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Sovereign Display and Fiscal Techniques

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Sovereign Display and Fiscal Techniques: Some Notes on Recent Strategies to Counteract Money Laundering and Terrorist Financing

*Magnus Hörnqvist**

ABSTRACT

Over recent decades, the state has come to increasingly rearticulate sovereignty at the very center of society. To support the thesis of a migration of sovereignty from the periphery to the center, from the punishment of marginalized groups to the regulation of economic transactions, this Article sketches the development of rules, monitoring, and sanctions—the three phases of regulation in the strict sense—with respect to first tax evasion and undeclared work and then organized crime, money laundering, and terrorist financing. Unbounded reasons of state, symbolic authority, and conflicts with formidable foes are found to be expressed in the economic sphere, which resonates with a reconstructed classical understanding of sovereignty, found in classical political theory. The spread of techniques across administrative domains is traced through organizational documents and interviews with practitioners and moreover is related to an observed trend toward integration between crime control and business regulation. The regulatory approaches transcend the categories developed by research traditions separated by the criminal law. In this way, the analysis may contribute to an integrated understanding of the contemporary regulatory state.

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TABLE OF CONTENTS

I.	INTRODUCTION	934
II.	PART I: SOVEREIGNTY—FROM THE PERIPHERY TO THE CENTER?.....	937
III.	PART II: TRACING THE REARTICULATION OF SOVEREIGNTY IN ORGANIZATIONAL PRACTICE	940
	A. <i>The Rise of Fiscal Policing</i>	944
	1. Tax Evasion.....	944
	2. Undeclared Work	947
	B. <i>Catching Crime in a Web of Taxation and Reporting Requirements</i>	951
	1. Organized Crime.....	951
	2. Money Laundering and Terrorist Financing.	954
IV.	CONCLUSION	959

I. INTRODUCTION

“Everywhere,” Joseph Schumpeter said at the time of the First World War, the tax state “confronts the private economies with relatively few means.”¹ The main purpose of taxation was to finance the war effort. In more recent times, over the very last decades, as organized crime and terrorist financing came to be seen as submerged in the regular economy, governments turned toward the instruments of taxation for different reasons. While taxation still provided the necessary funding, now the fiscal regimes themselves were used to counteract terrorism and organized crime and to differentiate the associated money trails from other kinds of business transactions.²

1. JOSEPH A. SCHUMPETER, *THE ECONOMICS AND SOCIOLOGY OF CAPITALISM* 111 (Richard Swedberg ed., 1990).

2. See generally Petrus C. van Duyne, *Crime and Commercial Activity: An Introduction to Two Half-Brothers*, in *THE ORGANISED CRIME ECONOMY: MANAGING CRIME MARKETS IN EUROPE 1* (2005) (discussing the complex interconnection between transnational organized crime and commercial activity); Michael Levi, *Combating the Financing of Terrorism: A History and Assessment of the Control of ‘Threat Finance’*, 50 *BRIT. J. CRIMINOLOGY* 650 (2010) (assessing historical and current measures against terrorism financing); Mark Pieth, *Criminalizing the Financing of Terrorism*, 4 *J. INT’L. CRIM. JUST.* 1074 (2006) (analyzing policies associated with examining money trailsto counter terrorist finance); Action Plan to Combat Organized Crime, 1997 O.J. (C 251) 1, 3; Directive 2005/60/EC, of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, 2005 O.J. (L309) 15, 15–20 [hereinafter Directive 2005/60/EC]; Financial Action Task Force [FATF], FATF 40

The transfer into new policy arenas was made possible by significant sharpening of the available fiscal instruments, which was carried out for the original reason of state funding. In a range of countries, tax regimes had evolved into powerful mechanisms of control in the administrative pursuit of tax evasion.³ The two developments originated in different policy contexts: criminal justice and business regulation. This Article explores the developments leading up to the recent intersection of criminal justice and business regulation, as well as the possible implications of this intersection.

Whether current strategies towards tax evasion, organized crime, money laundering, and terrorist financing should be understood along the lines of policing, or along the lines of regulation, would appear to be an issue of some importance. The two concepts are associated with different research focuses.⁴ As several commentators have noted, there is literature on regulation and on policing, which unfolds on parallel tracks.⁵ The division of academic labor goes back to institutional developments in the mid-nineteenth century. For a long time, business regulation and policing *were* deployed separately, differentiated by the creation of modern police forces and prisons. During the course of the nineteenth century, policing was referred to a specialist agency, with specially trained personnel performing functions of order, maintenance, and crime control. This led to specialization: a “uniformed paramilitary police, preoccupied with the punitive regulation of the poor,” whereas “business regulation became

Recommendations (Oct. 2003), www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf [https://perma.cc/4ZBP-333J] (archived Sept. 30, 2017); R. T. NAYLOR, WAGE OF CRIME: BLACK MARKETS, ILLEGAL FINANCE, AND THE UNDERWORLD ECONOMY (2002) (discussing financial operations funding terrorism and organized crime).

3. Justitiedepartementet, Ds 2008:38 *Nationell mobilisering mot den grova organiserade brottsligheten - överväganden och förslag* (Swed.); JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION, 88–142 (2000); JOHN BRAITHWAITE, MARKETS IN VICE, MARKETS IN VIRTUE (2005); Organisation for Economic Co-operation & Development [OECD], Tax Administration Guidance & Information Series (Mar. 2011), www.oecd.org/tax/administration/42419552.pdf [https://perma.cc/4YD9-JBZN] (archived Sept. 30, 2017).

4. Interestingly, Masciandaro et al. have noted a related dualism in economics, or research on the activities that are subject to regulation. Economists have traditionally focused on ‘legal financial transactions, while the economics of crime – following Becker – has neglected the financial aspects.’ Criminal economic activities are either absent from the analysis, or are placed in the foreground, overshadowing other aspects. See DONATO MASCIANDARO, ELŐD TAKÁTS & BRIGITTE UNGER, BLACK FINANCE: THE ECONOMICS OF MONEY LAUNDERING, at ix (2007).

5. See generally LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING 23–44 (Alfred Blumstein & David P. Farrington eds., 2005); CHRISTINE PARKER ET AL., REGULATING LAW (2004) (discussing regulation in various areas of law); Peter Gill, *Policing and Regulation: What is the Difference?*, 11 SOC. & LEGAL STUD. 523 (2002) (discussing the distinctions and similarities between policing and regulation).

variegated into many different specialist regulatory branches.”⁶ As a result, policing came to be associated with street-level crime, whereas regulation was instead associated with the complexities of business and market governance. Current institutional reshuffling, however, has complicated the picture.

This Article argues, first of all, that a number of state strategies operate in ways that make traditional distinctions between policing and regulation largely untenable.⁷ Secondly, and more controversially, it argues that the analyzed strategies involve a rearticulation of sovereignty at the center of society.⁸ The Article is divided into two Parts, one conceptual and one historical. The first Part takes issue with the assignment of sovereignty to the periphery, to the sphere of criminology, and to the policing and the punishment of marginalized groups, at a safe analytic distance from core societal processes. Over recent decades, state strategies to combat tax evasion, undeclared work, organized crime, and terrorist financing may be seen to have once again articulated sovereignty within the economic field. Analytically, sovereignty thus seems to be moving from the periphery to the center.⁹ In the historical Part, the argument is that although state control vis-à-vis predominantly legal companies and state control vis-à-vis predominantly criminal companies have developed separately, and from different points of departure, there is nevertheless a noticeable convergence between the developments. Simply put, and allowing for national variations, over the last decades there is more policing (crime control, intelligence techniques, and on-site inspections) in relation to ordinary business, and there is more regulation (taxation, financial monitoring, and reporting requirements) in relation to organized crime. As a consequence, irrespective of whether the individual companies are legal or not, they tend to be confronted with the same requirements—monitoring, sanctions, and institutions.

6. JOHN BRAITHWAITE, *REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER* 13–14 (2008).

7. For a discussion of remaining differences, which will not be discussed in this paper, see Magnus Hörnqvist, *Regulating Business or Policing Crime? Tracing the Policy Convergence Between Taxation and Crime Control at the Local Level*, 9 *REG. & GOVERNANCE* 352, 352–66 (2015) [hereinafter *Taxation and Crime Control*].

8. For a discussion of the wider theoretical implications of this ‘repositioning of sovereignty,’ which will not be pursued here, see Magnus Hörnqvist, *Repositioning Sovereignty? Sovereign Encounters With Organized Crime and Money Laundering in the Realm of Accountants*, 18 *THEORETICAL CRIMINOLOGY* 528, 538–41 (2014).

9. Yet the sovereign element is primarily articulated in low-wage and service-oriented sectors. The fiscal approach towards organized crime and the anti-money laundering regime mainly, but not exclusively, capture smaller companies and minor players in the construction, the restaurant, the cleaning, the road haulage, the taxi and the removal sectors. See *id.* at 540; see also SOU, *Branschsanering och andra metoder mot ekobrott*, Stockholm: Fritzes (1997).

II. PART I: SOVEREIGNTY—FROM THE PERIPHERY TO THE CENTER?

The state strategies to counteract tax evasion, undeclared work, organized crime, money laundering, and terrorist financing form part of the state's long-standing monopoly on punishment and taxation; moreover, they resonate with some of the most basic features of sovereignty. Historically, sovereignty was used to vindicate the worldly concerns of the heads of state over the religious establishment when the concept was introduced in the sixteenth century.¹⁰ The economic aspect was central at the outset. Long before the advent of capitalism, economic activity was immersed in sovereign concerns. Such concerns found their way into the doctrine of mercantilism, which influenced European economic policy for two centuries, held together by the view that commerce was above all a means to "achieve greater national power and glory."¹¹ Over the centuries, it has been articulated in state action by regents, governments, and local agencies. What appears to be at stake is the essence of statehood. Sovereignty is conceptually linked to the state, and specifically to the state. It has been referred to as "the struts and joists without which statecraft would not exist."¹² At bottom, there is the capacity to use force. As Max Weber emphasized, the basic characteristic of the state is its successful monopolization of the legitimate use of violence.¹³ Within a given jurisdiction, the state has the primary right and also a superior capacity to use force. Both aspects are essential. State sovereignty presupposes a legal dimension in addition to the position of strength in relation to competitors.

The split between legality and actuality was present in the very first writings on sovereignty. Jean Bodin spoke of sovereign "prerogatives" (*marques*), ambiguously referring to the distinguishing characteristics as well as the juridical rights of sovereignty.¹⁴ The sovereign state may use force whenever it prefers to do so. Yet any intervention must be legal. The two sources—the supreme power and the fundamental legality—are intimately connected. One influential model proposed that legality was grounded on the decision of a

10. WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* 28 (2010).

11. Lars G. Magnusson, *Mercantilism, in A COMPANION TO THE HISTORY OF ECONOMIC THOUGHT* 46, 56 (Warren J. Samuels et al. eds., 2003).

12. Daniel Philpott, *Sovereignty: An Introduction and Brief History*, 48 *J. INT'L AFF.* 353, 354 (1995).

13. MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE* (J. C. B. Mohr Tübingen 1972).

14. JEAN BODIN, *ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH* 46 (Julian H. Franklin ed., trans., 1992).

supreme power, and nothing else.¹⁵ While recognizing that all violence must be cast in a juridical form, the legality was seen to be unrelated to substantive considerations.

In addition, there is the element of violence beyond all justification, which is unacknowledged but inherent in the classical theories on sovereignty.¹⁶ When the state monopolized the legitimate use of violence, it simultaneously retained illegitimate violence as a prerequisite for sovereignty. This extra-legal violence has also been discussed in terms of “state crime”¹⁷ or “*homo sacer*.”¹⁸ It presupposes a binary split within the population, with the excessive violence then being exercised against certain categories of individuals on the margins of society. In an economic context, on the other hand, the fundamentally legal violence can be expected to be more prominent.

It has been said that the sovereign mandate is tied to the establishment of order, both in the market and in general.¹⁹ In Hobbes’s famous defense, sovereignty was the precondition for social order.²⁰ Yet it is also, at a more basic level, not tied to any specific goals at all. As Foucault remarked in relation to the original sense of *raison d’Etat*, “there is no prior, external purpose, or even a purpose subsequent to the state itself.”²¹ The French Cardinal Richelieu first articulated the notion of “reason of state” together with sovereignty in the seventeenth century. The implication was that any manifestation of state power was above moral concerns.²² Sovereignty is ungrounded in the sense that it escapes all considerations of utility. It is not limited, or justified, by goal satisfaction. In a similar vein, Hanna Arendt described sovereignty as the assertion of a solipsistic

15. CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN: TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN* (Duncker & Humblot 2009).

16. DANIEL LOICK, *KRITIK DER SOUVERÄNITÄT* (2012).

17. See generally PENNY GREEN & TONY WARD, *STATE CRIME: GOVERNMENTS, VIOLENCE AND CORRUPTION* (2004) (discussing state-sponsored terrorism).

18. See generally GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1998) (discussing the implicit nature of sovereignty as power over life).

19. Slavoj Žižek, *Carl Schmitt in the Age of Post-Politics*, in *THE CHALLENGE OF CARL SCHMITT 18–37* (Chantal Mouffe ed., 1999); see generally David Pan, *Against Biopolitics: Walter Benjamin, Carl Schmitt, and Giorgio Agamben on Political Sovereignty and Symbolic Order*, 82 *GERMAN Q.* 42 (2009) (analyzing the sovereign mandate and perspectives on cultural and political theory).

20. See generally THOMAS HOBBS, *LEVIATHAN* (Oxford University Press 1985) (discussing social contract theory and rule by an absolute sovereign).

21. MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–1978*, at 258 (Michel Senellart & François Ewald eds., Graham Burchell trans., 2007).

22. Luc Foisneau, *Sovereignty and Reason of State: Bodin, Botero, Richelieu and Hobbes*, in *THE RECEPTION OF BODIN: RECEPTION OF BODIN HISTORY 323, 334* (Howell A. Lloyd ed., 2013).

will.²³ The will of the sovereign is absolute and does not recognize the needs or goals of the surrounding world.

The claim to absolute supremacy is either celebrated or abhorred in the discourse on sovereignty. Yet the issue of its proper—as opposed to unbounded—field of application has also been discussed ever since sovereignty was first conceptualized. At least four areas in which sovereignty is exercised can be seen to recur across the centuries. The state can wage wars against other nations, lay down laws for citizens, punish law-breakers, and tax economically active subjects. Punishment and taxation, the two latter areas, are of primary interest for the purposes of this Article. Along with legislation and war making, they belong to the original sovereign prerogatives.²⁴

Punishment is arguably the sovereign prerogative *par excellence*. The exercise of violence against subjects who had contravened the will of the heads of state was consonant with all the basic principles of sovereignty. The state's right to tax its subjects was embraced less unequivocally by the theoreticians of the early-modern state. However, although both Jean Bodin and Thomas Hobbes were hesitant to entrust the sovereign with the right to tax, since this threatened to infringe on property rights, for them taxation nonetheless belonged to the order of sovereign powers as a special case of legislation.²⁵ Ever since, taxation, or the forced acquisition of economic value, has been a cornerstone on which state power has rested.

A further aspect of sovereignty is that of symbolic authority, which similarly has accompanied the concept from the outset.²⁶ Sovereignty is exercised towards subjects as criminals, taxpayers, soldiers, or political opponents. Besides being exercised, however, sovereignty is also *displayed*—towards everyone in their capacity as spectators. As display, sovereignty entails a symbolic confirmation of the supremacy of the state. Particularly when punishments are exacted, the endangered order is ritually reinstated and the power of the state appears uncontested.²⁷ Carl Schmitt saw the symbolic authority as a theological remnant, the transfer of sacred aura to the

23. See generally HANNAH ARENDT, *ON REVOLUTION* (1963) (discussing sovereignty and revolution).

24. HOBBS, *supra* note 20, at 128–285; BODIN, *supra* note 14, at 46.

25. See generally Dudley Jackson, *Thomas Hobbes' Theory of Taxation*, 21 *POL. STUD.* 175, 178 (1973); Martin Wolfe, *Jean Bodin on Taxes: The Sovereignty-Taxes Paradox*, 83 *POL. SCI. Q.* 268, 274–75 (June 1968).

26. Quentin Skinner, *The State*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* (Terence Ball et al. eds., 1989).

27. PHILIP SMITH, *PUNISHMENT AND CULTURE* 169–83 (2008) (discussing punishment and meaning in relation to state power).

secular state.²⁸ The symbolisms of sovereignty were integral in his conception of politics as the conflict between friend and foe. Drawing the boundary between the representatives of the state as guardians of order and, on the other hand, the state's enemies, belongs to the fundamental operations of the state.²⁹ State strategies towards organized crime inevitably draw on this existential conflict.

All aspects of sovereignty—the monopoly of violence, the fundamental legality, the solipsistic will, the symbolic authority, and the existential conflict between friend and foe—are typically manifested in the punishment of criminal offences. But, as this Article will argue, the economic sphere is by no means excluded. On the contrary, sovereignty is also displayed vis-à-vis businesses. All aspects of sovereignty are present in the interaction with the economy. The monopoly of violence, cast in a legal form, is the prerequisite for all regulation. Further, the symbolic authority of the state is activated, for example, when members of business elites are arrested following scandals. “The obvious discomfiture of previously lionized executives now paraded in handcuffs is a public demonstration of the enforcement myth,” notes Justin O’Brien, “that no one is above the equal application of the law.”³⁰ Yet the symbolic aspect of sovereignty is equally present in the routine acts of taxation, when property rights are overruled and the state's exclusive right to confiscate resources is displayed. Forceful intrusions into the economic sphere reaffirm the elevated position of the state, charged with overall responsibility.

In a regulatory context, the most controversial aspect of sovereignty is the assertion of solipsistic will. The basic absence of considerations of utility not only is hard to accommodate within prevailing approaches to regulation, but also challenges deeply held assumptions about the relationship between state violence and the market more generally.³¹

III. PART II: TRACING THE REARTICULATION OF SOVEREIGNTY IN ORGANIZATIONAL PRACTICE

The regulatory approaches analyzed in this Article are punitive, rule-based, and state-centered. For this reason, the observation to be made is that the strategies constitute prime examples of government, or a regulatory style which is very different from the dominant trend

28. SCHMITT, *supra* note 15.

29. *Id.*

30. JUSTIN O'BRIEN, GOVERNING THE CORPORATION: REGULATION AND CORPORATE GOVERNANCE IN AN AGE OF SCANDAL AND GLOBAL MARKETS 7 (2005).

31. Hörnqvist, *supra* note 8, at 538–41.

towards governance. In the recent literature on new regulatory forms, which document a growth of transnational governance, of standard setting, and of soft regulation, state economic intervention based on rules and sanctions is slightly patronizingly labelled “command-and-control regulation.” Command-and-control regulation is considered dated and marginalized by the new regulatory forms.³² To be sure, the literature also contains counterexamples. The drift away from punitive, rule-based, and state-centered regulation is not uniform.³³ In the area of corporate harm, criminalization is one of several techniques employed to discipline business.³⁴ The number of counterexamples multiplies if critical work on policing and security is taken into account.³⁵ Although not dominant, punitive, rule-based, and state-centered approaches are still significant in the contemporary regulatory landscape.³⁶ But the main thrust in the literature is towards a regulatory state—territorially decentered, involving a layered web of regulation, a variety of regulatory styles, and an array of organizations ranging from the police, through the tax agency, to private regulatory bodies.

In this story, there has been little place for sovereignty, except as something that is being superseded—or reserved for marginal populations. Few would deny its continued importance, yet the debate is restricted to a focus on the extent of state control. In particular, the

32. Marie-Laure Djelic & Kerstin Sahlin, *Governance and Its Transnational Dynamics: Towards a Reordering of Our World?*, in ACCOUNTING, ORGANIZATIONS, AND INSTITUTIONS : ESSAYS IN HONOUR OF ANTHONY HOPWOOD 175, 178 (Christopher S. Chapman et al. eds., 2009); MARIE-LAURE DJELIC & KERSTIN SAHLIN-ANDERSSON, TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION (2006) (discussing developments in transnational regulation); JACINT JORDANA & DAVID LEVI-FAUR, THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE 8–9 (2004); SOL PICCIOTTO, REGULATING GLOBAL CORPORATE CAPITALISM (2011) (discussing corporate law and financial market regulation); Anthony Ogus, *Regulation Revisited*, 2 PUB. L. 332 (2009) (discussing developments in regulation and public policy from 1979 to 2008); Marc Schneiberg & Tim Bartley, *Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century*, 4 ANN. REV. L. SOC. SCI. 31 (2008) (examining the expansion of regulation from the nineteenth to twenty-first century).

33. See generally FIONA HAINES, THE PARADOX OF REGULATION: WHAT REGULATION CAN ACHIEVE AND WHAT IT CANNOT (2011); Robert Baldwin, *The New Punitive Regulation*, 67 MOD. L. REV. 351 (2004) (discussing policy shifts toward punitive regulation); Adam Crawford, *Networked Governance and the Post-Regulatory State? Steering, Rowing and Anchoring the Provision of Policing and Security*, 10 THEORETICAL CRIMINOLOGY 449 (2006) (discussing policing and security developments in Britain’s ‘post-regulatory state’).

34. Steve Tombs & David Whyte, *The State and Corporate Crime*, in STATE, POWER, CRIME 103 (Roy Coleman et al. eds., 2010).

35. RICHARD V. ERICSON, CRIME IN AN INSECURE WORLD (2007); see generally Simon Hallsworth & John Lea, *Reconstructing Leviathan: Emerging Contours of the Security State*, 15 THEORETICAL CRIMINOLOGY 141 (2011) (discussing areas in which the security state is emerging).

36. HAINES, *supra* note 33, at 10.

qualitative aspects of sovereignty are missing. To understand sovereignty as something distinct from more—as opposed to less—state control, the Article recovers a richer notion through a reading of the classic tradition from Hobbes and Bodin. The classic concept of sovereignty is essential since it captures the forceful intrusion by the state into the economic sphere, an element of force that is related to the preservation of the state rather than other considerations.

The Article focuses on how the state imposes requirements that are linked to two core sovereign prerogatives—to punish and to tax—on economic actors. In one sense this is an age-old story. The state's current authority to punish and to tax stands in a historic continuity from the sixteenth century.³⁷ But it is an age-old story with a number of recent twists. During the last decades, the sovereign concerns insofar as they relate to the economy have been expressed in strategies counteracting tax evasion, undeclared work, organized crime, money laundering, and terrorist financing. The strategies have in common that they combine taxation and punishment; involve a series of new rules and new techniques for monitoring and sanctioning economic actors; shape the preconditions for economic activity in terms of compliance or avoidance costs; and unfold independent of their market functionality. The common features are elaborated upon in more detail later in this Part of the Article.

To support the thesis of a migration of sovereignty from the periphery to the center, from the punishment of marginalized groups to the regulation of economic transactions, the Article sketches the development of rules, monitoring, and sanctions—the three phases of regulation in the strict sense³⁸—with respect to first tax evasion and undeclared work and then organized crime, money laundering, and terrorist financing. When interviewing representatives from eleven state organizations³⁹ over a two-year period, these were the principal strategies encountered—there may well be more—involving sovereign goals and economic means. The interviews were conducted to acquire the practitioner's understanding of the new economic policing landscape, as well as detailed descriptions of individual control

37. Skinner, *supra* note 26.

38. The conception of regulation as a three-phase process comes close to what Parker et al. call “a regulatory regime.” See *Introduction to REGULATING LAW*, 1–5 (Christine Parker et. al. eds., 2004). But where they speak of “standards,” allowing for the regime to be organized around mutually agreed upon norms of conduct, I prefer to speak of “rules,” which simply presupposes authoritative force. See *Introduction to A READER ON REGULATION 3* (Robert Baldwin et. al. eds., 1998).

39. The informants were in managerial positions, responsible for the implementation of the new approaches, or were experienced investigators at The Tax Agency, The Enforcement Agency, The Social Insurance Board, The Security Service, The Tax Fraud Unit, The Financial Supervisory Authority, The Economic Crime Authority, The Prosecution Authority, The Financial Intelligence Unit, The Swedish Police, and The County Administrative Board of Stockholm.

instruments in organizational practice. In conjunction with the interviews, documents (policy papers, evaluations, guidelines, reports, court cases, etc.) were retrieved containing historical information on the regulation of tax evasion, undeclared work, organized crime, money laundering, and terrorist financing.⁴⁰

The research was part of a larger project undertaken in Sweden, and the organizations referred to are all part of the Swedish state.⁴¹ The empirical evidence is thus limited to Sweden. The following subpart will describe the evolution of policy and practice, answering questions such as which measures were implemented when, what is the subsequent use, how financial information is communicated, and which organizations are involved. Close attention to specific measures is required to catch the emergence of crime control, intelligence techniques, and on-site inspections in relation to predominantly legal business and the growing elements of taxation, reporting requirements, and financial monitoring in relation to predominantly criminal business. No attempt is made to compare the Swedish development with the evolution of the corresponding rules, monitoring, and sanctions in other countries. The research design involved a case study, not a comparative approach. However, it is well established that each of the general policy trends is international in scope. State control strategies targeting tax evasion, organized crime, money laundering, and terrorist financing have been adopted all over the contemporary Western world.⁴² For this reason, the theoretical claim extends to all advanced capitalist states, bearing in mind that different legal and organizational environments imply national variations.

The recent history of economic control will be written from two different perspectives: from the point of view of business regulation and from the point of view of crime control. The Article concentrates on the regulatory changes themselves without venturing into the actors and the contestations behind the changes. This is a desirable undertaking in itself. To fully understand the new regulatory space, it is necessary to probe into politics and “the pursuit of command over

40. Information from the written documents is referenced in a conventional manner, whereas statements from the interviews are synthesized and not referenced in the text for reasons of readability.

41. This study was conducted within the context of the project ‘New risks and actors. Terrorism and organized crime in the field of plural policing,’ financed by the Swedish Research Council, 2009–2014.

42. BRAITHWAITE, *supra* note 3; van Duyne, *supra* note 2; Levi, *supra* note 2; Pieth, *supra* note 2; OECD, *supra* note 3; Action Plan to Combat Organized Crime, *supra* note 2; Directive 2005/60/EC, *supra* note 2; FATF, *supra* note 2.

the regulatory process itself.”⁴³ The objective here is instead to establish its emergence and to discuss some of its implications.

A. *The Rise of Fiscal Policing*

1. Tax Evasion

The sovereign project of counteracting tax evasion presupposed a complex regime of reporting requirements. Although taxation as such is an ancient phenomenon, and the distribution of taxes among a population belongs to the art of statecraft, it was not until more recently that the state could tax according to received information on economic transactions. In fact, all the discussed state strategies with a significant sovereign element have one thing in common: the basic operation of processing information on everyday economic transactions. The enacted rules specify what financial information should be submitted to whom; the monitoring techniques investigate whether the submitted information is correct; and the sanctions are actualized when it is found to differ from other, more reliable information. The foundation is laid by rules on financial reporting and by developments in accounting practices. The rise of fiscal policing is to some extent a prosaic story of the gradual expansion of reporting requirements. Since the 1960s, there has been an increase in the regulation of mandatory disclosure of financial information. More and more information has to be made public or reported to special bodies. The development has been described in terms of an “accounting revolution.”⁴⁴ In the accounting literature, the term “disclosure regime” has been used to describe the sum total of “legally recognized information claims.”⁴⁵ The information claims primarily cover financial reporting. Yet they may also relate to other information beyond hard data on cash flow and sales. Due to financial scandals and high-profile bankruptcies, it is also necessary to disclose information on board members and risk management routines.⁴⁶ Taxation and initiatives against money laundering equally depend on the nature of the disclosure regime, and changes along with the establishment of new information claims.

43. LEIGH HANCHER & MICHAEL MORAN, CAPITALISM, CULTURE, AND ECONOMIC REGULATION 287 (1989).

44. WILLIAM H. BEAVER, FINANCIAL REPORTING: AN ACCOUNTING REVOLUTION 4 (2d ed. 1989).

45. Jens Wüstemann, *Disclosure Regimes and Corporate Governance*, 159 J. OF INSTITUTIONAL AND THEORETICAL ECON. 717, 717 (2003).

46. See Michael Power, ORGANIZED UNCERTAINTY: DESIGNING A WORLD OF RISK MANAGEMENT 53–55 (2007); Philipp B. Volmer, Jörg Richard Werner & Jochen Zimmermann, *New Governance Modes for Germany's Financial Reporting System: Another Retreat of the Nation State*, 5 Socio-Econ. Rev. 437, 452 (2007).

In Sweden, the general obligation to produce an income tax return was introduced in 1902. Taxation based on income information supplied by the taxpayers themselves had been tried earlier without success, but this time the system with income tax returns was here to stay. The reported information was used to determine the taxes for all taxpayers, including companies. Although reporting misleading information to evade taxation was criminalized in the same year, for a long time the state simply had to trust the companies. It possessed no means to corroborate the reported information. Only gradually was an elaborate structure for supervision erected on the basis of the taxation legislation. The Bookkeeping Act of 1929 was a first step as it mandated all companies to keep record of their economic transactions. But no state agency had the legal powers and the techniques to access the information contained in the company's accounts.⁴⁷ Unless the company went bankrupt, in which case the bookkeeping would be scrutinized to establish assets, the financial information was out of reach for the state.

The situation changed in 1955 with the introduction of the field audit. The tax agency was for the first time allowed to control the reported information at will. The field audit was originally described by the legislators as form of control where "the taxation authority not only scrutinizes the tax return and the documents belonging it, but also the also the basic data."⁴⁸ The auditors visit the company to obtain first-hand financial information (accounts, invoices, etc.), which is then compared with the information reported in the tax return. The procedure allows the tax agency to detect any discrepancies, such as underreporting income or inflating costs. Field audits in a sense revolutionized state regulation of economic transactions, and it is still the basic operation for all kinds of fiscal policing, whether directed against tax evasion, undeclared work, organized crime, or money laundering. It is also the most powerful tool in existence to control the companies' financial reporting. No prior suspicion is needed. On the contrary, field audits were from the outset meant to be performed on a regular basis and include companies that were the least likely to manipulate.

But the revolution of fiscal policing came slowly. The tax agency initially lacked the administrative capacity to carry out field audits *en masse*. It also lacked the knowledge—essential to the current risk-based approach—of what profit rates and levels or value added taxes

47. Riksskatteverket, RSV Rapport 1983:1 *Skatter och skattekontroll. Förutsättningar för en effektiv kontrollverksamhet* (Swed.) [hereinafter RSV Rapport 1983:1].

48. ATLE ERIKSSON, OM PÅFÖLJDER AV BROTT MOT SKATTEFÖRFATTNINGARNA SAMT OM TAXERINGSREVISION OCH HANDRÄCKNING I SAMBAND MED TAXERINGSKONTROLL 10 (Skattenytt 1961).

could typically be expected in different branches. This was confounded with a tradition of lay involvement in the monitoring procedure and a focus on the individual taxpayer rather than the companies. But the capacity and the ambition to control companies evolved during the decades, and by the 1970s, the tax agency performed thousands of audits each year for control purposes and considered itself to have a fairly good picture on how business was made in different branches and which entries in the tax returns were prone to be manipulated.⁴⁹ The shift of control focus and the resulting knowledge of branches constituted substantial steps towards the specific project of counteracting tax evasion, as opposed to simply collecting taxes. What was lacking, seen from a current standpoint, was a notion of the total extent of the tax evasion, as well as an organizational ambition to reduce it. Though not a concern at the time, as no real goal was formulated up until the 1980s, in the following decades the tax agency would, like many other state organizations, become increasingly goal-oriented.⁵⁰ Adopting the goal of reducing the tax gap, formulated in monetary terms as the difference between the theoretically correct taxation and the actual taxation,⁵¹ gave the tax agency a direction. Field audits, bankruptcy investigations, and other forms of fiscal policing were integrated in a strategy to counteract tax evasion.

The same period witnessed a considerable growth of sanctioning, both in terms of introduction of new types of sanctions and in terms of their subsequent use. To some extent, it was a consequence of the monitoring expansion. The number of suspected violations of the tax and the accounting legislation grew along with the control of the companies' financial reporting. As these violations strictly speaking always were violations of the criminal law, the tax agency would report the cases of misleading information or missing records to the police. Even minor irregularities were processed through the regular criminal justice system, resulting in fines, or more rarely, in imprisonment. In 1972, however, a parallel administrative sanctioning track was created. The new sanctions were strictly monetary: the tax payer had to pay the estimated tax evasion itself and, in addition, half of that amount as a penalty. The retaxation as well as the tax surcharge were determined by the tax agency and

49. RSV Rapport 1983:1, *supra* note 47; Proposition 1975:87 *Om riktlinjer för ändrad skatteadministration och taxering i första instans, m.m.* [government bill] (Swed.).

50. RSV Rapport 1983:1, *supra* note 47; Riksskatteverket, RSV Rapport 1998:3 *Skattefel och skattefusk. En utvärdering av skattekontrollen 1992–1997* (Swed.).

51. Riksskatteverket, *Tax Gap Map for Sweden: How was it Created and How Can it Be Used?* 9 (2008), https://www.skatteverket.se/download/18.361dc8c15312eff6fd2b9a4/1473840293366/Report_2008_1B.pdf [https://perma.cc/D98J-3862] (archived on Sept. 30, 2017) [hereinafter *Tax Gap Map*].

could be appealed to the administrative courts.⁵² In this way, a large number of cases were diverted from the criminal courts.

The palette of sanctions would be further widened in the 1980s. Following a heightened political interest in white-collar crime, new punishments were introduced to keep unscrupulous economic actors out of business for an extended period of time. The sanctions involved a ban on providing economic counseling or a ban on engaging in economic activities altogether, yet none have been much used in practice. The criminal justice system remains a significant source of punishment, and over the last decade, there has been a steady increase in reported tax and accounting crime. At the same time, the administrative sanctioning system has attained a routine character and outgrown the criminal courts in terms of decisions.⁵³

2. Undeclared Work

Undeclared work constitutes one form of tax evasion, which in recent years has spurred a specific series of regulatory inventions similar to ordinary policing. The discovery of undeclared work—and its subsequent politicization—was in a way a function of the extended fiscal control activity itself. As the tax agency built a capacity to monitor the companies' financial performance, the field auditors found a widespread practice of underreporting cash transactions. The transactions involved undeclared wage payments, undeclared sales, and unreported withdrawals. Large sums of money were in circulation that could not be taxed. In particular, by remunerating the workforce cash in hand, the companies could avoid the payroll tax. For the tax agency that meant a loss equivalent to the payroll tax, around 30 percent of the wage, plus what the employee would have paid as income tax. Expressed in terms of its organizational goal, undeclared work was estimated to comprise half of the entire tax gap, by far the single largest component, equivalent to SEK 66 billion.⁵⁴

The ambition to reduce undeclared work has not resulted in any changes in the general framework of rules. Instead, it correlates with a regulatory focus on certain branches. A number of branch-specific rules have been enacted to reduce undeclared work in accordance with the analysis that undeclared work is a problem above all in smaller companies in the low-wage service sector. Just like the

52. KARIN ALMGREN & BÖRJE LEIDHAMMAR, *SKATTEPROCESSEN* (2004); KARIN ALMGREN & BÖRJE LEIDHAMMAR, *SKATTETILLÄGG OCH SKATTEBROTT* (2006).

53. Brottsförebyggande rådet, *Polisens satsning mot organiserad brottslighet. En utvärdering av 43 projekt*, Rapport 2009:19 (2009); Skatteverket, *Skatter i Sverige - Skattestatistisk årsbok 2009* (2009) [hereinafter *Skatter i Sverige*].

54. *Tax Gap Map*, *supra* note 51.

overall strategy to reduce tax evasion, the focus on undeclared work in certain branches originated with the intensification of fiscal policing. In the 1970s, when the tax agency carried out large-scale audit projects in entire branches, and the police for the first time probed into "organized and economic crime," certain sectors were singled out as more problematic than others. Smaller companies in the construction, restaurant, cleaning, road haulage, taxi, and removal sector were seen to be especially prone to tax evasion and white-collar crime. Some of the companies were not even registered with the authorities and hence could not be taxed at all.⁵⁵ The control focus on these particular branches has remained strikingly constant ever since. The discussion of regulatory changes tailored to the special conditions in for instance the construction and the restaurant sectors dates back to the early 1980s.⁵⁶ However, it was not until very recently that branch-specific rules were enacted to turn undeclared work into declared work. Some of the more important rule changes include the reverse charge of value added tax in the construction sector, the updated staff registers in all restaurants and hairdressers, and the certification of cash registers in the entire retail sector.⁵⁷ The common denominator is the ambition to interfere in the undeclared cash flow, designing out noncompliance with the tax legislation.

In terms of regulatory change, the developments have been most dramatic in the second phase of regulation. The powers, the ambition, and the capacity to control undeclared work have expanded significantly, within and beyond the tax agency. Counteracting undeclared work first of all involved directing the general control mechanisms towards the analyzed risk branches. Within the branches, the tax agency had distilled indicators of noncompliance from decades of field audit protocols and the huge amount of regular tax data. The organization had a long tradition of using information technology, and implementing an explicit risk management approach in the 2000s was consistent with this tradition.⁵⁸ The approach involved new ways to select objects for control. The tax agency had assembled statistics of the expected turnover, the ordinary expenditures, and the average profit for companies in the high-risk

55. Riksskatteverket, *Effektivare revision* (1975); AMOB, *Organiserad och ekonomisk brottslighet i Sverige* (Rikspolisstyrelsen/Arbetsgruppen mot organiserad brottslighet 1977).

56. Lars E. Korsell, *Ekobrott, liksom!*, 10 SVENSK JURISTTDNING 932, 951 (2000) (A 1984 report authored by the Statens Offentliga Utredningar suggested that financial taxes and fees should be introduced in the construction and restaurant industries).

57. Prop. 2005/06:130 Omvänd skattskyldighet för mervärdesskatt inom byggsektorn [government bill] (Swed.); Prop. 2005/06:169 Effektivare skattekontroll m.m. [government bill] (Swed.); Prop. 2006/07:105 Konkurrens på lika villkor i kontantbranschen [government bill] (Swed.).

58. Skatteverket, Rapport 2005:8 *Riskvärdering. Metoder och principen* (2008).

branches, for instance a restaurant or a taxi business. Data mining instruments would then work their way through large computerized registers guided by the statistical information. As a consequence, any deviations from the established patterns in the produced tax returns could trigger a control. However, the control itself was largely the same as before: field audits and desk audits were used to reconstruct the money trail and to detect irregularities in the available documentation.

In addition, new control measures were invented to monitor the branch-specific rules. The tax agency performs unannounced field inspections in restaurants, in hairdressers, on construction sites, in taxi cars, and in any regular store. In 2008, eighteen thousand unannounced inspections were carried out in restaurants to control the staff registers and whether they correspond to the workforce present.⁵⁹ The tax agency also conducts field visits at construction sites, demanding identification of the workers and proof of tax registration. Further, tax inspectors may step into regular stores and control the cash registers to see whether they are certified or have been manipulated. The organization intends to carry out seventy-five thousand such inspections per year.⁶⁰ These kinds of field inspections are tied to the branch-specific rules and did not exist prior to them. They are simpler and less time-consuming than field audits, but the sheer volume of inspections represents a remarkable policing presence in the low-wage service sectors.

Undeclared work is pursued through a combination of massive presence and in-depth investigation. The control effect of the unannounced field inspections was reinforced by the intelligence-based techniques. Intelligence formerly had been considered police work in the strict sense but came to be entrusted to new actors in the field of taxation. In the beginning of the 2000s, the tax agency elaborated routines to carry out field observations strictly to gather intelligence. The methods involved counting the number of customers in a lunch restaurant, buying goods in a store for control purposes, or surveilling a workshop to establish ongoing activity.⁶¹ The intelligence thus mainly involved unsophisticated on-site observations. In more complex cases, the tax agency cooperates with other state organizations such as the police and the economic crime authority. Together, they have targeted the larger players in the trade with undeclared work, combining field audits, injunctions to

59. *Skatter i Sverige*, *supra* note 53, at 249.

60. Skatteverket, *Skatteverkets faktablad om kassaregisterlagen* (2010).

61. Riksskatteverket, RSV Rapport 2002:4 *Efterforskningsåtgärder i beskattnings- och brottsutredande verksamhet* (Swed.).

third parties, account-information from banks, and police intelligence.⁶²

The branch-specific regulatory focus is followed through in the branch-specific sanctions. Detected violations of the branch-specific rules are generally sanctioned through administrative fines. If the company cannot present a staff register or a certified cash register, it must pay a penalty charge according to a fixed table. The amount is large enough to be detrimental to a small business with a limited turnover. If the violations are more severe, if the cash registers are systematically manipulated to underreport sales, if a part or the entire wage of the workforce is undeclared, or if false invoices are used to cover transactions to remunerate the workforce cash in hand, the tax agency may hand over the investigation to the police and criminal justice system. The enhanced monitoring is linked to a significant increase in the number of individuals reported to the police suspected of tax crime and false accounting, including undeclared work, yet the development in terms of sanctions has so far been more modest. The large majority of detected violations are punished in a mundane fashion, involving administrative penalties. But a significant minority of cases has been managed by the criminal courts, resulting in harsh prison sentences when the undeclared work is found to have generated substantial amounts of money on the employer side.

Developments in the area of taxation since the 1960s, especially with regard to small- and medium-sized companies in the service sector, could be summarized as the prolonged rise of fiscal policing. The monitoring techniques and the sanctions, the targets and the institutional agents were either new or involved modifications of the criminal justice infrastructure. The major players were for the most part found outside of the criminal justice sector. A number of control and sanctioning mechanisms were introduced and subsequently used routinely and extensively. Field audits, field inspections, and financial intelligence were policing methods transferred to an economic context. The spread of tax surcharges, administrative fines, and criminal convictions was an indicator of the increasing presence of fiscal policing. The evidence consisted of documentation on money trails and financial irregularities, and the targeted companies were in the overwhelming majority of cases predominantly legal.

62. Skatteverket, *Slutrapportutyrningavarbetskraft. Svartjobbsgranskningen 2006–2008* (2009) (Swed.).

B. *Catching Crime in a Web of Taxation and Reporting Requirements*

1. Organized Crime

Traditionally, organized criminal activities are pursued by police organizations, tried in criminal courts, and sanctioned with prison sentences. Since the 1980s, however, a range of state agencies outside of the criminal justice sector have become more and more involved in the fight against organized crime, while adopting a strictly economic approach towards monitoring and sanctioning. This development runs parallel to a reinforced policing in the narrow sense. Organized crime remains the prime target for criminal justice. The conventional police organizations have all been mobilized to encounter what has been ranked as a security threat since the late 1990s, with the potential of disrupting the political and economic order.⁶³ However, the rising symbolic importance of organized crime has also been accompanied by a unified economic approach across the state organizations involved. A new consensus has been established according to which organized crime is essentially an economic matter. From an economic point of view, the activities present a mix of legality and illegality. What characterizes the criminally oriented groupings from an economic viewpoint is a flexible relationship to the legal framework—sometimes adhering to the basic rules of financial reporting, sometimes ignoring them and taking precautions to avoid detection.

The strategy starts from the official EU understanding of organized crime as essentially illegal business. In Sweden, more than ten state organizations, ranging from the social insurance board to the security service, are organizationally involved in counteracting organized crime.⁶⁴ As a result, organized crime confronts a new policing landscape stretching far beyond the criminal justice system. The involvement of new actors was consonant with a growing focus on economic transactions. The strategy was only recently given a name—summarized in the imperative “Follow the money!”—yet the regulatory reorientation started already in the 1970s.⁶⁵ For more than three decades, organized crime has increasingly been detected

63. See Action Plan to Combat Organized Crime, *supra* note 2; Justitiedepartementet, *supra* note 3; Ekobrottsmyndigheten (Swedish Economic Crime Authority), *Omvärlds- och hotbildsanalys 2008* (2008) (Swed.).

64. Brottsförebyggande rådet, *Polisens satsning mot organiserad brottslighet. En utvärdering av 43 projekt*, Rapport 2009:19 (2009); Justitiedepartementet, *supra* note 3.

65. AMOB, *Organiserad och ekonomisk brottslighet i Sverige* (Rikspolisstyrelsen/Arbetsgruppen mot organiserad brottslighet 1977); Statens Offentliga Utredningar [SOU] 1997:111 *Branschsanering och andra metoder mot ekobrott* [government report series] (Swed.).

and sanctioned through the expanded regulatory regime designed to tax companies.

The economic approach towards organized crime is to a large extent identical with fiscal policing in the predominantly legal economy. All moments of regulation are the same; the difference lies in the manner in which rules, monitoring techniques, and sanctions are being applied. First of all, no separate rules have been adopted for criminal economic activities. Organized crime is subject to the same rules as any other business. The legislation on taxation, accounting, company form, and bankruptcy are more often than not applicable to activities associated with organized crime. Whereas the rules imply compliance costs for legal companies, for organized crime above all two consequences stand out: the profit opportunities and the avoidance costs. Any regulation of legal economic activity establishes the conditions for illegal economic activity by creating profitable crime opportunities as well as by defining what must be evaded. Circumventing the compliance costs associated with rule following, in terms of taxation or reporting routines, implies a competitive advantage over legal companies and a higher profit margin, whereas the concomitant monitoring and sanctioning give rise to avoidance costs. Fiscal policing necessarily entails duties for all business, and, in this case, measures to avoid detection, taxes, and sanctions. This is also an essential part of the strategy towards organized crime which builds on the conscious use of monitoring and sanctioning to raise the avoidance costs.

The illegal economic activity of organized crime, although generally more complex than for instance false accounting detected in relation to an ordinary bankruptcy, represents no fundamentally different challenge to the regulatory frameworks surrounding markets. The control techniques are the same. The field audits, injunctions to third parties such as banks, unannounced field inspections, and bankruptcy investigations detect irregularities associated with organized crime as well as irregularities associated with legal businesses. But when the techniques are applied to organized crime, the objective is to punish—not to ensure compliance with the taxation legislation—and to raise the avoidance costs. And although the control techniques are the same, the manners in which they are applied differ. In relation to tax evasion more generally, the tax agency starts from the entire pool of financial information and then singles out a number of actors for closer examination through a complex selection process. In relation to organized crime, however, the tax agency has been notified in advance whom to control. The control selection is instead made by the police. All state organizations, insofar as they are counteracting organized crime, start from a number of designated actors whose identities are already known and whose financial information will be scrutinized.

The multi-agency approach also involves multi-agency sanctioning, which is a continuation of the multi-agency monitoring. The police typically initiate the sanctioning process when requesting information or assistance from the tax agency, the enforcement agency, or the social insurance board. Each of these agencies is in possession of specific sanctioning instruments. If the designated individuals lack reported income, or have an income that is not commensurate with the expenditures associated with their lifestyle, the tax agency may demand extra taxes by means of discretionary assessment and tax surcharges. Further, the special fraud investigating unit within the social insurance board has made extensive use of the lists produced by the police of individuals associated with organized crime. Many of them also appear on the lists of those who draw social benefits, and their use of sick leave, for instance, is investigated in detail. Social benefits found to be received on false grounds are subsequently reclaimed, in some cases resulting in claims of substantial amounts as the incorrect payments extend over several years. Finally, the enforcement agency may immediately freeze the assets of individuals, who are arrested as part of an ongoing criminal investigation. It can also enforce for instance outstanding tax debts in a more traditional way. All of these measures may be taken irrespective of whether the individual is convicted of a crime, as they are either of an administrative nature or not punishments at all, strictly speaking. Retaxation, enforcement of debts, and withdrawn social benefits were originally not intended as punishments, yet have been made to operate as such within the concerted multi-agency approach.

It should be stressed that the imperative to “follow the money” cannot be reduced to a policy level buzzword. Organizational practice was deeply affected. The strategies toward organized crime and tax evasion intersected in the pursuit of unreported transactions. A shared focus on the financial reporting of smaller companies in the low-end service sector was the joint policy implication. In a previous study, I examined a sample of two hundred written decisions relating to sanctions directed at restaurants in the three separate organizational tracks associated with taxation, criminal justice, and alcohol regulation.⁶⁶ The study indicates that the policy-level intersection was followed through in a shared focus on unreported transactions in organizational practice. The results from the fiscal investigation, while embedded in new legal contexts, returned in relatively unmodified form in the decisions on license revocations and on criminal convictions. The focus on unreported transactions is, thus, expanding across organizational and legal settings. In

66. Hörnqvist, *supra* note 7, at 355–56.

comparison to the situation before the intersection between “organized crime” and “tax evasion,” the contrast is striking. The written decisions from the 1990s contained no trace of attempts to reconstruct the real financial transactions, whereas such reconstructions can now be produced at the level of individual restaurants in a way that is sensitive to a given restaurant’s peculiar circumstances.

2. Money Laundering and Terrorist Financing

The global wave of anti-money laundering regulation reached Sweden in 1991 following the enactment of the first money laundering directive by the European Union. It has since been extended in successive turns.⁶⁷ The regulation responds according to shifting sovereign priorities. In the early 2000s, the existing anti-money laundering regime, installed to fight drugs in the 1980s and extended to fight organized crime in the 1990s, was transferred to a new political arena: the fight against terrorism. Alongside the military invasion of Afghanistan in October 2001, the first move in the War on Terror was to cut financing of suspected terrorist activities.⁶⁸ In this context, the anti-money laundering regulation was above all utilized to freeze assets and signal terrorist attacks in the making.⁶⁹ Strengthened with the ambition to cut financing for terrorism, the regulation was reinforced with new reporting requirements. Rules on risk management routines have also been adopted. According to the Third European Union Money Laundering Directive from 2005,⁷⁰ motivated by concerns of financial stability and of terrorism, all companies are expected to maintain sufficient routines for handling suspicious transactions, applying a risk-based approach and customer due diligence. Before executing any transaction, the currency exchange or the bank must know the identity of the client, the purpose of the transaction and the market of which it is part. If the company does not know the customer well enough to be able to assess the risk of money laundering, it must not proceed with the transaction.⁷¹

67. Statens Offentliga Utredningar [SOU] 1997:34 *Bekämpande av penningtvätt*, (Swed.); Statens Offentliga Utredningar [SOU] 2007:23 *Genomförande av tredje penningtvättsdirektivet* (Swed.) [hereinafter SOU 2007:23].

68. Levi, *supra* note 2.

69. See Nikos Passas & Samuel Munzele Maimbo, *The Design, Development, and Implementation of Regulatory and Supervisory Frameworks for Informal Funds Transfer Systems*, in COUNTERING THE FINANCING OF TERRORISM 174 (Thomas J. Biersteker et al. eds., 2008); Phil Williams, *Warning Indicators and Terrorist Finances*, in TERRORISM FINANCES AND STATE RESPONSES: A COMPARATIVE PERSPECTIVE 73 (Jeanne K. Giraldo & Harold A. Trinkunas eds., 2007); Levi, *supra* note 2, at 651–54.

70. Directive 2005/60/EC, *supra* note 2.

71. *Id.*; SOU 2007:23, *supra* note 67.

What is regulated is not the money laundering actors themselves, ranging from individual employers to terrorist groups, but the entities with which they enter into business relations: banks, remittances, currency exchanges, casinos, real estate agents, car dealers, and jewellers. In particular, banks, remittances, and currency exchanges are regarded as being indispensable to the process of money laundering, regardless of their own intentions,⁷² and have for this reason been subjected to the extended reporting requirements, monitoring, and sanctioning practices. They are absolutely essential yet reluctant partners, with no inherent incentive to report, a fact of which the regulators are well aware. The responsibility for monitoring compliance is spread over five different state organizations. The Financial Supervisory Authority is the main player, and to the extent that compliance is being monitored in practice, it is primarily carried out by this organization. The agency is equipped with far-reaching policing powers, in particular since the introduction of on-site inspections in 2008. Once a financial institute is authorized, the financial supervisory authority can conduct on-site inspections, announced or unannounced, to investigate compliance specifically with the anti-money laundering legislation. The inspectors will go through available documentation, interview staff on site, and request further relevant information. According to a European Commission directive from 2006, the on-site inspections “shall include the review of policies, procedures, books and records, and shall extend to sample testing.”⁷³ The reference to “sample testing” means that risk assessments in individual cases can be scrutinized—and questioned on the basis of the findings of the on-site inspections.

The extension of policing powers has not been matched with an equivalent increase of resources. The financial supervisory authority performs few on-site inspections of authorized financial institutes and cannot control nonauthorized financial institutes. The administrative

72. The large banks make money on all kinds of financial transactions, including financial transactions involving money laundering. There is little incentive on their part to root out a practice which is profitable. The financial sector is often capable of withstanding regulatory incentives, as Young and Pagliari have shown based on comparative data. See Kevin Young & Stefano Pagliari, *Capital United? Business Unity in Regulatory Politics and the Special Place of Finance*, 11 REG. & GOVERNANCE 3 (2017). Nevertheless, in this case the sector has proven unable to resist anti-money laundering requirements that go well beyond the conventional regulatory standards of ‘safety and soundness.

73. Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as Regards the Definition of ‘Politically Exposed Person’ and the Technical Criteria for Simplified Customer Due Diligence Procedures and for Exemption on Grounds of a Financial Activity Conducted on an Occasional or Very Limited Basis, 2006 O.J. L 214/29, Article 3(2).

sanctioning system has been in place for some time but is relatively untested. Typically, the financial supervisory authority issues warnings to noncompliant companies, followed by prescriptions on how to improve the routines. Should the rules violations continue, the same agency can resort to straightforward punishment: monetary fines or revocation of the authorization. Over the last decade, the regulatory pressure on the financial institutes has increased significantly. The fines are designed to be tangible, with an upper limit of 50 million SEK. In some much publicized cases—involving both large banks and currency exchanges—the maximum amount was demanded and upheld by the administrative courts. During the years 2012 and 2016, two major banks were fined (one of them twice) and one large chain of currency exchanges was deprived of its authorization.⁷⁴ In context, the time period represents an enforcement drive. The investigations, the sanctions, and the ensuing public discussion have sent a clear message. It is currently not possible for any major bank or currency exchange to disregard the anti-money laundering regulation. The reputational risks, in particular, are considerable. As a result, all large banks house specialized units to discover suspicious transactions and, due to the complexity of the regulatory requirements, there is an emerging market for anti-money laundering consultants.

The specificity of the evolving anti-money laundering regime could be seen to reside in the suspicious activity reports, although it also involves advanced intelligence processing and new organizations monitoring financial transactions. According to the official definition,⁷⁵ money laundering can be part of a scheme to avoid paying taxes, to remunerate undeclared work, to convert the proceeds of crime into legal property, or to channel money to subversive activities. It may involve many and complex steps, but some moves are considered typical and are used as indicators, for example large cash transactions, deviant transaction patterns, and unaccounted transactions. Such transactions are “suspicious”; that is, they may indicate money laundering.

The regulation is entirely rule-based. The anti-money laundering rules enumerate which kinds of transactions are suspicious—and must therefore be reported to the Financial Intelligence Unit, a special organization within the Police. In particular, cash transactions arouse attention. As long as amounts are simply transferred between bank accounts, money is easy to follow for investigators. But cash transactions involve a break in the chain,

74. Written communication with the Director of Risk Supervision – Markets at The Financial Supervisory Authority (Feb. 10, 2017).

75. Directive 2005/60/EC, *supra* note 2.

which allows individuals to hide the origins or the destination of the money.

The suspicious activity reports provide input in a separate risk communication system. All large banks, so far the major players as regards the regulatees, have set up specialized reporting units to manage the risk of money laundering. Typically, a deviant transaction pattern within, for example, a small construction company is discovered through the bank's risk management system; the bank sends a report to the Financial Intelligence Unit, which analyzes the information and requests further data from the bank, such as a statement of accounts. The Financial Intelligence Unit will then pass on the information. Depending on which, if any, connection emerges—drugs, fraud, tax evasion, terrorist financing—the information is circulated to the intelligence sections of the Police, the Customs Service, the Tax Fraud Units, or the Security Service. From there, if the suspicion becomes reinforced, the costs and the proceeds of the construction company may be further investigated by the Prosecution Authority, the Economic Crime Authority, or the Tax Agency.

The suspicious activity reports insert a wealth of new information into an already existing general regulatory framework composed of interlocking state organizations. The regulation has created a separate communication system to uncover unwanted economic activities that are difficult to detect in the ordinary tax-related information. The system is closed, separate, and innovative. It is closed in the sense that all information is classified, starting with the suspicious activity reports. It is organizationally separate from the monitoring of regular financial information. In this sense, the money laundering regime is the direct opposite of the economic approach to organized crime, which operates via existing organizations and information flows. And it is innovative, since the risk communication system unfolds independently of standard accounting principles. Historically, financial accounting for investors was closely associated with tax accounting for the state.⁷⁶ With the creation of a risk communication system centered on “suspicious transactions,” however, the links to both taxation and investments were weakened. The framework of reporting requirements on financial transactions was extended to sovereign concerns other than taxation, and the value of this move for economic decision making was not even considered.

76. PER THORELL, SKATTELÄG OCH AFFÄRSSED (1984); Peter H.J. Essers & Ronald Russo, *The Precious Relationship Between IAS/IFRS, National Tax Accounting and the CCTB*, in *THE INFLUENCE OF IAS/IFRS ON THE CCTB, TAX ACCOUNTING, DISCLOSURE AND CORPORATE LAW ACCOUNTING CONCEPTS: A CLASH OF CULTURES* 29 (2009).

One might think that the importance of the current anti-money laundering regime lies in its capacity to extract financial information from the private sector to pursue existential enemies associated with terrorism and organized crime. The principal objective is punishment—of drug-related crimes, organized crime, and terrorist financing. In practice, however, it connects to other parts of the crime control agenda, such as tax offenses. Although combating tax evasion does not play a prominent role in the justification of anti-money laundering measures, the information extracted has proven useful in relation to this end. A study on the crimes detected via the stepwise processing of suspicious activity reports in the Swedish anti-money laundering system shows that the cases are dominated by tax offenses, fraud, and the internet drug trade. The unreported transactions often originate in the restaurant, construction, road haulage, and other trades, where cash transactions have traditionally been central, a prime example being remuneration of the workforce using cash.⁷⁷ Activities associated with more common understandings of terrorism and of organized crime are absent.

The anti-money laundering regulation, like the regulatory approach to organized crime, transcends traditional boundaries between policing and regulation. The basic operation is the same: collecting information on economic transactions and establishing where the money comes from and where it goes. The information on economic transactions is processed mainly in order to combat crime. But the strategies draw information from different kinds of sources. The economic approach to organized crime detected and sanctioned economic irregularities mainly via the regulatory regime designed to tax companies, whereas the separate risk communication system on money laundering was created to identify precisely those economic irregularities that were difficult to detect on the basis of this everyday tax-related information. From that perspective, the strategies could be seen to be complementary.

While the anti-money laundering regulation strictly speaking is about processing financial information, in context it is about enemies rather than economy. The approach has less to do with correcting market failures than with pursuing enemies of the state. It was developed based on the understanding that terrorism and organized crime—formidable enemies, who were also pursued through conventional wars and criminal justice—had become effectively submerged in the economy. As economic actors, they were to be rooted out and disrupted *through* the economy; that is, by tapping into financial information being collected and circulated by other economic actors. It has been described as a hidden war, consciously

77. Brottsförebyggande rådet, *Penningtvätt – Rapportering och hantering av misstänkta transaktioner XX* (2011).

orchestrated by the Treasury.⁷⁸ Consequently, the anti-money laundering regulation must be seen as a continuation of the tradition in which the state asserts its authority, pursues its enemies, and exacts tribute within the economic sphere.

IV. CONCLUSION

This Article has argued that the recent state strategies to counteract tax evasion, undeclared work, organized crime, money laundering, and terrorist financing operate in ways that make any distinction between crime control and business regulation largely untenable. The regulatory approaches transcend the categories developed by research traditions separated by the criminal law. The types of law, the kinds of techniques, the justifications, the jurisdictions, and the variety of sanctions associated with either business regulation or traditional policing came to be used in concert, or strategically superimposed on each other. In this way, the analysis contributes to a more integrated understanding of the contemporary regulatory state, territorially decentered, involving a variety of regulatory styles and a layered web of organizations ranging from the police, through the tax agency, to private regulatory bodies.

Moreover, the Article has argued that the recent state strategies involve a rearticulation of sovereignty. It could be called “sovereignty at center,” as distinct from the more conventional “sovereignty at periphery,” which is implicated in the punishment of marginalized groups. In particular, the regulatory approaches toward organized crime and money laundering articulate sovereignty at the very heart of society, in the economic sphere. According to the reconstructed classical understanding, found in classical political theory, sovereignty involves the monopoly of violence, a fundamental legality, unbounded reasons of state, symbolic authority, and conflicts with formidable foes. Current articulations of such elements in the economic sphere were visible in the regulatory approaches to organized crime and money laundering. The approaches targeted existential enemies who were perceived to be submerged in the economy and who had to be rooted out through the economy—by the processing of financial information. The elements of display and of overt violence were thus less conspicuous compared to sovereignty at the periphery. Still, “sovereignty at the center” is characterized by a fundamental complexity. Given the overall position of the state in the social fabric, its sovereign interventions may amend market failures to stabilize economic crises or to protect property rights. Yet the state

78. JUAN C. ZARATE, *TREASURY'S WAR* (2015).

can also assert its authority, affirm order ritually, and take tributes regardless of economic repercussions. In such cases, it draws on a long tradition of sovereignty as the assertion of a solipsistic will, undisturbed by considerations of utility.