included in all tax codes of the French OCTs, residents and non-residents of the OCTs (this last category includes residents of mainland France, residents of French overseas departments or regions (DOM and ROM) and residents of other OCTs) shall not be taxed under the same conditions. As a result, the tax benefits available to residents are sometimes denied to non-residents. Moreover, no rule deprives their states of residence of the right to tax non-residents of the OCTs.

¹²⁴ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, pp. 80-81.

¹²⁵ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, footnote No 74, p. 84.

The example of St. Barthelemy. The example of St. Barthelemy is particularly significant in this respect. While it is often asserted that St. Barthelemy is a tax haven for its non-residents,¹²⁶ such claims from non-specialists are unfounded since non-residents do not benefit by the advantages granted to residents. It is necessary to know that the taxpayers who are not residents of St. Barthelemy are liable to the taxes due in their country of residence, to which they must add the following local taxes in respect of the operations they carry out in the territory of St. Barthelemy: a tax at the rate of 20 % based on real estate gains realised by individuals; taxes on capital gains on the sale of transferable securities at a minimum rate of 19 % plus social security contributions (15.5 %); and a 3 % tax on the market value of buildings whose owners are not in compliance with their reporting obligations. Insofar as St. Barthelemy has not concluded any convention for the elimination of double taxation with foreign states, non-residents do not benefit from any preferential treatment.

It follows that, unless they are a resident (which makes it possible to avoid direct taxes), tax evasion is difficult for taxpayers in St. Barthelemy, especially since some of the aforementioned levies are taxed at source. And it would be in vain for non-resident taxpayers to implement strategies of tax evasion by becoming residents, which would allow them to benefit from direct tax exemptions and hence to conceal income or patrimonial elements, since French law contains a mechanism to counter this strategy. More precisely, under paragraph I of Article LO 6214-4 of the French General Code of Local Authorities, 'The authority of St. Barthelemy shall exercise the powers it holds under 1 ° of I of Article LO 6214-3 in respect of taxes, duties and taxes in compliance with the following provisions: 1° Natural persons may be deemed to have their fiscal domicile in St. Barthelemy only after having resided there for at least five years. Legal entities may be considered as having their fiscal domicile in St. Barthelemy only after having installed the seat of their effective management for at least five years or when they have installed the seat of their effective management and are controlled, directly or indirectly, by natural persons resident in St. Barthelemy for at least five years. Natural or legal persons who do not fulfil the residency requirements laid down in the two preceding subparagraphs shall be deemed to have their fiscal domicile in mainland France'. In other words, direct tax exemptions that favour the concealment of income or assets are granted only to taxpayers who have actually resided in St. Barthelemy for more than five years. And 'neo-residents' (that is to say those who have resided in St. Barthelemy for less than five years) are therefore subject to mainland France's tax law.

As Michel Collet, who is a practising lawyer in a prestigious law firm and very familiar with local affairs, summarised, 'The 'neo-residents' are treated as tax residents of France. In the case of income or fortune originating in the territory of St. Barthelemy, 'neo-residents' will also be taxable in St. Barthelemy - like any person not resident in St. Barthelemy - where the tax code decides it. This is the case with respect to real estate gains

¹²⁶ According to the [European Commission](#), this is the case for Belgium. Several pages published on the Internet are also in this sense : See for example Jean-Marc Sylvestre, '[Exil fiscal : Les destinations préférées des Français !](#)', 11 May 2013; and Jean-Marc Sylvestre, '[Les paradis fiscaux pour les nouveaux pauvres de l'occident](#)', 2 November 2013 ; Or Olivier Grivat, '[St-Barthélemy: la France a aussi son paradis fiscal](#)', 25 March 2012.

on buildings situated in the territory of St. Barthelemy'.¹²⁷ He added that 'a phenomenon of double taxation is likely to follow, since the 'neo-resident' should be taxed also in mainland France on the same income. Tax residents of France are taxed on their income from worldwide sources. In accordance with the organic law, the French tax will be reduced by the tax levied in St. Barthelemy. No reimbursement will be granted in the case of real estate, where the tax of St. Barthelemy would have to be higher than the French tax. Finally, it should be noted that both French and foreign nationals are likely to be considered 'neo-residents''.¹²⁸

St. Barthelemy is not as attractive as it seems and is not the ideal territory for tax evasion. This idea was rightly pointed out as follows: 'Impossible to settle there deliberately, just before making a large sum of money in one's home country, and then flee the year after'.¹²⁹ In an article published in *Le Monde Diplomatique*, two researchers concluded that 'St. Barthelemy is not, in the legal sense, a tax haven, and will not become one of the new Euro-Caribbean platforms for money laundering and great financial delinquency'.¹³⁰

The taxation of non-residents of French OCTs by their states of residence. Finally, under the law applicable in St. Barthelemy and in the other French OCTs, non-resident taxpayers are not exempt from taxation imposed by other states. In particular, they may be taxed by those other states on the income derived therefrom and on elements of fortune situated therein. And if these states practice the principle of worldwide taxation, there is almost no international tax convention calling into question their right to tax revenues from French OCTs or the heritage elements located there.

2.3.2. The geographical distances and the difficulties of access

The remoteness of metropolitan France and of the European Union. The geographic remoteness of the OCTs is twofold: these French territories are on the one hand remote from mainland France and the European continent; and they are on the other hand far from the third states to which the tax evaders would seek to escape.

In ascending order, it should be noted that:

- Saint-Pierre-and-Miquelon is 4,270 km from Paris,
- St. Barthelemy is 6,800 km from Paris,
- French Polynesia is 15,700 km from Paris,
- Wallis-and-Futuna are 16,200 km from Paris,
- New Caledonia is 16,700 km from Paris.

¹²⁷ See Michel Collet, '[Eclaircissement sur les fiscalités applicables à Saint-Barthélemy](#)', CMS Bureau Francis Lefebvre, October 2010.

¹²⁸ See Michel Collet, '[Eclaircissement sur les fiscalités applicables à Saint-Barthélemy](#)', CMS Bureau Francis Lefebvre, October 2010.

¹²⁹ Laurent Guez, '[Saint-Barth La drôle d'économie d'un paradis](#)', 22 July 2016.

¹³⁰ Sébastien Chauvin and Bruno Cousin, '[Saint-Barthélemy, petit paradis pour milliardaires - Une île française sans impôts](#)', *Le Monde Diplomatique*, January 2006.

The remoteness of third countries. Similarly, French OCTs are relatively far from third countries. For example, French Polynesia is 5,700 km from Australia, 6,200 km from the United States and 9,500 km from Japan. And New Caledonia or the islands of Wallis-and-Futuna are respectively 3,300 and 4,300 km from Australia. St. Barthelemy and Saint-Pierre-and-Miquelon are closer to the American continent.

In addition, access to these OCTs is not always easy.

This remoteness and, in any event, the difficulties of access make international tax evasion complicated. Indeed, tax evasion presupposes a certain proximity or, at the very least, relative accessibility. And while it is true that the dematerialisation of the economy makes it easier to avoid tax using false domiciliation, the French OCTs are little concerned by this phenomenon. As William Gilles points out, 'Unlike individuals, corporate managers have the ability to locate their headquarters in Wallis-and-Futuna in the digital age, while continuing to manage them at distance in a more favourable environment, but the statistics show a reverse trend'.¹³¹ In the end, only St. Barthelemy knows an abnormally high number of companies: this explains why Eric Boquet, a French senator, refused to vote in favour of the law ratifying an agreement between France and St. Barthelemy for the following reasons: 'Having a code of contributions partly inspired by French tax law, St. Barthelemy must indeed be considered as a tax haven - of a particular form perhaps - situated moreover in an area of the planet which is already sufficiently provided. This is borne out by the fact that St. Barthelemy has more than 4,000 businesses for just over 9,000 residents: this is still a rather exceptional situation...'¹³²

2.3.3. The low level of development of local economies and banking systems

Level of development of local economies. Finally, the level of development of local economies and banking systems does not favour tax evasion thanks to the French OCTs.

This is particularly the case in Wallis-and-Futuna, where an author has written that 'the economy of this local authority is essentially subsistence and domestic, which limits the possibilities of tax resources. This economic system makes it difficult to introduce a tax based on value creation or profits: the product of economic activity - which is essentially based on agriculture, livestock and artisanal fisheries - is not only little creative value, it is mostly consumed directly by the population.'¹³³

¹³¹ William Gilles, 'La fiscalité à Wallis-et-Futuna. Entre Faiblesse, Paradoxe et Apparence', In Xavier Cabannes, *Regards sur la fiscalité dans le Pacifique sud*, Journal de droit comparé du pacifique, volume hors série No XVIII, 2015, p. 53.

¹³² Eric Bocquet, '[La collectivité de Saint-Barthélemy doit bel et bien être considérée comme un paradis fiscal](#)', 28 September 2015.

¹³³ William GILLES, 'La fiscalité à Wallis-et-Futuna. Entre Faiblesse, Paradoxe et Apparence', In Xavier Cabannes, *Regards sur la fiscalité dans le Pacifique sud*, Journal de droit comparé du pacifique, volume hors série No XVIII, 2015, pp. 46-47.

With the exception of St. Barthelemy, French OCTs suffer from a lack of dynamism in the local economy, poor infrastructures and sometimes geographical handicaps. As noted by the French Senate on Wallis-and-Futuna in the presentation of the 2012 Finance Act, 'The economic and social development of the territory is constrained by natural and structural handicaps, accentuated by several factors: high transport costs, distance from potential markets, low domestic market size, higher production costs than in neighbouring countries'.¹³⁴ Similarly, it is clear from a serious analysis published about this territory in *Le Monde* that 'It is estimated that about 70 % of the islands population does not have access to the monetary economy, and lives self-sufficiently from its own production (pigs, fruit trees, fishing ...). Public employment is relatively large in terms of population, and output from public services accounts for 55 % of the GDP of the islands. The islands benefit from European aid (€ 16.5 million under the EDF) and from state grants (around € 70 million)'.¹³⁵ These reasons undoubtedly explain why no EU Member State regards Wallis-and-Futuna as a tax haven.¹³⁶

Characteristics of the banking systems. In view of the characteristics of the banking systems to be examined below (point 3.3., in the context of the study on the fight against money laundering), tax evasion via the French OCTs is also difficult. There are few banks in the French OCTs; they are directly controlled by the major banks of mainland France; they collect a great deal of information from the account holders, notably on the origin of funds and income; and they offer only basic financial products, practicing essentially a deposit bank activity.

2.4. Conclusion

In the end, the risks of tax evasion are low in French Polynesia, New Caledonia and Saint-Pierre-and-Miquelon. The fact that levies at the source are used contributes to making tax evasion difficult.

For its part, the territory of Wallis-and-Futuna does not levy any direct tax on non-residents. However, the level of development of these islands and the level of banking services make them unattractive, even for non-residents wishing to engage in tax evasion.

Only the case of St. Barthelemy can ultimately be open for discussion, all the more so as the tax audits are weak. However, most experts agree that the risk of tax evasion is reduced. Responding negatively to the question of whether it is interesting to transfer a company's tax residence or location to St. Barthelemy for the purpose of tax evasion, Mr. Collet has identified three factors:

¹³⁴ French Sénat, Projet de loi de finances pour 2012 : Collectivités d'outre-mer, Nouvelle Calédonie et TAAF - [Avis n° 112 \(2011-2012\) de M. Christian COINTAT, fait au nom de la commission des lois](#), 17 November 2011.

¹³⁵ Nicolas Six, ['Wallis-et-Futuna, petit bout de France où règnent trois rois'](#), *Le Monde*, 5 September 2014.

¹³⁶ See the [list published by the European Commission](#). Even though Wallis-and-Futuna is the French OCT with the lowest tax burden, it is the only one to be considered as a tax haven by any Member State of the European Union.

- 'The necessary condition of prior installation for 5 years';¹³⁷
- 'The absence of a conventional network which will most likely result in a penalty of taxation at the source of the goods and foreign and French income of people relocating to Saint Barth. Because when we speak of tax relocation, we speak of populations that generally have wealth and international sources of income';¹³⁸
- 'Finally, there is the distance. In my opinion, relocation can only be effective if one actually establishes one's home, one's life in Saint Barth, which is likely to be a problem. To conclude on the subject, I will say that in terms of changes in tax residence abroad, there are countries at 1h30 of Paris by train where one finds very advantageous solutions, both in terms of taxation proposed locally and in the framework of comprehensive networks of tax treaties'.¹³⁹

¹³⁷ See Michel Collet, '[Eclaircissement sur les fiscalités applicables à Saint-Barthélemy](#)', CMS Bureau Francis Lefebvre, October 2010.

¹³⁸ See Michel Collet, '[Eclaircissement sur les fiscalités applicables à Saint-Barthélemy](#)', CMS Bureau Francis Lefebvre, October 2010.

¹³⁹ See Michel Collet, '[Eclaircissement sur les fiscalités applicables à Saint-Barthélemy](#)', CMS Bureau Francis Lefebvre, October 2010. In this sense, see also Maïté Koda, Interview of Professor Bernard Castagnède, '[Parler de paradis fiscal pour l'Outre-mer français relève de la mythologie](#)', *Outre Mer* 1ère, 25 April 2013.

3. French OCTs and anti-money laundering

Summary and plan. The remarks made on the effectiveness of the tax audit procedures are also valid in the fight against money laundering.

In this field, it must be stated that, although the rules applicable in the French OCTs are very close to the regulation of mainland France and therefore comply with the requirements of European Union law (3.1.), the intensity of controls and the production of data relating thereto remains insufficient (3.2.).

This is all the more unfortunate as the laundering practices are relatively limited in the French OCTs (3.3.).

3.1. The indirect application of European anti-money laundering rules in the French OCTs

Application of metropolitan law with adaptations. In the French OCTs, the rules applicable to the fight against money laundering are virtually identical to those prevailing in mainland France. Therefore, secondary legislation of the European Union applies indirectly, but certainly. In other words, the European regulations do not apply directly (legally impossible), but thanks to the extension made by French law (legally possible even if not obligatory).

This is in part due to the fact that ‘the three territories using the euro, Saint-Pierre-and-Miquelon, St. Barthelemy and Saint-Martin, apply European secondary banking and financial law’,¹⁴⁰ which includes the rules relating to the fight against money laundering.

This is also due to the fact that in all the decentralised overseas local authorities (including the three other OCTs), the state has retained its competence in the field of security and repression of tax offences (and similar offenses) having a penal character. For example, Article 7 of the Organic Law of 27 February 2004 on French Polynesia provides that ‘In matters falling within the jurisdiction of the state, the laws and regulations applicable in French Polynesia shall be expressly stated to that end. By way of derogation from the first subparagraph, have full force and effect in French Polynesia, without prejudice to provisions adapting to its particular organisation, the laws and regulations relating to: (...) 8. Combating illicit traffic and money laundering, combating the financing of terrorism, the powers of investigation and detection of infringements and customs procedures, the system of foreign investment in an activity which participates in the exercise of official authority, or activities of a nature likely to infringe public policy, public security, the interests of national defence or the activities of research, production or marketing of arms, ammunition, explosive substances’. Similar examples could be given for all other overseas French local authorities that are the subject of this study.¹⁴¹

¹⁴⁰ Cour des comptes, *L'autonomie fiscale en Outre-Mer*, November 2013, p. 18.

¹⁴¹ Concerning St. Barthelemy, see [article LO 6214-3 du Code général des collectivités territoriales](#). Concerning Saint-Pierre-et-Miquelon, see [article LO 6414-1 du Code général des collectivités territoriales](#).

Traditional extension to the French OCTs of EU secondary legislation on the fight against money laundering. The extension to the French OCTs, via the laws of the central state, of the rules of secondary legislation of the European Union relating to the fight against money laundering is a trend which can be observed for a long time. Otherwise explained, the French legislator has long extended the EU's anti-money laundering rules to the French OCTs, although it is not obliged to do so.

The statement of reasons for a Commission decision of 26 November 2009 'authorising France to conclude an agreement with Saint-Pierre-et-Miquelon, Mayotte, New Caledonia, French Polynesia and Wallis and Futuna respectively for transfers of funds between France and each of these territories to be treated as transfers of funds within France, pursuant to Regulation (EC) No 1781/2006 of the European Parliament and of the Council'¹⁴² testifies it. It is indeed possible to read there:

- that 'Saint-Pierre-et-Miquelon, Mayotte, New Caledonia, French Polynesia and Wallis and Futuna do not form part of the territory of the Community as determined in accordance with Article 299 of the EC Treaty. However, Saint-Pierre-et-Miquelon and Mayotte through a Council Decision of 31 December 1998 as well as New Caledonia, French Polynesia and Wallis and Futuna through Protocol 27 on France annexed to the Treaty of the European Community form part of the currency area of France. Saint-Pierre-et-Miquelon, Mayotte, New Caledonia, French Polynesia and Wallis and Futuna therefore comply with the criterion set out in Article 17(1)(a) of Regulation (EC) No 1781/2006';
- that 'Payment services providers in Saint-Pierre-et-Miquelon, Mayotte, New Caledonia, French Polynesia and Wallis and Futuna participate directly in payment and settlement systems in France, namely either CORE or Target2-Banque de France. They therefore comply with the criterion set out in Article 17(1)(b) of Regulation (EC) No 1781/2006';
- that 'Order No 2009-103 of 30 January 2009 concerning the freezing of assets notably in the fight against terrorism financing ensure that appropriate measures are in place in to Saint-Pierre-et-Miquelon, Mayotte, New Caledonia, French Polynesia and Wallis and Futuna to impose financial penalties vis-à-vis entities or persons listed by the United Nations or the European Union';
- that 'Order No 2006-60 of 19 January 2006 modernising the financial and economic law applicable to Mayotte, New Caledonia, French Polynesia and Wallis and Futuna, Decree No 2006-736 of 26 June 2006 concerning the fight against money laundering and modifying the financial and monetary code and Law No 2004-130 of 11 February 2004 reforming the statute of some judiciary and legal professions ensure that Saint-Pierre-et-Miquelon, Mayotte, New Caledonia, French Polynesia and Wallis and Futuna have in place an anti-money laundering regime equivalent to that in application on the French territory as regards transfers of funds'
- and that 'Saint-Pierre-et-Miquelon, Mayotte, New Caledonia, French Polynesia and Wallis and Futuna have adopted the same rules as those established under Regulation (EC) No 1781/2006 and require their respective payment services

¹⁴² [*Official Journal of the European Union*, L. 312, 27 November 2009, pp. 71-72.](#)

providers to apply them, thus fulfilling the criterion set out in Article 17(1)(c) of that Regulation’.

Many other examples could be given. This is the case, for example, with the decree of 22 September 2009¹⁴³ implementing overseas Articles L. 562-1 et seq. of the French Monetary and Financial Code concerning obligations to combat money laundering and the financing of terrorism. This decree extended the aforementioned provisions of the Monetary and Financial Code to the territories which at the time of its adoption were then OCTs: Mayotte, Saint-Pierre-and-Miquelon, New Caledonia, French Polynesia, Wallis-and-Futuna Islands, and French Southern and Antarctic Territories.

Similarly, it is interesting to read in the report of a hearing in the framework of the European affairs committee of the French Senate¹⁴⁴ held shortly after the drafting of the European Council decision on the modification of the European Statute of the island of St. Barthelemy, ‘that the evolution of St. Barthelemy towards the status of OCT would not be detrimental to the general interests of the Union: (...) France wishing that the euro continue to be used in St. Barthelemy, monetary continuity will be ensured. As it has confirmed to the European Commission, which is particularly vigilant on this subject, France will subscribe to the undertakings necessary for the application in Saint Barthelemy of the rules relating to combating counterfeiting of currency, of the rules relating to combating the illicit circulation of money and the money laundering, and of the rules relating to administrative cooperation and fiscal transparency. The transformation of St. Barthelemy into the OCT thus meets the specific needs of this local authority, without threatening the general interests of the European Union’.¹⁴⁵

Extension to the French OCTs of the most recent provisions of European Union anti-money laundering legislation. The provisions recently adopted by the French authorities with a view to transposing the most recent European secondary legislation still go in this direction. Pursuant to Article 118 of Law No 2016-731 of 3 June 2016,¹⁴⁶ which strengthened the fight against organised crime and terrorism and their financing, an Order of 1 December 2016¹⁴⁷ extended to the French OCTs most of the rules set out:

- in Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006;

¹⁴³ *Journal Officiel de la République Française*, No 229, 3 October 2009, p. 16039.

¹⁴⁴ In this case, 13 October 2010.

¹⁴⁵ Sénat, [Communication de M. Jean Bizet et audition de M. Michel Magras, sénateur de Saint-Barthélemy - Modification du statut de Saint-Barthélemy, examen par la commission des affaires européennes le 13/10/2010](#).

¹⁴⁶ [Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale](#), *Journal Officiel de la République Française*, No 129, 4 June 2016, text No 1, article 118.

¹⁴⁷ See [Ordonnance n° 2016-1635 du 1er décembre 2016 renforçant le dispositif français de lutte contre le blanchiment et le financement du terrorisme](#), *Journal Officiel de la République Française*, No 280, 2 December 2016, text No 14, articles 17 to 19.

- and in Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

3.2. Critical examination of the effectiveness of the rules applicable within the French OCTs

Necessity of the examination. Whilst the rules on money laundering applicable in the French OCTs thus present no theoretical risk for the European Union and its Member States, the question of its effective observance arises. Similarly to what has been observed concerning the fight against tax evasion, the latter very often depends on the administrative means actually implemented (which are not uniform) as well as on the attitude of professionals and citizens.

Insufficiencies have been noticed. They relate to the intensity of the reporting of suspicions and of the controls (3.2.1.) and the production of related data (3.2.2.).

3.2.1. The insufficiency of the reporting of suspicions and of the controls

Weakness in the number of reports of suspicions. The fight against money laundering is largely based on reports of suspicions made by professionals (such as credit institutions, accountants, notaries and lawyers) to national supervisory authorities. It should be noted, first of all, that very few reports of suspicions (RS) are sent by professionals located in the French OCTs to the *Tracfin* service.¹⁴⁸

For example, the last annual activity report published by this service indicates that, compared to those operating in mainland France, accountants established in the OCTs rarely bring cases to the attention of the anti-money laundering authorities. This report states, *inter alia*, that 'Conversely, other regions sensitive to AML/CFT risks are under-represented. This is particularly the case for Corsica and the Overseas Regions, where the professionals of the number have transmitted only 12 RS in 2015'.¹⁴⁹ It should be noted that during the same period, more than 45,000 reports of suspicions were sent to *Tracfin* in mainland France by the professionals operating there.

This situation is not new. In a report published in 2011, the FATF already noted that 'Although the legislation in force is, apart from a few minor exceptions, the same throughout France, the assessors highlighted in the report several situations that raise

¹⁴⁸ *Tracfin* is the acronym for '*Traitement du renseignement et action contre les circuits financiers clandestins*' (Intelligence and action against clandestine financial circuits). It is an organisation belonging to the Ministry of the Economy and Finance, in charge of the fight against money laundering.

¹⁴⁹ *Tracfin*, [Rapport annuel d'activités Tracfin 2015](#).

doubts as to how effectively AML/CFT measures are implemented in overseas France. Thus, there remain serious doubts as to the full implementation of the STR obligation in certain territories situated overseas (this point applies to both the financial and non-financial professions)¹⁵⁰

This situation can be explained in two ways:

- The first explanation is the lack of a culture of anti-money laundering on the part of local professionals. In this sense, the evaluation report drafted by the FATF in 2011 indicates 'that while the strong financial connection with metropolitan France facilitates the implementation of AML/CFT legislation in these territories, it is also true that the geographical remoteness of these territories lessens the impact of the authorities' communication and awareness efforts regarding the covered professions'.¹⁵¹ Similarly, the report notes that 'no resources – or almost none – are devoted by Tracfin in territories located overseas to dialogue and exchanges and, more particularly to awareness raising on STR obligations among covered professions'.¹⁵² The absence of professional organisations that can guide and support professionals can also be stressed.
- The second explanation is the weakness of money laundering in the French OCTs (see below, 3.3.).

Weak controls. The weakness of the controls responds to the weakness of the reports of suspicions.

This weakness was identified as early as 2011 by the FATF. In an evaluation report, it is thus possible to read that 'At the level of AML/CFT compliance inspections for financial professionals, the evaluation report notes the virtual absence of on-site inspections by the AMF in these territories and the necessity for the ACP to increase its inspection activity'.¹⁵³ There is no indication that the conclusions drawn should now be called into question.

The same is true for non-financial professionals, which are also important: 'Inspections in overseas territories are organised in the same way as in metropolitan France, apart from a few exceptions, the scope of which is still hard to determine. The deployment of LAB/CFT inspections cannot be measured in these territories either. It appears to be crucial for the authorities to examine the organisation of these inspections and their effectiveness throughout the whole country'.¹⁵⁴

¹⁵⁰ FATF, [*Anti-Money Laundering and Combating the Financing of Terrorism. France*](#), 25 February 2011, p. 5.

¹⁵¹ FATF, [*Anti-Money Laundering and Combating the Financing of Terrorism. France*](#), 25 February 2011, p. 5.

¹⁵² FATF, [*Anti-Money Laundering and Combating the Financing of Terrorism. France*](#), 25 February 2011, p. 5.

¹⁵³ FATF, [*Anti-Money Laundering and Combating the Financing of Terrorism. France*](#), 25 February 2011, p. 5.

¹⁵⁴ FATF, [*Anti-Money Laundering and Combating the Financing of Terrorism. France*](#), 25 February 2011, p. 17.

3.2.2. The lack of data on money laundering in the French OCTs

Acknowledgment of the absence of data. The weakness of the reports of suspicion and then the weakness of the controls imply, mechanically, a difficulty for the French authorities to produce data relating to laundering and the fight against money laundering in the French OCTs.

For example, the annual activity reports published by *Tracfin* do not contain any substantial data on the number of checks carried out in the French OCTs and on the infringements found. This absence is very significant in view of the missions of *Tracfin*. It contrasts with the high quality, on all other points, of the reports published by this service.

Equally significant is the fact that the author of this report has not been able to find the number of staff assigned to anti-money laundering missions in the French OCTs.

Finally, some press reports show that local authorities are not necessarily aware of the risks of money laundering.¹⁵⁵

Condemnation by the FATF of the absence of data. This conclusion has been shared by the FATF. When France's most recent anti-money laundering and terrorism assessment was carried out within the framework of this group, it was more precisely pointed out that 'The absence of government authorities clearly identified for dealing with AML/CFT matters in these territories is especially viewed as a difficulty. French authorities should rectify these shortcomings and, more broadly, improve knowledge of the risks of money laundering and terrorist financing in every region of the country'.¹⁵⁶

It was then suggested that 'French authorities should therefore consider collecting quantified data more systematically and broadly by motivating all the authorities involved. Also, despite the existence of law enforcement authorities in the territories located overseas, too little quantified data is available regarding their crime-fighting activities in these regions. The lack of statistics and clarity in the available quantified data thus made it impossible for the assessment team to assess with any certainty the effectiveness of law enforcement authorities concerning AML/CFT throughout France'.¹⁵⁷

However, these recommendations did not lead to any formal follow-up.

¹⁵⁵ See for example Matthieu Delahousse, « [Panama Papers : ce vendeur de fruits et légumes qui intéresse la justice](#) », *L'obs*, 16 May 2016.

¹⁵⁶ FATF, [Anti-Money Laundering and Combating the Financing of Terrorism. France](#), 25 February 2011, p. 5.

¹⁵⁷ FATF, [Anti-Money Laundering and Combating the Financing of Terrorism. France](#), 25 February 2011, p. 7.

3.3. The need to put into perspective the risks of money-laundering via the French OCTs

Weakness of laundering in French OCTs. However, money-laundering remains low in the French OCTs. The main reason is that the banking system in place in these territories is not conducive to laundering practices, given its level of development and structuring (3.3.1.). Considering then the amount of the bank assets and the number of bank accounts held in the French OCTs, it seems that the importance of money laundering is relatively low (3.3.2.).

3.3.1. Limited risks with respect to banking systems and feasible banking operations

Two banking systems. There are two banking systems in the French OCTs, both of which bear witness to the unitary nature of the French state, the existence of a decentralised organisation and the lack of autonomy or sovereignty of the French OCTs. Both are evidence of the unitary character of the French state, the existence of a decentralised organisation and the lack of autonomy or sovereignty of the French OCTs:

- Saint-Pierre-and-Miquelon and St. Barthelemy (Atlantic zone) on the one hand are two OCTs using the euro. The banking system deployed there is therefore the metropolitan banking system, under the aegis of the *Banque de France*, which itself operates within the European framework;
- New Caledonia, French Polynesia and Wallis-and-Futuna (Pacific zone) on the other hand do not use the euro, but the Pacific franc. The functions of Central Bank are provided by the *Institut d'Emission d'Outre-Mer* (IEOM), to which three missions are entrusted:
 1. To be a relay of the national financial strategy, notably in fiduciary matters, but also by refinancing the banking system through monetary policy tools, and by clarifying financial decisions through analyses, statistical, financial or legal analysis;
 2. To contribute to financial stability through prudential policies, supervision of banking actors, monitoring of means of payment and control of anti-money laundering procedures;
 3. To render public services to economic actors, through the function of economic and banking observatory, but also by advising vulnerable groups (over-indebtedness, bank bans, etc.) or by managing the accounts of financial actors and public actors.

The result is a banking organisation that does not favour money laundering. Similarly, financial products offered locally are not very sophisticated.

The banking offer in the Atlantic area (Saint-Pierre-and-Miquelon and St. Barthelemy).

In the Atlantic area, the banking offer is relatively limited. According to the *Institut d'Emission d'Outre-Mer*, the banking and financial activities of the archipelago of Saint-Pierre-and-Miquelon are organised around only five establishments: they are two cooperative banks (*Caisse d'Epargne CEPAC* (ex-*Banque de Saint-Pierre-et-Miquelon*) and *Caisse d'Epargne Île-de-France*), the *Banque Postale* (commercial bank), a finance company

(*Coopérative Immobilière des Iles Saint-Pierre-et-Miquelon*) and a specialised credit institution (*Agence Française de Développement*).¹⁵⁸ Most of these establishments are thus secondary establishments of metropolitan establishments controlled in mainland France, whose reputations in terms of the fight against money laundering are satisfactory.

Similar remarks can be made about St. Barthelemy. The bank offer is based on four banks of the French Banking Federation of St. Barthelemy (namely *Banque des Antilles Françaises*, *Banque Française Commerciale Antilles-Guyane*, *BNP Paribas Guadeloupe*, and the *Banque Postale*) and two cooperative banks (*BRED - Banque Populaire* (BPCE Group) and *Caisse Régionale de Crédit Agricole de la Guadeloupe*).¹⁵⁹ Apart from *Caisse Régionale de Crédit Agricole de la Guadeloupe*, which is headquartered in Guadeloupe ('DOM', to which St. Barthelemy was previously attached), all these establishments have their headquarters in mainland France.

In Saint-Pierre-and-Miquelon and in St. Barthelemy, most of the activity is carried out by metropolitan establishments. In mainland France, they are subject to controls and audits, which also cover overseas operations once they are included in their balance sheets.

The banking offer in the Pacific area (New Caledonia, French Polynesia and Wallis-and-Futuna). In the Pacific area, the banking offer is not more developed. According to the *Institut d'Emission d'Outre-Mer*, banking and financial activity in French Polynesia is organised around three banks (*Socredo*, *Banque de Polynésie*, and *Banque de Tahiti*), three financing companies (*Ofina*, *Sogelease BDP* and *Oceor Lease Tahiti*), and the *Centre de chèques postaux de Papeete* under the aegis of the Post and Telecommunications Office (OPT). In addition to the local banking system, seven locally-established financial institutions operate regularly from mainland France, with the main focus being on financing local authorities and providing housing loans to individuals. *Casden Banque Populaire* (represented locally by *Banque de Polynésie* and *Socredo*), the French Development Agency (AFD: *Agence française de développement*), *DEXIA*, *Natexis-Banques Populaires*, the European Investment Bank and *Société de gestion des fonds de garantie d'outre-mer* (Sogefom). *Caisse des dépôts et consignations* (CDC), which is not a credit institution within the meaning of the French Monetary and Financial Code, also intervenes in French Polynesia.¹⁶⁰

In New Caledonia, there are nine local credit institutions: four banks belonging to the local committee of the *Fédération Bancaire Française* (*Banque Calédonienne d'Investissement*, *Société Générale Calédonienne de Banque*, *BNP Paribas Nouvelle Calédonie*, and *Banque de Nouvelle Calédonie*), a specialised credit institution (*Caisse de Crédit Agricole Mutuel de Nouvelle Calédonie*) and four financing companies (*Crédit Calédonien et Tahitien*, *OCEOR LEASE Nouméa*, *Nouméa Crédit* and *GE Money*). The offer of banking services is supplemented by *Centre financier de Nouméa* (service of the Post Office and Telecommunications). In addition to the local banking system, seven credit institutions, located outside the monetary zone, operate with some regularity in New Caledonia: the French Development Agency (AFD),

¹⁵⁸ See [Institut d'Emission d'Outre-Mer](#).

¹⁵⁹ See [Institut d'Emission d'Outre-Mer](#).

¹⁶⁰ See [Institut d'Emission d'Outre-Mer](#).

the European Investment Bank (EIB), *CASDEN Banques Populaires* (represented locally by *Société générale calédonienne de banque*), *Banque calédonienne d'investissement*, Dexia (formerly CLF: *Crédit Local de France*), *Natexis-Banque Populaire* and the *Société de gestion des fonds de garantie d'outre-mer* (SOGEFOM). The Caisse des dépôts et consignations (CDC) also intervenes locally.¹⁶¹

In New Caledonia as in French Polynesia, the present credit institutions are therefore not those that favour money laundering.

Finally, in Wallis-and-Futuna, the banking system is weakly developed. It is composed of a retail bank (*Banque de Wallis-et-Futuna*), which is the only commercial bank of the place (it is a subsidiary of *BNP Paribas Nouvelle-Calédonie*, belonging to the French BNP Paribas group), and of a public institution (the Directorate of Public Finance of the Wallis-and-Futuna Islands, authorised by decree of 20 December 2001 to continue its activity of managing personal accounts, but not to open new accounts, in the territory of the Wallis-and-Futuna Islands). In addition, a specialised credit institution, the *Agence Française de Développement* (AFD), assists the local authorities, the private sector and civil society by providing loans or guarantees through SOGEFOM.¹⁶²

Rudimentary nature of the banking operations that can be carried out in the French OCTs. Entirely dependent on metropolitan establishments, the few banks located in the French OCTs offer locally few services to their customers.

For the most part, the services offered are retail banking services. In a report published in 2013, the *Institut d'Emission d'Outre-Mer* indicated, for example, that 'The banking system of Pacific local authorities is made up of retail banks, oriented towards the collection of resources and the distribution of credits, which is shown by the preponderance of transactions with customers in the balance sheets (78.5 % of assets and 69.5 % of liabilities). Market and asset management activities are non-existent, as they are managed by parent companies located in mainland France. The range of means of payment available to customers of the Pacific local authorities is varied and comparable to that of mainland France, while the supply of savings products is concentrated on conventional products (demand deposits, term). Banks offer life insurance contracts as well as investment securities (stocks, bonds, UCITS), but these are transferred to mainland France, where they are managed. Regulated savings products are more limited than in mainland France: ordinary booklets, accounts and home purchase savings plans are found in both geographies, while *Livrets A* are only available in New Caledonia. In the lending market, the banking offer is concentrated on so-called 'conventional' loans and leasing'.¹⁶³ In other words, the activities carried out by credit institutions in the French OCTs in the Pacific area do not present any risk in terms of money laundering.

¹⁶¹ See [Institut d'Emission d'Outre-Mer](#).

¹⁶² See [Institut d'Emission d'Outre-Mer](#).

¹⁶³ See [Institut d'Emission d'Outre-Mer](#).

The same applies to banks in the Atlantic area. Locally, there is no financial instrument to effectively engage in money laundering activities.

As proof of the rudimentary nature of the banking system in certain OCTs, it should finally be noted that in the Wallis-and-Futuna archipelago, 'the BWF has a Bank Automat in Wallis, made available to make cash withdrawals by credit card (Carte Bleue Visa, Visa Premier, Mastercard and Eurocard). This type of service does not exist in Futuna'.¹⁶⁴ As a reminder, the local economy is not very developed. It is essentially oriented towards self-sufficiency of a population, 70 % of which does not use any banking service.

3.3.2. Money laundering practices necessarily low given the number of bank accounts opened in the French OCTs and the amount of bank assets

Two indicators. In addition to its theoretical difficulty, given the banking systems and the operations carried out, the absence of a developed practice of money laundering in the French OCTs can be deduced from the examination of two indicators: the number of bank accounts and the amount of assets.

Weak number of bank accounts. Relative to the number of inhabitants, the number of bank accounts is relatively low in the French OCTs. Without their number being known, this shows that few non-residents open bank accounts in the French OCT for money laundering purposes. For example, in French Polynesia, local banks and the OPT managed, on 31 December 2015, 385 301 bank accounts distributed as follows:

Table 4: Number of bank accounts in French Polynesia

	2011	2012	2013	2014	2015	Variation 2015/2014
Current accounts	214 500	205 800	199 894	205 790	207 059	0.6 %
Special saving accounts	155 957	153 816	154 143	153 647	154 114	0.3 %
<i>Of which Ordinary booklets</i>	<i>140 346</i>	<i>139 717</i>	<i>139 948</i>	<i>139 682</i>	<i>139 508</i>	<i>-0.1 %</i>
<i>Of which Housing Savings accounts</i>	<i>718</i>	<i>770</i>	<i>827</i>	<i>776</i>	<i>758</i>	<i>-2.3 %</i>
<i>Of which Housing Savings plans</i>	<i>12 893</i>	<i>13 329</i>	<i>13 368</i>	<i>13 189</i>	<i>13 848</i>	<i>5.0 %</i>

¹⁶⁴ See [Institut d'Emission d'Outre-Mer](#).

	2011	2012	2013	2014	2015	Variation 2015/2014
Term deposit accounts	18 297	21 824	24 002	24 518	24 022	-2.0 %
Cash certificates and certificates of deposit	243	175	152	131	106	-19.1 %
Total	386 997	381 615	378 191	384 086	385 301	0.3 %

Source: [Institut d'Emission d'Outre-Mer](#)

The number of accounts per capita was thus 1.4, which is small.

Table 5: Number of bank accounts per capita in French Polynesia

	2011	2012	2013	2014	2015	Variation 2015/2014
Current accounts	0.80	0.76	0.74	0.76	0.76	-0.2 %
Special saving accounts	0.58	0.57	0.57	0.57	0.56	-0.5 %
<i>Of which Ordinary booklets</i>	0.52	0.52	0.52	0.52	0.51	-0.9 %
Term deposit accounts	0.07	0.08	0.09	0.09	0.09	-2.8 %
Total	1.45	1.42	1.40	1.42	1.41	-0.5 %

Source: [Institut d'Emission d'Outre-Mer](#)

Similar results can be found in New Caledonia. On 31 December 2015, locally-established banks managed 517,200 bank accounts, *i.e.* 1.89 accounts per capita.

Table 6: Number of bank accounts in New Caledonia

	2011	2012	2013	2014	2015	Variation 2015/2014
Current accounts	192 653	199 804	205 701	214 036	221 210	3.4 %
Special saving accounts	264 519	272 451	278 010	283 561	285 405	0.7 %
<i>Of which Ordinary booklets</i>	<i>106 894</i>	<i>111 690</i>	<i>115 512</i>	<i>119 371</i>	<i>122 369</i>	<i>2.5 %</i>
<i>Of which Livrets A et B (booklets)</i>	<i>149 446</i>	<i>152 140</i>	<i>153 727</i>	<i>155 020</i>	<i>153 425</i>	<i>-1.0 %</i>
<i>Of which Housing Savings accounts</i>	<i>1 769</i>	<i>1 761</i>	<i>1 648</i>	<i>1 535</i>	<i>1 422</i>	<i>-7.4 %</i>
<i>Of which Housing Savings plans</i>	<i>3 078</i>	<i>2 898</i>	<i>2 871</i>	<i>3 203</i>	<i>3 589</i>	<i>12.1 %</i>
<i>Of which other saving accounts</i>	<i>3 332</i>	<i>3 962</i>	<i>4 252</i>	<i>4 432</i>	<i>4 600</i>	<i>3.8 %</i>
Term Credit account	9 946	11 224	12 219	11 400	10 550	-7.5 %
Saving vouchers	27	4	3	0	0	0
Total	467 145	483 485	495 940	509 016	517 199	1.6 %

Source: [Institut d'Emission d'Outre-Mer](#)

This resulted in a banking rate of 81 %, which is significantly lower than the rate observed in metropolitan France (124 %).

Table 7: Number of bank accounts per capita in New Caledonia

	2011	2012	2013	2014	2015	Variation 2015/2014
Current accounts	0.77	0.79	0.80	0.80	0.81	1.6 %
Special saving accounts	1.05	1.07	1.08	1.06	1.04	-1.1 %

	2011	2012	2013	2014	2015	Variation 2015/2014
<i>Of which Ordinary booklets</i>	1.02	1.04	1.05	1.02	1.01	-1.2 %
Term deposit accounts	0.04	0.04	0.05	0.04	0.04	-9.0 %
Total	1.86	1.90	1.93	1.89	1.89	-0.1 %

Source: [Institut d'Emission d'Outre-Mer](#)

Similar results can be found in Saint-Pierre-and-Miquelon, where locally-established banks managed 17 504 bank accounts in 2015, distributed as follows:

Table 8: Number of bank accounts in Saint-Pierre-and-Miquelon

	2010	2011	2012	2013	2014	2015	Variation 2015/2014
Current accounts	8 269	7 846	7 514	7 480	7 532	7 588	0.7 %
Booklets	8 924	8 977	9 041	9 633	8 897	8 794	-1.2 %
Housing savings accounts and plans	117	120	151	188	282	466	65.2 %
<i>Of which Housing Savings accounts</i>	7	12	14	13	17	19	11.8 %
<i>Of which Housing Savings plans</i>	110	108	137	175	265	447	68.7 %
Term Credit account	1 611	1 241	912	760	690	656	-4.9 %
Total	18 921	18 184	17 618	18 061	17 401	17 504	0.6 %

Source: [Institut d'Emission d'Outre-Mer](#)

In summary, as indicated by the *Institut d'Emission d'Outre-Mer*, 'The rate of banking of the Pacific population is on average much lower than that of mainland France. It reaches 0.79 [accounts per capita] in New Caledonia, 0.74 in French Polynesia and 0.42 in Wallis-and-Futuna, compared with 1.62 in mainland France'.¹⁶⁵

Weak amounts of bank assets. Moreover, the amount of bank assets held in the OCTs is relatively low, which means that money laundering activities cannot be significant.

For example, the average outstanding amount of a deposit account (all types of customers: individuals, companies, etc.) stood at 1,412 thousand Pacific francs (11,832 euros) at the end of the year 2015 in New Caledonia.¹⁶⁶ In Saint-Pierre-and-Miquelon, this number reached 9,403 euros, as shown in the table below.

Table 9: Average deposit account balance in Saint-Pierre-and-Miquelon

	2010	2011	2012	2013	2014	2015	Variation 2015/2014
Current accounts	9 290	8 550	9 680	10 186	9 283	9 403	1.3 %
Booklets	5 706	6 215	7 442	7 243	7 872	8 362	6.2 %
Housing savings accounts and plans	24 241	23 468	28 768	31 502	27 854	25 901	-7.0 %
Term Credit account	31 086	37 723	37 760	46 846	50 030	48 619	-2.8 %

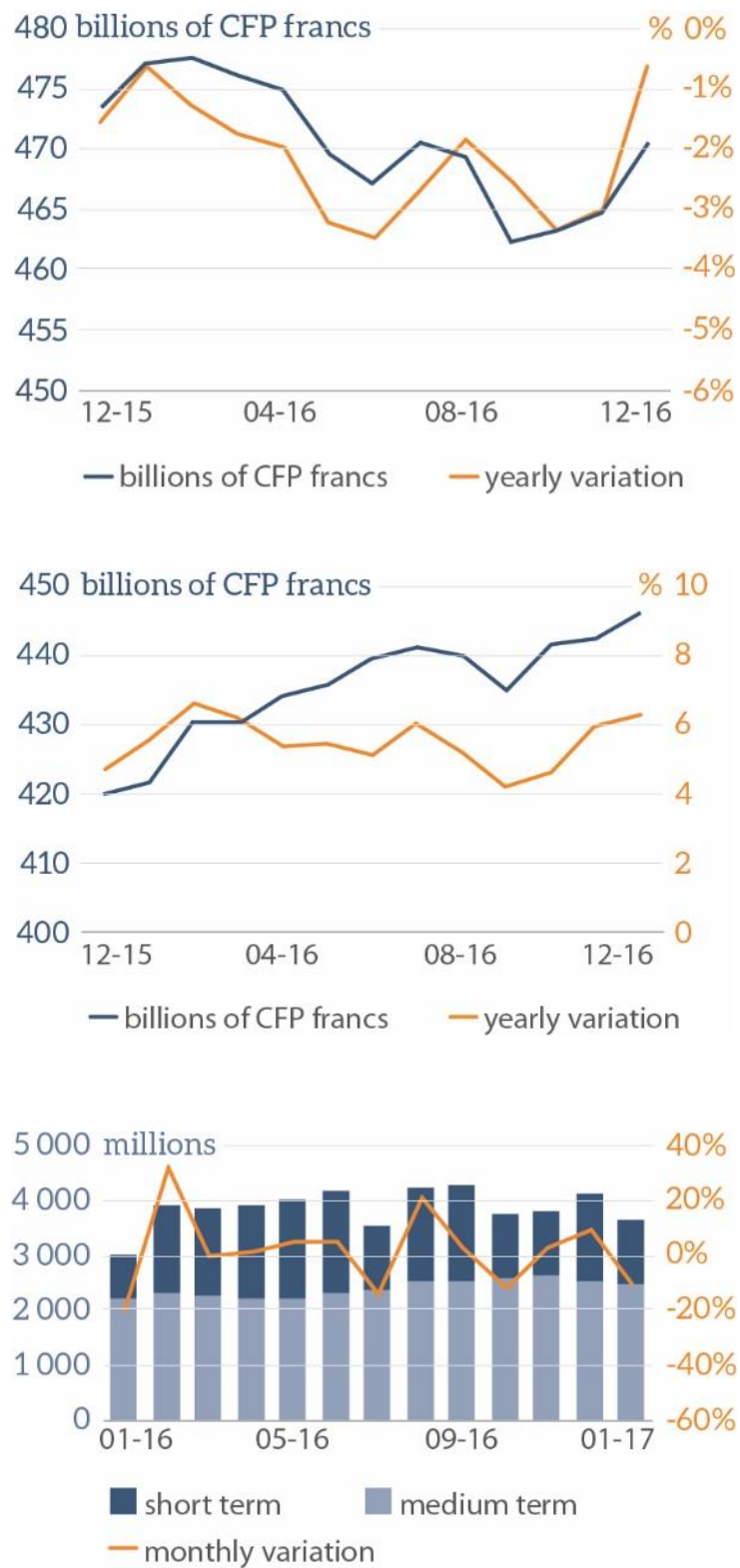
Source: [Institut d'Emission d'Outre-Mer](#)

Finally, it must be noted that the amount of deposits is low in French Polynesia, as shown in the graphics below. In particular, it must be noted that the total amount of deposits is 417,750 million Pacific francs (3.5 billion euros), for 271,800 inhabitants.

¹⁶⁵ Institut d'Emission d'Outre-Mer, [Panorama de l'activité bancaire dans les COM du Pacifique - Évolution de l'activité bancaire de 2003 à 2013](#), June 2015.

¹⁶⁶ See [Institut d'Emission d'Outre-Mer](#).

Figure 2: Banking activity in French Polynesia

Source: [Institut d'Emission d'Outre-Mer](#)

In New Caledonia, the total amount of deposits is equal to 580 billion Pacific franc (4.86 billion euros) for 268,000 inhabitants.¹⁶⁷

3.4. Conclusions

Conclusion on laundering involving non-residents. These data show that the extent of laundering in the French OCTs can only be small. And even if the number of accounts held by non-residents is unknown, it is in practice difficult for them to open bank accounts from which they engage in money laundering activities. In practice, many documents need to be provided (data about their bank accounts in the country of origin, copies of latest salary statements, presentation of a valid identity document, proofs of income and address).¹⁶⁸

Conclusion on laundering involving in non-residents. Locally, the financial delinquency that can be detected is small. And no significant money laundering activity is observed.

Without these facts constituting money laundering, criminal offences may, unfortunately, be committed at the highest political level in the French OCTs. The symbolic case of Gaston Flosse, former president of the Polynesian government, must be mentioned.¹⁶⁹ But such facts do not reflect the reality of the French OCTs, where financial offences remain relatively limited in number.

An illustrative example of the particular situation of French OCTs in the fight against money laundering: the case of the decree limiting the amounts that can be paid in cash in French Polynesia. The situation of the OCTs with regard to the fight against money laundering is thus ambiguous: the weakness of the controls (which is acknowledged) corresponds to the relative importance of the infringements. Rather than a long theoretical discourse, in order to be convinced it is sufficient to focus on the conditions under which a decree intended to fight against money laundering in French Polynesia entered into force.

Published in August 2015, the purpose of this decree was to limit the amount of money that could be settled in cash (119,300 Pacific francs, *i.e.* 1,000 euros). In an article on the implementation of this measure, it was indicated that many employers would continue to remunerate their employees in cash, and that this payment would change from a monthly to a weekly basis to comply with the new regulations. In the same article, the difficulties encountered by the many inhabitants of the islands who do not have bank accounts were also pointed out. Finally, the author stressed the weakness of the controls on the implementation of this measure: 'The question is whether this decree will actually be

¹⁶⁷ Institut d'Emission d'Outre-Mer, [*Panorama de l'activité bancaire dans les COM du Pacifique - Évolution de l'activité bancaire de 2003 à 2013*](#), June 2015.

¹⁶⁸ See for example the [practical guides](#) made for persons that want to establish in New Caledonia.

¹⁶⁹ Gaston Flosse was sentenced to four years' imprisonment (with suspension), a fine of 125,000 euros and a three-year sentence of ineligibility in a fictitious employment case (this sentence became final on 23 July 2014, following a decision of the Court of Cassation). After the President of the Republic refused to pardon him, the Justice Ministry asked the Constitutional Council, on 10 September 2014, to deprive him of his mandate as a senator. This deprivation was pronounced on 16 September 2014. He was convicted on other occasions for acts of embezzlement of public funds.

applied on the ground, and therefore whether agents of the local authority or of the state will be responsible for controlling enterprises. Since the state has the competence for the currency, the DGAE (local administration) is convinced that it is the IEOM (*Institut d'Emission d'Outre-Mer*: national administration) that is in charge of this part. The Institute explains that it is in charge of monetary policy, and not of controls, and redirects to the DGAE and the tax administration. In the Tax Department, it is explained that their role is not to check payments but to collect taxes, and that checks are more the responsibility of the DGAE ... The loop is completed'.¹⁷⁰

¹⁷⁰ See '[Aujourd'hui les paiements cash ne peuvent plus dépasser 119 300 Fcfp](#)', published on tahiti-infos.com in September 2015.

4. French OCTs and tax transparency

Summary and plan. Analysing the issue of tax transparency, the French National Audit Office noted in 2013 that 'Tax cooperation between mainland France and these territories has, on the other hand, been marked by progress recently'.¹⁷¹ Since then, the latter has been accentuated.

Following what has been seen in the previous chapters, the applicable transparency standards are of the highest level (4.1.).

This being so, the lack of available public data on this subject is once again to be regretted (4.2.).

However, this lack of data must not obscure the fact that France has a habit of cooperating well with other states in the exchange of tax information and fiscal transparency. Paradoxically, France fears, in the case of the OCTs, that it finds itself in a dissymmetrical situation which is unfavourable to it (4.3.).

4.1. A willingness to ensure tax transparency respecting the highest standards

Legal basis for tax transparency. Cooperation between the OCT tax administrations and the metropolitan tax administration has several bases.

On the one hand, Article L. 114 of the French Code of Tax Procedures states that 'The tax administration may exchange information with the financial administrations of Saint-Pierre-and-Miquelon, New Caledonia, French Polynesia, the Wallis-and-Futuna Islands and the French Southern and Antarctic Territories and other local and regional authorities of the French Republic governed by a specific tax system, and with states which have concluded with France an administrative assistance agreement to combat the tax fraud and tax evasion'.

On the other hand, various legislative provisions provide for the signature of agreements between the French state and the French OCT with a view, *inter alia*, to organising the exchange of tax information.

Paragraph I of Article LO 6214-4 of the French General Code of Local Authorities provides, for example, that '2° St. Barthelemy shall transmit to the state all information relevant for the application of its tax regulations and for the execution of the exchange of information clauses provided for in the tax treaties concluded by France with other states or territories'. Paragraph I *bis* of this Article indicates then that 'The detailed rules for the application of Paragraph I are specified in an agreement concluded between the state and St. Barthelemy with a view to preventing double taxation and combating tax evasion and avoidance'.

¹⁷¹ Cour des comptes, [L'autonomie fiscale en Outre-Mer](#), November 2013, p. 75.

In the case of Saint-Pierre-and-Miquelon, Article LO 6414-1 of the same Code states, for its part, that 'V.-1. For the purposes of avoiding double taxation and preventing tax evasion, an agreement between the state and the local authority determines the obligations of the local authority to provide tax information. The local authority shall transmit to the state all information relevant for the application of its regulations relating to taxes and duties and for the execution of the exchange of information clauses provided for in tax treaties concluded by France with other entities, other states or territories'.

For each French OCT, similar examples could be given.

Modalities for the implementation of tax transparency. With the exception of Wallis-and-Futuna, all the French OCTs have entered into agreements for the exchange of information with the central state and, in some cases, with other countries, with the aim of combating fraud and tax evasion. In the case of Wallis-and-Futuna, the French National Audit Office has rightly observed that 'This situation results essentially from the inadequacy of its tax system'.¹⁷² The latter does not include any direct taxes, so that no information could be exchanged.

Content of agreements between the OCT and the central state. In practice, the conventions binding the OCTs and the central state comply with OECD standards. Sometimes they even go beyond.

In a French parliamentary report on agreements between the state and the local authorities of Saint-Martin, St. Barthélemy and French Polynesia, it was stated that 'the tax treaties concluded with Mayotte, Saint-Pierre-and-Miquelon and New Caledonia already include provisions on the exchange of information and assistance in recovery. Their application does not raise any particular problems, according to the directorate of tax legislation'.¹⁷³ These conventions have long been in compliance with current OECD standards.

This is also the case for agreements that were subsequently adopted at the beginning of the year 2010. It is thus possible to read, with regard to agreements between the state and the local authorities of Saint Martin, St. Barthélemy and French Polynesia, that 'The three tax cooperation agreements were negotiated on the basis of Articles 26 and 27 of the OECD Model Tax Convention, which deal respectively with the exchange of tax information between the taxing authorities of the contracting states and assistance to the recovery by each of the contracting states for the benefit of the other state'.¹⁷⁴

Moreover, it should be pointed out that these three agreements go further than those provided for in the OECD model, in particular by offering the possibility for the state to

¹⁷² Cour des comptes, *L'autonomie fiscale en Outre-Mer*, November 2013, p. 85.

¹⁷³ Didier Quentin (MP), *Rapport sur la proposition de loi organique tendant à l'approbation d'accords entre l'État et les collectivités territoriales de Saint-Martin, de Saint-Barthélemy et de Polynésie française*, Assemblée Nationale, No 3248, 16 March 2011, p. 11.

¹⁷⁴ Didier Quentin (MP), *Rapport sur la proposition de loi organique tendant à l'approbation d'accords entre l'État et les collectivités territoriales de Saint-Martin, de Saint-Barthélemy et de Polynésie française*, Assemblée Nationale, No 3248, 16 March 2011, p. 14.

monitor on-the-spot the reality of operations which have given right to tax exemptions in metropolitan France. Similarly, the state may itself impose the taxation of persons settled in St. Barthelemy but taxed as residents of the state. Ultimately, 'these agreements therefore contribute to the development of transparency in tax matters. By showing that the tax authorities of overseas local authorities comply with the most demanding standards of the OECD model tax treaty, France demonstrates its determination to be exemplary in applying the principles defined by the OECD, at the request of the G20'.¹⁷⁵

4.2. The regrettable lack of data on the implementation of tax transparency in the French OCTs

Lack of reliable data on the implementation of the measures adopted. Again, however, there is a lack of data on the implementation of measures to ensure fiscal transparency in the French OCTs.

During the discussion of an organic law intended to approve agreements between the state and the local authority of Saint-Martin, St. Barthelemy and French Polynesia, René Dosière, Member of the *Assemblée Nationale*, indicated that 'In the area of taxation, an impact assessment would be particularly useful. The proof of this is the figures we have: our rapporteur tells us that there are 1,000 French civil servants in Saint-Martin, while the Senate speaks of 2,000; our rapporteur estimates the cost to the state of the agreement with Saint Martin to two million euros when the Senate places it between one and two million euros. We would like to have a safer assessment'.¹⁷⁶

Then he added, with regard to the Conventions, that 'they must be applicable: if the staff of the tax administration is reduced, there will not be enough agents to check on-the-spot how the tax exemptions apply. However, when one reads the reports of the National Audit Office on tax exemptions in the overseas territories - I am thinking particularly of Wallis-and-Futuna - there are some concerns'.¹⁷⁷ Given the weakness of tax audits, which was highlighted earlier (see paragraph 2.2.2.), these concerns appear to be legitimate.

4.3. An effective cooperation

The exemplarity of France underlined by the OECD. This being so, France is rightly renowned for its exemplary tax transparency.

On this point, it should be noted that in the context of the OECD Global Forum on Fiscal Transparency, France has been the subject of peer review. In the report published in 2013

¹⁷⁵ Didier Quentin (MP), [*Rapport sur la proposition de loi organique tendant à l'approbation d'accords entre l'État et les collectivités territoriales de Saint-Martin, de Saint-Barthélemy et de Polynésie française*](#), Assemblée Nationale, No 3248, 16 March 2011, p. 16.

¹⁷⁶ Didier Quentin (MP), [*Rapport sur la proposition de loi organique tendant à l'approbation d'accords entre l'État et les collectivités territoriales de Saint-Martin, de Saint-Barthélemy et de Polynésie française*](#), Assemblée Nationale, No 3248, 16 March 2011, p. 29.

¹⁷⁷ Didier Quentin (MP), [*Rapport sur la proposition de loi organique tendant à l'approbation d'accords entre l'État et les collectivités territoriales de Saint-Martin, de Saint-Barthélemy et de Polynésie française*](#), Assemblée Nationale, No 3248, 16 March 2011, p. 30.

as a result of this peer review, the exemplarity of France was highlighted. In particular, the administrations of other states receive a significant amount of information from French services or French banks. And although some negative remarks were made (notably on the deadlines for reply), none of them concerns the OCTs.¹⁷⁸

Risk of asymmetry. Conversely, the French authorities and those of the OCTs are concerned that the implementation of the agreements on tax transparency will lead to dissymmetrical situations. For example, the report on the proposal for an organic law for the approval of agreements between the state and the local authorities of Saint-Martin, St Barthélemy and French Polynesia states that 'If the three mutual assistance agreements establish a very high degree of transparency in order to prevent tax avoidance and evasion from the departments and the three overseas local authorities, the French example could in fact lead to disadvantage those local authorities, which are required to provide information to third States and territories without being able to benefit from their cooperation'.¹⁷⁹

4.4. Conclusion

With the exception of the lack of public data, France's tax transparency situation is exemplary, whether it concerns OCT information or any other information. Summarising the situation that could already be seen in 2013, the French National Office Audit had indicated that 'Conventions now offer the possibility for the state to monitor on-the-spot, on a concerted basis, the reality of operations benefiting from a tax exemption in France and the situation of persons located in these territories, without being domiciled there for tax purposes. Thus, France is in a position to respond to the request of third states on the tax situation of taxpayers resident in those territories'.¹⁸⁰

¹⁷⁸ OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review France 2013: Combined: Phase 1 + Phase 2, Incorporating Phase 2 ratings*, OECD Publishing, 2013.

¹⁷⁹ Didier Quentin (MP), *Rapport sur la proposition de loi organique tendant à l'approbation d'accords entre l'État et les collectivités territoriales de Saint-Martin, de Saint-Barthélemy et de Polynésie française*, Assemblée Nationale, No 3248, 16 March 2011, p. 23.

¹⁸⁰ Cour des comptes, *L'autonomie fiscale en Outre-Mer*, November 2013, p. 87.

5. Conclusions: Lessons learned on controlling tax evasion, countering money laundering and ensuring transparency

The in-depth analysis of the French situation with regard to tax evasion, money laundering and tax transparency shows that the French OCTs present little risk for the other Member States of the European Union.

This absence of risk results from three factors:

- On the one hand, French OCTs are not fully autonomous and have no sovereignty. In other words, these decentralised authorities are relatively controlled by the central state, which can, depending on the circumstances, grant them more or less autonomy. In the areas covered by this study, it is relatively weak.
- On the other hand, the rules which apply in the OCTs are very close to the metropolitan regulations, and therefore to European regulations where they exist. Coordination with mainland France is certain. And high standards are respected.
- Finally, neither the economic context nor the infrastructures encourage tax evasion or laundering activities in the French OCTs. In particular, the banking sector is insufficiently developed to allow local engagement in these reprehensible practices.

It follows that the French OCTs can serve as a model for the OCTs of the other Member States. While the idea is not to question the competence and autonomy of the latter, it would perhaps be appropriate that, as in the French OCTs, regulations close to European regulations and standards apply there in the field of the fight against money laundering and of administrative cooperation.

Of course, improvements could be made to combat tax evasion and money laundering in the French OCTs. In particular, the administrative departments responsible for carrying out control operations could benefit from more resources. This would allow for more controls and more data. At the same time, local professionals could be more aware of risks.

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ANNEX II

In-depth analysis evaluating the legal, political and institutional framework concerning offshore practices related to tax evasion, money laundering and tax transparency in the Overseas Countries and Territories (OCTs) of the Kingdom of the Netherlands, as defined in Annex II of the Treaty on the Functioning of the European Union (TFEU), and the relations of the Kingdom of the Netherlands with those OCTs

AUTHORS

This study has been written by **Prof. Dr H.E. Bröring, Prof. Dr O.O. Cherednychenko, Prof. Dr H.G. Hoogers and G. Karapetian LL.M.** (Department of Constitutional Law, Administrative Law and Public Administration/Groningen Centre for European Financial Services Law (GCEFSL), University of Groningen), at the request of the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

CONTACT

University of Groningen

Faculty of Law

Department of Constitutional Law, Administrative Law and Public Administration

P.O. Box 716

9700 AS Groningen

The Netherlands

Tel.: + 31 50 363 56 74

Website: www.rug.nl/rechten/organization/vakgroepen/sbb/

RESPONSIBLE ADMINISTRATOR:

Dr Isabelle Ioannides, Ex-Post Evaluation Unit

To contact the Unit, please email: EPRS-ExPostImpactAssessment@ep.europa.eu

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Executive Summary

Background

The recent global financial crisis and the disclosure of the Panama Papers added a sense of urgency to the need for tackling the issue of the so-called offshore tax havens, including those in the Overseas Countries and Territories (OCTs) of the EU Member States. The latter are countries and territories that have a special relationship with one of the four Member States (Denmark, France, the Kingdom of the Netherlands and the United Kingdom). Many of the OCTs are considered infamous because of their secretive offshore tax regimes.

The growing concern with tax havens worldwide gives rise to questions about the possible role for the EU and its Member States in tackling offshore practices in the EU Member States' OCTs. On the one hand, the EU is increasingly engaging with the OCTs, in particular in the area of financial services and taxation, recognising the need for cooperation in this field. On the other hand, many questions still exist concerning the possible role for the Member States in this domain. While the EU Treaties do not contain any specific legal obligation for the Member States to ensure the application of relevant EU law in their OCTs, the special relationship between some Member States and OCTs is often put forward as a justification for the Member States' political responsibility in this area. Yet the extent to which the EU and/or Member States can play an effective role in the fight against money laundering and tax evasion in the OCTs depends on the particular legal, institutional and political framework governing the relations between them.

Objectives

This study, commissioned by the **European Parliament Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (PANA)**, explores the legal, political and institutional framework on offshore practices related to money laundering, tax evasion and tax transparency in the OCTs of the Kingdom of the Netherlands, i.e. Aruba, Curaçao, St Maarten, Bonaire, Statia and Saba. The overall aim of the study is to contribute to a better understanding of the extent to which the EU and the Kingdom of the Netherlands, as an EU Member State, can exert influence on the OCTs in the fight against offshore practices.

More specifically, the study has four objectives:

- To analyse the legal, institutional and political framework for the relationship between the EU, the Kingdom of the Netherlands and its OCTs;
- To assess to what extent this framework allows the EU and the Kingdom of the Netherlands to exert influence on the OCTs of the Kingdom in combating money laundering and tax evasion and in enhancing tax transparency;
- To provide an overview of the most relevant legislation with relevance to money laundering, tax evasion and tax transparency which applies in the OCTs of the Kingdom of the Netherlands and to make a preliminary assessment of the effectiveness of this legislation in practice;
- To identify options for improving the legal, institutional and political framework with a view to combatting money laundering and tax evasion and enhancing tax transparency in the OCTs of the Kingdom of the Netherlands.

The key findings and recommendations from this analysis are presented below.

Key findings and the way forward

- The OCTs of the Kingdom of the Netherlands operate within a complex multi-level system of governance consisting of four levels: (1) the EU level; (2) the level of the Kingdom of the Netherlands comprised of the Country of the Netherlands and three Caribbean countries (Aruba, Curaçao, St Maarten); (3) the level of the Caribbean countries of the Kingdom of the Netherlands (Aruba, Curaçao and St Maarten); and (4) the level of the Caribbean territories of the Country of the Netherlands (Bonaire, Statia and Saba), also known as the Caribbean Netherlands. Each level is characterised by its own constitutional set up which determines the relationship between the EU, the Kingdom of the Netherlands, the Country of the Netherlands and the OCTs of the Kingdom based on the division of competences.
- Following the recent developments in EU overseas law, the EU can play an increasingly important role in fighting offshore practices in the OCTs of the Kingdom of the Netherlands in cooperation with such territories. In particular, the recent OAD equips the EU not only with soft tools but also with hard instruments, such as the power of the European Commission to withdraw or reduce financial aid to the OCTs that could allow the EU to impact on the OCTs when it comes to combating money laundering and tax evasion and enhancing tax transparency.
- The status of the three Caribbean countries (Aruba, Curaçao and St Maarten) within the Kingdom of the Netherlands fundamentally differs from that of the three Caribbean territories (Bonaire, Statia and Saba). While the former are autonomous countries within the Kingdom of the Netherlands, the latter form part of the Country of the Netherlands and are therefore subject to Dutch law and oversight by the Dutch institutions. This distinction is relevant for determining the extent to which the Kingdom and the Country of the Netherlands can interfere in the affairs of these OCTs when it comes to offshore practices.
- In the areas related to financial regulation and supervision, as well as taxation, the powers of the Kingdom of the Netherlands with respect to the autonomous Caribbean countries of the Kingdom are rather limited. This makes it hard for the Kingdom to exert any significant influence on these OCTs in the fight against offshore practices. The situation is further complicated by an uneasy relationship between the Caribbean countries in question, on the one hand, and the Kingdom and the Country of the Netherlands, on the other, given their colonial past and the small scale of societies concerned.
- In contrast, the Caribbean territories form part of the Country of the Netherlands and are therefore subject to Dutch law and oversight by the Dutch institutions. As a result, the Dutch government at the level of the Country of the Netherlands has significant possibilities to exert pressure on the Caribbean territories in matters relating to money laundering, tax evasion and tax transparency.
- All six OCTs of the Kingdom of the Netherlands have generally adopted rather modern legislation pertaining to money laundering, tax evasion and tax transparency in accordance with the relevant international and European standards. However, the key problem faced by each OCT of the Kingdom to a

greater or lesser extent is discrepancy between the law on the books (the adopted law) and the law in action (implementation and enforcement of the law). The effectiveness of legislation in the autonomous Caribbean countries of the Kingdom is undermined by two key factors: (a) structural weaknesses caused by poor implementation of good governance principles; and (b) functional weaknesses related to the insufficient capacity of the relevant authorities, such as a shortage of financial and human resources and insufficient knowledge and experience. Notably, the gap between the law on the books and the law in action is much smaller when it comes to the financial markets and taxation in the Caribbean territories where the implementation and enforcement of relevant legislation are centralised at the level of the Country of the Netherlands.

- Improving the effectiveness of the existing laws in the OCTs is crucial to the fight against offshore practices. Given the growing reach of EU overseas law, the EU institutions could play a particularly important role in addressing the above-mentioned problems in the autonomous Caribbean countries of the Kingdom with respect to which the Kingdom itself has only limited possibilities to intervene. The Country of the Netherlands in turn could play a major role in ensuring effective implementation and enforcement of relevant legislation in the Caribbean territories, which form part of this country.

Acronyms

CARICOM	Caribbean Community
CFATF	Caribbean Financial Action Task Force
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights and Fundamental Freedoms
EU	European Union
FATF	Financial Action Task Force
ICCPR	International Covenant on Civil and Political Rights
OAD	Overseas Association Decision
OCTs	Overseas Countries and Territories
OLAF	European Anti-fraud Office
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Chapter I: Introduction

This study explores the legal, political and institutional framework on offshore practices related to money laundering, tax evasion and tax transparency in the Overseas Countries and Territories (OCTs) of the Kingdom of the Netherlands, i.e. Aruba, Curaçao, St Maarten, Bonaire, Statia (St Eustatius) and Saba.

Background

In April 2016, the International Consortium of Investigative Journalists, together with other partners from around the world, revealed more than 200 000 offshore entities connected to individuals from more than 200 countries and territories, including many EU Member States among which France, the Kingdom of the Netherlands and the United Kingdom. These revelations, known as the 'Panama Papers', originate from a massive leak of offshore financial records of a Panama-based law firm, Mossack Fonseca. The Panama Papers exposed numerous ways of exploiting secretive offshore tax regimes in order to hide the true ownership or origins held by offshore entities. Such entities have reportedly been widely used for money laundering, tax evasion and avoidance purposes.

The recent global financial crisis and the disclosure of the Panama Papers added a sense of urgency to the need for tackling the issue of the so-called offshore tax havens, including those in the EU Member States' OCTs. The latter are countries and territories that have a special relationship with one of the four Member States (Denmark, France, the Kingdom of the Netherlands and the United Kingdom). Such countries and territories deserve special attention, given the fact that many of them are considered infamous because of their secretive offshore tax regimes. For example, according to the recent study by Oxfam (an international confederation of 20 NGOs fighting against poverty around the globe), several UK OCTs are among the world's worst tax havens.¹⁸¹ In particular, the Bermuda and the Cayman islands figure prominently on Oxfam's list of top 15 corporate tax havens, occupying the first and second position, respectively.¹⁸² These OCTs earned their place on the Oxfam's list because they facilitate the most extreme forms of corporate tax avoidance, driving the race to the bottom in corporate taxation. While the OCTs of the Kingdom of the Netherlands, which are the focus of this study, do not appear on Oxfam's list, remarkably, the Kingdom of the Netherlands itself has been placed at the 3rd position.¹⁸³ The fact that many offshore practices facilitating tax avoidance, in particular in the European part of the Country of the Netherlands,¹⁸⁴ are currently not illegal as such, adds extra complexity to dealing with them.

The growing concern about tax havens worldwide gives rise to questions about the possible role for the EU and its Member States in tackling offshore practices in the EU Member States' OCTs. On the one hand, the EU is increasingly engaging with the OCTs, in

¹⁸¹ Oxfam, [Tax Battles: The Dangerous Global Race to the Bottom on Corporate Tax](#), Policy Paper, 12 December 2012.

¹⁸² Ibid., p. 4.

¹⁸³ Ibid., p. 4.

¹⁸⁴ On the structure of the Kingdom of the Netherlands, see Chapters 2 and 3.

particular in the area of financial services and taxation, recognising the need for cooperation in this field.¹⁸⁵ On the other hand, many questions still exist concerning the possible role for the Member States in this domain. While the EU Treaties do not contain any specific legal obligation for the Member States to ensure the application of relevant EU law in their OCTs, the special relationship between some Member States and OCTs is often put forward as a justification for the Member States' political responsibility in this area. Yet the extent to which the EU and/or Member States can play an effective role in the fight against money laundering and tax evasion in the OCTs depends on the particular legal, institutional and political framework governing the relations between them.

Objectives

Against this background, the overall aim of this study is to contribute to a better understanding of the extent to which the EU and the Kingdom of the Netherlands, as an EU Member State, can exert influence on the OCTs in the fight against offshore practices. More specifically, the study has four objectives:

- To analyse the legal, institutional and political framework for the relationship between the EU, the Kingdom of the Netherlands and its OCTs;
- To assess to what extent this framework allows the EU and the Kingdom of the Netherlands to exert influence on the OCTs of the Kingdom in combating money laundering and tax evasion and in enhancing tax transparency;
- To provide an overview of the most relevant legislation related to money laundering, tax evasion and tax transparency that applies in the OCTs of the Kingdom of the Netherlands and to make a preliminary assessment of the effectiveness of this legislation in practice;
- To identify options for improving the legal, institutional and political framework with a view to combatting money laundering and tax evasion and enhancing tax transparency in the OCTs of the Kingdom of the Netherlands.

Key Concepts

For the purposes of this study, the Kingdom of the Netherlands is a State which is a Member of the European Union and which comprises four autonomous countries (i.e. the Country of the Netherlands and three Caribbean countries which have the OCT status – the Country of Aruba, the Country of Curaçao and the Country of St Maarten). The Country of the Netherlands is an autonomous country within the Kingdom of the Netherlands which consists of the European part (the so-called European Netherlands) and the Caribbean part (the so-called Caribbean Netherlands). The Caribbean Netherlands in turn includes the other three OCTs of the Kingdom of the Netherlands, i.e. Bonaire, Statia and Saba. The OCTs of the Kingdom of the Netherlands are thus six overseas countries and territories which have a special relationship with the Kingdom of the Netherlands and which, within the current constitutional set up of the Kingdom, fall into one of the two categories: 1) the Caribbean countries of the Kingdom of the Netherlands (i.e. Aruba, Curaçao and St Maarten) and 2) the Caribbean territories of the Country of the Netherlands (i.e. Bonaire, Statia and Saba).

¹⁸⁵ E.g. [COUNCIL DECISION 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union](#) ('Overseas Association Decision'), *OJ EU L* 344/1.

In addition, these countries and territories enjoy the OCT status under EU law.¹⁸⁶ Apart from the OCT status, EU law also recognises two other main categories of the overseas territories of the EU Member States: an Outermost Region (OR) and Territories *sui generis* whose relationship with the EU is governed by a plethora of *ad hoc* arrangements and which do not fall within the OCT or OR category.¹⁸⁷ Although the overseas territories of the Kingdom of the Netherlands in question currently all have the OCT status, as will be explained in Chapter II, this overall classification of overseas territories is relevant to understanding the historical and political context surrounding the relationship of the OCTs of the Kingdom with the EU.

Following conventional wisdom, the study has also proceeded on the basis of the following general definitions of the three key concepts involved therein. 'Money laundering' is the term used for a number of acts involving processing the proceeds of crime with a view to concealing their illegal origin and bringing them back into the legal economy. It should be recalled in this context that the Financial Action Task Force (FATF) has recommended that countries criminalise money laundering and 'apply the crime of money laundering to all serious offences with a view to including the widest range of predicate offences'.¹⁸⁸ 'Tax evasion' has been defined as an illegal act of evading taxes by concealing income, earned either legally or illegally, from detection and collection by the tax authorities. Tax evasion should be distinguished from 'tax avoidance', which refers to using the tax regimes to one's own advantage to reduce one's tax burden. In contrast to money laundering and tax evasion, which are illegal activities, tax avoidance is generally not illegal as such but may nevertheless be economically damaging to the affected countries. Tax transparency is understood in a broad sense covering the communication of a company's approach to tax planning and compliance with tax regulations, as well as the amount of tax it pays. Reporting is key to ensuring tax transparency.

Methodology

In order to realise the stated research objectives, the study will primarily apply well-established legal methods. In particular, the following sources will be subject to an in-depth systematic analysis: relevant EU and national legislative instruments; legislative history; policy documents; administrative practice; case-law of the Court of Justice of the European Union (CJEU) and domestic courts; as well as academic literature.

It is beyond the scope of this study to provide a complete picture and in-depth analysis of the OCT's legislation pertaining to money laundering, tax evasion and tax transparency. Only the most important pieces of legislation representative of each of the two groups of

¹⁸⁶ As will be explained in Chapter II, below, the list of OCTs in Annex II to the Treaty on the Functioning of the European Union (TFEU) is outdated following the 2010 constitutional reform of the Kingdom of the Netherlands.

¹⁸⁷ Cf. D. Kochenov, *The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis*, in D. Kochenov (ed.), *The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis*, Kluwer Law International, The Hague, 2011, p. 12.

¹⁸⁸ FATF, *International Standards of Combating Money Laundering & the Financing of Terrorism & Proliferation: The FATF Recommendations*, February 2012 (as updated in October 2015), para. B.3.

the OCTs identified in section 1.3 above (i.e. Caribbean countries of the Kingdom of the Netherlands and Caribbean territories of the Country of the Netherlands) will be mentioned.

In addition, the analysis will consider relevant empirical studies carried out by or for governmental and non-governmental institutions, in particular the governments of the Kingdom of the Netherlands and the Country of the Netherlands, that shed light on the effectiveness of the OCT's legal and institutional framework in combating money laundering and tax evasion and ensuring tax transparency. These include, inter alia, the reports prepared by the Commission Spies;¹⁸⁹ Winter, Bröring and others;¹⁹⁰ the General Audit Board (*Algemene Rekenkamer*) of St Maarten;¹⁹¹ the Commission on the Integrity of Public Administration (*Commissie Integriteit Openbaar Bestuur*);¹⁹² and PriceWaterhouseCoopers.¹⁹³ The publicly available studies demonstrate that the issue in question has been studied in a particularly extensive manner in relation to the Caribbean territories of the Country of the Netherlands (Bonaire, Statia and Saba). The above analysis will allow us: to identify the possibilities for and limits of action that the EU and the Kingdom of the Netherlands may take in relation to the OCTs of the Kingdom; to understand the problems faced by these OCTs in the fight against offshore practices; and to present options for improvement.

Structure

The structure of the study will reflect the multi-level governance system within which the OCTs of the Kingdom of the Netherlands operate. Chapter II will first explore this system in more detail, providing a general overview of the powers available for the EU, the Kingdom of the Netherlands, the Country of the Netherlands and the OCTs of the Kingdom themselves at each level of governance. This Chapter will also explain the context in which the multi-level system of governance operates.

Building on this general framework, subsequent chapters will discuss each of the four level of governance in more detail:

- Chapter III will address the role of the EU in combating money laundering and tax evasion and enhancing tax transparency in the OCTs (Level 1). This Chapter will

¹⁸⁹ Commissie Spies, [*Vijf jaar verbonden. Bonaire, Sint Eustatius, Saba en Europees Nederland. Rapport van de commissie evaluatie uitwerking van de nieuwe staatkundige structuur Caribisch Nederland*](#), The Hague, 12 October 2015. For the conclusion of this study in English, see [*Joined Together for Five Years: Bonaire, Sint Eustatius, Saba and the European Netherlands*](#).

¹⁹⁰ H.B. Winter, H.E. Bröring *et al*, [*Vijf jaar Caribisch Nederland. De werking van wetgeving*](#), Groningen 2015. For the summary in English, see [*Summary Five Years of the Caribbean Netherlands: Working of the Legislation*](#).

¹⁹¹ Algemene Rekenkamer, [*Nulmeting Sint Maarten: Stand van zaken institutionele integriteitszorg*](#), March 2014.

¹⁹² Commissie Integer openbaar bestuur, [*Doing the right things right*](#), 12 July 2014.

¹⁹³ PriceWaterhouseCoopers, [*Integrity Inquiry into the functioning of the Government of Sint Maarten*](#), PriceWaterhouseCoopers, 2014.

demonstrate the potential for EU law and EU institutions to play an increasingly important role in this area.

- Chapter IV will discuss the respective powers of the Kingdom of the Netherlands with respect to its OCTs (Level 2). This Chapter will show major limits of the Kingdom's action in its autonomous Caribbean countries (Aruba, Curaçao and St Maarten) with a view to fighting offshore practices.
- Chapters V and VI in turn will throw some light on the legal, institutional and political framework on offshore practices in the Caribbean countries of the Kingdom of the Netherlands (Aruba, Curaçao and St Maarten) (Level 3) and the Caribbean territories of the Country of the Netherlands (Bonaire, Statia and Saba) (Level 4), respectively.

It should be noted at the outset that the case of the Caribbean countries differs significantly from that of the Caribbean territories. As mentioned above, the former are autonomous countries within the Kingdom of the Netherlands with the Kingdom having only limited powers to intervene in their affairs. In contrast, the latter form part of the Country of the Netherlands and are therefore subject to Dutch law and oversight by the Dutch institutions. This important difference between the position of the Caribbean countries and that of the Caribbean territories within the Kingdom of the Netherlands will be reflected in the structure and content of Chapters V and VI. Chapter V will not only highlight relevant legislation, but it will also take a closer look at the institutional framework governing financial supervision in the three autonomous Caribbean countries and show the complexity involved in ensuring effective cooperation between the Caribbean countries and the Country of the Netherlands. Chapter VI in turn will focus primarily on relevant legislation in the Caribbean territories of the Country of the Netherlands, in particular insofar as it differs from that of the European Netherlands. Both Chapters V and VI will also shed some light on the effectiveness of this legislation in practice.

Finally, Chapter VII will present key findings and outline the way forward.

Chapter II: The OCTs of the Kingdom of the Netherlands within a Multi-Level System of Governance

Given that the OCTs of the Kingdom of the Netherlands operate within the multi-level governance system consisting not only of the level of the Kingdom but also that of the EU, this Chapter will take a closer look at this system. In particular, it will provide a general overview of the powers at each level of governance available respectively to:

- the EU;
- the Kingdom of the Netherlands;
- the countries of the Kingdom (including the Country of the Netherlands and three OCTs of the Kingdom, i.e. the Country of Aruba, the Country of Curaçao and the Country of St Maarten); and
- the Country of the Netherlands itself (including the other three OCTs of the Kingdom, i.e. Bonaire, Statia and Saba (the so-called Caribbean Netherlands)).

In addition, this Chapter will also explain the historical, geographical, economic and political context in which the multi-level system of governance operates.

Before we proceed with this analysis, one important clarification should be made concerning the categorisation of OCTs in the Treaty of the European Union (TEU). According to Article 52 TEU, the Treaties are applicable to the Kingdom of the Netherlands. Article 355(2) of the Treaty on the Functioning of the European Union (TFEU) in turn states that in addition to the provisions of Article 52 TEU relating to the territorial scope of the Treaties, the special arrangements for association set out in Part IV of the TFEU shall apply to the overseas countries and territories listed in Annex II.

However, Annex II to the TFEU is outdated in so far as the Netherlands Antilles no longer exists following the 2010 constitutional reform of the Kingdom of the Netherlands to be discussed below. While the abolishment of the Netherlands Antilles in the course of this reform was within the competence of the Kingdom of the Netherlands, it did not alter the OCT status of the Caribbean countries and territories of the Kingdom of the Netherlands under EU law.

2.1 Historical, Geographical and Economic Context

Until 10 October 2010 the Kingdom of the Netherlands was composed of three countries: the Country of the Netherlands (in Europe), the Country of Aruba (in the Caribbean) and the Country of the Netherlands Antilles (in the Caribbean). The Country of the Netherlands Antilles in turn embraced five islands: Curaçao, St Maarten, Bonaire, Statia and Saba. This governing structure of the Kingdom of the Netherlands has been substantially amended in the course of the 2010 constitutional reform. Since 10 October 2010, the Kingdom of the Netherlands consists of four countries: the Country of the Netherlands (comprising the European Netherlands and the Caribbean Netherlands) and three Caribbean countries – the Country of Aruba, the Country of Curaçao and the Country of St Maarten.

Several reasons lie behind this restructuring of the Kingdom of the Netherlands. Firstly, the reform was informed by geographic considerations: there was a linear distance of over 900 km or 560 miles between the Windward (St Maarten, Statia and Saba) and the Leeward

islands (Curaçao and Bonaire) that comprised the former Country of the Netherlands Antilles. Secondly, the latter lacked political and cultural cohesion. In the Windward Caribbean, for example, the English language is dominant, while in the Leeward Caribbean most inhabitants speak Papiamentu (or Papiamentu). A relatively large island of St Maarten wanted to opt out of the Netherlands Antilles because it no longer accepted to be governed by 'Willemstad' (the residence of the government of the Netherlands Antilles on Curaçao).¹⁹⁴ St Maarten preferred the status of an autonomous country within the Kingdom, just as the one acquired by Aruba in 1986 ('*status aparte*'). A similar wish was also expressed by Curaçao.

Against this background, the Netherlands Antilles were abolished and two new countries emerged from it - St Maarten and Curaçao. Initially, it was not clear what this constitutional reform meant for the position of the three remaining islands of the former Netherlands Antilles - Bonaire, Statia and Saba. Without intending to be disrespectful, one could say that these small islands were leftovers. In the end, Bonaire, Statia and Saba became part of the Country of the Netherlands. As a result, as the current map of the Kingdom of the Netherlands presented in Figure 1 below shows, nowadays the territory of the Country of the Netherlands extends from Europe to the Caribbean.

¹⁹⁴ This appears to resonate with the deep-seated sentiments dating back to the old times when St Maarten was a subordinate island of the colony Curaçao.

Figure 1: The Current Map of the Kingdom of the Netherlands and its Countries



Source: Authors' elaboration.

In addition, the governance within the Kingdom of the Netherlands has a European dimension given that the Kingdom is a Member of the European Union. The Caribbean territories of the Kingdom of the Netherlands always had the status of OCT and not that of Outermost Region. In the initial phase of the restructuring of the Netherlands Antilles much discussion took place on what kind of relationship between the Caribbean countries and territories of the Kingdom of the Netherlands and the European Union is preferable. In particular, Aruba preferred the Outermost Region status. However, given that it can be problematic for the Caribbean countries and territories of the Kingdom to meet all EU demands, it was ultimately decided to keep their OCT status.¹⁹⁵

Table 1 below presents some basic geographical and economic data on the OCTs of the Kingdom of the Netherlands. In particular, it shows that all six OCTs of the Kingdom strongly depend on tourism. The table also includes the indicative amounts of EU financial aid over the period 2014-2010 and their proposed concentration within the OCT economies. As will be shown in Chapter III below, financial aid can be an important instrument in the

¹⁹⁵ See H.E. Bröring, D. Kochenov, H.G. Hoogers, J.H. Jans (eds), *Schurende rechtsordes. Over de Europese Unie, het Koninkrijk en zijn Caribische gebieden*, Europa Law Publishing, Groningen, 2008.

hands of the European Commission in exerting influence on the OCTs of the Kingdom of the Netherlands in the fight against offshore practices.

Table 1: The OCTs of the Kingdom of the Netherlands: Some Geographical and Economic Data

OCTs of the Kingdom of the Netherlands	Territory	Population ¹⁹⁶	GDP per capita	Key economic sectors	EU financial aid over 2014-2020 (indicative)	Proposed sector of concentration for EU financial aid ¹⁹⁷
Country of Aruba	179 km ²	110 309 (2016)	28.924 USD (2014)	Tourism	€13.05 million	Education
Country of Curaçao	444 km ²	158 986 (2016)	22.619 USD (2012)	Tourism, Oil Refinery	€16.95 million	Renewable energy
Country of St Maarten	34 km ²	39 410 (2016)	15.400 USD (2008)	Tourism	€7million	Water and sanitation
Bonaire	294 km ²	19 408 (2016)	21.900 USD (2015)	Tourism	€3.95 million	Social Development - Youth
Statia	32 km ²	3 193 (2015)	26.300 USD (2012)	Tourism, Oil Storage Terminal	2.45 million EUR	Energy
Saba	13 km ²	1 947 (2015)	21.400 USD (2012)	Tourism, Medical School	3.55 million	Renewable energy

Source: Authors' elaboration.

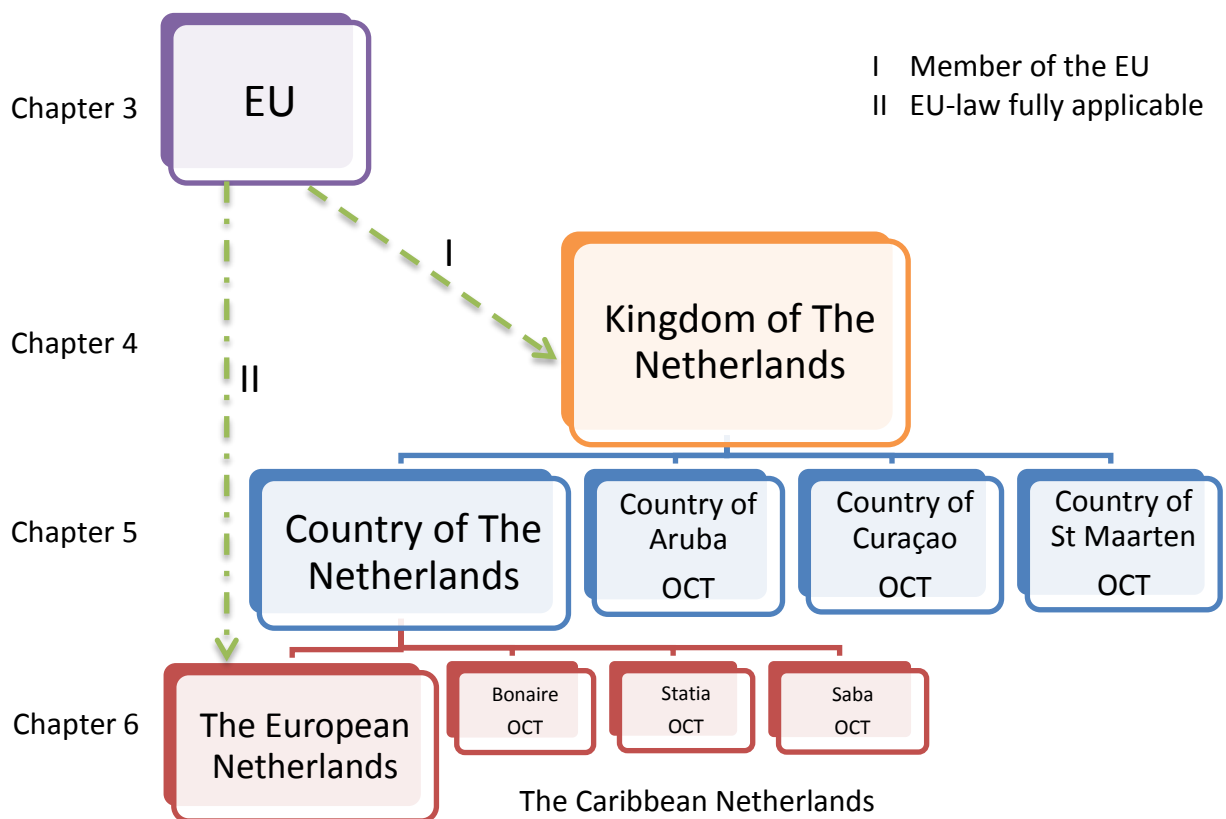
¹⁹⁶ Bonaire, Statia and Saba: [Centraal Bureau voor de Statistiek](#), Aruba: [Central Bureau of Statistics Aruba](#), Curaçao: [Central Bureau of Statistics Curaçao](#), St. Maarten: [Department of Statistics Sint Maarten](#).

¹⁹⁷ Ibid.

2.2 The Governance Levels within the Kingdom of the Netherlands

The system of multilevel governance within which the OCTs of the Kingdom of the Netherlands currently operate is reflected in the schematic overview in Figure 2 below.

Figure 2: The OCTs of the Kingdom of the Netherlands in a Multi-Level Governance System



Source: Authors' elaboration.

As the diagram in Figure 2 illustrates, there are generally four governance levels of relevance to the OCTs of the Kingdom of the Netherlands:

- (1) The European Union. The Kingdom of the Netherlands is a Member of the European Union. EU law is only fully applicable in the European part of the Country of the Netherlands, i.e. the European Netherlands. In particular, the European Commission

has the power to start infringement proceedings against the Kingdom of the Netherlands for failure to ensure compliance with EU law in the European Netherlands. Furthermore, national courts also play an important role in the enforcement of EU law. The impact of EU law is generally weaker in the OCTs of the Kingdom of the Netherlands, particularly the Caribbean countries of the Kingdom. This level of governance is discussed in more detail in Chapter III.

- (2) The Kingdom of the Netherlands, consisting of the four autonomous countries (the Netherlands, Aruba, Curaçao and St Maarten). The Kingdom of the Netherlands is a governance structure *sui generis*. It is in between an association of states and a federal state and certainly does not imply a centralised, unitarian state. The legislative powers on the central level of the Kingdom are strictly limited. The most important (general) power of the Kingdom to supervise the observance of fundamental human rights and principles of the rule of law and good governance in its countries has a vague nature. The powers of the Kingdom are further elaborated in Chapter IV.
- (3) The autonomous Caribbean countries of the Kingdom of the Netherlands (Aruba, Curaçao and St Maarten). These countries enjoy autonomy when it comes to law making and thus have their own laws. Legislation of relevance to combating offshore practices is considered in Chapter V. The Caribbean countries of the Kingdom can be bound by treaties concluded by the Kingdom but only in case the treaty was ratified for these countries. For example, they are bound by the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Kingdom can intervene in the governance of its Caribbean countries only in exceptional cases, particularly where good governance is at stake.
- (4) The Caribbean territories of the Country of the Netherlands, also known as the Caribbean Netherlands (Bonaire, Statia and Saba). Together with the European Netherlands, these territories are part of the Country of the Netherlands. The latter can be characterised as a (decentralised) unitarian state which has a central government, as well as regional authorities (provinces) and local authorities (municipalities) with their own powers based on the subsidiarity principle (centralised powers only in so far as decentralised powers are inadequate). Thus Bonaire, Stata and Saba are the addressees of legislation adopted at the level of the Country of the Netherlands in its capital, The Hague, and are subject to oversight by the Dutch authorities.¹⁹⁸ However, as will be explained in Chapter VI, this does not imply that the European Netherlands and the Caribbean Netherlands have entirely the same legislation with respect to offshore practices.

¹⁹⁸ For reasons of flexibility, the Caribbean territories of the Country of the Netherlands do not have the status of a regular municipality but that of a public entity *sui generis*. In particular, this status implies that these Caribbean territories are not part of any province, like all Dutch municipalities, but only have a direct relationship with the central government of the Country of the Netherlands in The Hague.

2.3 The Caribbean Countries and the Influence of Dutch and European Law

Despite the OCT status of the Caribbean countries and their autonomous position within the Kingdom of the Netherlands, the legal principles and legislation of the Caribbean countries and those of the Country of the Netherlands are closely allied. The vast majority of the Caribbean legislation is based on the Dutch legislation. The explanation for this is twofold. A *legal* explanation has to do with the principle of concordance (*concordantiebeginsel*) embodied in Article 39 of the Charter of the Kingdom of the Netherlands. This principle aims at ensuring convergence of the laws of the four countries of the Kingdom.

A *pragmatic* explanation of the phenomenon of ‘legal transplants’ is simple. The Caribbean countries are traditionally familiar with the Dutch civil, administrative and criminal law system and, given their small legislative capacities, are inclined to adopt Dutch legislation. Since EU law profoundly affects Dutch law, it also *indirectly* influences the law of the Caribbean countries. At the same time, the impact of Dutch and European law in the Caribbean countries generally lags behind. At present, much Caribbean legislation reflects Dutch and European law from earlier days. This is the case, for example, in the field of environmental law. Conversely, the Caribbean legislation in the financial sector is quite modern. This is a result of cooperation within the Kingdom of the Netherlands.

2.4 Political Sensitivity and the Use of Soft Tools

While the law of the Caribbean countries reflects Dutch law, the relationship between the three Caribbean countries and the Country of the Netherlands is rather complicated. Firstly, because of their common colonial history.¹⁹⁹ In order to avoid criticism in the Caribbean countries fed by post-colonial sentiment, the Dutch government is very reluctant to intervene in their affairs. Secondly, a lack of balance in terms of the population size between the Country of the Netherlands (17 000 000 inhabitants) and the other three (Caribbean) countries of the Kingdom (Curaçao 153 500, Aruba 102 911 and St Maarten 33 600 inhabitants) adds further complexity to an already complicated relationship.²⁰⁰

As a consequence, the Country of the Netherlands tends to be (*stricto sensu* mistakenly) identified with the Kingdom of the Netherlands and *vice versa*. For both reasons, the Dutch attitude towards the Caribbean countries is riddled with political sensitivity.²⁰¹ Therefore, in order to exert influence on these countries, the Dutch government tends to resort to soft

¹⁹⁹ According to R. Santos do Nascimento, *Het Koninkrijk ontsluit* (diss. Groningen – Aruba), Maklu-Uitgevers, Apeldoorn–Antwerpen, 2016, p. 305, the Charter of the Kingdom of the Netherlands is a residue of colonialism: ‘This Kingdom is both *de jure* and *de facto* identical to the Netherlands. As a result, the Caribbean peoples are not only *de facto* but also *de jure* subordinate to both the Netherlands and the people of the Netherlands.’

²⁰⁰ See Table 1 in section 2.1 of Chapter II.

²⁰¹ As one of the famous authors of Curaçao, Boelie van Leeuwen, once explained: ‘You Dutch play chess, we play domino. You are calculating, we totally surrender to our passion. And that is why we for centuries talk to each other without understanding one another.’ See M. Schenk, J. Schinkelshoek, ‘Antilliaanse politiek had tot tien moeten tellen’, [Volkskrant 14 January 2008](#).

tools, such as dialogue with local authorities or the provision of expert advice, rather than hard tools, such as binding instructions.²⁰² In many respects, this is also true for the Caribbean territories of the Country of the Netherlands. In fact, political manoeuvring is an essential element of the relations between the European Netherlands, the Caribbean countries and the Caribbean Netherlands.

The European Netherlands is clearly much more important for the inhabitants of the Caribbean countries and the Caribbean Netherlands than the other way around. In fact, many people from the Caribbean live in the European Netherlands. At the same time, the European Netherlands is generally not very popular in the Caribbean. People in the Caribbean cherish the ability to do their own business without interference from the outside. Nevertheless, there is awareness that some assistance from the European Netherlands can be helpful. Such assistance may not only take the form of financial aid but, as further explained in section 5 below, also that of cooperation in judicial matters.

2.5 Small Scale Societies

It is notable that Dutch judges often sit and take decisions in the Caribbean courts, which is often criticised both in the autonomous Caribbean countries of the Kingdom of the Netherlands and the Caribbean territories of the Country of the Netherlands. At the same time, both politicians and ordinary people in these countries and territories know very well how important independence and impartiality of the judiciary are for their economies. An independent and impartial judiciary is crucial where the political and governmental system is highly polarised and nepotism and favouritism are very common. In fact, the latter phenomena are inherent in such small scale societies as those in the Caribbean.

A closely related aspect is the poor implementation and enforcement of law. Evidently, this problem is also related to a shortage of human and financial resources. Another issue faced by small scale societies is a lack of checks and balances. Apart from the judiciary, there are only few countervailing powers, like regulatory and supervisory authorities. For example, while the Caribbean countries of the Kingdom normally have a Central Bank, a Court of Auditors and an Economic and Social Council, financial supervisory authorities and inspectorates in many other domains are simply non-existent.

In addition, by frequently using private companies (legal persons) for public tasks, the Caribbean countries try to create some distance from politics. However, in practice there are close links between such companies and the local governments. At the same time, it must be recognised that there are some important differences when it comes to acting in accordance with the standards of integrity. With due deference and prudence, one can say that the level of respect for such standards differs across the Caribbean countries and territories of the Kingdom.

²⁰² This is illustrated by the [ISLA case](#) (in English). Relevant case law includes, for example, *Gemeenschappelijk Hof van de Nederlandse Antillen en Aruba*, 15 September 2009, ECLI:NL:OGHNAA:2009:BJ7862, and *Gemeenschappelijk Hof van de Nederlandse Antillen en Aruba*, 12 January 2010, ECLI:NL:OGHNAA:2010:BK9395. See also the [documents pertaining to the Expert Meeting at the Dutch Parliament concerning ISLA held on 27 January 2016](#).

It is also important to bear in mind that cooperation with the Country of the Netherlands is essential for small scale societies. As mentioned above, such cooperation exists in judicial matters. Even more cooperation between the Country of the Netherlands and the Caribbean countries is envisaged in the area of justice. An important example is the Law Enforcement Council, i.e. a legal entity in which the Country of Curaçao, the Country of St Maarten and the Country of the Netherlands (on behalf of Bonaire, Statia and Saba) take part. The Council is based on the Kingdom Act on the Law Enforcement Council (7 July 2010).²⁰³ Its function is to monitor the quality of all parts of the justice system (with the exception of the courts) and foster cooperation between Curaçao, St Maarten and the Netherlands. The Council is charged, inter alia, with the general inspection of the organisation of the judiciary and the quality and effectiveness of judicial cooperation between the countries.²⁰⁴

It is notable that none of the reports of the Council published so far concerns money laundering, tax evasion or tax transparency. This suggests that these topics have not proved very problematic. The recent research has focused, for example, on the quality of the information available for police and prosecution (Curaçao)²⁰⁵ and the state of law enforcement (Curaçao, St Maarten).²⁰⁶

2.6 Concluding Remarks

This Chapter has shown that in the wake of the 2010 constitutional reform of the structure of the Kingdom of the Netherlands, its OCTs (i.e. Aruba, Curaçao, St Maarten, Bonaire, Statia, Saba) operate within a complex multi-level system of governance consisting of four levels: (1) the EU level ; (2) the level of the Kingdom of the Netherlands ; (3) the level of the autonomous Caribbean countries of the Kingdom of the Netherlands ; and (4) the level of the Caribbean territories of the Country of the Netherlands. Each level is characterised by its own constitutional set-up which determines the relationship between the EU, the Kingdom of the Netherlands, the Country of the Netherlands and the OCTs, based on the division of competences.

The four levels identified in this Chapter will be subject to further examination in the following chapters. This Chapter has also shed some light on the historical, geographical, economic and political context in which the multi-level system of governance operates. In particular, it has highlighted an uneasy relationship between the Country of the Netherlands on the one hand, and the Caribbean countries of the Kingdom of the Netherlands (Aruba, Curaçao, St Maarten) and the Caribbean Netherlands (Bonaire, Statia and Saba), on the other, given the colonial past and the small scale of societies concerned.

²⁰³ Rijkswet van 7 juli 2010 tot regeling van de instelling, taken en bevoegdheden van de Raad voor de rechtshandhaving van Curaçao, van Sint Maarten en van Bonaire, Sint Eustatius en Saba (Rijkswet Raad voor de rechtshandhaving; Kingdom legislation on the establishment, task and powers of the Council for Law Enforcement), *Stb* 2010, 388.

²⁰⁴ A short historical background of the [Law Enforcement Council](#), last visited: 23 March 2017.

²⁰⁵ See [Raad voor de rechtshandhaving](#), 2015.

²⁰⁶ See Raad voor de rechtshandhaving: [Curaçao](#) and [St Maarten](#), 2015.

Chapter III: The European Union and the OCTs of the Kingdom of the Netherlands

Building on the general framework governing the relationship between the EU, the Kingdom of the Netherlands, the Country of the Netherlands and the OCTs of the Kingdom presented in Chapter II, we now turn to the EU level of the multilevel governance system in which the OCTs operate. In particular, this Chapter will discuss the relationship between the EU and the OCTs of the Kingdom of the Netherlands and the possible role of the EU in combating money laundering and tax evasion and enhancing tax transparency in such territories.

3.1 The Application of the EU Treaties in the OCTs of the Kingdom

The EU Treaties, the TEU and the TFEU, are according to Article 52 TEU applicable in the whole territory of the Member States. However, for further details on the *ratione loci* of the EU Treaties, Article 52(2) TEU, refers to Article 355 of the TFEU. According to Article 355 under (2) TFEU, 'the special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II'. The association of the OCTs in Part IV of the TFEU comprises seven provisions. The purpose of the OCT association is by virtue of Article 198 TFEU twofold. Firstly, it seeks to promote the OCTs' economic and social development, and secondly, it aims to establish close economic ties between the OCTs and the EU. The OCT association's objectives are mentioned in Article 199 TFEU. Those are, inter alia, that the EU Member States shall apply the same treatment to their trade with the OCTs as they apply with other Member States pursuant to the EU Treaties²⁰⁷, and that the Member States shall contribute to the investments which are required for the OCTs' development.²⁰⁸

Part Four of the TFEU does not contain any legal obligations for the Member States or the OCTs to ensure the application of relevant EU law pertaining to money laundering, tax evasion and tax transparency. However, in the EU Action Plan to Combat Organised Crime²⁰⁹ adopted by the Council on 28 April 1997, the EU obliges Member States 'to take action and provide adequate defences against the use by organised crime of financial centres and off-shore facilities, in particular where these are located in places subject to their jurisdiction'.²¹⁰ In this Action Plan, it is considered that pertaining to these Member States' locations 'elsewhere', it is the duty of the Council to develop '*a common policy, consistent with the policy conducted by the Member States internally, with a view to prevent the use thereof by criminal organisations operating within the Union [...]*'.²¹¹

²⁰⁷ [Article 199\(1\) TFEU](#).

²⁰⁸ [Article 199\(3\) TFEU](#).

²⁰⁹ [Action Plan to Combat Organised Crime, 97/C 251/01, OJ EC, Vol. 40](#).

²¹⁰ [Action Plan to Combat Organised Crime, 97/C 251/01, OJ EC, Vol. 40](#).

²¹¹ [Action Plan to Combat Organised Crime, 97/C 251/01, OJ EC, Vol. 40](#).

3.2 The Overseas Association Decision and Money Laundering, Tax Evasion and Tax Transparency in the OCTs of the Kingdom

At present, the common policy envisaged in the 1997 Action Plan is generally lacking in the EU. However, it is notable that the Overseas Association Decision (OAD), currently the 8th version, as adopted by the Council in Decision 2013/755 on 25 November 2013, opens up major possibilities for developing such a policy with respect to money laundering, tax evasion and tax transparency in the OCTs. Although the application of the provisions of EU law concerning these aspects is not included in the association regime of Part Four of the TFEU, the *rationale* of the above-mentioned Action Plan concerning a common policy within the EU, including the OCTs of the Kingdom of the Netherlands, is – more specifically – reiterated in the Preamble of the OAD:

*‘Cooperation in the area of financial services between the Union and OCTs should contribute to building a safer, sounder, more transparent financial system that is essential to enhance global financial stability and to underpin sustainable growth. Efforts in that area should focus on convergence with internationally agreed standards and approximation of OCTs legislation with Union acquis on financial services. Adequate attention should be paid to strengthening administrative capacity of OCTs authorities, including in the area of supervision’.*²¹²

This objective is elaborated in several provisions of the OAD. The first relevant provision of the OAD concerning this issue is Article 40(2). According to this provision, which is embodied in Chapter 6 of Part Two entitled ‘Areas of Cooperation for Sustainable Development in the Framework of the Association’, the OCTs ‘shall cooperate with the Union as regards combatting money laundering and the financing of terrorism in accordance with the Articles 70 and 71’. Furthermore, Article 42(g) OAD explicitly mentions that one of the general objectives of the trade and trade-related cooperation between the EU and the OCTs is to ‘promote the stability, integrity and transparency of the global financial system, and good governance in the tax area’.²¹³ Building upon this provision of the OAD, Articles 70 and 71 OAD in turn address the issue of cooperation in the area of financial services and taxation matters. Article 70 OAD reads:

‘With a view to promote the stability, integrity and transparency of the global financial system, the association may include cooperation on international financial services. Such cooperation may concern: [...]

(b) the prevention and combat of money laundering and financing of terrorism’.

By virtue of Article 71 OAD, the EU and the OCTs should promote regulatory alignment concerning recognised international standards on regulation and supervision in the area of financial services. This list includes among others the following standards: the Basel Committee’s *Core Principle for Effective Banking Supervision*, the OECD’s *Agreement on*

²¹² [Preamble Council Decision 2013/755/EU, L344/1, under 31.](#)

²¹³ See also Article 66(2) which reads as follows: ‘Nothing in this Decision may be construed so as to prevent the adoption or enforcement of any measure aimed at preventing tax fraud or avoidance or evasion of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements, or domestic tax legislation in force.’

exchange of information on tax matters, the G20 Statement on Transparency and exchange of information for tax purposes and the Financial Action Task Force's International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation – the FATF Recommendations. In addition, this provision also includes the following final sentence:

'When it is appropriate to do so, or at the request of the OCTs concerned, the Union and the OCTs may make efforts to promote greater alignment of OCTs legislation with Union legislation on financial services'.

Since the OAD is a decision of the Council, it is up to the Council to clarify when it seems appropriate to promote greater convergence of the OCTs' legislation to EU legislation pertaining to money laundering, tax evasion and tax transparency. Concerning the cooperation between the EU and the OCTs in the tax area, Article 73 OAD reads as follows:

'The Union and the OCTs shall promote cooperation in the tax area in order to facilitate the collection of legitimate tax revenues and to develop measures for the effective implementation of the principles of good governance in the tax area, including transparency, exchange of information and fair tax competition'.

According to Geursen,²¹⁴ the OAD only contains a 'soft-law obligation and not a hard legal obligation'. In our opinion, this is true so far as the above-mentioned provisions use such terms as 'shall promote' or 'may concern'. However, there are also hard legal obligations of the OCTs when it comes to the protection of the EU's financial interests. Thus Article 90(1) OAD empowers the European Commission to take appropriate measures 'ensuring that, when actions financed under this Decision are implemented, the financial interests of the Union protected by the application of preventive measures against fraud, corruption and any other legal activities, by effective checks and, if irregularities are detected, by the recovery of the amounts wrongly paid and, where appropriate, by effective, proportionate and deterrent penalties'.

In this context, the European Anti-fraud Office (OLAF) may carry out on-the-spot checks and inspections on economic operators concerned directly or indirectly with EU funding to the OCTs in order to determine whether there has been fraud, corruption or any other illegal activity in connection with such funding.²¹⁵ The primary responsibility for the financial supervision of the EU funds lies with the OCTs.²¹⁶ However, the OCTs will carry out such supervision, where appropriate, with the EU Member State to which the OCTs are constitutionally linked.²¹⁷ The European Commission is responsible for ensuring the correct and effective use of EU funding in the OCTs, and in the case that irregularities take place, it is obliged to send recommendations or requests for remedying these irregularities

²¹⁴ W. Geursen, [Influence of EU Law on Taxation in the EU Member States' Overseas Territories and Crown Dependencies](#), In-Depth Analysis for the TAXE 2 Committee of the European Parliament, 2016.

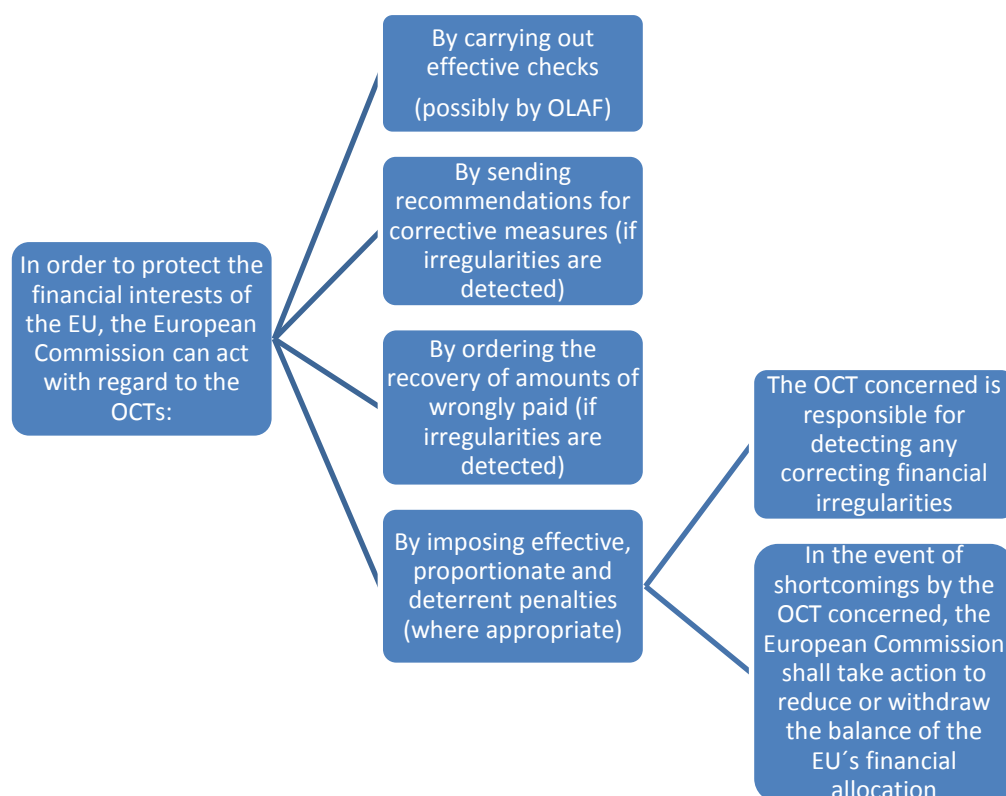
²¹⁵ [Article 90 \(2\) OAD](#).

²¹⁶ [Article 90 \(3\) OAD](#).

²¹⁷ [Article 90 \(3\) OAD](#). The cooperation between the Member State and its OCTs in the supervision of Union funds shall be carried out in accordance with national legislation of the Member State in question.

to the OCTs.²¹⁸ Finally, with regard to financial corrections, the OAD also makes it clear that although the OCTs are in the first instance responsible for detecting and correcting financial irregularities, *‘in the event of shortcomings by the OCTs concerned, the Commission shall take action, if the OCT fails to remedy the situation and attempts at conciliation are unsuccessful, to reduce or withdraw the balance of the overall allocation corresponding to the financing decision of the Programming Document’.*²¹⁹ This provision of the OAD can be regarded as a hard obligation, since the European Commission has the power to reduce or withdraw financial support to the OCTs if the latter fail to ensure the correct and effective use of EU funding. The Commission’s competences concerning the protection of the EU’s financial interests with regard to the OCTs are summarised in a schematic overview in Figure 3.

Figure 3: The Powers of the European Commission with Respect to Protecting the Financial Interests of the EU in the OCTs under the OAD



Source: Authors’ elaboration of Article 90 OAD.

²¹⁸ [Article 90 \(4\) OAD](#).

²¹⁹ [Article 90 \(6\) OAD](#).

Since under Article 90(6)(a) OAD the OCTs have a primary responsibility for remedying any detected financial irregularities, the European Commission should send its recommendations for possible corrective measures to the OCT concerned, i.e. Aruba, Curacao, St. Maarten, Bonaire, Statia and Saba. However, due to the constitutional framework of the Kingdom of the Netherlands and the Country of the Netherlands, it is possible for the European Commission to contact the Country of the Netherlands if irregularities are detected in the Caribbean Netherlands (Bonaire, Statia and Saba), since the Caribbean Netherlands is part of the Country of the Netherlands.

3.3 The Extended Application of EU Law in the OCTs of the Kingdom under the CJEU Case Law

Although under the EU Treaties the OCTs of the Kingdom of the Netherlands are only subject to the association regime of Part IV of the TFEU, in the case law of the CJEU the territorial and personal scope of the TFEU has been extended to these territories. It has also been noted in the literature that 'Part IV TFEU is *not all the law* applicable to the OCTs'.²²⁰ In this section, therefore, some relevant case law of the CJEU concerning the extension of the TFEU's application to the OCTs will be briefly discussed in order to show that the application of EU law in the OCTs is not limited to Part IV of the TFEU.

One of the first cases concerning the intricate matter of EU law and the OCTs is *Kaefer and Procacci*.²²¹ In this case pertaining to two decisions of the High Commissioner of the French Republic of Polynesia (a French OCT), the CJEU ruled that it has jurisdiction to provide preliminary rulings on questions raised by a court or tribunal located in an OCT, *in casu* the *Tribunal administratif*, Papeete. Consequently, in addition to Part IV of the TFEU, Article 267 TFEU concerning preliminary rulings is applicable in the OCTs.

Furthermore, the *Antillean Rice Mills* judgement of the CJEU has made it clear that the Principles of Part I of the TFEU are also fully applicable in the OCTs.²²² *Antillean Rice Mills* NV was a company established in Bonaire. In this case the Court ruled that when adopting an OAD, the Council 'must take account not only of the principles in Part Four of the Treaty but also of the other principles of Community law, including those relating to the common agricultural policy'.²²³ The Court also stated that this conclusion is consistent with Article 131 of the Treaty (now Article 197 TFEU), according to which the OCT-association's objective is to promote the economic and social development of the OCTs.²²⁴

²²⁰ D. Kochenov, *The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis*, in D. Kochenov (ed.), *The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis*, Kluwer Law International, The Hague, 2011, pp. 3-67.

²²¹ [Case C-100& 101/89 *Kaefer and Procacci* \[1990\] ECR I-4667](#).

²²² [Case C-390-95 P *Antillean Rice Mills* \[1999\] ECR I-798](#).

²²³ [Case C-390-95 P *Antillean Rice Mills* \[1999\] ECR I-798](#), para. 37.

²²⁴ [Case C-390-95 P *Antillean Rice Mills* \[1999\] ECR I-798](#), para. 38.

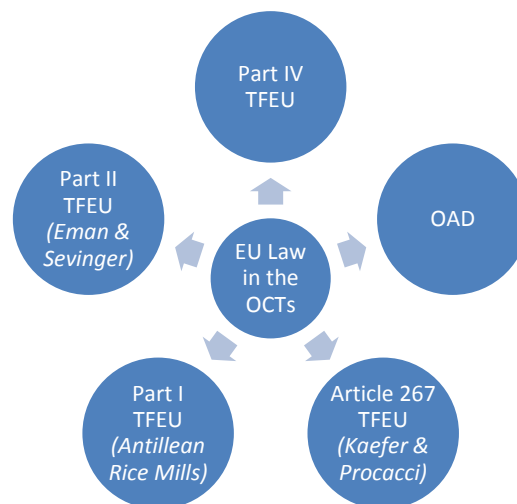
Another major judgement of the ECJ with respect to the scope of the TFEU is *Eman and Sevinger*.²²⁵ Both Eman and Sevinger are citizens of the Kingdom of the Netherlands.²²⁶ In this judgement the Court ruled that:

'[P]ersons who possess the nationality of a Member State and who reside or live in a territory which is one of the OCTs referred to in Article 299(3) EC may rely on the rights conferred on citizens of the Union in Part Two of the Treaty'.²²⁷

According to this judgement, the OCT-citizens who have the nationality of one of the Member States are also EU citizens and can thus rely on the rights in Part II of the TFEU.

Based on the current state of EU law, in particular the above-mentioned case law of the CJEU, Figure 4 provides a schematic overview of the reach of EU law in the OCTs.

Figure 4: The Application of EU Law in the OCTs According to the Case Law of the CJEU



Source: Authors' elaboration.

As the diagram in Figure 4 shows, the application of EU law in the OCTs extends beyond Part IV of the TFEU. In our opinion, therefore, the claim that only Part IV of the TFEU is applicable in the OCTs is no longer justified given the above-mentioned developments in EU law.²²⁸ Remarkably, most case law of the CJEU concerning the application of the TFEU

²²⁵ [Case C-300/04 *Eman and Sevinger* \[2006\] ECR I-8055](#).

²²⁶ There is one nationality in the Kingdom of the Netherlands: the Dutch one, see [Article 3\(1\)\(c\) of the Charter of the Kingdom of the Netherlands](#). For further details, see: G. Karapetian, 'De genesis van de Europese burger overzee. Over het personenverkeer van Nederlanders binnen het Koninkrijk', *Tijdschrift voor Constitutioneel Recht*, 2016, pp. 99 – 114.

²²⁷ [Case C-300/04 *Eman and Sevinger* \[2006\] ECR I-8055](#), para. 29.

²²⁸ See also: J. Ziller, *The European Union and the Territorial Scope of European Territories*, 38 *Vict, University Wellington Law Review*, 2007; D. Kochenov, *The EU and the Overseas: Outermost Regions*,

in the OCTs has its origin in a rather peculiar constitutional framework of the Kingdom of the Netherlands discussed in Chapters II and IV in more detail.

3.4 Concluding Remarks

This Chapter has analysed the relationship between the EU and the OCTs of the Kingdom of the Netherlands with the focus on the reach of EU law in such territories. It has demonstrated that under current EU law the application of EU law in the OCTs is no longer limited to Part IV of the TFEU. The case law of the CJEU has progressively expanded the reach of EU law in the OCTs to other parts of the Treaty. Moreover, under the recent OAD, EU not only has soft tools but also hard instruments, such as the power of the European Commission to withdraw or reduce financial aid to the OCTs, that could allow the Union to exert impact on the OCTs when it comes to combating money laundering and tax evasion and enhancing tax transparency. These developments in EU overseas law demonstrate a move away from the traditional paradigm of the relationship between the EU and OCTs based on one-sided classic development and aid cooperation towards a more reciprocal partnership between the two parties.²²⁹ As a consequence, the EU can play an increasingly important role in fighting offshore practices in the OCTs of the Kingdom of the Netherlands in cooperation with these OCTs.

Overseas Countries and Territories Associated with the Union, and Territories Sui Generis, in D. Kochenov (ed.), *The EU and the Overseas: Outmost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis*, Kluwer Law International, The Hague, 2011, pp. 3-67.

²²⁹ See also European Commission, [*Green Paper on Future Relations between the EU and the Overseas Countries and Territories*](#), COM (2008) 383, Brussels, 25-06-2008; European Commission, [*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Elements for a New Partnership between the EU and the Overseas Countries and Territories \(OCTs\)*](#), COM (2009) 623, Brussels, 6-11-2009.

Chapter IV: The Kingdom of the Netherlands and the OCTs

Having addressed the possible role of the EU in combating money laundering and tax evasion and enhancing tax transparency in the OCTs of the Kingdom of the Netherlands, in this Chapter we will turn to the Kingdom of the Netherlands itself and analyse the Kingdom's powers in this area in relation to its OCTs, with a particular focus on the three autonomous Caribbean countries, i.e. Aruba, Curaçao and St Maarten.

4.1 General Characteristics of the Charter for the Kingdom

After long discussions in the late 1940s, the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*) came into force on 29 December 1954. The Charter for the Kingdom was the cornerstone of the new legal order of the Kingdom of the Netherlands aimed at restructuring the Kingdom, emancipating the colonial territories in the Caribbean and ensuring their influence on the Kingdom level. It was never intended to be a fully-fledged new constitution of the reconstituted Kingdom. It is rather a kind of 'adjacent constitution' to augment the existing Constitution for the Kingdom (*Grondwet voor het Koninkrijk der Nederlanden*), which has always been the Constitution for the European Netherlands and the Kingdom's overseas territories in the Caribbean, in so far as they were subject to the regulatory and administrative powers exercised by Dutch state authorities.²³⁰

The Charter does not fundamentally change that constitutional make-up, but restructures it in a few important ways. First of all, it is no longer the Constitution itself but the Charter that regulates which parts of the Constitution are in force for the overseas territories of the Kingdom. Secondly, the Charter provides for the ways through which the Caribbean countries of the Kingdom, i.e. Aruba, Curaçao and St Maarten, can influence decision-making at the Kingdom level. Thirdly, it stipulates the powers of the Kingdom and, by default, the autonomous powers of each of the Kingdom countries, thereby guaranteeing the autonomy of the Caribbean countries within the framework of the Kingdom. Finally, the Charter can only be amended through the collaboration of all the four countries of the Kingdom (i.e. the Netherlands, Aruba, Curaçao and St Maarten), which constitutes an important safeguard for the Caribbean countries of the Kingdom.²³¹ However, because the Charter is the supreme law of the Kingdom, it also affects and limits the authorities of the Country of the Netherlands itself.

4.2 The Kingdom's Constitutional Make-Up

In general, the structure of the Charter can be characterised as follows. The Charter recognises the principal authorities of the Dutch state laid down in the Constitution – the King, the Government, the States-General (*Staten-Generaal*, the parliament), the Council of State (*Raad van State*, the main advisory body in legislative matters), and 'reinstates' them as the authorities of the Kingdom. In their capacity as the Kingdom's authorities, they are not only governed by the relevant provisions of the Constitution but also those of the

²³⁰ The best account of the genesis of the Charter is G. Oostindie and I. Klinkers, *Knellende Koninkrijksbanden*, Part 1, Amsterdam University Press, Amsterdam, 2001.

²³¹ C. Borman, *Het Statuut voor het Koninkrijk*, Kluwer, Deventer, 2012, pp. 21-45.

Charter. The provisions of the Charter guarantee that Aruba, Curaçao and St Maarten can, through elected and appointed representatives, exercise their influence on the decision-making process in the Kingdom. The impact of the Caribbean countries on this process is (almost) never decisive, but it is greater than their population size compared to that of the Country of the Netherlands would merit.

The principal body of the Kingdom of the Netherlands is the Kingdom Government, which comprises the King, all ministers who form the government of the Country of the Netherlands, and one Minister-Plenipotentiary for each of the three Caribbean countries, who is nominated by and responsible to his or her own government.²³² Decisions in the Council of Ministers (i.e. the government without the King) are in principle taken by unanimity, but when there is a conflict among the Dutch ministers and one or more of the Ministers-Plenipotentiary, a special procedure is laid down in Article 12 of the Charter. This procedure guarantees that the Minister-Plenipotentiary has a stronger voice in the Council of Ministers than any of his Dutch colleagues unilaterally, but not strong enough to overcome persistent objections from the 'Dutch' part of the Kingdom's Government.

The Council of State, which is the primary advisory body with respect to all legislation in the Kingdom, is also an authority of both the Country of the Netherlands and the Kingdom of the Netherlands. The Council of State of the Kingdom comprises all the members of the Dutch Council of State, but the Charter stipulates that the King can nominate three extra members, one for each of the three Caribbean countries, if their governments so desire. They take part in the activities of the Council when it comes to Kingdom regulations.²³³

Although the legislator of the Kingdom comprises the Kingdom's Government together with the States-General, the Charter does not provide for the enlargement of the States-General when dealing with Kingdom legislation. In order to guarantee that the Caribbean countries can also influence the legislative process, the Ministers-Plenipotentiary are given some special powers to act in Parliament. In particular, they can speak in both chambers of the States-General to present the opinion of their own governments (and are therefore not bound by the normal unanimity rules of government *vis-à-vis* parliament); they can propose amendments to acts and a qualified majority in the Second Chamber of parliament is necessary to overcome objections of the Ministers-Plenipotentiary raised against a law proposal.²³⁴ The three overseas parliaments themselves can also send representatives to the States-General to take part in the legislative procedure and they can basically exercise the same rights as the Ministers-Plenipotentiary.²³⁵ However, the Charter does not provide for actual voting rights in the States-General for the representative of the overseas parliaments and the Ministers Plenipotentiary. This situation has often been described as the democratic deficit of the Kingdom.

²³² [Article 7, Charter of the Kingdom of the Netherlands.](#)

²³³ [Article 13, Charter of the Kingdom of the Netherlands.](#)

²³⁴ [Articles 17 and 18, Charter of the Kingdom of the Netherlands.](#)

²³⁵ [Articles 17 and 18, Charter of the Kingdom of the Netherlands.](#)

4.3 The Kingdom's Powers

The powers of the Kingdom are mostly well-defined and narrow. One of the strongest indications for the quasi-federal structure of the Kingdom is the fact that the Charter defines and limits the powers of the Kingdom, which are mostly laid down in Article 3 of the Charter. Everything else is within the autonomous sphere of the four countries of the Kingdom. The most important powers of the Kingdom relate to defence and foreign relations, nationality law, shipping regulations, immigration and free travel of Dutch nationals and extradition.

However, Article 3 is not the only source of the Kingdom powers. The Kingdom, and especially the Kingdom Government, also has some important powers in the field of control and oversight. The main source of these powers is Article 43 of the Charter for the Kingdom. This article lays down the obligation of each of the four countries of the Kingdom to promote the realisation of fundamental human rights and freedoms, the rule of law and good governance. According to this provision, the Kingdom acts as a guarantor of the observance of this obligation by the countries of the Kingdom. It is generally recognised that Article 43 does not in itself create powers for the Kingdom or the Kingdom Government.

There are certain Charter provisions that do create specific powers to uphold Article 43. The first is the one laid down in Article 44 of the Charter. According to this provision, any amendment to the Constitutions of Aruba, Curaçao or St Maarten dealing with fundamental human rights, the powers of government, the local parliament or the judiciary needs the approval of the Kingdom Government before it can enter into force.

Article 45 of the Charter mirrors this for the Country of the Netherlands: the amendments to the Dutch Constitution concerning the same matters need to be discussed within the Council of Ministers of the Kingdom before they can be brought before the States-General. This gives the Ministers-Plenipotentiary the chance to discuss the amendments with respect to such fundamental issues with their Dutch colleagues and express the views of their own governments.

Articles 50 and 51 of the Charter empower the Kingdom Government to nullify any legal provision laid down in the legislation of Aruba, Curaçao or St Maarten if it violates Kingdom law, international obligations of the Kingdom or other fundamental interests of the Kingdom, and to interpose itself autonomously when a public body in one of the three Caribbean countries does not fulfil its obligations under the Charter, a treaty or a Kingdom regulation. However, both articles have so far never been applied.

4.4 Financial Oversight by the Kingdom in the Autonomous Caribbean Countries

The Charter for the Kingdom of the Netherlands does not confer specific powers on the Kingdom with regard to oversight in the areas of financial and tax law, in particular when it comes to money laundering, tax evasion and tax transparency.

Most relevant in this context is the Kingdom Financial Supervision Act for Curaçao and St Maarten (*Rijkswet financieel toezicht Curaçao en Sint Maarten*) that entered into force after the breaking up of the Netherlands Antilles in 2010.²³⁶ This act is a Kingdom act but not a regular one. It was made by the Kingdom legislator based on Article 38 of the Charter, which stipulates that the countries of the Kingdom can enable the Kingdom itself to regulate matters that lie within these countries' competence.

The financial supervision act in question provides that the Kingdom shall have indirect oversight over the budget of both St Maarten and Curaçao through an independent body, i.e. the Financial Supervisory Board (*College Financieel Toezicht, CFT*). Four members of this body are nominated by the councils of ministers of the Kingdom of the Netherlands, the Country of the Netherlands, the Country of Curaçao and the Country of St Maarten, respectively. The Financial Supervisory Board has not only oversight powers over the budget and the development of the collective sector of Curaçao and St Maarten, but also the power to determine which officials have the authority to enter into financial obligations under private law.²³⁷ The Board is only empowered to make recommendations to the governments of Curaçao and St Maarten and to the Kingdom Government. Only the Kingdom Government can take binding decisions.

There is also another route through which the Kingdom of the Netherlands may exert influence on the way in which its overseas countries are dealing with the issue of political and financial integrity. On 30 September 2013, the Kingdom Government gave an official instruction to the Governor of St Maarten to order an independent evaluation of the state of public and financial affairs in St Maarten.²³⁸ This evaluation was to be conducted by independent researchers and the results of it were to be communicated to the Kingdom Government within six months.²³⁹ The instruction was based on Article 15 of the Regulations concerning the Governor of St Maarten (*Reglement voor de Gouverneur van Sint Maarten*), the Kingdom Act concerning the position and powers of the Governor as the Kingdom's authority.²⁴⁰ This article stipulates that the Governor represents the Kingdom Government and safeguards the common good of the Kingdom in accordance with the provisions of the Regulations and under the instructions of the Kingdom Government. However, there has been some recent controversy over the meaning of this provision. Does it mean that the Kingdom Government can instruct the Governor to take any action it considers appropriate or should such instructions be linked to the powers of the Governor laid down in the Regulations in question? In the case at hand, as well as in other cases in which instructions were given to the Governors of St Maarten and Aruba, the Kingdom

²³⁶ [Rijkswet financieel toezicht Curaçao en Sint Maarten van 10 juli 2010, Stb. 2010, 334.](#)

²³⁷ Ibid., Article 20.

²³⁸ The results of this evaluation are discussed in Chapter V below.

²³⁹ [Besluit van 30 september 2013, houdende een aanwijzing aan de Gouverneur van Sint Maarten tot het gelasten van onderzoek naar het functioneren van het openbaar bestuur op Sint Maarten](#) (Royal Decree of 30 September 2013 on the instruction to the Governor of Sint Maarten to order an independent inquiry into the functioning of public administration in Sint Maarten), *Landscourant van Sint Maarten* 2013, no. 21.

²⁴⁰ [Rijkswet van 7 juli 2010](#), Stb. 2010, no. 340.

Government has taken the position that such actions are covered by the general provision of Article 43. However, in its official advice in the matter provided at the request of the Dutch Parliament, the Council of State has denounced this standpoint and taken the view that has historically always prevailed, i.e. that the only powers that can be used to uphold Article 43 are those explicitly given in the Charter itself or in other Kingdom Acts.²⁴¹ Although the Council of State of the Kingdom acts as an advisory body, its opinion carries a lot of weight within both the Kingdom Government and the States-General.

According to the Council of State, the Kingdom Government can only give a legally binding instruction within the limits of the powers of the Governor enumerated in the Regulations. Among these powers are the following:

- The publication of all Kingdom Acts and Kingdom Orders by the Council of State in St Maarten (Article 16);
- The oversight over observance of the Kingdom legal acts in St Maarten (Article 20);
- The right to refuse to sign a national ordinance of St Maarten if he deems this to be in contravention of higher law (Article 21);
- The duty to send every national ordinance of St Maarten to the Kingdom Government directly after its entry into force (Article 22).

In light of the above-mentioned opinion of the Council of State of the Kingdom and the fact that its opinion reinforces and underlines a long-standing constitutional practice, it seems clear that the instruction given by the Kingdom Government to the Governor of St Maarten on 30 September 2013 is unconstitutional since it does not correspond to any of the enumerated powers of the Governor.

4.5 Concluding Remarks

The Kingdom of the Netherlands has a rather peculiar constitutional framework, which is partly laid down in the Charter of the Kingdom of 1954 and partly in the Dutch Constitution dating back to 1814. Within this constitutional framework, the existing constitutional authorities of the Country of the Netherlands also act as the authorities of the Kingdom of the Netherlands. Decision-making within the latter can be influenced by the three autonomous Caribbean countries of the Kingdom only to a limited extent. However, this is compensated by the fact that the Kingdom itself has very limited powers.

The only power of the Kingdom that could somehow be described as lying in the fields of financial oversight, public-private cooperation and the private sector in the OCTs concerns the power to safeguard good governance in these countries. But this general power does not in itself create specific powers in the above-mentioned fields and has historically been interpreted narrowly. This situation makes it hard to see how the Kingdom Government could act within its powers to regulate or supervise the financial sector in its overseas countries of Aruba, Curaçao and St Maarten.

²⁴¹ Voorlichting over het geven van aanwijzingen aan de Gouverneurs van de landen in het Caribische deel van het Koninkrijk (Official opinion on the power of the Kingdom Government to give binding instructions to the Governors of the countries in the Caribbean part of the Kingdom), *Kamerstukken II 2014-2015, 34000 IV*, nr. 52.

Chapter V: Financial oversight in the Caribbean countries of the Kingdom of the Netherlands

As has been demonstrated in Chapter IV, the Charter for the Kingdom of the Netherlands does not give powers to the Kingdom in matters relating to money laundering and tax evasion. These subjects lie within the autonomous sphere of Aruba, Curaçao and St Maarten. The Country of the Netherlands may exert impact on these three Caribbean countries only within the framework of voluntary cooperation. In this light, this Chapter will first provide an overview of the most important legislation relating to money laundering, tax evasion as well as tax transparency, with the focus on Curaçao. Subsequently, the competences of the Dutch Central Bank – *De Nederlandsche Bank* – and the overseas central banks of the three Caribbean countries will be scrutinised. Finally, cooperation between the Country of the Netherlands and the three Caribbean countries within the Kingdom of the Netherlands will be discussed using the example of the case of St Maarten Integrity Chamber.

5.1 Overseas Laws and Central Banks

Financial supervision in Aruba is governed by the National Ordinance on Aruban Temporary Financial Supervision (*Landsverordening Aruba Tijdelijk Financieel Toezicht*). In Curaçao and St Maarten, financial supervision is addressed by the Kingdom Act on Financial Supervision and St Maarten (*Rijkswet financieel toezicht Curaçao en Sint Maarten*) that provides for voluntary cooperation between the Country of the Netherlands, the Country of Curaçao and the Country of St Maarten. These legislative acts also provided for the establishment of the Boards of financial supervision (*Colleges financieel toezicht*) – the Financial Supervisory Board of Aruba and the Financial Supervisory Board of Curaçao and St Maarten. The aim of these Boards is to achieve ‘the common goal of all governments within the Kingdom of the Netherlands: realising sustainable financial management’.²⁴² The specific objectives of the two Boards vary from reporting and advising the Minister, the Council of Ministers, the Government of the Kingdom and the Countries’ Parliaments (*Staten*) to supervising the progress made in the implementation of reforms aimed at improving financial governance and management.²⁴³

Apart from the above-mentioned financial supervision acts for the three Caribbean countries of the Kingdom of the Netherlands, there are two Kingdom Acts concerning tax matters for the Country of the Netherlands and the Country of Curaçao, on the one hand, and the Country of the Netherlands and the Country of St Maarten, on the other. These are

²⁴² As mentioned on the Boards’ website. See [Boards of Financial Supervision \(Colleges financieel toezicht\)](#).

²⁴³ The specific objectives of the two Boards are mentioned in Article 4 of the Kingdom Act on Financial Supervision Curaçao and St Maarten and in Article 2 of the Aruban National Ordinance respectively. The reason that the legal foundation for financial oversight differs between Aruba and the two other countries lies in the fact that the provisions concerning oversight in Curaçao and St Maarten were part of the regulations leading to the dissolution of the Netherlands Antilles, while related regulations for Aruba came into force only in 2014. However, the content of both regulations is almost identical.

the Tax Regulation for the Netherlands and Curaçao (*Belastingregeling Nederland Curaçao*)²⁴⁴ and Tax Regulation for the Netherlands and St Maarten (*Belastingregeling Nederland Sint Maarten*).²⁴⁵ These regulations aim at preventing double taxation. Other relevant regulations include the Regulations concerning the Declaration of Cross-Border Money Transports,²⁴⁶ the National Ordinance on International Tax Assistance,²⁴⁷ the National Ordinance on the Notification of Unusual Transactions,²⁴⁸ the National Ordinance on the Identification when Providing Services,²⁴⁹ the Regulation concerning the Indicators of Unusual Transactions²⁵⁰, the National Ordinance on the Supervision of Money Transaction Offices²⁵¹, and the National Ordinance on the Notification of Cross-Border Transactions.²⁵²

Supervision over compliance with the legislation aimed at combating money laundering and tax evasion and ensuring tax transparency normally lies in the hands of central banks. Within the Kingdom of the Netherlands, there are three such banks: the Dutch Central Bank (*De Nederlandsche Bank*), the Central Bank of Aruba (*De Centrale Bank van Aruba*) and the Central Bank of Curaçao and St Maarten (*Centrale Bank van Curaçao en Sint Maarten*). Due to increasing concerns about the well-functioning and integrity of the Central Bank of Curaçao and St Maarten, the Dutch Central Bank has expanded its prudential supervision activities in these overseas countries.²⁵³ Furthermore, the Dutch Central Bank itself is responsible for financial supervision in the Caribbean territories of the Country of the Netherlands (Bonaire, Statia and Saba). A schematic overview of the authorities in charge of financial supervision in the OCTs of the Kingdom of the Netherlands is presented in Figure 5.

²⁴⁴ [Belastingregeling Nederland Curaçao](#) of 30 September 2015.

²⁴⁵ [Belastingregeling Nederland Sint Maarten](#) of 23 December 2015.

²⁴⁶ [Regeling aangifteformulier grensoverschrijdende geldtransporten](#) (Sint Maarten) of 22 May 2015.

²⁴⁷ [Landsverordening internationale bijstandsverlening bij de heffing van belastingen](#) (Curaçao) of 2 August 2015.

²⁴⁸ [Landsverordening melding ongebruikelijke transacties \(St Maarten\)](#) of 23 July 2014.

²⁴⁹ [Landsverordening identificatie bij dienstverlening](#) (Curaçao) of 10 February 1996.

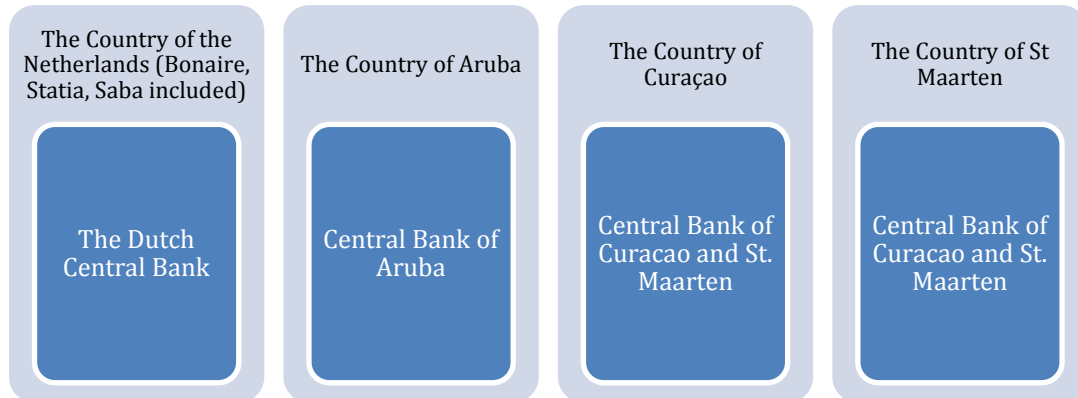
²⁵⁰ [Regeling indicatoren ongebruikelijke transacties](#) (Curaçao) of 21 May 2010.

²⁵¹ [Landsverordening toezicht geldtransactiekantoren](#) (Curaçao) of 25 September 2014.

²⁵² [Landsverordening aanmeldplicht grensoverschrijdende transacties](#) (St Maarten) of 25 March 2002.

²⁵³ De Nederlandsche Bank, [Staat van Toezicht 2015](#), 2015, Amsterdam, p. 41.

Figure 5: Financial Supervision in the OCTs of the Kingdom of the Netherlands



Source: Authors' elaboration.

Although legislation relating to money laundering, tax evasion and tax transparency in the three Caribbean countries of the Kingdom (Aruba, Curaçao and St Maarten) is largely in accordance with the EU standards, the effectiveness of this legislation leaves much to be desired. Notably, in June 2016, St Maarten Minister of Finance launched an 'integrity investigation' into the president and directors of the Central Bank of Curaçao and St Maarten.²⁵⁴ These investigations are currently ongoing.

Furthermore, the three Caribbean countries of the Kingdom (Aruba, Curaçao and St Maarten) are members of the *Caribbean Financial Action Task Force* (CFATF). This organisation comprises 27 countries and states in the Caribbean Basin, Central America and South America. Its main objective is to address the problem of money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction in this area by ensuring that its members comply with the FATF recommendations. In order to fulfil its objectives, the CFATF prepares mutual evaluation reports and follow-up reports. While the former illustrate the status of the CFATF member concerned with respect to the implementation of the FATF recommendations before the mutual evaluation, the latter reflect the CFATF member's progress after the mutual evaluation.²⁵⁵ If the reports indicate that the CFATF member does not comply with the FATF Recommendations, a sanction in accordance with the CFATF procedure can follow.²⁵⁶ To our knowledge, so far

²⁵⁴ Curacao Chronicle, [Sint Maarten Minister Instructs VDSM To Investigate Central Bank's Management](#), 30 June 2016.

²⁵⁵ There are 7 Follow-up Reports and 1 Mutual Evaluation Report available with respect to Aruba; 5 Follow-up Reports and 1 Mutual Evaluation Report with respect to Curaçao and 8 Follow-up Reports and 1 Mutual Evaluation Report with respect to St. Maarten. For further details, see [Caribbean Financial Action Task Force](#).

²⁵⁶ With respect to sanctioning, the website of the CFATF contains the following information: 'Sanctions can include a letter describing the importance of complying; being included in a Public Statement which can severely hinder [the Member's] international and especially financial relations and ultimately being suspended or terminated as a Member'. See Caribbean Financial Action Task Force, [What are the FATF Recommendations and How Do They Affect Our Members?](#) Last visited: 23 March 2017.

the OCTs of the Kingdom of the Netherlands have not been subject to sanctions for non-compliance with the CFATF.

5.2 Cooperation among the Countries of the Kingdom: The St Maarten Integrity Chamber Case

As has been mentioned above, the powers of the Kingdom to intervene in the autonomy of the Caribbean countries when it comes to justice and financial oversight are limited. For this reason, the Netherlands as a country within the Kingdom seeks to ‘gently force’ the other three countries (Aruba, Curaçao and St Maarten) to cooperate in these areas. However, as the following example shows, this is not always easy. Although each autonomous Caribbean country is a special case, the St Maarten Integrity Chamber case discussed below illustrates the difficulties involved in developing effective cooperation between the Country of the Netherlands and the Caribbean countries of the Kingdom in general.

On 30 September 2013, the Kingdom Government issued an instruction to the Governor of St Maarten to conduct a study into the integrity of the St Maarten public administration and the impact of organised crime on the public and private sectors of this country. The studies were conducted by the General Audit Board (*Algemene Rekenkamer*) of St Maarten,²⁵⁷ the Commission on the Integrity of Public Administration (*Commissie Integriteit Openbaar Bestuur*)²⁵⁸ and PriceWaterhouseCoopers.²⁵⁹ Based on the results of these studies, the Governments of St Maarten and the Netherlands signed a protocol concerning the establishment of the so-called integrity chamber (*Integriteitskamer*) in St Maarten.²⁶⁰

The Integrity Chamber was vested with far reaching powers to oversee and improve the quality of the St Maarten public and private authorities (in so far as the latter are under government control) when it comes to their financial and criminal integrity. The costs of this new institution were to be shared between the Country of the Netherlands and the Country of St Maarten. The Integrity Chamber was to be a legal person under the public law of St Maarten, comprising three members. Two of the members were to be nominated by the Governments of St Maarten and the Netherlands, respectively, and the third by the two other members. All three members of the Integrity Chamber were to be appointed by St Maarten Government Decree. The Country of the Netherlands and the Country of St Maarten also agreed that the law that would introduce the Integrity Chamber should be passed by the St Maarten Parliament no later than 31 July 2015. The National Ordinance

²⁵⁷ Algemene Rekenkamer, [Nulmeting Sint Maarten: Stand van zaken institutionele integriteitszorg](#), March 2014.

²⁵⁸ Commissie Integer openbaar bestuur, [Doing the right things right](#), 12 July 2014.

²⁵⁹ PriceWaterhouseCoopers, [Integrity Inquiry into the functioning of the Government of Sint Maarten](#), St Maarten, 2014.

²⁶⁰ [Protocol tussen Nederland en Sint Maarten strekkende tot samenwerking door middel van een onderlinge regeling op grond van art. 38, eerste lid, van het Statuut voor het Koninkrijk der Nederlanden in verband met de instelling, de inrichting, het functioneren en de bekostiging van een Integriteitskamer op Sint Maarten](#) of 24 May 2015.

on the Integrity Chamber was published in the *Government Gazette* of St Maarten on 21 August 2015, three weeks later than expected.²⁶¹

According to this legislation, the powers of the newly established institution included, *inter alia*, the power to give binding advice to the Government on integrity-related issues, such as fraud, embezzlement and favouring family members (Article 1(b)), and to oversee the implementation of this advice (Article 3(1)). In addition, the Integrity Chamber was given extensive investigatory powers with respect to integrity violations, such as the power to make inquiries, to investigate all relevant documents and to enter into offices without consent, if necessary, with the assistance of the police (Article 4). Moreover, all the parties concerned were obliged to cooperate with the Integrity Chamber (Article 4). Where an inquiry by the Integrity Chamber could lead to pressing criminal charges against the persons concerned, the Integrity Chamber was obliged to report all relevant information to the Public Prosecutor's Office (Article 3(4)).

However, the constitutionality of this legislation was challenged by the St Maarten Ombudsman who brought it before the Constitutional Court of St Maarten. The latter can review the constitutionality of any act approved by Parliament and signed by the Governor of St Maarten before its entry into force. If the Constitutional Court rules that a National Ordinance is unconstitutional, it becomes void and never enters into force. Under the St Maarten Constitution, the Ombudsman is the only actor who can bring a law before the Constitutional Court.

It was the combination of the Integrity Chamber's extensive investigatory powers that could lead to the discovery of facts relevant under criminal law and its obligation to report relevant information to the Public Prosecutor's Office that led the Ombudsman to bring the National Ordinance on the Integrity Chamber before the Constitutional Court. The Ombudsman believed this legislative act to be in violation of several fundamental rights guaranteed by the St Maarten Constitution, in particular the *nemo tenetur*-principle laid down in Article 26, the presumption of innocence of Article 28 and the right to privacy enshrined in Articles 5 and 7. The Constitutional Court generally agreed with the objections of the Ombudsman and declared the National Ordinance on the Integrity Chamber unconstitutional by its decision of 7 July 2016.²⁶²

The Country of the Netherlands and the Country of St Maarten are thus back at square one. The above-mentioned case provides a striking illustration of the intrinsic complexity surrounding the attempts of the Country of the Netherlands to exert influence on the autonomous Caribbean countries of the Kingdom. Ironically, the law establishing the Integrity Chamber that was supposed to improve the integrity of public administration in the Country of St Maarten was struck down by the Constitutional Court of St Martin on the grounds that it violated the fundamental rights of St Maarten citizens. At present, a solution to this controversy is not in sight.

²⁶¹ [Landsverordening Integriteitskamer](#) of 21 August 2015.

²⁶² Constitutional Court of St Maarten, Decision of 7 July 2016, Case 2015/1.

5.3 Concluding Remarks

The three Caribbean countries of the Kingdom of the Netherlands (Aruba, Curaçao and St Maarten) have all adopted rather modern legislation relating to money laundering, tax evasion and tax transparency. However, these countries face major problems in ensuring the effectiveness of this legislation in practice. The quality of financial supervision and enforcement are areas of particular concern. As has been shown in Chapter IV, the powers of the Kingdom of the Netherlands to intervene in the affairs of the Caribbean countries in matters relating to financial oversight are rather limited. Given the Kingdom's quasi-federal make-up, such powers belong to the autonomous spheres of the countries themselves. The Country of the Netherlands tries to compensate for this lack of constitutional powers on the part of the Kingdom of the Netherlands by actively promoting cooperation with the Caribbean countries of the Kingdom. This cooperation is voluntary and in practice is always initiated by the Country of the Netherlands. Yet, the latter faces major difficulties in developing such cooperation. This is illustrated by the fact that the legislation aimed at establishing the Integrity Chamber in the Country of St Maarten to improve the integrity of the entire St Maarten government apparatus was declared unconstitutional by the Constitutional Court of St Maarten.

Chapter VI: Financial Oversight in the Caribbean Netherlands

The previous Chapter has shed some light on the legal, institutional and political framework pertaining to offshore practices in the autonomous Caribbean countries of the Kingdom of the Netherlands (Aruba, Curaçao and St Maarten). In this Chapter, such a framework will be discussed in relation to the Caribbean territories of the Country of the Netherlands (Bonaire, Statia and Saba), also known as the Caribbean Netherlands. As has already been mentioned above, the constitutional status of these Caribbean territories within the Kingdom differs substantially from that of the Caribbean countries. While the latter are autonomous countries within the Kingdom of the Netherlands with the Kingdom having only limited powers to intervene in their affairs, the Caribbean territories are part of the Country of the Netherlands and are therefore subject to Dutch law and oversight by the Dutch institutions.

Therefore, after a brief explanation of the position of the Caribbean Netherlands within the Country of the Netherlands, this Chapter will primarily focus on the most relevant legislation related to money laundering, tax evasion and tax transparency, in particular insofar as it differs from that of the European Netherlands. The Chapter will also highlight some aspects of the implementation and enforcement of this legislation. In this context, it is important to be aware of the fact that the institutions from the European Netherlands are in charge of the financial sector of the Caribbean Netherlands. As will be further explained below, this can be seen as a guarantee that the Caribbean Netherlands' legislation pertaining to combating offshore practices is in accordance with European standards and relatively effective in practice.

6.1 The Position of the Caribbean Territories within the Country of the Netherlands

As has already been mentioned in Chapter II, following the 2010 constitutional reform which abolished the Netherlands Antilles, the Country of the Netherlands now includes the European Netherlands and three territories in the Caribbean, i.e. Bonaire, Statia and Saba.²⁶³ For reasons explained in Chapter II, since 10 October 2010, the powers of these three Caribbean territories, and hence their room for manoeuvre in matters related to offshore practices, are restricted by Dutch law. These territories also have a direct relationship with the central government of the Country of the Netherlands in the legislative and supervisory domain.

It is thus the Dutch government that has the power to make legislation on money laundering, tax evasion and tax transparency applicable in the Caribbean Netherlands. However, this does not mean that the legislation relating to these subjects is entirely the

²⁶³ Most inhabitants of these three Caribbean territories of the Country of the Netherlands were born in the Netherlands Antilles (59 %) (which ceased to exist following the 2010 constitutional reform), 21 % in South and Central America, 9 % in the European Netherlands, 5 % in the USA and Canada and 6 % in other countries. See Centraal Bureau voor de Statistiek (CBS, Central Office for Statistics), 2011.

same in the European Netherlands and the Caribbean Netherlands. Based on the principles of legislative restraint and differentiation, some divergence between the two is accepted. As will be illustrated below, such divergence can be observed, for example, in the field of anti-money laundering law.

The new constitutional system within which the Caribbean territories of the Country of the Netherlands currently operate has been evaluated by the Commission Spies five years after the introduction of this system.²⁶⁴ The Commission concluded, inter alia, that so far the inclusion of these territories within the Country of the Netherlands has not been a great success, that the people were disappointed (also due to wrong expectations), and that the quality of local government has not improved. According to the Commission Spies:

*'After the dissolution of the Netherlands Antilles as a level of government, two worlds collided, each with their own context. Bonaire, Sint Eustatius and Saba are small, also from an administrative perspective, vulnerable and isolated communities which are geared towards dealing with everyday problems. The new administrative structure and its implementation were given shape prior to 2010 with a great level of autonomy, under the federal system of the Netherlands Antilles. Meanwhile some 8 000 kilometres away in The Hague, the Netherlands has been formulating regulations and policy since 2010 and has been taking decisions that impact the everyday lives of the people of Bonaire, Sint Eustatius and Saba. The context from which the European part of the Netherlands operates is different: within a broad European context, with ministries for general policy and enforcing regulations with, generally, little knowledge of the local circumstances in the Caribbean, and reasoning from the decentralised unitary state in which the autonomy of the decentral administration can be limited relatively easily. Two different cultures and contexts, one in which ideas and decisions are given shape, the other in which these ideas and decisions result in consequences.'*²⁶⁵

These findings are particularly interesting when assessing the effectiveness of the legislation relating to offshore practices in practice.

6.2 Financial Markets

In the field of financial markets, the following legislation is relevant (since 1 July 2011): the Regulations concerning the Financial Markets in the public entities of Bonaire, Statia and Saba and the supervision of those markets ('Financial Markets (BES Islands) Act', *Wet financiële markten BES (Wfm BES)*), and the Regulations for the prevention of money laundering and terrorist financing in the public entities of Bonaire, Statia and Saba (Money laundering and terrorism financing (BES Islands) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme BES*)). Furthermore, there are also regulations concerning the monetary system of these Caribbean territories (*Regels met betrekking tot het geldstelsel van de openbare lichamen Bonaire, Sint Eustatius en Saba, alsmede enige voorzieningen van*

²⁶⁴ Commissie Spies, [*Vijf jaar verbonden. Bonaire, Sint Eustatius, Saba en Europees Nederland. Rapport van de commissie evaluatie uitwerking van de nieuwe staatkundige structuur Caribisch Nederland*](#), The Hague, 12 October 2015. For the conclusion of this study in English, see [*Joined Together for Five Years: Bonaire, Sint Eustatius, Saba and the European Netherlands*](#).

²⁶⁵ Commissie Spies, [*Joined Together for Five Years: Bonaire, Sint Eustatius, Saba and the European Netherlands*](#), p. 6.

*overgangsrechtelijke aard (Wet geldstelsel BES)).*²⁶⁶ The latter stipulate, inter alia, that the US dollar is the official currency in the Caribbean Netherlands.²⁶⁷

The Financial Markets (BES Islands) Act builds on the former legislation of the Netherlands Antilles, as well as the current legislation of the European Netherlands, in particular the 2006 Financial Supervision Act (*Wet financieel toezicht (Wft)*), and that of the EU.²⁶⁸ The Financial Markets (BES Islands) Act has adopted the so-called twin peaks model characterised by a separation between prudential supervision exercised by the Dutch Central Bank (*De Nederlandsche Bank (DNB)*) and conduct supervision exercised by the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten (AFM)*).²⁶⁹ The harmonisation with the legislation of the European Netherlands and the EU is also illustrated by the adoption of (international) standards of Basel II, Solvency II and Basel III. This harmonisation was presented as a matter of modernisation due to the constraints posed by the principle of legislative restraint. Within the framework of financial markets, such restraint was defended with the argument that the financial markets of Bonaire, Statia and Saba are very small, that the product range is limited and that these financial markets are closely intertwined with those of Curaçao and St Maarten. It is worth noting that financial services were one of the main pillars of the economy of the former Netherlands Antilles.²⁷⁰

Compared with the former legislation of the Netherlands Antilles, the Financial Markets (BES Islands) Act is much more developed in terms of the conduct of business rules and supervisory powers.²⁷¹ One can conclude that the Financial Markets (BES Islands) Act is a modern act on financial services. A close relationship between the banks of Bonaire, Statia and Saba and those of Curaçao and St Maarten is still relevant and reflected in the fact that many banks of the Caribbean Netherlands are the head offices of the banks of Curaçao and St Maarten. The Dutch legislator had to take this into account.²⁷² Such a close relationship between the banks of different countries requires close cooperation between the financial supervisors of the Country of the Netherlands (*DNB* and *AFM*) and the Central Bank of Curaçao and St Maarten (*CBCS*). In order to ensure such cooperation, *DNB*, *AFM* and *CBCS* make arrangements in the form of the so-called 'memoranda of understanding'.

²⁶⁶ H.B. Winter, H.E. Bröring *et al.*, *Vijf jaar Caribisch Nederland. De werking van wetgeving*, Groningen 2015, p. 77-83, contains a comprehensive overview of financial markets regulation in the Caribbean Netherlands.

²⁶⁷ In practice, the US dollar has already been widely used.

²⁶⁸ *Kamerstukken II 2010/11, 32 784, 3 (MvT, explanatory memorandum)*, p. 6, underlines the influence of the Act on Financial Supervision of the European Netherlands. Besides, the Dutch financial authorities (and other institutions) were consulted about the Financial Markets (BES Islands) Act.

²⁶⁹ In earlier days, the supervisory powers were exercised by the Central Bank of the Netherlands Antilles and the Central Bank of Curaçao and St Maarten, respectively.

²⁷⁰ *Kamerstukken II 2010/11, 32 784, 3 (MvT, explanatory memorandum)*, p. 7.

²⁷¹ The Dutch General Administrative Law Act with, inter alia, general rules on law enforcement, is not applicable in the Caribbean Netherlands. Therefore, the Financial Markets (BES Islands) Act contains special rules on law enforcement. These rules are based on the 2006 Financial Supervision Act (of the European Netherlands).

²⁷² *Kamerstukken II 2010/11, 32 784, 3 (MvT, explanatory memorandum)*, p. 4.

Box 1: Financial Supervision Legislation of Bonaire, Statia and Saba

Content of the Financial Markets (BES Islands) Act (*Wfm BES*):

Chapter 1.	General provisions
Chapter 2.	Market access
Chapter 3.	General provisions governing financial enterprises
Chapter 4.	Provisions governing specific categories of financial enterprises
Chapter 5.	Market conduct and securities transactions
Chapter 6.	Control of listed companies
Chapter 7.	Enforcement
Chapter 8.	Special prudential measures, emergency regulation and deposit guarantee system
Chapter 9.	Penal provisions
Chapter 10.	Transitional and final provisions

Source: Authors' elaboration.

Other relevant legislation includes, inter alia: the Decree on rules with regard to the financial markets in the public entities of Bonaire, Statia and Saba and the financial enterprises active in these markets (Financial Markets (BES Islands) Decree) and the Regulations from the Minister of Finance of 25 May 2012 laying down further rules to implement the Financial Markets (BES Islands) Act and the Financial Markets (BES Islands) Decree (Financial Markets (BES Islands) Regulation). In addition, several policy principles were clarified by the *AFM* and *DNB* in its policy rules on the application and implementation of the Financial Markets (BES Islands) Act.

One can conclude that the financial markets regulation of the Caribbean Netherlands is rather modern and comprehensive, particularly given the very small scale of the territories concerned.

6.3 Money Laundering

A number of legislative acts has been specifically adopted with a view to combating money laundering. The Money Laundering and Terrorism Financing (BES Islands) Act (*Wwft BES*) was considered necessary to merge the Identification (Provision of Services) (BES Islands) Act (*Wet identificatie bij dienstverlening BES*), the Disclosure of Unusual Transactions (BES Islands) Act (*Wet melding ongebruikelijke transacties BES*) and the Cross-Border Currency Movement (BES Islands) Act (*Wet grensoverschrijdende geldtransporten BES*) into one act aimed at preventing the abuse of the financial system for money laundering and terrorist financing. The Money Laundering and Terrorism Financing (BES Islands) Act is a modern act based on the current international and European standards embodied in relevant legislation of the European Netherlands and that of the EU. International agreements, such as FATF Recommendations, are also relevant for the Caribbean Netherlands. As has already been mentioned above, the supervisory tasks are performed by the authorities

from the European Netherlands. Apart from *DNB* and *AFM*, these also include other authorities, in particular, the Dutch Financial Intelligence Unit (*FIU Nederland*).²⁷³

Box 2: Anti-Money Laundering Legislation of Bonaire, Statia and Saba

Content of the Regulations on the prevention of money laundering and terrorist financing (*Wwft BES*):

Chapter 1.	General provisions
Chapter 2.	Customer due diligence
Chapter 3.	Disclosure of unusual transactions
Chapter 4.	Cross-border currency movements
Chapter 5.	Enforcement
Chapter 6.	Penal provisions
Chapter 7.	Transitional and final provisions

Source: Authors' elaboration.

Other relevant legislation, inter alia, includes the BES Money Laundering and Terrorist Financing (Prevention) Decree (*Besluit ter voorkoming van witwassen en financieren van terrorisme BES / Wwft BES*) and the BES Money Laundering and Terrorist Financing (Prevention) Regulation (*Regeling ter voorkoming van witwassen en financieren van terrorisme BES / Rwft BES*). In addition, several policy principles were clarified by the *AFM* and *DNB* in its policy rules on the application and implementation of the Regulations on the prevention of money laundering and terrorist financing.

Once again, it can be concluded from the above that the anti-money laundering legislation in the Caribbean Netherlands is quite modern and comprehensive.

6.4 Taxation

The legislation of the Caribbean Netherlands in the area of taxation can also generally be considered adequate. Since 10 October 2010, this legislation was modernised and technically improved, building in part on the legislation of the European Netherlands. The Tax Act Bonaire, Saba and Statia (*Belastingwet BES*), the Customs and Excise Act Bonaire, Saba and Statia (*Douane- en Accijnswet BES*), and the Act Introducing the Tax Act Bonaire, Saba and Statia (*Invoeringswet belastingwet BES*) were published on 16 December 2010.²⁷⁴

The amount of taxes involved in the Caribbean Netherlands is approximately US\$ 42 million.²⁷⁵ Some differentiation in tax regulations between the European Netherlands and the Caribbean Netherlands is accepted. An example of such divergence is the current straightforward system of flat income tax applicable in the Caribbean Netherlands which

²⁷³ See, from a more general point of view, also M. Fletcher, EU Crime and Policing and the OCTs, in D. Kochenov (ed), *EU Law of the Overseas*, Kluwer Law International, The Hague, 2011, p. 291.

²⁷⁴ 'BES' stands for Bonaire, Statia (St Eustatius) and Saba.

²⁷⁵ With another US\$ 10 million for labour and income tax. See H.B. Winter, H.E. Bröring *et al.*, *Vijf jaar Caribisch Nederland. De werking van wetgeving*, Groningen, 2015, p. 59.

differs from that adopted in the European Netherlands.²⁷⁶ The flat income tax is about 30 % (< US\$ 250 000) and 35 % (≥ US\$ 250 000).

While building on the former legislation of the Netherlands Antilles, the customs and excise legislation of the three Caribbean territories of the Kingdom of the Netherlands currently in force has been simplified and modernised reflecting the EU basic customs legislation contained in the Community Customs Code.²⁷⁷ Statia and Saba have retained the free port status. The Caribbean Netherlands customs authority is part of the customs authority of the European Netherlands headquartered in Rotterdam.^{278 279}

6.5 Implementation and Enforcement

One can easily conclude that the Dutch Caribbean legislation pertaining to financial markets, money laundering and taxation is generally in line with the standards applicable in the European Netherlands and the EU. However, it is hardly a secret that in the Caribbean countries of the Kingdom there is often a gap between the law in the books (the adoption of a law) and law in action (its implementation). In the Dutch Caribbean, too, in general the implementation and enforcement of legislation is problematic. According to the Commission Spies:

‘The legal framework is paramount for promoting good administration. However, the manner in which people give substance to their responsibilities and the instruments at their disposal in the end determines the result. The administrative practices and the quality of the administration are first and foremost determined by personal qualities and conduct, while the administrative culture only has a minor influence. There is still a lot of room for improvement in this area, and this can be achieved through education, support and collegial accountability. Achieving the necessary changes will not happen overnight. It will require huge efforts, patience and time.’²⁸⁰

The problems highlighted by the Commission Spies in relation to the implementation and enforcement of legislation by the Caribbean authorities are, to a large extent, the result of weak governance. Despite some improvements in the recent years, the local authorities of Bonaire, Statia and Saba seem to be still rather weak.²⁸¹ This vulnerability is caused by a

²⁷⁶ This tax system is expected to be replaced by a new more nuanced system in the future.

²⁷⁷ See [Council Regulation \(EEC\) No 2913/92](#); [Commission Regulation \(EEC\) No 2454/93](#).

²⁷⁸ See H.B. Winter, H.E. Bröring *et al.*, *Vijf jaar Caribisch Nederland. De werking van wetgeving*, Groningen, 2015, p. 65.

²⁷⁹ See, generally, also A. Tryfonidou, The Overseas of the Customs Duties Provisions, in D. Kochenov (ed), *EU Law of the Overseas*, Kluwer Law International, The Hague, 2011, p. 221.

²⁸⁰ Commissie Spies, [Joined Together for Five Years: Bonaire, Sint Eustatius, Saba and the European Netherlands](#), p. 11.

²⁸¹ According to Winter, Bröring *et al.*: ‘In practice enforcement has improved since the transition, but there are also shortcomings. The improvements relate to more attention being paid to enforcement in general and supervision in particular; checks on compliance are actually being carried out in certain areas. The professionalisation of the supervision and the intensification of inspections contributes to compliance, not only through the use of strict enforcement tools, but also through guidance (support). The enforceability of regulations on the islands is being negatively influenced by a lack of capacity and expertise with regard to supervision and enforcement. Progress has been

shortage of money and expertise, as well as the social aspects pertaining to small scale societies where everybody knows everybody, a situation that lends itself to favouritism.²⁸²

However, it should be emphasised that this characterisation does not entirely apply to the domains of financial markets and taxation because in these areas the institutions from the European Netherlands are in charge, in particular the Dutch customs authority, *DNB*, *AFM* and *FIU Nederland*. This implies not only supervision but also administration by the authorities from the European Netherlands.²⁸³ The formal and practical presence of the Dutch authorities in the Caribbean Netherlands distinguishes the institutional framework for these Caribbean territories from that for the autonomous countries of the Kingdom of the Netherlands (Aruba, Curaçao and St Maarten), as described in Chapter V. The prominent role of the Dutch authorities in the Caribbean Netherlands in the financial sector significantly reduces the gap between the law on the books and the law in action in this sector compared to many other sectors, such as construction industry.

6.6 Concluding Remarks

Bonaire, Statia and Saba, also known as the Caribbean Netherlands, are part of the Country of the Netherlands. Therefore, Dutch law, which in many areas is based on EU law, is applicable in their territories. As a result, even though these three Caribbean territories currently have the OCT status, EU law indirectly influences their law. While the legislation of the Caribbean Netherlands is not identical to that of the European Netherlands, the former differs only to a limited extent from the latter.

The legislation of Bonaire, Statia and Saba relating to financial markets, money laundering and taxation is quite modern and is based on relevant international and European standards. This legislation also confers powers on the Dutch authorities at the national level of the Country of the Netherlands with respect to its implementation and enforcement in the Caribbean Netherlands. The Dutch authorities thus have sufficient powers to intervene in the affairs of these Caribbean territories when it comes to combating money

made on policy development on all three islands. To what extent the actual enforcement has improved using the administrative enforcement tools is less clear. On Sint Eustatius the enforcement of administrative legislation through administrative bodies is not really happening: enforcement is left to the police and judicial authorities. Certain traditions in the method of enforcement on all three islands seem to persist. For Saba one can thereby point to the emphasis on informal dispute resolution.' See H.B. Winter, H.E. Bröring *et al.*, [*Summary Five Years of the Caribbean Netherlands: Working of the Legislation*](#), Groningen, August 2015, pp. 10-11.

²⁸² Improvements are pursued by means of close cooperation, information exchange and training. Here the Representative of the Country of the Netherlands in the Caribbean Netherlands (*Rijksvertegenwoordiger*) and the Caribbean Netherlands Service of the Country of the Netherlands (*Rijksdienst Caribisch Nederland*, (RCN)) play an important role.

²⁸³ It is notable in this context is that the inhabitants of Bonaire, Statia and Saba thought that since 10 October 2010 (when these Caribbean territories became part of the Country of the Netherlands) tax legislation has changed and that the tax amount has considerably increased. However, the change concerned not the legislation but its enforcement. For the inhabitants of these Caribbean territories taking tax collection seriously was a new phenomenon. See H.B. Winter, H.E. Bröring *et al.*, [*Viif jaar Caribisch Nederland. De werking van wetgeving*](#), Groningen, 2015, p. 70.

laundering and tax evasion and ensuring tax transparency. In this respect, the institutional framework for the Caribbean Netherlands differs fundamentally from that for the autonomous Caribbean countries of the Kingdom of the Netherlands discussed in Chapter V.

Although the legislation of the Caribbean territories of the Country of the Netherlands is largely adequate, its implementation and enforcement are not entirely unproblematic. Despite significant progress made in the recent years in terms of ensuring the effectiveness of the law on the books in practice, there is still room for improvement, particularly when it comes to good governance in the Caribbean Netherlands. At the same time, compared to many other sectors, the gap between the law on the books and the law in action is much smaller in the financial sector where the implementation and enforcement of relevant legislation are centralised matters dealt with at the level of the Country of the Netherlands.

Chapter VII: Key Findings and the Way Forward

- The OCTs of the Kingdom of the Netherlands (i.e. Aruba, Curaçao, St Maarten, Bonaire, Statia and Saba) operate within a complex multi-level system of governance consisting of four levels: (1) the EU level; (2) the level of the Kingdom of the Netherlands; (3) the level of the autonomous Caribbean countries of the Kingdom of the Netherlands; and (4) the level of the Caribbean territories of the Country of the Netherlands. Each level is characterised by its own constitutional set-up, which determines the relationship between the EU, the Kingdom of the Netherlands, the Country of the Netherlands and the OCTs of the Kingdom based on the division of competences.
- Following the recent developments in EU overseas law, the EU can play an increasingly important role in fighting offshore practices in the OCTs of the Kingdom of the Netherlands in cooperation with such territories. In particular, the recent OAD equips the EU not only with soft tools but also with hard instruments, such as the power of the European Commission to withdraw or reduce financial aid to the OCTs that could allow the EU to impact on the OCTs when it comes to combating money laundering and tax evasion and enhancing tax transparency.
- The status of the three Caribbean countries (Aruba, Curaçao and St Maarten) within the Kingdom of the Netherlands fundamentally differs from that of the three Caribbean territories (Bonaire, Statia and Saba), also known as the Caribbean Netherlands. While the former are autonomous countries within the Kingdom of the Netherlands, the latter form part of the Country of the Netherlands and are therefore subject to Dutch law and oversight by the Dutch institutions. This distinction is relevant for determining the extent to which the Kingdom and the Country of the Netherlands can interfere in the affairs of these OCTs when it comes to offshore practices.
- In the areas related to financial regulation and supervision, as well as taxation, the powers of the Kingdom of the Netherlands with respect to the autonomous Caribbean countries of the Kingdom are rather limited. This makes it hard for the Kingdom to exert any significant influence on these OCTs in the fight against offshore practices. The situation is further complicated by an uneasy relationship between the Caribbean countries in question, on the one hand, and the Kingdom and the Country of the Netherlands, on the other, given their colonial past and the small scale of societies concerned.
- In contrast, the Caribbean territories form part of the Country of the Netherlands and are therefore subject to Dutch law and oversight by the Dutch institutions. As a result, the Dutch government at the level of the Country of the Netherlands has significant possibilities to exert pressure on the Caribbean territories in matters relating to money laundering, tax evasion and tax transparency.
- All six OCTs of the Kingdom of the Netherlands have generally adopted a rather modern legislation pertaining to money laundering, tax evasion and tax transparency in accordance with the relevant international and European standards. However, the key problem faced by each OCT of the Kingdom to a greater or lesser extent is discrepancy between the law on the books (the adopted law) and the law in action (implementation and enforcement of the law). The

effectiveness of legislation in the autonomous Caribbean countries of the Kingdom is undermined by two key factors: (a) structural weaknesses caused by poor implementation of good governance principles; and (b) functional weaknesses related to the insufficient capacity of the relevant authorities, such as a shortage of financial and human resources and insufficient knowledge and experience. Notably, the gap between the law on the books and the law in action is much smaller when it comes to the financial markets and taxation in the Caribbean territories, where the implementation and enforcement of relevant legislation are centralised at the level of the Country of the Netherlands.

- Improving the effectiveness of the existing laws in the OCTs is crucial to the fight against offshore practices. Given the growing reach of EU overseas law, the EU institutions could play a particularly important role in addressing the above-mentioned problems in the autonomous Caribbean countries of the Kingdom with respect to which the Kingdom itself has only limited possibilities to intervene. The Country of the Netherlands in turn could play a major role in ensuring effective implementation and enforcement of relevant legislation in the Caribbean territories, which form part of this country.

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ANNEX III

In-depth analysis evaluating the legal, political and institutional framework concerning offshore practices related to tax evasion, money laundering and tax transparency in the Overseas Countries and Territories (OCTs) of the United Kingdom, as defined in Annex II of the Treaty on the Functioning of the European Union (TFEU), and the relations of the United Kingdom with those OCTs

AUTHOR

This study has been written by **Dr Peter Clegg** of the University of the West of England, Bristol, at the request of the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

CONTACT

Department of Health and Social Sciences
University of the West of England, Bristol
Frenchay Campus
Coldharbour Lane
Bristol BS7 8LZ
United Kingdom
0044 117 3282376
Peter.Clegg@uwe.ac.uk

RESPONSIBLE ADMINISTRATOR:

Jan Tymowski, Ex-Post Evaluation Unit
To contact the Unit, please email: EPRS-ExPostImpactAssessment@ep.europa.eu

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Acronyms

AML/CFT	Anti-Money Laundering and Combatting the Financing of Terrorism
BVI	British Virgin Islands
EEC	European Economic Community
EU	European Union
FCO	Foreign and Commonwealth Office
FFR	Framework for Fiscal Responsibility
GDP	Gross Domestic Product
IMF	International Monetary Fund
INCSR	International Narcotics Control Strategy Report
NAO	National Audit Office
OECD	Organisation for Economic Cooperation and Development
TCI	Turks and Caicos Islands
UK	United Kingdom
UKOT	United Kingdom Overseas Territory
UN	United Nations
US	United States
WIA	West India Act

Executive Summary

This report focuses on the OCTs of the UK; and especially those located within the Caribbean and West Atlantic. Relations between the UK and its so-called Overseas Territories have been shaped by many centuries of history. More contemporary relations were established in the 1960s with two key Acts of Parliament – the West Indies Act 1962 and the Bermuda Constitution Act 1967, later supplemented by the Anguilla Act 1980. These Acts give the UK sovereign power over the territories, and this is reinforced by the Colonial Laws Validity Act 1865 and the Interpretation Act 1978. The resultant authority allows the UK to create constitutions for each territory via Orders in Council. Orders have also been used to introduce more particular pieces of legislation. Therefore, on first sight it seems that the UK does have clear authority to impose changes to improve the territories' offshore practices.

However, the reality is rather different, and there are various reasons for this. The report considers them in some detail. First, the constitutions of the territories have always provided a separation of responsibilities between the Governor, appointed by the UK, and the local territory government. Further, the constitutions that have been more recently introduced – through consultation, not imposition – have given greater autonomy to the territories. It is true that the UK has retained key powers for the Governor, for instance in regard to defence and the public service, but there is a clear dilution and blurring of UK power from those original Acts of Parliament. This picture is complicated further because each territory has slightly different levels of autonomy, including in relation to their offshore financial sectors. Second, day-to-day relations between the Governor and the territory government can also be difficult and sometimes conflictual in the area of offshore finance. Third, there are political and economic factors that help shape relations, such as the UK's sensitivity to being seen as a 'colonial' power if it intervenes too strongly and too often, or the demand of the UK that the territories should be economically self-sufficient. By exploring these issues, with the support of case studies, the report offers a nuanced picture of how relations are carried out and how despite the UK's sovereign authority on paper, in practice its role is checked.

So the deep-seated complexities of managing the territories; the reluctance of the UK to allocate more funds to them, including to help diversify their economies; the view that the territories should largely manage themselves; together with the absence of concerted international action, means at this time the UK is unlikely to take a more forceful role in addressing the concerns about the territories' offshore practices related to tax evasion, money laundering, and tax transparency.

Chapter 1: Introduction to the UK OCTs

1.1. The UK OCTs and those relevant for the report

There are 14 UK Overseas Territories in total spread across the globe (see Figure 1); twelve of which are associated with the EU and are known as Overseas Countries and Territories (OCTs)²⁸⁴. Each is a separate constitutional unit, and so not part of the UK, but the UK is the sovereign power. The vast majority of UK OCTs are economically self-sufficient and have interests in a range of industries. Bermuda, British Virgin Islands (BVI), and Cayman Islands have large financial centres and are successful tourism destinations; while the Falkland Islands economy is based on fisheries, tourism, and agriculture. Thus these territories have high GDPs per capita. Yet their economic vulnerability is a concern. Other territories are less successful, particularly Montserrat and Pitcairn, both of which receive budgetary aid from the UK (see Table 1).

Figure 1: The United Kingdom Overseas Territories



Source: Map produced by Christian Dietrich, EPRS.

²⁸⁴ The special character of Gibraltar was described in the introductory part of this Study, while the Sovereign British Bases on Cyprus (Akrotiri and Dhekelia, covered by Article 355(5)(b) TFEU) remain out of the scope of this analysis. Ascension Island and Tristan de Cunha form part of one OCT with Saint Helena.

Table 1: Key statistics for those UK OCTs that are listed in Annex II of the Treaty on the Functioning of the EU²⁸⁵

Territory	Population	GDP per capita (US\$)	Key industries	UK budgetary aid
Anguilla	16 318	20 000	Tourism, construction, financial services	No
Bermuda	65 091	85 747	Financial services, tourism	No
British Virgin Islands	29 537	32 111	Financial services, tourism	No
Cayman Islands	58 238	59 657	Financial services, tourism	No
Falkland Islands	2 562	92 675	Fisheries, agriculture, tourism	No
Montserrat	4 922	11 896	Construction, tourism, agriculture	Yes
Pitcairn	54	N/A	Subsistence fishing, horticulture, and sale of handicrafts	Yes
St Helena, Ascension & Tristan da Cunha	5 134	6 799	Tourism, coffee, stamp sales	Yes
Turks & Caicos Islands	33 740	22 245	Tourism, construction, financial services	No

²⁸⁵ UK OCTs official government statistics, and Foreign and Commonwealth Office, 2012a. South Georgia and the South Sandwich Islands, British Antarctic Territory, and the British Indian Ocean Territory have no permanent population and are thus excluded from further analysis.

The nine territories are not part of the EU and therefore are not directly subject to EU law, but they do have associate status – under Part IV of the Treaty on the Functioning of the EU. The key articles within Part IV are Articles 198 to 203, which set out the underlying basis of the relationship, focusing on the promotion of economic and social development; the establishment of close economic relations; the importance of non-discrimination in economic matters; and the right to free movement of OCT workers.²⁸⁶ Links between the territories and the EU were established in 1973 on the UK's accession (to the European Economic Community, EEC), although the OCTs more generally were referenced in the original Treaty of Rome (Treaty Establishing the EEC) in 1957. This report does not cover all UK OCTs, just those that have a stake in the offshore financial industry. So the report concentrates on Anguilla, Bermuda, BVI, Cayman Islands, Montserrat, and Turks and Caicos Islands (TCI).

1.2. Economic considerations

As was noted above the UK OCTs have relatively high GDPs per capita, although this was not always the case. After the Second World War and for the following two decades the territories remained relatively underdeveloped, with a strong focus on agriculture, some fishing, a few light industries, and salt extraction. However, circumstances changed from the 1960s, particularly in Bermuda and Cayman Islands. From the mid-1960s Cayman passed a series of new banking laws and made extensive investments in infrastructure.²⁸⁷ The result, with assistance from the City of London amongst others, was the growth of a large offshore financial sector with no income, property, inheritance, or capital gains taxes. The tourism sector also began to grow. Further, Bermuda started to properly develop its offshore financial interests at this time – a key piece of legislation being the 1958 Exempted Partnerships Act, which allowed non-residents to operate out of partnerships formed in the territory. Later, Bermuda took a significant stake in the captive insurance market.²⁸⁸ A similar story was seen in BVI after the 1984 enactment of the International Business Companies Act which saw the incorporation of about 3,000 companies in the territory between July 1984 and December 1986.²⁸⁹ The other territories also saw their economies develop from the 1980s, although largely based on tourism and construction rather than offshore finance. TCI, for example, benefitted from the completion of an international airport on Providenciales in 1983. However, the Montserrat economy was knocked back significantly by the impact of the Soufrière Hills Volcano in the late 1990s.

The profile of the economies remains very similar today. So in Cayman Islands, financial services contribute around 50 % of GDP, and the territory is the world's sixth largest banking centre and the largest domicile for hedge funds. Bermuda is the leading centre for captive insurance, with financial services providing about 40 % of its GDP; while BVI is the world leader for company incorporation. All have high GDPs per capita. Anguilla and TCI

²⁸⁶ Official Journal of the EU, 2012.

²⁸⁷ Cichon, 1989.

²⁸⁸ Palan, et. al., 2010.

²⁸⁹ Cichon, 1989, 503.

are also relatively prosperous. Montserrat is the exception; it still struggles to pay its way and is reliant on British aid.

1.3. Scope and sources of the paper

This research paper takes at its starting point the particular economic profiles of the six OCTs (as identified at the end of chapter 1.1.) of the UK and their involvement – to a greater or lesser extent – in the offshore financial sector. The remainder of the paper is divided into three main sections, followed by Conclusions and Recommendations. Chapter Two assesses the constitutional, legal, and legislative framework that shapes relations between the UK and its territories. This is important as it sets out the balance of powers that exists between the two sides, and the extent to which – at least in theory – the UK can enforce its will on the territories. It is important to note here that the governing framework is not uniform across the territories, and this has implications for what the UK can do to shape their offshore financial sectors. Chapter Three analyses the local legislation and international initiatives that regulate the offshore industries, and the day-to-day relations between the UK-appointed Governors and the OCTs themselves. This explains why certain actions that in theory might be possible are more difficult to enact in practice. Chapter Four focuses on the broader political and economic factors that help define the UK's approach to its OCTs in relation to offshore finance, and how the territories perceive the UK. An appreciation of this broader context is important because it affords a greater level of nuance when considering potential UK actions.

The research for this report is based on a wide range of quantitative and qualitative sources. Specifically, a variety of primary sources are referenced, such as Acts of Parliament, recent Constitutions, Orders in Council, and governmental and non-governmental reports. Further, important secondary sources, including academic literature and newspaper articles are considered.

Chapter 2: Constitutional, legal, and legislative framework

2.1. Historical background

The link between the UK and the territories goes back 350 years or so. Anguilla was colonised by English settlers in about 1650; BVI saw its first English settlers in 1666 before Tortola was annexed by the British Crown in 1672; Cayman Islands had informal English settlements from the late 1650s, although control was not formalised until the 1730s; Montserrat was first settled in 1632 before being lost to France twice and it was not until 1783 that British control was consolidated; and TCI has been overseen by the British since 1766. Despite quite similar initial histories there were later differences in the territories' political development. For example, some were governed in regional groupings (such as Montserrat within the Leeward Islands Federation), while others were ruled by neighbouring colonies (Cayman Islands by Jamaica, 1863-1962, and TCI by the Bahamas, Jamaica and then again by the Bahamas up until 1973). Bermuda, the UK's oldest territory (from 1620), has never been governed as part of a wider federation or by another colony.

A key change for the territories was the growing demands for self-rule and possible independence across the English-speaking Caribbean from the 1930s onwards. Although the loudest voices for change came from the larger territories, the smaller ones were also impacted, most particularly with the creation of the Federation of the West Indies in 1958 that included Anguilla (as part of St Kitts – Nevis – Anguilla), Cayman Islands (as part of Jamaica's administrative structure), Montserrat, and TCI (again linked to Jamaica). However, the Federation was weak from the outset and collapsed as Jamaica and Trinidad and Tobago demanded independence in their own right. The outcome was independence for the larger countries without their dependencies and a new legal framework for the smaller ones. Over the next 20 years the majority of these territories also gained their independence, but a few (the OCTs) did not follow suit.

After the collapse of the Federation of the West Indies the UK reconfigured its relationship with each of the territories that retained formal ties with London. Three Acts provide the basis upon which the constitutions of the territories are now made.

2.2. West Indies, Bermuda Constitution, and Anguilla Acts

The key provisions within each Act are as follows:

West Indies Act 1962, Section 5. – (1)

Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified.

Bermuda Constitution Act 1967, Section 1. – (1)

Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of Bermuda.

Anguilla Act 1980, Section 1. – (2)

Her Majesty may by Order in Council make such provision as appears to Her expedient for and in connection with the government of Anguilla.

Table 2: The Legal Basis for the Territories' Constitutions

Act	Date	Territories
West Indies Act	1962	BVI, Cayman Islands, Montserrat, & TCI
Bermuda Constitution Act	1967	Bermuda
Anguilla Act	1980	Anguilla

These Acts allow the constitution of each territory to be established via an Order in Council. As Hendry and Dickson argue, each constitution 'is legally enacted by Her Majesty the Queen, by and with the advice of Her Privy Council, acting on the recommendation of United Kingdom Ministers'.²⁹⁰ So final constitutions are implemented via an Order in Council, and according to the letter of the legislation this can be done without any approval from, or consultation with, the UK Parliament or local territory governments or legislatures. In addition, it is important to note that under WIA 1962 the territories are referred to as 'colonies'.

2.3. Colonial Laws Validity Act 1865 & Interpretation Act 1978

The three Acts noted above are complemented by two other Acts of Parliament in particular (see Figure 2). They are the Colonial Laws Validity Act 1865 and the Interpretation Act 1978. The Colonial Laws Validity Act 1985, Section 2 states:

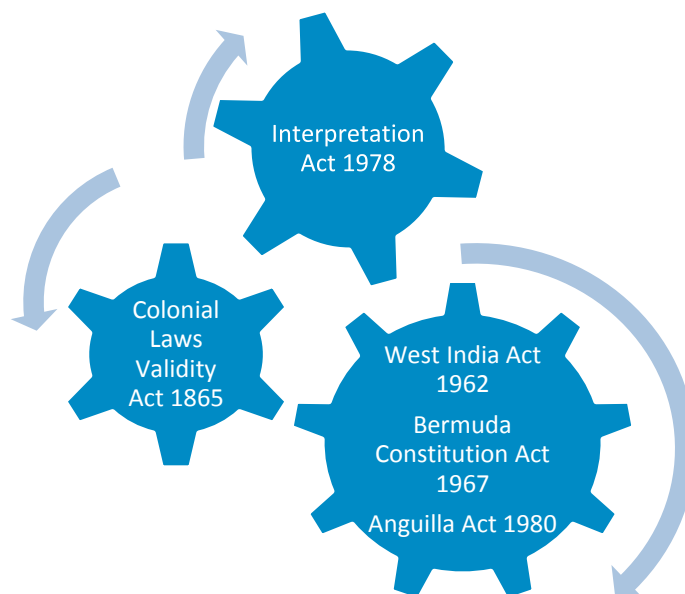
Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

This Act was introduced to remove inconsistencies between UK and local legislation, and to ensure local legislation is not in contradiction to any UK Act of Parliament. This means

²⁹⁰ Hendry and Dickson, 2012, 14.

in essence that territory constitutions cannot be altered by the enactment of local legislation. Also, all territories that come under this legislation are recognised as ‘colonies’, so both Anguilla and Bermuda come under this heading, even though they are not overseen by WIA 1962. The Interpretation Act 1978, meanwhile, gives the UK government (under section 14) the power to amend or revoke Orders in Council. Further, it reinforces the terminology of ‘colony’ in relation to the UK OCTs (under Schedule 1).

Figure 2: Key Acts of Parliament defining UK – OCTs relations



It is clear that the Crown (i.e. the UK government) via Parliament is supreme when it comes to enacting legislation in relation to the territories. However, the Acts of Parliament noted above, particularly West Indies Act 1962, Bermuda Constitution Act 1967, and Anguilla Act 1980 are largely a means to an end to facilitate the establishment of constitutions for each territory. On occasion, Orders in Council have also been used to introduce more particular pieces of legislation. The UK can do this because it has a general power to legislate; although for Bermuda no such power exists. The major instances when the UK has enforced changes in offshore practices are considered later on in the report.

2.4. Constitutional reform in the territories

Constitutional renewal has been a regular feature of the relationship between the UK and its territories. For example, since 1962, BVI has had new constitutions in 1967, 1976, and 2007, and for TCI in 1962, 1976, 1988, 2006 and 2011. Although, Bermuda’s 1968 constitution remains in place, albeit with some amendments.²⁹¹ Indeed, Bermuda stands somewhat apart due to the significant autonomy that was enshrined within the 1968 constitution, in the expectation at that time that the territory would move to independence soon afterwards; although of course that did not happen. Bermuda wished to retain the link

²⁹¹ See Bermuda Constitution Amendment Order 2003.

with the UK, because it appreciated, and still appreciates, the advantages it provides in terms of a measure of sovereign protection, which helps to reassure potential investors. The other territories share that view. The influence of English law and language and even the ‘pomp and pageantry of the colonial government, with its venerable yet quaint British customs, are used to sell the islands as changeless (and hence stable) to both tourists and financiers’.²⁹² Some local powers which Bermuda, but not other territories have been afforded, are presented in Table 3. Some of these have implications for the levers that the UK has at its disposal when trying to enact change, including in relation to offshore practices.

Table 3: Examples of greater local powers in the Bermudan constitution

1.	There is no reserved power for the UK to legislate for Bermuda by Order in Council.
2.	The Governor does not chair the Cabinet.
3.	Bermuda’s government has the power to appoint a political attorney general.
4.	The power of the UK to disallow laws enacted by the local legislature is very restricted.

For the other territories (with the exception of Anguilla that has not completed its constitutional review process) negotiations for the most recent constitutions began in 2001. This corresponded with the ‘Partnership for Progress and Prosperity’ White Paper published by the UK government in 1999.²⁹³ For the first time the process was supposedly “locally owned rather than directed from London”.²⁹⁴ As a result the territories hoped that quite fundamental reform would be undertaken. This impression was reinforced when the Foreign and Commonwealth Office (FCO) failed to make its own position clear, including the extent to which it would accept changes to the existing constitutions.

With the UK faced with growing demands on the part of the territories for significant reform, it finally set out its ‘red lines’ beyond which change was not possible. In a memorandum submitted on 27 October 2003 by the FCO Minister Bill Rammell to the House of Commons Foreign Affairs Committee strict limits were placed on territories’ constitutional room for manoeuvre. The final sentence of the memorandum stated: “O[verseas] T[erritories’] governments should not expect that in the Constitutional Reviews ... the UK will agree to changes in the UK Government’s reserved powers, or which would have implications for the independence of the judiciary and the impartiality of the civil service’.²⁹⁵ So the constitutions that resulted were certainly shaped by the territories, thus highlighting a dilution of the supremacy of the UK Parliament in enacting new constitutions as set out in WIA 1962, but it was clear the UK government was determined to retain many key powers and responsibilities, and was not going to allow

²⁹² Roberts, in Aldrich and Connell, 1998, 88.

²⁹³ FCO, 1999.

²⁹⁴ Foreign Affairs Committee, 2014, 7.

²⁹⁵ Foreign Affairs Committee, 2004, 9.

the territories to move towards the Bermuda constitutional model. When the constitutions were enacted, all resulted in further autonomy for the territories, but in fairly limited ways.²⁹⁶ For example, a National Advisory Council was created in Montserrat to advise the Governor on internal security and police matters and BVI, Cayman Islands and Montserrat were given more of a role in international affairs.

Key findings

- The UK has supreme authority over the territories as set out in the five key Acts of Parliament, and on paper that authority appears clear-cut. The terminology of “colony” which is used reinforces this impression.
- However, it is apparent within each territory’s constitution the power of the UK and the Governor is checked.
- Although within limits, recent constitutional review processes have had sizable local territory involvement, and have awarded more autonomy to the territories.

²⁹⁶ Clegg and Gold, 2011, 125.

Chapter 3: Legal & political oversight of offshore finance

As the previous chapter highlights the relationship between the UK and its OCTs has evolved over time, and is now framed by some key pieces of legislation and their own bespoke constitutions. Each allocates duties between the Crown (i.e. the UK and the Governor) and the territory. Those powers generally reserved for the Crown include defence, external affairs, internal security, including the police, and the public service; while territory governments have control over all aspects of policy that are not overseen by the Crown including the economy, immigration, and education.

In relation to offshore finance oversight is more nuanced, both in terms of the legal framework in place and how each constitution sets out who has day-to-day responsibility for the sector. So for some territories the Governor takes that role, while for others the local territory is responsible.

This chapter considers the most important local legislation and international initiatives that regulate the offshore industries, and how political oversight operates.

3.1. Overview of the offshore sectors

Although each territory has an interest in offshore finance, they differ markedly in terms of the kinds of services they offer (see Table 4) and the size of the sector. The largest and most 'traditional' offshore financial industries can be found in BVI and Cayman Islands.

The BVI is the world's leading centre for company incorporation, with around 500,000 active companies. The International Monetary Fund (IMF) in 2010 estimated, perhaps conservatively, that BVI companies held over US\$ 600 billion in assets²⁹⁷ arguing that the territory 'holds an important place in the global financial infrastructure'.²⁹⁷ As part of its offering the BVI is a leading domicile for mutual funds, shipping registration, hedge funds and captive insurance.

The Cayman Islands, meanwhile, is the world's sixth largest banking centre, with a specific interest in hedge funds and captive insurance companies. In June 2015 it had banking assets worth US\$ 1.4 trillion.²⁹⁸

The other territory with a sizeable financial services sector is Bermuda, but the focus is on insurance, reinsurance and captive insurance. It is the world's third largest reinsurance centre and the second largest captive insurance domicile. Bermuda does not permit offshore banks or shell companies.

The remaining OCTs have much smaller and less well developed offshore sectors. Anguilla has a stake in the captive insurance market; Montserrat has four offshore banks; while TCI

²⁹⁷ IMF, 2010, 6.

²⁹⁸ INCSR, 2016, 92.

is gaining popularity as a domicile for niche US manufacturer-owned offshore reinsurance companies called Producer Owned Reinsurance Companies.

Table 4: Key focus of territories' offshore financial industries

Territory	Focus of offshore sector
Anguilla	Captive insurance
Bermuda	Insurance, reinsurance, captive insurance
BVI	Company incorporation
Cayman Islands	Hedge funds; captive insurance
Montserrat	Banking
TCI	Reinsurance

3.2. International initiatives and local legislation

In recent years there has been significant international and local action to improve the oversight and probity of offshore financial centres. For example internationally there has been the US Foreign Account Tax Compliance Act, the OECD's Common Reporting Standards, the EU's Savings Tax Directive (now repealed); and the 'black lists' established by bodies like the OECD and IMF. The UK OCTs are compliant or moving towards compliance in relation to these international commitments. The adoption of these standards is a joint UK/territory undertaking, with agreement needed from both parties; although the UK can put significant pressure on the territories if they resist. One example was the EU's Savings Tax Directive, which provoked strong resistance from Cayman Islands in particular (see Case Study 1).

Case Study 1 – UK attempts to introduce the EU savings tax directive in the territories

EU Economics and Finance Ministers reached an agreement on the 'Directive on the Taxation of Savings' in January 2003. Under the proposal "each member state would ultimately be expected to provide information to other Member States on interest paid from that Member State to individual savers resident in other Member States". The UK took the decision that the directive should also apply to its OCTs. Most of the territories were prepared to accept the directive, but Cayman Islands was not.

In response, UK Chancellor Gordon Brown threatened to issue an Order in Council against the Cayman Islands that would force the territory to adopt the directive. This threat led McKeeva Bush, the Cayman Islands' Leader of Government Business to accuse the UK of behaving like the colonial power of old, ruling by dictat and treating the island's citizens like slaves. However,

Cayman Islands reached an agreement with the UK over the implementation of the directive. Agreement was possible because of the growing realisation on the part of Cayman Islands that the directive was going to be imposed one way or another. In addition, the other territories had by this time signed up to the directive, and thus Cayman Islands was isolated in its opposition to the measure. Further, the UK offered Cayman Islands a number of compensatory measures to offset any possible negative effects of the directive. In retrospect the UK authorities recognised that a better balance was needed between the implementation of measures and the process of consultation. This case study illustrates: (1) that the UK can take action against the territories in relation to offshore financial affairs; (2) compromise in the end was possible; and (3) the initial very strong reaction of the Cayman government to the UK's threat to impose the directive via an Order in Council.

At the local level too attempts have been made to boost regulation in the offshore sector, across the areas of tax evasion, money laundering and tax transparency, again with the territories and the UK working together. Examples include:

- **BVI Business Companies Act (Amended) (2012)**: Obliges the registered agent to keep updated identify information on the owners of bearer shares and on the custodian holding those shares.
- **Bermuda Proceeds of Crime and Related Measures Amendment Act and the Transnational Organized Crime Act (2013)**: Incorporates requirements of the International Terrorist Financing Convention and the UN Convention against Transnational Organized Crime.
- **Cayman Islands Directors Registration and Licencing Law (2014)**: Holds company directors and leaders of certain financial entities to higher standards and limit the instances of fraud.
- **TCI Trust Companies (Licensing and Supervision) Ordinance (2015)**: More clearly delineates and improves licensing requirements, and enhances existing, as well as introducing new requirements, for prudential reporting, including in respect to capital and governance.

3.3. Gaps in the regulatory framework

Despite the efforts to improve regulatory standards in the offshore financial sectors of the OCTs, problems remain in all of them. In the smallest jurisdictions (Anguilla and Montserrat) inadequate regulatory capacity is a key problem.

For Montserrat, the US Department of States argues, '[its] Financial Services Commission is still not adequately structured and staffed to effectively carry out its functions. There are insufficient human resources, and the money laundering investigations staff also perform

other policing functions'.²⁹⁹ In addition, there are difficulties in recruiting and retaining staff. One outcome, is that the number of suspicious activity reports is low, and the number of local prosecutions is even lower. As Michael Foot, who undertook a review of the offshore financial centres, argued, '... it is likely that suspicions will remain in some quarters about the vigour with which prosecutions are pursued'.³⁰⁰ This perception of gaps in the regulatory framework causes lower level problems too.

As the Report for the Anguilla Financial Services Commission stated, 'inspections noted a number of areas where service providers exhibited a low level of compliance with the AML/CFT [Anti-Money Laundering and Combatting the Financing of Terrorism] legislation, particularly in training and awareness, policy and systems and controls'.³⁰¹ Other concerns in the two territories relate to the level of anonymity and confidentiality, and inadequate checks on the cross-border transportation of currency. On the former, the US Department of State argues, 'the true nature of business undertakings [in Anguilla] is not always verifiable'.³⁰²

Similar concerns are also present in the larger jurisdictions, particular BVI and Cayman Islands. For example, capacity issues and the small number of successful local prosecutions have been noted in the recent past.³⁰³ The US State Department records that BVI and Cayman Islands both had only two convictions in 2015, despite the size of their sectors. Further, as the US Department of State reported in regard to Cayman Islands, 'there remains a lack of penalties for failing to report ownership and identity information, which undermines the effectiveness of its identification obligations'.³⁰⁴

Other challenges include weaknesses in financial reporting and recording keeping; and limited access to beneficial ownership information.³⁰⁵ The US Department of State noted that BVI 'does not require a statement of authorized capital, and the lack of mandatory filing of ownership information pose significant money laundering risk'.³⁰⁶ Because of these concerns both BVI and Cayman remain on the US Department of State's list of countries/jurisdictions of concern in relation to money laundering and financial crimes. In addition, local legislation has been passed, notably in BVI, to increase the penalties against whistle-blowers.

In 2014 BVI passed the Computer Misuse and Cybercrime Act, which mandates prison sentences of up to 20 years for data whistle-blowers, and sentences of up to 15 years for

²⁹⁹ INCSR, 2016, 321.

³⁰⁰ Michael Foot, 2009, 55.

³⁰¹ Anguilla Financial Services Commission, 2013, 15.

³⁰² INCSR, 2016, 29.

³⁰³ NAO, 2007; Foot, 2009; INCSR, 2016.

³⁰⁴ INCSR, 2015, 94.

³⁰⁵ See Global Forum, 2011, 7.

³⁰⁶ INCSR, 2015, 75.

anyone who publishes the data that is obtained “without lawful authority”.^{307 308} Therefore, there are gaps in the regulatory framework, and the remainder of this chapter and the next considers why these gaps may exist.

3.4. Day-to-day political oversight in the territories

In Anguilla, Montserrat and TCI, the Governor is ultimately responsible for the offshore sectors. They oversee the licencing of new offshore financial business in the territories, and work with each financial services authority to ensure the sector is managed to the required standards. Governors also appoint all of the members of the financial services authorities. However, as was seen in Section 3.3 there are capacity and other problems. The problems can be explained by several inter-linking factors.

First, the role of the Governor requires a difficult balancing act, as Hendry and Dickson argue: ‘Governors ‘wear two hats’, because they head the governments of the territories but are appointed on the advice of, and report to, the Secretary of State’.³⁰⁹ In other words, whilst they are accountable to London they do have responsibilities for representing the views of local politicians and the interests of the local economy. This sometimes means they recognise the need to maintain existing offshore practices, and their focus on good government is diluted.

Second, despite the Governor being in a key position, funding for regulating the sector is provided by the territory itself, either directly from the local government or via a proportion of the fees collected from the industry. Foot argued ‘these jurisdictions must explain how and when these resources will be provided’,³¹⁰ and more recently FCO minister, Mark Simmonds, made clear, ‘... the regulation of the financial services sector for overseas territories is ultimately a matter for the jurisdiction of individual territories’.³¹¹ So there can be a disconnection between what the Governor wants and what the local territory is prepared to fund.

Third, the work of Governors is made more difficult by being faced in the territories with ‘close communities with personal or extended family relationships between officials and citizens, and small legislatures with a lack of separation of duties and membership between the executive and the elected assembly’.³¹² It is often challenging for the Governor to penetrate these byzantine local networks.

³⁰⁷ Chavkin, 2014.

³⁰⁸ The UK has power to disallow a law enacted by the legislature of a territory, but it is very rarely used, and was not used in this case. However, the Governor (and other stakeholders) made representations to the BVI government that the legislation should be amended to accommodate a public interest defence. A limited one was added.

³⁰⁹ Hendry and Dickson, 2011, 37.

³¹⁰ Foot, 2009, 41.

³¹¹ European Committee B, 2013, 19.

³¹² NAO, 2007, 31.

Fourth, constitutions provide many opportunities for turf wars between the Governor and local Ministers. As Taylor argued, 'In my time in Montserrat Ministerial attempts to encroach on the Governor's areas of responsibility and to challenge his powers were the normal stuff of day-to-day administration as they are to a greater or lesser extent in all the Territories'.³¹³ These turf wars often apply to the management of the offshore financial industries.

In the other territories, their offshore sectors are managed by Financial Services Commissions, but without any direct role for the Governor. However, in reality the UK works with the territories to improve their regulatory standards and as was highlighted in Section 3.2 it can place pressure on them to accept new initiatives. However, there is almost always a line beyond which the UK will not cross. One recent example is the decision of the UK not to force its OCTs in the Caribbean to create registries of beneficial ownership that are open to the public. The opposition Labour Party argued the fact that Cayman Islands was claiming a victory against the UK showed Prime Minister David Cameron's 'grand claims about his record on tax transparency are coming apart at the seams'.³¹⁴

Although, the constitutional settlement in relation to offshore finance provides the territories with sizeable freedom of action, even when the Governor is in charge, and consultation is preferred when the UK believes certain initiatives should be implemented, there is one case in the late 1980s, which shows that the UK can take much stronger action. Although some time ago, the case is important to highlight here because it illustrates that the UK does have the power, if it wants to use it, to establish a more significant level of control over the territories' offshore industries. The case was Montserrat, when the entire sector was tarnished by corruption and mismanagement (see Case Study 2). This was clearly an extreme instance, but it does show that strong UK action is possible to deal with regulatory weakness.

³¹³ Taylor, 2000, 339.

³¹⁴ Wintour, 2016.

Case Study 2 – Montserrat and the loss of control over its offshore financial sector

In the early to mid-1980s Montserrat witnessed the growth of an offshore financial sector under the control of the Montserrat government, in part to meet a UK target for phasing out budgetary aid. However, by the end of the decade there were concerns over the probity of a number of offshore banks in relation to corruption and money-laundering, and the UK government through the Governor started to take a leading role in investigating the sector, via a task force.

In July 1989 tensions between the Governor and the Montserrat government came to a head when the former ordered police officers to raid one of the banks that had been accused of breaches of banking regulations without the agreement or even knowledge of the local government. At that point Chief Minister, John Osbourne, accused the Governor of acting “high-handedly” and impinging on the constitution. However, the role of the FCO was already sizeable. In February, the FCO had appointed Rodney Gallagher, of the consultants Coopers and Lybrand Deloitte, to carry out a review of its offshore financial sector. The review found most of the islands’ banks were involved in money laundering, while the island’s police uncovered a conspiracy involving 20 banks. Ultimately, over 90 % of the banks on Montserrat had their licences revoked. The Gallagher report criticised the Montserrat government for its “flawed administration of offshore banking including its failure to apply existent laws of scrutiny and discipline”. Gallagher recommended that most of the banking and insurance legislation should be replaced, and the industry be removed from local Ministerial control and placed under the authority of the Governor. Osbourne railed against the “disgusting” proposals, but ultimately a new constitution was introduced by Order in Council in 1989, which included offshore finance in the Governor’s portfolio of responsibilities. This case is important as it illustrates: (1) the power of the Governor to intervene even though he did not have any specific authority to do so; (2) the use by the UK government of a commission of inquiry to shed light on an issue of concern; and (3) the determination of the UK to place offshore finance under the control of the Governor as part of a new constitution implemented by Order in Council.

Key findings

- The offshore financial industries in the territories vary both in size and the type of services that are provided.
- International and local oversight of the sector has been strengthened in recent years, but significant deficiencies remain.
- Several reasons for this are linked to the often awkward management of the sector between the Governor, the UK, and local territory government.
- The UK is reluctant to go too far in getting the territories to alter their regulatory frameworks, but in the case of Montserrat in 1989 UK action was firm and decisive via the use of its constitutionally reserved powers.

Chapter 4: Broader political and economic context

So far the report has considered the legal, legislative, and constitutional aspects of the relationship between the UK and its territories, and how it impacts on offshore practices. It is clear that the division of powers and responsibilities are blurred, and when one includes the broader political and economic context of relations then the practical authority of the UK is further constrained.

This chapter therefore considers the key political influences that shape the relationship, such as the view of the UK towards democratically-elected governments in the territories and the UK's sensitivity to being seen as a 'colonial' power.

The economic context is also important here. As is highlighted in Table 1 the only territory in the Caribbean that receives budgetary aid from London is Montserrat, and this is because of the long-term effects of the volcano. Before that Montserrat had been largely economically self-sufficient for several years. Indeed, economic self-sufficiency is an often repeated mantra of the UK, and this is a central aim to uphold. The economic problems that have faced the global economy over the last decade and which have also impacted on the territories have not changed this view; indeed they have may strengthened it. In turn this has had implications for the management and oversight for the UK OCTs offshore financial industries.

4.1. Political considerations

The final section of Chapter Three highlighted some of the day-to-day pressures faced by the Governors in the OCTs in relation to managing their offshore sectors. There are also other issues – at a broader level – that have an impact, and they are considered within this chapter.

In terms of the direct relationship, the UK is reluctant to use its full powers, even in areas where the Governor has responsibility – rather consensus and persuasion is preferred. The UK is aware of the importance of maintaining good relations with democratically elected governments. Further, the UK government's position is that it should help 'the Territories run themselves effectively and not run them itself'.³¹⁵ A further constraint is the limited power the Governor has in certain situations. There remains a problem with issues that are in the mid-spectrum. As Clegg and Gold said 'the Governor can use his constitutional powers including Commissions of Inquiry, and the UK government can introduce Orders in Council, but there is a reluctance to do this because of the controversy they cause'.³¹⁶ Also, 'Governors have few intermediate levers between ... influence on the one hand and the constitutional power on the other, despite the responsibilities they must discharge'.³¹⁷

³¹⁵ FCO, 2012b, 2.

³¹⁶ Clegg and Gold, 2011, 123.

³¹⁷ NAO, 2007, 26.

In consequence, concerns that are serious but not extremely so are sometimes left unattended or dealt with inadequately and thus are allowed to worsen. The serious recent case in the TCI regarding financial corruption and mismanagement is such an example. Concerns over low-level malpractice were left largely unattended, which allowed much more serious misconduct to take root (see Case Study 3).

Issues also exist in Whitehall, particularly in terms of continuity of personnel both at ministerial and civil service level. There is a high-turnover of individuals filling the ministerial post that has responsibility for the territories; under the recent Labour Government (1999-2010) six different people filled the role. A similar high turn-over of ministers has taken place more recently. Further, the ministerial position occupied presently by Baroness Anelay of St Johns, as well as dealing with the territories, includes all Foreign Office business in the House of Lords; the Commonwealth (as an institution); the Caribbean; human rights; the UN, international organisations, peacekeeping and the International Criminal Court; climate change; and international energy security policy. She is also the Prime Minister's Special Representative on Preventing Sexual Violence in Conflict. Consequently, the territories are not always represented effectively. It was certainly true in the past that the UK considered them to be 'mostly of peripheral interest'.³¹⁸

Case Study 3 – UK imposes direct rule on the TCI after serious allegations of corruption are made

Concerns over poor standards of governance and possible corruption in the TCI had been growing for some time. For example, the Fuller Report in 2004 noted problems with the administration and allocation of Crown Land, and similar issues were raised in the 2005 Barthel Report, and the 2008 Robinson special report. After the last report, the Governor expressed serious concerns about what was happening and even suggested a Commission of Inquiry into Crown Land deals should be established. There were other investigations, including the 2006 Bradfield Report which was highly critical of the Public Works Department, and a 2007 UK National Audit Office report, which highlighted the TCI's widespread departure from competitive tendering.

Then in late 2007 and into 2008, the UK House of Commons Foreign Affairs Committee (FAC) undertook an investigation into the territories, including TCI. A large number of submissions were made in relation to the TCI, which alleged a range of serious corrupt practices on the part of the local government.

The FAC stated in its report, "The onus has been placed on local people to substantiate allegations. This approach is entirely inappropriate given the palpable climate of fear on TCI", and therefore recommended the UK establishes a Commission of Inquiry, which the government did. The Inquiry confirmed, "There is a high probability of systemic corruption in government and the legislature and among public officers in the TCI".

³¹⁸ Orr, 2008, Ev. 171.

The UK government had little choice but to act. As the FCO minister said at the time: “These are some of the worst allegations that I have ever seen about sitting politicians” and “when things go badly wrong ... we need to act”. An Order in Council, the Turks and Caicos Islands Constitution (Interim Amendment) Order 2009, S.I. 2009/701, was implemented on 14 August 2009. The Order suspended ministerial government and the House of Assembly for a period of up to two years. In their place, the Governor was given the power to take charge of government matters, subject to instruction from the FCO, supported by a range of other British officials and guided by an Advisory Council and Consultative Forum.

The decision by the UK provoked a strong reaction. Ex-Premier Michael Misick (who is now standing trial for corruption) said that the action was “tantamount to being recolonised”, was a “military coup”, and called on local people to “unite and fight against the occupation of the foreign invaders”, while his short-lived successor, Galmo Williams, said that the TCI was being “invaded” with a “dictatorship” like “the old red China”. Even the Caribbean Community rebuked the UK action as a “backwards step” and “counterproductive”. After significant reform, including a new constitution for the TCI in 2011, which strengthened the powers of the Governor, local self-government was re-established.

This is another important case study in highlighting several key issues when considering UK authority over its territories: (1) the UK government’s initial failure (over several years) to take substantive action to address the growing concerns over corruption, despite various reports being commissioned and the unease of the Governor; (2) the criticisms of the FAC in relation to the government’s softly-softly approach; (3) the power of the UK government when it finally did decide to act via an Order in Council; (4) the stinging criticism of many in the TCI and the wider Caribbean concerning the UK’s “recolonisation”; and (5) the sustained time, effort, and expenditure that was required by the UK to return direct rule to the TCI and to investigate and prosecute those behind the alleged corruption. Ultimately, the UK had no choice but to deal comprehensively with the issues and reset the TCI’s political and economic system. It was also seen as a warning to other territories to keep their houses in order.

In addition, the qualifications of the people filling the ministerial role have sometimes been inadequate. Some of the deficiencies at ministerial level have also been replicated within the civil service. For example, there is a regular turnover of leadership in the Overseas Territories Directorate, while FCO desk officers for the territories tend to remain in post for only 18 months to two years, reflecting general practice in the FCO and across Whitehall.³¹⁹ As the NAO argued ‘... the resulting lack of continuity and loss of Territory-specific knowledge has been a concern for some stakeholders’.³²⁰ In short, institutional memory in the FCO has been lost regarding how matters relating to the territories can be dealt with most effectively.

³¹⁹ NAO, 2007.

³²⁰ NAO, 2007, 28.

4.2. Economic considerations

The constraints of realpolitik are clearly apparent, but economic considerations are also important in shaping relations between the UK and its territories when it comes to the regulation of offshore practices. There are two key inter-linked factors at play – the determination of the UK to ensure the territories are financially self-sufficient (i.e. there is no expectation of receiving UK budgetary support), and that they are able to maintain this position even in times of economic difficulty. The report considers first the UK's economic approach to the territories.

It has been a long-term objective of the UK government – both under Conservative and Labour administrations – to reduce the amount of UK funding going to the territories. This stands apart from the approach of France, the United States, and to a certain extent the Netherlands and their overseas territories in the Caribbean. The expectations of the UK have largely been fulfilled in that all of its territories in the region – with the exception of Montserrat, as noted above – do not receive any budgetary support. The territories are able to support themselves financially, and this suits the UK very well. It is true that funding is provided by the UK, primarily through the FCO and the Department for International Development, for projects such as the promotion of good governance, but the sums are relatively small. The position of the UK is encapsulated in the following quote from William Hague, the then Foreign Secretary, on launching the 2012 White Paper, *The Overseas Territories: Security, Success and Sustainability*: 'We expect these territories to do all that is necessary to reduce ... their reliance on subsidies from the British taxpayer; and we expect all Territory governments to manage their public finances sustainably'.³²¹ In short, self-reliance is extremely important and it is the primary responsibility of the territories to ensure this.

In order to maintain this self-reliance and financial sustainability, the role of their offshore financial services is extremely important, particularly for Bermuda, BVI, and Cayman Islands as noted previously. Any sizable reduction in their offshore sectors would cause a dramatic decline in their economies, and would very likely require budgetary support from the UK. As already argued the UK does not want this, neither do the territories. Indeed as Freyer and Morriss suggest regarding Cayman Islands, '[offshore financial centre] revenue effectively bought Cayman additional autonomy'.³²² Therefore the territories clearly see the benefits of both economic and political autonomy and are resolute in preserving this position. This then limits what actions both the UK and territory governments are prepared to countenance; see for example the decision not to adopt registries of beneficial ownership that are open to the public (see part 3.3. of this report).

The opposition Labour Party in the UK, led by its leader Jeremy Corbyn, has been more forthright arguing that if the territories do not get their house in order direct rule from London should be considered. He drew parallels with the decision of the last Labour

³²¹ FCO, 2012b, 2.

³²² Freyer and Morriss, 2013, 1338.

government to impose direct rule on the TCI. In a debate on 11 April 2016 Corbin argued, the 'national scandal [of tax avoidance] has got to end'.³²³ A few days before an opinion poll on behalf of Christian Aid and Global Witness showed a clear preference for a strong UK role in making sure the offshore sectors in the territories are transparent in terms of the ownership of companies, even though that might impact adversely on their economies.³²⁴ Despite such criticism the long-standing view of the UK government in regard to the benefits and rationale for safeguarding offshore finance in the territories has not changed. Further, it could be argued that if Labour and Corbyn ever got into power, they would be faced with the same pressures and retreat from their commitments made in opposition.

Another factor that needs to be recognised here is the strong ties between the City of London and the offshore centres in the territories. As the report has already mentioned the City of London had a key role in the initial creation of the offshore financial sectors, and that link is still important today. Palan has called this a 'Second British Empire',³²⁵ whereby UK OCTs and former colonies such as Hong Kong have formed a network of offshore centres focused on the City of London. As Fichtner argues, 'This concept is ... very useful to highlight the ancillary role of the UK 'colonies' for the strong position of the City of London in international finance'.³²⁶ When one considers the amount of financial flows between them the strong links become very clear. For example, the value of UK resident monetary financial institutions lending to non-residents in the Cayman Islands was US\$ 266.9 billion in the third quarter of 2016.³²⁷ While Bermuda has a sizable interest in supporting the UK's speciality insurance services via their involvement with the Lloyd's Market. This has been called "something of a special relationship".³²⁸ These important links are not hidden by the UK. For example, Mark Simmonds, then FCO minister in charge of the territories recognised the key role the territories play in generating billions of pounds for the UK economy.³²⁹

An associated sub-text was the desire on the part of the UK to ensure the territories self-sufficiency (with the exception of Montserrat) during and after the economic downturn of 2007/08. There was reduced activity in financial services and falls in tourist arrivals and construction. For example, in BVI new international business company incorporations fell by 44 % in the final quarter of 2008, while in Cayman Islands, new hedge fund launches fell by 18 % in 2008 and 10 % of all existing funds were terminated.³³⁰ As a consequence, their economies shrank, in some cases very considerably, and the recovery has been slow and halting (see Table 5). A related impact was rising fiscal deficits, which were

³²³ House of Commons Hansard, 11 April 2016.

³²⁴ Christian Aid, 2016.

³²⁵ Palan, 2015.

³²⁶ Fichtner, 2016, 1056.

³²⁷ Bank of England, 2016, Consolidated worldwide claims, 2016 Q3.

³²⁸ *Bermuda Reinsurance Magazine*, 2011.

³²⁹ Foreign Affairs Committee, 2012.

³³⁰ Foot, 2009.

particularly acute in Anguilla, Cayman Islands, and TCI – the latter’s situation being exacerbated by the well-publicised corruption scandal. In Cayman Islands, for instance, the government’s fiscal deficit reached over 7 % of GDP in 2009.³³¹ One outcome was insufficient cash available to meet all of the government’s payroll obligations, and payments to contractors and other suppliers were postponed. In response, the government won permission from the UK to borrow more to cover its short-term obligations.

Table 5: Territory growth rates, 2009-2014

Territory		2009	2010	2011	2012	2013	2014
Anguilla		-24.4 %	-6.6 %	-1.9 %	-1.5 %	0.9 %	9.5 %
Bermuda		-5.3 %	-2.1 %	-4.4 %	-4.0 %	-2.0 %	0.3 %
BVI		-11.6 %	0.0 %	-0.7 %	-4.5 %	5.6 %	0.0 %
Cayman Islands		-6.3 %	-2.7 %	1.2 %	1.3 %	1.5 %	2.4 %
TCI		-20.9 %	0.2 %	4.7 %	-4.2 %	3.0 %	6.7 %

Despite these difficult conditions the UK still wanted to ensure that the territories’ self-sufficiency would continue. So it did two things. First, it defended the offshore industries. So for example, as the 2012 White Paper argued, the UK ‘will continue to represent the interests of those Territories which meet [international standards] and will strongly support their right to compete freely in international markets’.³³² Also, in December of the same year, FCO minister Mark Simmons stated: ‘It is not a matter for the UK to impose [greater transparency] on the Territories, but we encourage them [to do so]’.³³³ Then in October 2013 he asserted, ‘Overseas Territories want appropriate regulation and not overly burdensome regulation’.³³⁴ This of course set the scene for the UK’s acceptance in 2016 that the territories would not have to adopt registries of beneficial ownership that are open to the public.

The second thing the UK did was to increase its oversight of the territories’ budgets despite the fact it does not retain responsibility for the day-to-day operation of their economies. London felt that strong corrective action was necessary to bring budgets back onto a more sustainable footing. For example, in both Anguilla and the Cayman Islands the UK forced revisions to local budgets to cut spending and raise revenue by withholding the required assent of the territories’ budgets until the necessary changes were made. Further, there

³³¹ Moody’s Credit Analysis, 2013, 6.

³³² FCO, 2012a, 57.

³³³ Foreign Affairs Committee, 2012, Ev. 11.

³³⁴ European Committee B, 2013, 19.

were the Frameworks for Fiscal Responsibility (FFR).³³⁵ The UK was insistent that the territories (excluding Bermuda due to its greater level of legislative autonomy) should implement this legislation, which commits the governments to be prudent and transparent on fiscal and debt management. There was considerable opposition from the territories to this piece of legislation, particularly from Anguilla and Cayman Islands – some Caymanians worried the UK would misuse its budget authority to undermine the financial services industry.³³⁶ But ultimately there was agreement to implement the FFR, after the UK threatened to impose it via an Order in Council. The controversy around the FFR is important, because it illustrates again that the UK can intervene in economic and financial matters when it deems it correct to do so. However, the UK's engagement recently has focused more on spending rather than revenue.

A good example of this relates to Cayman Islands and the difference in approach between the Labour government and the Conservative-led coalition government that won power in 2010. At the height of the economic difficulties in Cayman and after the UK authorised additional borrowing, London stated that an independent assessment should be carried out on 'the options for, and potential impact of, new revenue sources including direct taxation ... which would bring about a significant diversification of [the] revenue base'.³³⁷ The subsequent 'Miller Report' was issued in March 2010 and ruled out direct taxation. It argued that the introduction of direct taxes would be "extremely deleterious" to the country's financial services industry. However, the report called for significant reductions in government expenditure. Based on the findings of the Miller Report there was a strong rear guard action in Cayman against the need for direct taxation and this found favour in the UK after the 2010 general election. The new government led by the Conservatives dropped the previous administration's insistence on direct taxes; rather it accepted a plan of spending cuts and alternative revenue raising measures.

Key findings

- Territories have democratically-elected governments and are economically self-sufficient, which means the UK is cautious about imposing its will on them.
- Territories' offshore financial sectors afford them economic self-reliance, and significant political autonomy, which both they and the UK appreciate.
- There are strong mutually beneficial links between the territories and the City of London.
- Concerned about the health of the OCT economies after the 2007/08 crash, the UK took a more hands-on approach, but it has focused primarily on controlling government expenditure. The offshore sector is seen as a crucial revenue raiser, and has been strongly defended by the UK.

³³⁵ FCO, 2011.

³³⁶ Cayman Hansard, 2012.

³³⁷ Terms of Reference, Miller Commission, 2009.

Chapter 5: Conclusions and Recommendations

The legal, political and institutional framework underpinning relations between the UK and its OCTs is nuanced, despite what first appearances might indicate. This report has disaggregated the relationship to show that key Acts of Parliament make very clear that the UK is sovereign and has supreme authority to ensure ‘peace, order and good government’ in the territories, including Bermuda despite its significant level of autonomy. And it is true that on a small number of occasions the UK has used this power to enforce changes, such in Montserrat in 1989 when the Governor was given responsibility for the territories’ offshore financial sector.

The process of introducing ‘Orders in Council’ by the UK can be swift with no scrutiny or wider parliamentary support required. However, as the case studies indicate even when Orders are enacted the UK is cautious in using them and, when it does, local opposition is usually extremely vociferous. More generally the multi-layered nature of UK-Governor-Territory relations dilutes and blurs the original authority of the UK and the associated reserve powers of the Governors, and as a result decision-making can be complicated, slow and frequently deferred.

However, what has been suggested does not mean the UK is now less responsible for what is happening in the territories’ offshore financial sectors, and cannot act. It is still the sovereign power, with important levers at its disposal.

In recent years though the UK has taken some political decisions, which have reduced its role in the territories, most particularly, the new constitutions that have awarded further autonomy.

Also, the determination to ensure that the territories are economically and financially self-sufficient and that funding from the UK taxpayer is as limited as possible has further restrained the UK’s scope of action. As Mark Simmonds, FCO minister said, ‘My view is that where Territories demonstrate responsible governance, transparency ... and financially responsible management, we should look at ways of continually allowing democratically-elected Territories to have more and more control over their jurisdictions’.³³⁸ For the time being this is the prevalent view in Whitehall.

So the deep-seated complexities of managing the territories; the reluctance of the UK to allocate more funds to them, particularly at a time of general economic and financial retrenchment; the limited support the UK is providing to help diversify their economies; and of course the uncertainty surrounding the UK’s exit from the EU, means that the UK is not in a strong position to implement further reform to address concerns regarding the offshore practices related to tax evasion, money laundering, and tax transparency in the territories.

³³⁸ Foreign Affairs Committee, 2013, 4.

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This study aims to present the legal, political and institutional framework governing offshore practices in the Overseas Countries and Territories (OCTs) of the European Union, which are under the sovereignty of four Member States: Denmark, France, the Netherlands and the United Kingdom. The institutional arrangements of the OCTs with the relevant EU Member States directly affect the possibility to establish policies and adopt regulations, including on taxation and money laundering. Regardless of the level of control of the EU Member States over their OCTs, implementation of the law by the local authorities is of concern in a number of the UK and Dutch OCTs, both in terms of structural weaknesses, but also because of limited financial and human resources. In the case of the French OCTs, suboptimal oversight controls and lack of information make it difficult to supervise financial activities.

The opening analysis compares the French, Dutch and British cases in terms of combating tax evasion, money laundering and enhancing tax transparency; explores the case of Greenland; and draws conclusions on how the EU could better use its leverage in these overseas territories. The analysis is based on the detailed annexed contributions, written by external experts, which cover in detail the OCTs under French, Dutch, and British rule.

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