Lawyers, their AML regulation and suspicious transaction reporting

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Introduction

When addressing the issues of lawyers and their regulation for money laundering purposes, it is helpful to consider to what problems these are supposed to be either the solution or (more likely, in the view of this author) the mitigation. These are essentially threefold:

1. Lawyers as primary offenders, most commonly as fraudsters on their own or in active combination with co-offenders for their own benefit, including the avoidance of financial ruin or of blackmail;

2. Lawyers as crime facilitators, providing legal services to the establishment of corporate and other legal instrument fronts for crime commission and/or for money laundering with varying degrees of consciousness/suspicion of the purposes of these legal services;

3. Lawyers as victims or neutral intermediaries who are hacked, either for exposure of their clients' sometimes dubious activities (as in Mossack Fonseca) or as an unwitting counterparty, e.g. in scams which divert funds from clients (e.g. in property sales) to third parties by simulating that the fraudsters were actually the law firm.

Some controls over lawyers may be aimed at the first category, though Legal Professional Privilege (LPP) issues often arise where investigators seek contemporaneously or *ex post facto* to investigate the files and interactions.[1] Other controls relate to the consciously or inadvertently pejorative term 'enablers', which could refer to anyone in the 'crime script' chain, and may reflect the cynicism with which the legal profession is sometimes viewed by the general public, law enforcement, media and politicians. To date, it appears that no lawyers have been convicted around the world in connection with the Panama Papers, but one accountant has been jailed for 39 months in the US.[2] Except inasmuch as the cyber hacks detail some myopic (at best) lawyer conduct, I will not discuss here the third category, though it is of growing economic and cultural importance.[3]

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[1] There can be confusion as well as national legal variation over whether the privilege attaches to the lawyer or to the client.

[2] https://www.justtherealnews.com/exec-depts/justice-department/u-s-accountant-in-panama-papers-investigation-sentenced-to-39-months-in-prison/. Both the US and German authorities currently seek Mossack and Fonseca's extradition, but Panama does not extradite its citizens.

[3] Khalid Mohammed Sharif, partner at Belgravia firm Child & Child, has been fined £45,000 by the Solicitors Disciplinary Tribunal. Costs of £40,000 were also imposed. According to the SDT decision, Sharif's failings had 'led to a risk of large

In addition to placement, layering and integration, there is a stage of creation and another of consolidation. Obviously any analysis of the adequacy of lawyer regulation is predicated upon what has been investigated and therefore is known about, and this in turn is affected by the powers of the investigative authorities as well as their priorities (for example a general preference for prosecuting drug dealers and terrorists over tax fraudsters, especially where tax and other regulatory agencies have had their budgets slashed). In the modern era of global crime connections (which constitutes only a sub-set of all crimes for gain), work comes to any law enforcement and mutual assistance authority in two ways: from cases of domestic and of overseas origin, and from a variety of sources, including Suspicious Activity Reports (SARs), organised crime investigations, journalistic exposes, et cetera. Lawyers' involvement arises from their utility (a) as legitimators of schemes by enhancing their credibility, (b) as the sole persons licensed to transfer property in some jurisdictions, (c) as persons able to establish corporations and other vehicles of ownership concealment and funds transfer, and (d) as assistants to launderers by introducing criminals to financial institutions as their clients and by lending their accounts to criminals for cash deposits that otherwise would be regarded as suspicious (or over the reporting threshold in those jurisdictions that have such rules). In some (mostly civil law) jurisdictions, commercial and personal property transfers can only be made by notaries, whereas in Anglo-Saxon regimes, notaries have less importance.

The regulation of the legal professions is one of the most varied components of the AML regime around the globe and there is a spectrum of lawyer engagement and regulation from the UK, at one end, to Australia and the US at the other. Legal professional privilege is one of the most closely guarded areas, though whereas the British accept that in many contexts, lawyers are behaving merely as commercial enablers to which should be attached no special legal professional privilege, this is not so everywhere. Indeed, in Belgium, the Constitutional Court partially annulled the Law of 18 September 2017 on the prevention of money laundering, with the result that a member of the bar cannot be obliged to report a suspicious transaction to the Financial Intelligence Processing Unit (CTIF-CFI) when his client, on his advice, stops such a transaction. Neither can someone who is a third party to the

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amounts of money being laundered' and his culpability was high. However…he co-operated with the investigation and had voluntarily reported himself to the Solicitors Regulation Authority. Sharif's clients…have been reported to be two daughters of a central Asian head of state. The women set up a British Virgin Islands-incorporated company to help manage two properties in Knightsbridge, London. The properties were worth nearly £60m…. Child & Child had instructed Mossack Fonseca to incorporate the company. Sharif claimed that the two women had no political connections. But, according to the published outcome, Sharif admitted that he failed to take adequate steps to check this, when even an internet search might have identified them as politically exposed persons. The solicitor, admitted in 2005, also admitted to not undertaking enhanced customer due diligence even though he had not met the clients. Sharif was the firm's money laundering reporting officer (MLRO). 'The respondent was wholly culpable for his misconduct. Further, he was the MLRO at the firm. This should have heightened his sense of his obligations, and his awareness of the risks,' the judgment said. *https://www.lawgazette.co.uk/law/panama-papers-solicitor-fined-45000-/5068873.article*. See https://www.icij.org/investigations/panama-papers/20160509-american-fraudsters-offshore/ for some US law firms' assistance to well known American fraudsters.

relationship of trust between the lawyer and his client, even if he is a lawyer as well, be allowed to communicate to CTIF-CFI information covered by professional secrecy.[4] Part of the tension in these issues lies in disputes about the extent of harm caused either by lawyer misconduct or the absence of reporting. The evidence about how frequently (rotten barrel) or rarely (rotten apple) the legal profession is consciously engaged in money laundering is not strong enough to be conclusive: the electronic surveillance that has become so ubiquitous in some jurisdictions cannot legally and publicly be utilised in lawyer-client meetings, and strong evidence is needed to justify seizing and using what normally would be privileged material on the grounds that it meets the 'crime/fraud exception' that negates privilege.[5] The aim of this paper is to describe and explain how different legal regimes deal with the involvement of lawyers in laundering. From a policy perspective, it seems clear to this author that getting lawyers to identify clients and to consider reporting/actually report their subjective suspicions of their clients will not eliminate all money laundering. Indeed, unless more is done about lawyers' and others' reports than has been the case in the past, it is not clear what the practical value of such a reporting process is, though it still has a

[4] The obligation for independent legal professionals, including lawyers, to report information in particular circumstances led to much opposition, though the protection of professional secrecy of lawyers is not explicitly set out in the Belgian Constitution. The Belgian Bars asked the Constitutional Court to annul the domestic act implementing the European Directive (Const. Court No. 126/2005, 13 July 2005.) The Constitutional Court referred a preliminary question to the European Court of Justice asking whether the obligation for professionals in the financial sector to report potential money laundering by clients to official authorities violated the constitutional prohibition of discrimination read in the light of Art. 6 ECHR. Given that the Belgian implementing act almost entirely copied the text of the Directive, a finding by the Constitutional Court that the implementing act violated fundamental rights would imply that the Money Laundering Directive suffered the same flaws. In its judgment *Ordre des barreaux francophones et germanophone*, the European Court of Justice answered that the Directive establishing this obligation did not violate the constitutional right to non-discrimination read in the light of Art. 6 ECHR. (Case C-305/05 *Ordre des barreaux francophones et germanophone and others* [2007] ECR I-05305.) The ECJ indicated that sufficient guarantees had been provided in the Directive, given that the obligation to report is limited to the execution of certain transactions, essentially those of a financial nature or concerning real estate, and no obligation to report was provided where a lawyer is called upon to assist or represent a client before the courts. The Bar Association to which a lawyer belongs in Belgium varies according to the language, but the President of each has to exercise his supervision based on a risk assessment. To that end, he has to ensure that he:

- has a clear understanding of the ML/FT risks present in Belgium, based on relevant information concerning national and international risks, including the report drawn up by the European Commission pursuant to Article 6(1) of Directive 2015/849 and on the national risk assessment referred to in Article 68;
- bases the frequency and intensity of on-site and off-site supervision on the obliged entities' risk profile.

The President of the Bar Association has to adopt a supervisory regime in order to ensure compliance by the lawyers, and the implementing measures of Directive 2015/849. For the Flemish Bar Association (OVB), the President can ask for the assistance of a centralized AML Audit Cell at OVB level. When the President of the Bar Association finds that a lawyer for whom he is responsible has breached the provisions, he can take the following measures with regard to the obliged entity involved:

- issue a public statement mentioning the identity of the natural or legal person and the nature of the offence;
- issue an injunction that the natural or legal person ceases this behaviour and does not repeat it;
- impose a temporary ban for any person with a management role in the obliged entity or any other natural person held responsible for the offence, to carry out management positions.

The President of the Bar Association can also impose an administrative fine of at least EUR 250 and at most EUR 1 250 000. Actual enforcement data are unavailable so there is no evidence of how this works in practice.

[5] For a good example, see *Super Worth International Ltd -v- Commissioner of the Independent Commission Against Corruption,* HCMP1320/2012, 3 July 2015

symbolic importance. However, with these caveats, this paper aims to examine in variable detail the contentious issues surrounding AML and its application to the legal professions.

The US ABA focuses on educating lawyers regarding unwitting involvement so that (as they assert) criminals will not be able to find lawyers who will assist them in their unlawful schemes. The Bar Associations state:[6]

> "In a recent empirical study regarding terrorist financing, U.S. law firms performed among the best among surveyed entities in refusing requests for help in suspicious circumstances. This is a good illustration of approaches that are "different" to those in the 40 Recommendations and are working effectively in practice."

The notion of 'effectiveness' is left wholly implicit in the statement above. This 'professional exceptionalism' may be connected with professionals' sense of their own virtue. A survey presented in Vancouver at the International Bar Association conference in 2010 found no Canadian lawyer surveyed considered that corruption was a major problem facing the legal profession in their country, compared with just under 40% in the UK and in the US.[7] The proportion was over 70 per cent in the following regions: CIS, Africa, Latin America and, Baltic States and Eastern Europe. More than a fifth of respondents said they had been approached or may have been approached to act as an agent or middleman in a transaction that could reasonably be suspected to involve international corruption. Nearly a third of respondents said a legal professional they know has been involved in international corruption offences. 43 per cent of respondents recognised that their bar associations provide some kind of anticorruption guidance for legal practitioners. Of these, only a third said that such guidance specifically addresses the issue of international corruption. More than two-thirds of respondents said their law firms had not been subject to anticorruption or anti-money laundering due diligence conducted by foreign clients. These results – from a non-random global survey of the legal profession, making it less representative and valid – are now a decade old, and are related only to corruption, but nevertheless are a useful backdrop to this study.

A global report by a range of three international Bar Associations in 2014 set out its ambit as:[8]

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[6] *A Lawyer's Guide to Detecting and Preventing Money Laundering* 2014, P.47. There is no reference given, but this is a rather selective reading of the *Global Shell Games* study, since on other measures related to 'ordinary' and 'grand corruption' money laundering, US financial services firms and lawyers performed poorly when approached by the researchers experimentally.

[7] *Risks and threats of corruption and the legal profession: Survey 2010*, www.anticorruptionstrategy.org.

[8] *A Lawyer's Guide to Detecting and Preventing Money Laundering*, 2014, p.7

ABA	CCBE	IBA
ABA comprises almost 400,000 members Operates the Task Force on Gatekeeper Regulation and the Profession that examines government and multilateral efforts to combat international money laundering and the implications of these efforts for the legal profession Formulates an effective AML and counter-terrorist financing policy consistent with the U.S. Constitution and other fundamental underpinnings of the lawyer-client relationship. Educates lawyers about AML initiatives, including ABA Formal Ethics Opinion 463.	The CCBE represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers Includes the Anti-Money Laundering Committee Clarifies how the Recommendations and EU Directives have been implemented in the various EU member states.	Membership consists of 30,000 individual lawyers and over 195 bar associations/law societies globally Operates the Anti-Money Laundering Legislation Implementation Working Group Focuses on challenges for the legal profession presented by compliance with AML legislation throughout the world Provides country by country information on the following website: *http://www.anti-moneylaundering.org/globalchart.aspx*

The International Bar Association has a specialised working group within its Public and Professional Interest Division, the Anti-Money Laundering Legislation Implementation Working Group, which focuses on the challenges for the legal profession presented by compliance with AML legislation throughout the world. The ABA's Task Force on Gatekeeper Regulation and the Profession was created in 2002 to analyse and coordinate the ABA's response to AML enforcement initiatives by the U.S. federal government and other organisations that (from its perspective) could adversely affect the lawyer-client relationship. It reviews and evaluates ABA policies and rules regarding the ability of lawyers to disclose client activity and information, helps develop policy positions on gatekeeper-related issues, runs educational programs for lawyers and law students and produces related guidance materials for lawyers. It has been an active lobby group, including lobbying against tougher AML regulation of the US legal profession.

The pan-European CCBE has had many discussions with FATF and the European Commission in connection with AML regulations and directives. It has worked alongside other European organisations and the EC to produce a useful document setting out the implementation of the Recommendations within the European Union and answering questions on related issues such as tipping-off, the jurisdiction of relevant bar associations over reporting obligations, and the circumstances under which a lawyer is obliged to report to authorities.[9] In addition, national representative bodies include the Law Society of England and Wales and its Money Laundering Task Force ("MLTF") commenced in 2002, following discussions with government, law enforcement, other regulatory bodies and the

[9] CCBE, *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*, 2018, Council of Bars and Law Societies of Europe, Brussels.

profession, when it issued official guidance for solicitors, periodically revised and extended. This will be examined later in greater detail. It would be a mis-characterisation to represent this resistance to lawyer obligations towards the State as motivated purely by economic self-interest: in the light of authoritarian regimes past, present and doubtless future, legal (and/or client) professional privilege is an important value.

FATF and lawyers

FATF engagement with the private sector has been changing and it has reviewed its own guidance to the legal professions in 2019, paras 131 and 132 of which deal with the contentious issue of lawyer reporting of suspicions.[10] There are and plausibly will remain many national differences in the implementation of FATF principles. Let us take, for example, Politically Exposed Persons, to whom must be applied Enhanced Due Diligence measures, by the legal profession as by others. The German, Italian, Spanish and UK AML laws follow the EU definition of PEPs, while Switzerland defines PEPs as the FATF does. Italy goes beyond international standards, as the national definition of PEPs includes other individuals such as mayors and heads of regions. Likewise, in Spain, persons like mayors of towns of more than 50,000 people or persons holding senior management positions in trade unions or employers' organisations also fall within the scope of PEPs.

According to the FATF, there are *Special Rules for Privileged Professions.* Pursuant to Recommendation 23(a), lawyers, notaries, other independent legal professionals and accountants should be bound by the reporting obligation when, on behalf of or for a client, they engage in a financial transaction in relation to any of following activities: buying and selling of real estate; management of client money, securities or other assets; management of bank, savings or securities accounts; organisation of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements; and buying and selling of business entities.

The requirement to file a SAR should however not be mandatory "if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege".[11] The material scope of professional secrecy is left to the discretion of States. However, according to the Interpretative Note to Recommendation 23, this "would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings."

[10] *Guidance for a Risk-Based Approach Guidance for Legal Professionals*, FATF, 2019.
[11] Interpretative Note to FATF Recommendation 23 (2012), para. 1.

In principle, lawyers, notaries, other independent legal professionals and accountants are required to submit their SARs directly to the FIU.[12] However, according to the Interpretative Note to Recommendation 23, "[c]ountries may allow lawyers, notaries, other independent legal professionals and accountants to send their SAR to their appropriate self-regulatory organisations, provided that there are appropriate forms of cooperation between these organisations and the FIU".[13] Furthermore, where they "seek to dissuade a client from engaging in illegal activity, this does not amount to tipping-off ".[14] The Bar Associations' report states that lawyers should consider adding provisions to their terms of engagement that track the protections in Recommendation 21 so as to protect themselves contractually from civil liability for compliance with STR obligations if they report suspicions in good faith to the FIU; and do not disclose to, or tip off, the client that an STR is being filed with the FIU.[15] The IBA's International Principles on Conduct for Lawyers make it clear that the principle of treating client interests as paramount is qualified by duties owed to a court and the requirement to act in the interests of justice.[16] The same concept is found in ABA Model Rule of Professional Conduct 3.3, in which certain specific obligations to the tribunal take precedence over obligations to the clients. The CCBE Code of Conduct lays down similar principles for European lawyers.[17] The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 463 in May 2013 dealing with the ethical dimensions of the ABA's *voluntary* AML good practice guidance and noting the tensions between compliance with AML obligations and the duty of confidentiality that lawyers owe to their clients.[18] Its accent is on the latter. The possible consequences of these disparities for forum shopping by offenders is nowhere mentioned, though this report for the Cullen Commission does not take the existence of that forum-shopping for granted: the ease of using lawyers in another jurisdiction when most of one's criminal businesses are elsewhere is an issue that so far has eluded empirical or even conceptual analysis. It may be one thing for an American lawyer to act on Canadian or Mexican matters, but quite another to act in European or Australian ones, unless they belong to a firm with a branch there. It is a moot point how many lawyers in which jurisdictions would deny themselves lucrative fees by refusing to act where there is objectively no good reason for employing lawyers, say, in the US rather than in Europe.

The EU Second Directive adopted a broad definition of money laundering, including predicate offences such as corruption. It raised the possibility of application to lawyers

[12] FATF Recommendation 23 (2012).
[13] Interpretative Note to FATF Recommendation 23 (2012), para. 3.
[14] Interpretative Note to FATF Recommendation 23 (2012), para. 4.
[15] P.18.
[16] International Bar Association. "Commentary on IBA International Principles on Conduct for the Legal Profession." 28 May 2011
[17] CCBE. "Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers". 2013. https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf
[18] *See* Formal Opinion 463 (May 2013), ABA Standing Committee on Ethics and Professional Responsibility.

participating in financial or corporate transactions, which was met with fierce opposition by the European Parliament. A compromise was reached and professionals, such as lawyers, were excluded.[19] However following '9/11' and the Madrid bombings, and developing FATF pressures, the EU Third Directive of 2006 made the regime applicable to lawyers, notaries, accountants, real estate agents, casinos and encompassing trust and company services, for CDD and cash transactions exceeding €15,000.

In Europe, Art. 34(2) 4AMLD provides an exception to the reporting requirement enshrined in art. 33(1)(a) 4AMLD. Notaries and other independent legal professionals, such as lawyers, are not subject to the obligation to report where they are bound by professional secrecy, that is when the matter "relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings."[20] This exemption from the reporting obligation also applies to tax advisors, external accountants and auditors.

The general obligation under the 4MLD not to undertake transactions where CDD is incomplete does *not* apply to independent lawyers, patent attorneys, notaries, auditors, tax advisors and tax agents, if their client seeks legal advice or legal representation, *except* where the obliged entity knows that the client is consciously using the legal advice or representation for the purpose of money laundering or terrorism financing.

The 5th Money Laundering Directive imposes further requirements on the legal profession, including:

- An obligation to consult a beneficial ownership register when performing AML due diligence, and a requirement for law firms to report any discrepancies between the register and the information they hold; and
- An extension of beneficial ownership reporting requirements to trusts.

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[19] "The parliamentary members of the special conciliation committee accepted virtually all of a text governing the professional secrecy of lawyers and their clients as proposed by the Belgian presidency of the EU. Tackling the big outstanding problem, the MPs agreed legal advice could be exempted from professional secrecy where a lawyer was taking part in money-laundering activities or knew that his client was seeking advice for money-laundering purposes. But the committee voted down a presidency proposal that lawyers should report their clients to the authorities when there was "reason to believe" the client was seeking advice to launder funds. Yesterday's discussions in the parliament have thus left resolution of an increasingly bitter dispute between the parliament and member states over money-laundering rules hanging on a phrase. If parliament and member states cannot resolve their differences by mid-November, the legislation will collapse" 'EU fails to find accord on anti-terrorist financing rules', *Financial Times*, 3 October 2001.

[20] In its report on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities published in June 2017, the European Commission asserted that this exemption from the reporting obligation is often abused by legal professionals (European Commission, *Report on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross- border activities*, 26 June 2017, COM(2017) 340 final, para. 2.1.5.). However, there are no good data to illustrate how often, or indeed whether this 'abuse' is more than insisting on their legal rights.

Summarising a range of European jurisdictions, Maillart stated:[21]

> Legal professionals, in particular lawyers and notaries, and tax advisors fall within the scope of the FATF Recommendations and the 4AMLD and are subject to AML/CTF regulations in all the jurisdictions analysed. It should be noted, however, that at the moment tax advisors and legal professionals in Switzerland fall within the scope of the AML law only insofar as they act as financial intermediaries, i.e. when they qualify as "persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets". Such professionals are therefore not subject to the AML law when their work is limited to preparing or executing non-financial aspects of the transactions concerned. In particular, this means that acts related to setting up companies, legal persons and legal arrangements, in which lawyers, notaries or fiduciaries may be involved without being involved in transactions such as transfers, are outside the scope of the AML law. In contrast, under the 4AMLD as well as under German, Italian, Spanish and UK laws, legal professionals are deemed obliged entities when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or when they assist their clients in the carrying out or the planning of transactions concerning: (i) the buying and selling of real property or business entities; (ii) the management of client money, securities or other assets; (iii) the opening or management of bank, savings or securities accounts; (iv) the organisation of contributions necessary for the creation, operation or management of companies; or (v) the creation, operation or management of trusts, companies, foundations or similar structures. As regards tax advisors, EU, German, Spanish, Italian and UK laws designate such professionals as obliged entities irrespective of any particular type of professional activity.

Some Specific European Jurisdictions

France

Much of the French legal profession has focussed on CDD obligations. The STR obligation is organized in such a manner that all communications must be sent to the head of the regional bar (*bâtonnier*), who is the only person authorized to enter into direct contact with the FIU. Individual advocates are not allowed to contact the FIU direct, and vice versa. Suspicious transaction reports received by the bâtonnier are not automatically passed on, the *bâtonnier*'s role being to "assist colleagues, verify reports and ensure that no rules on professional secrecy are infringed."[22] A confidential dialogue may take place between the reporting advocate and the *bâtonnier*, which is not to be disclosed to the FIU. Irrespective of whether

[21] P. 809.

[22] Conseil National Des Barreaux. *Guide Pratique: Lutte Contre Le Blanchiment Et Le Financement Du Terrorisme*, at p.28.

an STR is transmitted by the *bâtonnier* and the FIU's response to it, the reporting lawyer must immediately terminate his retainer or representation. Nougayrede notes that "[t]he implication here is that for the French bar authorities, the very expression by a lawyer of her suspicions in writing means that she is no longer able to carry out her duties objectively and independently, and must therefore cease to act."[23] There are 163 *bâtonniers,* of which the Paris Bar is by far the largest.

One forthcoming comparative study of how French and German lawyers manage the tensions between confidentiality and AML obligations observes:[24]

> Lawyers use several strategies to avoid becoming responsible for crimes on behalf of their clients. First, they carry out extensive KYC controls. Second, they relay clients to banks and rely on them to carry out necessary controls (in France, every transaction is decided and controlled by Carpa). Third, they reject clients rather than entering a risky relationship.
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> Finally, they are involved in peer-to-peer counselling. In the French case, this is mainly a dialogue between the individual lawyer and the bâtonnier. The one thing that no lawyer does is to report a client. In fact, a former bâtonnier in Paris interprets the obligation to report to the police as "treason".

Lawyers relying on banks for checks on existing and new clients: if a bank has already checked where the money comes from, then that is good enough for them for 'source of funds'. Rejecting a client is viewed as preferable to taking them on and then reporting them. In France 1,474 reports by notaries and one by a lawyer were made to the FIU in 2018; rising to 1816 by notaries and 12 by lawyers in 2019.[25] Tracfin congratulates the now widespread use of the ERMES platform by the profession, 93% of suspicious transaction reports being transmitted by this secure and electronic system (which reduces the time the FIU needs to take on processing). 37% of contributing notarial studies in 2019 are first-time declarers, which underlines the profession's growing awareness of AML / CFT issues. These good results are the translation of awareness-raising actions carried out in a coordinated manner, in all of France, by Tracfin, the notarial profession itself and the Caisse des Dépôts et Consignements as well as the means deployed by the profession in 2018 (vigilance questionnaire, e-learning, access to lists of interests, etc.). Although the Caisse des Dépôts et Consignements is a financial sector establishment, its reports are included in connection with the activity of the notaries for which it keeps the accounts. In 2019, the reports of the Caisse des Dépôts et Consignement (CDC) returned to their level of 2017 (1,096 SARs) after peaking at 1,763 SARs in 2018.

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[23] P.357.

[24] Ola Svenonius and Ulrika Mörth. "Avocat, rechtsanwalt or agent of the state?." *Journal of Money Laundering Control* (2020).

[25] *Rapport annuel d'activité Tracfin 2019*

On the other hand, Nougayrede notes how few STRs have been made by the French Bar, the maximum being 6 in 2013, and a total of 23 over the period 2007-2018.[26] She explains this by theemphasis that has been placed on upstream CDD to reduce the flow of AML-exposed activity and the central place of the bar authorities and "bâtonniers" in the reporting regime as a manifestation of the professional secrecy regime. When in any doubt on KYC and client background, many practitioners will often prefer to forego work opportunities altogether, upfront, in order to avoid the extensive CDD investigations that they know would be required before they could proceed. In the French system, client monies held by advocates are placed under the control of regional organizations, called the CARPAs, which are supervised by the bar councils. AML control over these funds is performed by the CARPAs themselves which communicate freely with advocates under rules of professional secrecy. Until 2020 the CARPAs were not under any independent reporting obligation and were not required by law to spontaneously report suspicions.[27] This has now changed following statutory instruments implementing 5AMLD, however their reporting will be to the regional bâtonnier and not directly to the FIU.[28] The future will tell to what extent this new reporting line will lead to an increase in STRs from the advocates themselves.[29]

In short, except for real estate, where notaries are making many reports, the profession has largely internalized its AML procedures and placed the process under the central control of the bar authorities and *bâtonniers*. This remains the case following changes introduced in 2020 which are nevertheless prompting bar authorities to increase awareness-raising campaigns and tighten their policing of practitioners.[30] It is moot whether this 'works' or not (and for whom). Can one say that it is easier or harder to launder money in France than in the UK, or to use lawyers in either country to facilitate laundering?

On the real estate theme, the CDC remains a leading declarer of information. In 2019, operations between 1-10 million euros represent as in 2018 a little over a quarter of operations reported by the CDC, and those relating to amounts between 100,000 and 500,000 euros remained stable at one third of the SDs received. Thus, questionable transactions are not restricted to large amounts or transactions related to luxury real estate.

These positive results, which accompany a very dynamic real estate market in France in 2019, still allow real prospects for improvement in the detection of potential money

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[26] P.357

[27] Nougayrede, pp 358-9

[28] Ordinance n° 2020-115 and decrees n° 2020-118 and n° 2020-119 of 12 February 2020. These instruments have also expanded CDD obligations to litigation and advisory activities including with regard to taxation. I am grateful to Delphine Nougayrede for sending me details about these 2020 changes in the French system.

[29] When filing a STR to the *bâtonnier*, the Carpas will be authorized to inform the advocate or law firm holding the Carpa account. See Information Letter by the Paris Bar Council of 5 March 2020.

[30] See for example a publication by the Conseil National des Barreaux expanding on the type of AML/TF risk management procedures that must be implemented by advocates and law firms (February 2020). The Paris Bar Council has rolled out a web-based tool to assist practitioners in the design of these procedures.

laundering operations and in the analysis capacity of the professionals. In 2019, reporters mainly report the sending of funds by third parties to the operation and are sensitive to inconsistencies between the profile of buyers and the value of the property. It seems that notaries are now reporting more the lack of transparency about the beneficial owner. The detection of early and/or split payments as well as out-of-study payments is progressing slowly. Cases of reductions/overvaluations of the transaction price in the context of actual market prices might constitute another point of vigilance. Tracfin would like to see more detail in STRs on the description of the operation, analysis of the suspicion and diligence carried out by the notary, as well as their attaching documents to the STR. In general, an element of doubt alone should not trigger automatically the suspicious transaction report, but must prompt the notary to consider an operation as a whole, and rely as much as possible, on a cluster of clues.

Tracfin emphasises that vigilance must extend over the entire duration of the operation. In addition, half of the professional firms that submitted a suspicious transaction report in 2018 did not make a declaration in 2019, which suggests (in their view) that vigilance may not be sustained over time. The reporting effort is still heavily focused on a small number of firms: in 2019, 14% of firms transmitted at least one declaration, so 86% made no reports.

The most recent data from Tracfin states that there was significant growth in the number of STRs from notaries, up 5% to 1,474, the highest figure since they began reporting in 1998. This performance confirmed the profession's leading position for reporting in the non-financial sector. The commonest suspected typologies are related to real estate investments. In most instances the notaries had questions or doubts about the origin of the money, particularly in the case of politically exposed persons (PEPs), who appeared in 4% of the submissions. By contrast, tax cases were less in evidence. As in previous years, reports came mostly from three areas: the Greater Paris region, Provence-Alpes Côte d'Azur and Grand Est, with the latter continuing to report steadily. On the other hand, reporting was extremely disparate in other parts of the country, where a shortage of notaries or lack of real estate transactions was not a credible explanation. These disparities were also found for notaries' offices. In 2018, 11% of notary offices sent at least one STR to Tracfin, down 2% on 2017. Closer study of the submissions showed that between 2009 and 2019, 'only' 37% of offices submitted at least one report, though it is not clear what the ideal rate should have been. When the volume of reporting by the profession is set against the buoyancy of the real estate market in 2018 – a year that saw 1,570,000 sales (source: DGFiP) – it appears that there is a rich seam of information to be mined by the FIU. 53% of submissions had no attachments of supporting documentation as well as often (in the view of Tracfin) being too short, lacking analysis or clearly formulated suspicions and being based on tenuous individual signs rather than a body of evidence. Not all notaries were able as a matter of course to recognise atypical means of financing a sale or inconsistencies between the buyer profile and the value of the property, despite the Unit's enhanced awareness-raising efforts.

Tracfin adds that despite these areas for improvement, the profession has legitimate grounds for satisfaction. Notaries have emphatically embraced the ERMES e-reporting system, using it to send almost 90% of STRs in 2018. In addition, 2018 saw the introduction of a number of resources to help understanding of AML/CFT issues. For instance, the National Association of Notaries (CSN) provided the entire profession with open access to a commercial database to identify politically exposed persons or individuals whose reputation must be taken into account when considering a real estate transaction. The CSN also provided an IT tool in the form of a due diligence questionnaire designed to help notaries decide whether or not to submit reports. Lastly, the profession developed an e-learning module to raise awareness of AML/CFT reporting requirements among notaries. Tracfin would like to assist notaries to establish risk assessment and management systems specific to each office and focusing on different geographical areas, activities and clienteles. Thus 2018 showed that the greater demands made by the public authorities on notaries, who play a key role in real estate transactions and are therefore particularly exposed to the risk of money laundering, were vindicated. These moves to combat money laundering and terrorist financing are expected to continue in the long term, complemented by what Tracfin describes as 'truly effective monitoring and inspection systems'.[31] As elsewhere, the concept of 'effectiveness' is under-analysed.

Germany

A Franco-German comparative study based on lawyer interviews notes that

> "both French and German lawyers would walk at [go to] great lengths to prevent reporting clients to the financial police…. German lawyers typically position themselves vis-a-vis the AML regulation in practical terms for oneself or for society, whereas a French lawyer would refuse to comply with the law out of principle. The majority of [German] respondents claim never having been in a situation where submitting a report about suspected money laundering would be an option. Those who had been in such situations stated that they would still not do it, because it may put them at risk that the suspicious client would know who had reported on them. This would put the lawyer at risk for retaliation.
>
> All lawyers put very high confidence in their KYC protocols…. To end up in a situation where a lawyer would have to report to the police – most German lawyers equals this notification with a regular police report (Strafanzeige), despite the attempts by the regulator to frame it differently – would be a failure on behalf of the law firm….The German lawyers have a longer corporate tradition than the French but share the same ideal for the lawyer–client relationship. The Verschwiegenheitspflicht or Anwaltsgeheimnis is protected in a similar fashion as in

[31] Tracfin Annual Report 2018, pp.29-30.

> France and breaching it may result in a revocation of the professional licence and/or a prison sentence."[32]

In Germany, as elsewhere, nearly all SARs come from the financial sector. Out of a rising number of registered professionals in 2019 (following out-reach seminars by the FIU), the number of SARs made to the FIU in 2019 is set out below, with the 2018 figure in brackets: Lawyers, 21(22); Chamber legal advisers 0 (0); Patent attorneys 0 (0); Notaries 17 (8); Legal counsel 3 (0); Auditors and sworn auditors 0 (2); Tax advisors and tax agents 8 (4); Trustee, service provider for fiduciary business 15 (1); and Real estate agent 84 (31). [33]

According to section 2 para. 1 of the German money laundering law, attorneys at law, legal advisers that are member of a bar associations, patent attorneys and notaries are obliged entities to the extent that they assist a client in the planning or carrying out of one of the following businesses: (i) buying and selling of real property or business entities; (ii) managing of money, securities or other assets; (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures. Furthermore, these legal professionals are also obliged entities to the extent that they execute, on behalf of and for their client, financial or real estate transactions, advise the client on the capital structure, industrial strategy or related questions, provide advice or services in relation to mergers and acquisitions, or assist on tax matters in a business-like manner. To the extent that they perform these, independent legal advisors who are not members of a bar association, and natural persons and entities that, due to their special knowledge, have been authorised to provide certain legal services, such as the provision of advice on foreign law, are also covered.

If an obliged entity is not in a position to fulfil its enhanced CDD obligations, it must, according to section 10 para. 9 and section 15 para. 9, not establish or continue the business relationship and must not perform any transaction. This prohibition does not apply to independent lawyers, patent attorneys, notaries, auditors, tax advisors and tax agents, if they are asked to provide legal advice or legal representation, except where they *know* that the legal advice or representation has been consciously used or will be used for the purpose of money laundering or terrorism financing.

Section 10 para. 9 s. 4 provides that notaries must not perform a notarisation if the client is a legal entity, partnership, trust or similar structure which has not yet provided him or her with documentation about its ownership and control structure; notaries must furthermore not perform a notarisation if a legal entity or partnership that is domiciled abroad wants to acquire real estate in Germany as long as this entity or partnership has not provided its

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[32] Ola Svenonius and Ulrika Mörth. "Avocat, rechtsanwalt or agent of the state?." *Journal of Money Laundering Control* (2020).
[33] *Jahresbericht 2019,* Financial Intelligence Unit. (In German only.)

beneficial ownership information to the German beneficial ownership registry nor to an equivalent registry in another Member State.[34]

In Germany, section 30 para. 3 s. 3 provides for legal privilege of lawyers, patent attorneys, notaries, auditors, tax advisors and tax agents as regards information requests from the FIU. These obliged entities may refuse to provide the FIU with information insofar as the request relates to information they obtained in the context of providing legal advice or the legal representation of the contracting party.[35] However, according to section 30 para. 3 s. 4, the obligation to provide information continues to exist if the obliged entity knows that the contracting party has used or is using its legal advice for the purpose of money laundering or terrorist financing.

Obliged entities are required to respond to the FIU's questions about transactions. However, although they do have an obligation to supply documents, attorneys at law, patent attorneys, notaries, auditors, tax advisors and tax agents may refuse to answer the request if it relates to information they obtained in the context of the provision of legal advice or of legal representation, unless they positively know – a severe test - that the legal advice or representation was or is being used for money laundering or terrorism financing.

There are no data regarding the take-up or effectiveness of SARs from the legal profession, but Vogel notes that: [36]

> since 2017, SARs no longer have to also be reported to the [German] criminal justice authorities but now exclusively to the FIU, it seems that obliged entities less and less equate SARs with a criminal complaint and more and more perceive SARs only as a quasi-supervisory instrument, thereby meaning they have fewer inhibitions about reporting their clients. In 2018, 58% of SARs were forwarded to competent authorities as being possibly related to money laundering, terrorism financing or other criminal offences. However, in the same year the FIU received only 14,065 feedback communications from state prosecution offices; only 275 of those communications mentioned that the SAR subject matter led to a criminal conviction, to an out-of-trial criminal fine or to an indictment.

I would add that these data tell us little about the inherent validity or value of SARs in Germany. As elsewhere, it may tell us more about the constrained resources and competence of financial investigators and prosecutors, and their capacity to take these cases forward in the context of other cases they have, despite Germany being a 'legality principle' jurisdiction in which (with some exceptions) prosecutors have an obligation to prosecute where there is sufficiently strong evidence to do so. In October 2020, The Koln prosecutors

[34] Section 11 para. 5a and section 20 para. 1 s. 2 and 3 Geldwäschegesetz (GWG)
[35] See section 2 para. 1 nos. 10 and 12 GWG.
[36] Benjamin Vogel, 'Germany', 2020, p.223.

issued international arrest warrants for Jürgen Mossack and Ramón Fonseca to answer accusations of forming a criminal organization and complicity in tax evasion in Germany: they are also being sought by the US and are said to be 'under investigation' in Panama, which does not extradite its citizens.

Italy

In Italy, according to art. 3.4 of L.D. 90/2017, the legal profession and tax advisors are obliged entities, falling under the category of professionals, during the exercise of their profession, in an individual or in an associate form or in companies. Lawyers are subject to the regulatory and sanctioning power of the National Council of the Bar, whose "Technical Rules on AML", adopted on 15 December 2017, are applicable. These Rules implement the new AML provisions with regard to the following matters: CDD measures, record keeping, duty to report and politically exposed persons (PEPs).

Tax advisors are under the supervision of the Board of Professional Accountants and Auditors. The Board of Professional Accountants and Auditors is going to adopt the "Technical Rules on AML" to implement the new AML provisions with regard to the following matters: risk assessment, CDD measures and record keeping. According to the Technical Rules of the National Council of the Bar, a low-risk situation is one where there is a repeated and continuous assignment of professional duties to the lawyer by the same customer, in a context of consistency of the services required with the customer's risk profile (Technical Rule no. 7). In a low-risk situation, lawyers can fulfil their CDD obligations by using structured collection and processing of data and information, even predefined IT procedures, that are able to automatically assign a risk class to the customer. Lawyers can also fulfil their CDD obligations by acquiring a statement confirming the data and information provided by the customer, in particular relating to the ownership structure and beneficial ownership (Technical Rule no. 8). In any case, if there is a low risk, lawyers are exempted from gathering detailed information on the economic-patrimonial situation of the client, and from carrying out specific verification of the origin of funds and resources available to the client (Technical Rule no. 9). The Technical Rules of the National Council of Notaries refer to the law's simplified CDD requirements. They only specify that legal persons, such as supervised companies, and public administrations or institutions that carry out public functions represent customers with a low risk profile.

The provisions of the Ministry of Justice concerning the "Determination of irregularity indicators in order to facilitate the identification of money laundering suspicious transactions by certain categories of professionals and auditors", adopted on 16 April 2010, are applicable to all of the above-mentioned professionals. The sector of privileged professionals showed an increase (+5.3%) in the number of SARs for 2019, primarily driven by notaries' reports (+6.6%). The contributions from other professional categories remained numerically ancillary, although the previously declining trends regarding accountants (from

319 to 327) and lawyers (from 38 to 48) were reversed. Relatively more significant was the increase of reporting by auditing firms and statutory auditors (from 13 to 30). The contribution of associated, interprofessional and inter-lawyer firms continued to decrease (from 81 to 18). As such, the National Council of Notaries is now almost the only source of reports (98.2%). To a much lesser extent than notaries, reports by accountants are transmitted mainly by the National Council of Chartered Accountants and Accounting Experts (73.4% compared to 72.3% in 2018).[37]

The Netherlands

There has been intermittent research into the role of lawyers and notaries in money laundering and in organised crime in the Netherlands.[38] In the earliest study, Van de Bunt did not find any case that came close to the image of lawyers acting as Mafia-type consiglieri. However, he concluded that, unlike accountants, tax advisers and notaries, culpable involvement in organized crime activities by lawyers was more than incidental. Van de Bunt described 29 cases of culpable involvement of lawyers and 12 cases of compromising conduct of notaries.[39] However, that study is more than two decades old, and we need to consider – to the extent we can – how behaviour and rules have changed in the interim.

The Anti-Money Laundering and Terrorist Financing Act 2008 (WWFT) applies to lawyers ('advocaten') under specific circumstances. The Economic Crimes Act (WED) and Dutch Penal Code apply to lawyers subject to Dutch jurisdiction requirements. Lawyers are also subject to the 2009 by-law on administration and financial integrity, issued by the Dutch Bar Association (Nederlandse Orde van Advocaten, NOvA). This requires various client due diligence obligations and an obligation for the lawyer to consult the local Bar president if he makes or accepts a cash payment of more than €5,000. In addition, Art. 11 of this by-law – enforceable through professional discipline- refers to the obligations of lawyers prescribed by the WWFT:

> "Advocates shall keep accounts of their practice and shall keep the books in such a way that compliance with the provisions of the Law on the prevention of money laundering and terrorism financing can be satisfactorily established at any moment."

Enforcement by criminal law will only take place if the lawyer himself is suspected of money laundering or any of its predicate crimes.

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[37] Unità di Informazione Finanziaria, *Annual Report for 2019*, May 2020, 13, at www.uif. Bancaditalia.it.

[38] Francien Lankhorst and Hans Nelen. "Professional services and organised crime in the Netherlands." *Crime, law and social change* 42.2-3 (2005): 163-188; Hans Nelen, "Real estate and serious forms of crime." *International Journal of Social Economics* 35.10 (2008): 751-762.

[39] Henk van de Bunt, Inzake Opsporing Bijlage X. Deel III onderzoeksgroep Fijnaut. Beroepsgroepen en fraude, 1996. 's-Gravenhage: Sdu uitgevers. See https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vi3ag2g6swzj

In the revised Dutch Lawyers Act (Advocatenwet) – in force since 2015 – the local Bar presidents are appointed as the regulators responsible for supervision of compliance with anti-money laundering regulations (WWFT). So the Dean of the local Bar is responsible for supervising the lawyers. Details of lawyers' obligations are available elsewhere.[40] The WWFT contains no obligations to obtain consent from authorities before proceeding with legal advice or transactions. However, if the lawyer concerned has reported a SAR in which he renders advice or assists in a transaction, it might be wise to abstain from further services to the client. Not only does the lawyer run the risk of committing crimes if he proceeds with the advice or transaction he reported on, or of forfeiting any indemnity from lawsuit that might originally have been rendered to him, there are circumstances in which continuing the relationship with the client might also be contrary to the rules of professional practice.

There are a number of case studies, developed both by the FIU and from my research and media sources. The Dutch Financial Intelligence Unit gives the following recent example, though the outcome beyond rejection of the business by this notary is open.[41]

> **An alert civil-law notary** 20-01-2020
>
> A man went to a civil-law notary to establish a private limited company. The man submitted the required documents to prove that he was independently authorized to handle the affairs of several private limited companies. A striking fact was that, without exception, the private limited companies were established over a hundred kilometres away from the notary's business address. In addition, the man lived near the business addresses of the private limited companies. The objects clause of the new private limited company stated the trade in household goods. Based on the request for his services, the civil-law notary investigated the businesses and the man himself. It turned out that both the man and the businesses could be linked to shady practices. This gave the civil-law notary the impression that it was likely that the objects clause stated would not match the company's actual business activities. Given his findings, trade in or production of narcotic substances would be more likely. This also explained the illogical action of the man seeking notary services this far away from home. The civil-law notary refused to cooperate, and reported the intended establishment of the company to the FIU. The FIU determined that the Civil-law notary had been right. There were clear indications that it was indeed highly likely that the private limited company would be used for criminal purposes. The intended establishment was designated suspicious and forwarded to the police.

Panama Papers

[40] https://www.anti-moneylaundering.org/europe/Netherlands.aspx
[41] https://www.fiu-nederland.nl/en/an-alert-civil-law-notary

A Dutch notary who appeared in the Panama Papers was disciplined for enabling the set-up of a corporate vehicle scheme that was used to launder money. The client (based in Panama) was referred to this notary by a Dutch Trust provider with whom they had worked frequently in the past. Given time constraints and the extremely competitive environment this notary worked in, he had failed to do proper due diligence on the client.[42]

16-02-2018[43]

A civil-law notary who had been removed from office and appealed against the sentence received an even heavier sentence. The Court of Appeal sentenced him to twelve months' imprisonment, of which three months suspended, for forgery of documents, laundering and knowingly completing and filing an incorrect tax return. It was considered proved that he had been involved in fraudulent activities in the winding-up of an estate. When the tax authorities started asking awkward questions, he also saw to it that the information provided by the parties concerned matched. At the start of the investigation, which eventually led to the above sentence, and for the purpose of the investigation, FIU-Netherlands provided the investigative team with a file containing transactions of a total amount of 1.7 million euros.

06-06-2017[44]

Last month, the police and the Fiscal Intelligence and Investigation Service interviewed a lawyer, a tax consultant, an accountant, and a civil law notary about their failure to report unusual transactions or to screen clients properly. It was the first time a lawyer was interrogated as a suspect in the 'Project on parties failing to report', according to the Public Prosecution Service.

The lawyer was involved in the sale of a building which contained a coffee shop. The acquisition of ownership was effected in an arrangement by which the lawyer became a co-owner of the building. The arrangement was so unusual that the lawyer should have submitted a report in accordance with the Money Laundering and Terrorist Financing (Prevention) Act. He did not file a report either to the dean of the Bar Association or directly to FIU-the Netherlands.

The investigation was launched after the Board of Discipline made a disciplinary conviction in response to a joint complaint by the dean of the Amsterdam Bar Association and the Financial Supervision Office. The Board of Discipline conditionally suspended the lawyer from legal practice. Under the direction of the Public Prosecution Service, persons and institutions that are suspected of

[42] Disciplinary Court, 's Hertogenbosch, 19 March 2018, case no ECLI:NL:TNORSHE:2018:1
[43] https://www.fiu-nederland.nl/en/new-case-overstepping-the-mark
[44] https://www.fiu-nederland.nl/en/new-case-lawyer-failed-to-report-an-unusual-transaction

noncompliance with their duty to report unusual transactions have been visited periodically over the past few years.

Notary did not meet his Wwft obligation[45]

A ruling by the Rotterdam District Court on the legality of an imposed administrative fine was published. The fine of 36,000 euros was imposed on a civil-law notary by the regulator, Bureau Financial Supervision (BFT). This is because, in the opinion of the regulator, he was in default during a real estate transaction. He had not carried out an adequate investigation and had not reported an unusual transaction to the Dutch FIU when there was every reason to do so. These obligations are included in the Money Laundering and Terrorist Financing (Prevention) Act (Wwft). The supervisor had imposed the fine on the civil-law notary for having passed a deed in which the property was sold for 200,000 euros, while the WOZ value was set at 248,000 euros. Seventeen months after the sale date, the property was appraised and a sales value of 360,000 euros was determined.

The court endorsed the opinion that the very low purchase price and the lack of substantiation of the purchase price should have resulted in a stricter customer due diligence and (due to the risk of, for example, a 'black' partial payment) a notification to the Dutch FIU, which the civil-law notary did not do. The court therefore ruled that the appeal was unfounded, and the administrative fine was upheld.

Notary public convicted of failing to report unusual transactions[46]

This week, a notary in The Hague was convicted by the court for failing to report real estate transactions, while he should have reported them to FIU-the Netherlands. The notary's client, a real estate dealer sentenced to five years in prison for malpractice earlier this year, had the sale of several houses passed through the notary. The court accused the civil-law notary of failing to conduct a thorough investigation into the background of the buyers and the origin of the money. The notary admitted during the hearing that he had known of the real estate dealer's dubious reputation. The notary was sentenced to a fine of EUR 47,500.

The notary and the Ivy case[47]

In a Dutch real estate fraud case involving abuses of the Phillips pension fund, one civil-law notary in particular played a major facilitating role in the perpetration of the fraud. He made a numbered account available for the holding and concealment

[45] https://www.fiu-nederland.nl/nl/notaris-voldeed-niet-aan-zijn-wwft-plicht
[46] https://www.fiu-nederland.nl/nl/notaris-veroordeeld-voor-het-niet-melden-van-ongebruikelijke-transacties
[47] Henk van de Bunt and Karen van Wingerde, "We are going to be rich" A case study of the Dutch real estate fraud case. In: J. van Erp, W. Huisman and G. Vande Walle, 2015, eds., *The Routledge handbook of white-collar and corporate crime in Europe*, Routledge, pp.304-335; and https://www.fiu-nederland.nl/nl/de-notaris-en-de-klimop-zaak.

of the 'surplus profits', and participated in multiple transactions to significantly manipulate the value of the property. This civil-law notary was eventually sentenced to 5 months imprisonment for his part in the real estate fraud case and was also struck off the register of civil-law notaries by the disciplinary court. Another civil-law notary, who was acting on behalf of the party acquiring the property, failed to exercise the necessary diligence when executing the highly unusual A-B-C-D transaction.

In February 2015, the appeal of the case was heard against a - now dismissed – notary. The Court stated that the notary ″knowingly and for a considerable fee of more than € 450,000, his third-party money account was made available to his co-defendants to facilitate a flow of money that he knew had a criminal origin. His intervention did not only hide the nature and origin of this flow of money. and disguised, but in addition to these funds (by the trust that generally exists in society in the office of notary) a semblance of legitimacy has been given. -...- In addition, the Defendant in project 126 refrained from - although obliged - of reporting an unusual transaction, and has committed forgery of a sales agreement drawn up by him. "

The verdict left little room for difference of interpretation. In addition to the serious offense of actual money laundering, the Court also strongly charged the notary for not reporting unusual transactions. The Court found the offenses committed in relation to the special position of trust of a civil-law notary so serious that her verdict was much higher than what the Public Prosecution Service demanded. The former civil-law notary was sentenced to 4 years in prison.

Spain

In Spain, the trade-off between AML measures and lawyers' professional secrecy[48] is also a live tension. Spanish regulation asserts that lawyers are obliged to communicate suspicious transactions when acting as an *advisor*. However, it remains unclear which advisory activities are protected by professional secrecy and which are not.[49] Notaries and land, commercial and moveable property registrars[50] (art. 2.1(n) AML Law), as well as lawyers and barristers[51] (art. 2.1(ñ) AML Law), count as obliged persons under the AML Law. In the case of "lawyers, barristers and other independent professionals", their duties as obliged

[48] See art. 542.3 of the Organic Law for the Judiciary System no. 6/1985 and art. 32 of the Spanish Bar Association Code.
[49] That is the official statement of the General Council of the Spanish Lawyers, recommending that in the event of doubt over the duty to inform, the lawyers should contact the Dean of the Special Commission for the prevention of Money Laundering of the aforementioned Council. See: http://www.abogacia.es/wp-content/uploads/2012/06/RECOMENDACIONES- PBC-ABOGADOS-CGAE.pdf, p. 10.
[50] The movable property registrar legally registers ownership and burdens regarding movable property, such as rights, contractual terms, and vehicles.
[51] Spanish lawyers are required to follow the terms of the Spanish Bar Association (*Colegio de Abogados*): to hold a law degree, for those enrolling after 2011 to hold a specific practice-oriented Master's degree that enables one to exercise one's profession, to pass the national test of the Bar Association, and then to be registered with one of the provincial sections of the Association.

persons are restricted to specific transactions or triggered by pre-defined situations: "when they participate in the design, implementation or advice on activities on behalf of clients relating to the buying and selling of real estate or business entities, the management of funds, securities or other assets, the opening or management of current, savings or securities accounts, the organisation of contributions necessary for the creation, operation or management of companies or the creation, operation or management of trusts, companies or similar structures, or when acting on behalf of clients in any financial or real estate transaction" (art. 2.1(ñ) AML Law). Art. 22 AML Law does not answer the question regarding the professional activities of lawyers subject to the duty to inform, because it determines that lawyers are exempt from communicating suspicious transactions when "ascertaining the legal position for the client". Nevertheless, it is a vague expression to use to specify the situation in which a lawyer performs such acts (of ascertaining the legal position for the client). Later on, art. 22 AML Law states that lawyers are not obliged to carry out due diligence measures when they are involved in the legal defence of their client, "including the *advisory* activities about ways to avoid a legal proceeding, regardless of the fact that they have received this information before, after or during the aforementioned proceeding" (art. 22 AML Law).[52]

The legislation is clear that lawyers are obliged entities when creating and managing companies and trusts and representing clients in operations not exclusively performed by legal professionals (i.e. management of funds, buying and selling real estate property).[53]

Nevertheless, there is a discussion in Spanish doctrine about the extent of lawyers' duties to inform when acting as advisors and the potential conflict with professional secrecy. This is a recognised problem within the legal professions under the money laundering regime, and the doctrine in Spain mainly adopts the interpretation of the European Court of Human Rights.[54] It highlights that any pre-judicial consultation with lawyers must be exempt from the duty to inform, because acts aiming to "ascertain the legal position of the client" coincide with the core of constitutional defence rights, and therefore are not subject to the AML Law.[55]

As yet, there is no jurisprudence in Spain on this topic. However, based on the theoretical conclusions mentioned above, the litigation and pre-litigation phases are exempt from the

[52] Art. 22 AML Law: "Exemption. Lawyers shall not be subject to the obligations under articles 7.3, 18 and 21 with respect to the information that they receive from any of their clients or obtain on the latter when ascertaining the legal position for their client or performing their duty of representing that client in or concerning judicial proceedings, including advice on instituting or avoiding proceedings, irrespective of whether such information was received or obtained before, during or after such proceedings. Notwithstanding the provisions of this Law, lawyers shall remain subject to their obligation of professional secrecy in accordance with the legislation in force".

[53] Coca Vila, "El abogado frente al blanqueo de capitales. ¿Entre Escila y Caribdis?", *InDret*, no. 4, 2013, p. 19

[54] ECtHR, *Michaud v. France*, Application no. 12323/11

[55] Coca Vila, "El abogado frente al blanqueo de capitales. ¿Entre Escila y Caribdis?", *InDret*, no. 4, 2013, p. 20.

duty to inform, respecting the need for professional secrecy.[56] In that sense, lawyers must carry out their CDD and reporting obligations when representing their client outside of the litigation and pre-litigation phases.

The above-mentioned art. 2.1(ñ) AML Law obliges lawyers to report when exercising *advisory* functions in some operations or in relation to the legal position of the client.[57] This is a transplant straight from a European Directive into Spanish law, where, however, a slightly different translation presents problems exacerbated by there being no institution in Spain ready to counsel law firms on the specific risks of each legal area or to serve as an intermediary between lawyers and the FIU.[58] Because of this, it was no surprise that the FATF MER stated that lawyers in Spain are "an outlier, with limited awareness of their ML/FT risks and obligations, and little evidence that effective controls are in place".[59] Notaries and civil registrars have one of the most developed structures of money laundering prevention by obliged entities, since the Notary Regulation Act and the Notary Act make it mandatory for notaries and civil registrars to cooperate in relation to AML policies.[60] This preceded successive Spanish land development corruption scandals.

In terms of CDD, lawyers' triggers for applying CDD measures are related to the legal service they provide, and arise in the following situations: (i) when they participate, on behalf of clients, in the design, implementation or advice on activities relating to the buying and selling of real estate or business entities; (ii) the management of funds, securities or other assets; (iii) the opening or management of current, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures; and (vi) when acting on behalf of clients in any financial or real estate transaction (art. 2.1(ñ) AML Law). When dealing with specific situations,[61] notaries shall undertake measures to identify natural and legal persons, based on documentation and following procedures established by law (art. 6 Decree 304/2014).

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[56] in 2014 SEPBLAC published a document notifying the commencement of inspections of law firms to look for 'suspicious activities'. The document from the Bar Association of Barcelona indicates the notification from the FIU: http://web.icam.es/bucket/ REQUERIMIENTO%20SEPBLAC%20FEBRERO%202014.pdf.

[57] The advisory activity goes further than merely *participating* or *assisting*. Sánchez Stewart. *Abogados y prevención del blanqueo de capitales*, Málaga, 2014, p. 19.

[58] There is no organisation similar to the role performed, for instance, in France by the President of the Bar Association, who serves as a special filter for the information provided by lawyers.

[59] FATF, *Mutual Evaluation Report – Spain*, 2014, p. 13.

[60] Art. 24 Notary Act (Law of 28 May 1982).

[61] Transactions of forming companies, associations, foundations or similar legal arrangements, or undertaking any legal acts or legal proceedings related to their functioning or management, or when dealing with clients constituting, transmitting or extinguishing any actual rights upon real estate or commercial entities, or the purchasing or sale of stocks, shares or any other exchangeable securities or financial instruments.

Private Sector CDD Guidance

Spanish Notaries have a well-developed system to provide further guidance on the exercise of CDD within the sector. The OCP of the Notaries[62] has a specific objective of collaborating with law enforcement authorities in the prevention of money laundering. It has an Analysis and Communication Unit that is responsible for examining 'suspicious operations' of which it has been informed by individual notaries across the country, and for providing notaries with further guidance. On the same basis, the CRAB performs similar tasks in relation to the activity of registrars, and will acquire increasing significance in Spain, since it is currently responsible for beneficial ownership registries.

Moreover, notaries must identify the beneficial ownership and the shareholding and control structure of legal entities before registering the legal entity's activities when it identifies the signs of high-risk transactions outlined by the OCP, or when the legal entity has been established in a jurisdiction listed as tax haven (art. 3 Order EHA/114/2008). Finally, the General Council of Spanish Lawyers also provides brief and simplified guidance for the sector, giving some examples of what might trigger CDD measures.[63]

SARs filed by the privileged professions in Spain are not treated any differently from other obliged entities, except for notaries and registrars. Lawyers, auditors, external accountants and tax advisors report directly to the FIU, while notaries and mercantile registrars have their own supervisory body. Notaries report SARs to the OCP, whose Analysis Unit analyses them and then forwards the information to the FIU in the name of the reporting notary. The CRAB performs the same tasks as the OCP in relation to registrars, receiving and analysing SARs submitted by property and mercantile registrars. After carrying out their analysis,[64] the CRAB and the OCP are required to forward the SARs to the FIU.[65]

There are no significant differences in the content of SARs filed by notaries and registrars as privileged professions. According to specific regulation on the sector, however, SARs from notaries need to contain as a minimum the identity of all the natural and legal persons involved in the transaction, the nature of their participation and a list of transactions and all the details pertaining to them. The minimum information also includes a brief description of every circumstance that gives rise to the suspicion or reliable identification of ties to money laundering. The regulation on property registrars has no further details on the content of SARs.

Notaries are exempted from filing SARs in cases with no economic or patrimonial elements (i.e. last wills, power of attorney, simple statutory modifications) or notarial acts that do not have any

[62] Regulated by Ministry Order EHA/2963/2005, of 20 September 2005.

[63] http://www.abogacia.es/wp-content/uploads/2012/06/RECOMENDACIONES-PBC- ABOGADOS-CGAE.pdf.

[64] Art. 27.2 AML Law, art. 44 Decree 304/2014, art. 5 Ministerial Order ECC/2402/2015

[65] Art. 6 Ministerial Order ECC/2402/2015

relevance to money laundering (art. 3.2 Decree 304/2014), with one exception, i.e. setting up companies, associations, foundations or similar legal arrangements, or undertaking any legal acts or legal proceedings related to their functioning or management. When setting up companies, the notary and registrar are required to evaluate the risk of money laundering (however this is done!) and, if there is a suspicion, file a SAR.

The special feature of the reporting regime for privileged professions in Spain is the possibility of creating centralised prevention bodies for collegiate professions, similar to the OCP, which may assume responsibility for reviewing suspicious transactions and filing SARs in the name of professionals. Other than that, all obliged entities and persons in privileged professions are required to respect the general triggers[66] and degree of suspicion above to evaluate the transactions.

According to art. 24.3 AML Law, there is an exception to the 'tipping off' provisions in the case of auditors, external accountants, tax advisors and legal professionals, who are allowed to inform the client about the possibility that a SAR could be filed when they are trying to dissuade their client from committing an illegal activity. The General Council of Spanish Lawyers' manual on money laundering prevention stresses that such warnings and guidance in that context do not infringe the duty not to disclose information to clients.

In addition to these provisions in relation to SARs, there are other datasets involving lawyers that can be searched. The main database of obliged entities in Spain is the Single Computerised Index of the College of Notaries, the second- biggest database in Spain, after the database of the Tax Agency. The College of Notaries combines within a single database all data collected as part of the exercise of its functions, with an exception made for last wills.[67] As a result, the Index contains information on 390 different kinds of notarial acts, such as selling and buying of real estate (location, use and size of the estate, method and means of payment used, taxes collected, register of former owners, the e-mail addresses of the buyers and sellers, etc.), founding of companies, identification of legal persons, historical registry of company owners, incorporation of companies owned by foreign-based legal entities, borrowings, mortgages, endorsements of debts, etc. The Index also contains the largest list of PEPs in Spain.

In addition to the general Index, there are satellite databases, which check multiple entries in the system and bring them together under a single reference, except where 'front men' are used (because the same person can have transactions registered with their passport, national resident's ID and national ID; in principle, different IDs appear in the Index as different people, so the

[66] In a public statement during a seminar run by the College of Notaries, the director of the OCP emphasised the need for more precise rules to indicate triggers and suspicious transactions. The reference to screening the functioning of companies to identify the risk of money laundering is considered to be vague, particularly because a significant proportion of money laundering relates to activities in shell companies and tax havens. See "El papel del notariado en la prevención del blanqueo de capitales", p. 4, http://www.notariado.org/liferay/c/ document_library/get_file?folderId=12092&name=DLFE-149784.pdf.
[67] More general information can be found on the website of the Single Computerised Index: http://www.notariado.org/liferay/web/notariado/e-notario/indice-unico.

satellite databases process and bring this information together under a separate entry for further consultation). If one notary communicates a suspicious transaction to the OCP, its members may consult the Index to look for further information about the person or company that is the subject of the communication. Moreover, the Index has the capacity to carry out data mining itself, using the 28 typologies developed and updated for the functioning of the software. According to the requests received (from the police, tax authorities, FIU, obliged entities, etc.), the software generates a spreadsheet with the information, whose scope will be limited by the purpose of the information request.

The College of Notaries brought a suit against the competence of the Mercantile Registrar to collect beneficial ownership information. The College of Notaries argued that it would give rise to a duplication and possible contradiction of information and the violation of privacy rights (given the public character of the mercantile registries), and that the College of Notaries alone should be responsible for the centralised database, given its expertise and more extensive database. The National High Court decided preliminarily against the petition from the College of Notaries, maintaining the validity of Order JUS/319/2018, but a final decision is still pending.[68] In accordance with the AML Law (art. 4), the College of Notaries created a beneficial ownership database in 2012 which collects beneficial ownership data from limited liability companies for the purposes of preventing money laundering, although it still does not include the registers of joint-stock companies, which are held by other registries. Pending AML legislation will create a BO database under the Ministry of Justice.

The Single Computerised Index manages this database, and the OCP of the College of Notaries, in its role as a supervisory body (art. 44.2(c) Decree 304/2014), has full access to the information stored in it. The database contains the identification of beneficial owners of new Spanish companies and other companies that have an act before a notary, such as changes to the board of directors or the company's capital, transfers of shares in limited liability companies, etc. The information is generally reliable, accurate and up-to-date.

The database, which is integrated into the Index, offers two levels of information: (i) the beneficial ownership information obtained by the individual notary in carrying out standard CDD requirements; and (ii) for limited liability.

Spanish law allows privileged professionals acting within the same legal person or in a network to share information regarding the filing of SARs or suspicious transactions, provided that they belong to the same professional category and are subject to equivalent obligations as regards professional secrecy and personal data protection (art. 24.1 *c* AML Law).

According to information from the FIU, in 2017 the OCP filed 383 SARs, the Mercantile Registrars filed 158 SARs, and "public bodies" filed 52 SARs. These are out of a total of 4,999 SARs in Spain

[68] Decision of the High Court – Audiencia Nacional, Section 3ª, Auto 89/2018 of 28 May 2018, Rec. 427/2018

as a whole. There is no information available on what happens to these SARs when filed e.g. how many lead to new investigations or make a big difference to existing ones; or lead to conviction or major confiscations.

Sweden

The Swedes have been among the relative laggards (in a neutral sense of slow adoption) in AML implementation within the EU, and lawyers are not an exception, with cultural resistance to being drawn into acting as agents of the AML regime.[69] Moreover, there is a strong tradition of self-regulation of the profession via the Swedish Bar Association, which is the designated body monitoring AML/CTF compliance among lawyers. On CDD, for example[70],

> To mediate between the needs of clients, and that of the regulator…it did therefore happen that lawyers began advising on a case without the AML/CTF-vetting being concluded…. In this way, the needs of the client for speedy service was taken care of. In parallel, compliance with the regulation was seen to by not starting the billing process until all necessary documentation for the client in question was in place: Clients were not true clients if they had not been entered in systems for billing, it was argued. And the regulation concerned true clients.

The FATF Mutual Evaluation Report (MER) of Sweden in 2017 noted:[71]

> Some banks also indicated issues with respect to the determination of beneficial ownership of accounts where client funds are managed by their lawyer, as the lawyer would not disclose the actual owner to the bank unless authorised by the client. According to the lawyers, this can occasionally happen if the lawyer's client did not pre-approve the provision of customer information to third parties, and the lawyer would subsequently have to seek approval from their client. The SBA confirmed that information about the beneficial owner of a client funds account in the name of the law firm falls within the professional secrecy and cannot be revealed without the consent of the client, and according to the AML/CFT Act, the beneficial owner of a client fund account (a client) needs not to be verified if the information can be made available at the request of the bank. The extent that this results in such accounts being opened without accurate identification of beneficial ownership, or FIs refusals to open such accounts, is not clear and should be jointly examined by the authorities and resolved as necessary.

Partly in response, the 2017 AML/CFT Act establishes a coordinating body for AML/CFT and risk assessment, eliminates exemptions from CDD, expands coverage to individual

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[69] Karen Helgesson and Ulrike Mörth, Client privilege, compliance and the rule of law: Swedish lawyers and money laundering prevention. *Crime Law Soc Change* 69, 227–248 (2018)

[70] Helgesson and North, supra.

[71] *Sweden*, FATF 2017, P.104, para 319

lawyers and legal professionals and requires senior management approval for risk assessments. It applies comprehensive CDD measures to all lawyers and legal professionals.

One study noted:[72]

> There is a limited number of industries where the advisers have protected professional titles, such as authorised auditors and lawyers. Individuals who hold such titles are often highly diligent and often reject certain commissions at first glance, such as handling funds that may be illegal. One interviewee mentioned that law firms often reject individuals with likely links to terrorist organisations, or who present false ID documentation or passports. Given that the adviser has not established a business relationship they are unlikely to submit a report.
>
> However, one interviewee emphasised that these perpetrators turn to other advisers when rejected. Some interviewees stated that certain advisers are aware of individuals who act as advisers in sectors that are exempt from the duty to submit STRs. One authority representative stated that some lawyers refer suspicious customers to a less reputable adviser, instead of accepting them. One representative from a law firm suggested that no honest lawyer would refer a suspicious client to a colleague, as this would harm that colleague.

In the study of 15 lawyers from different sized firms, "[m]ost of our informants had not been involved in reporting anything to the Financial Police. None of them had reported a transaction with an existing client." At least two reports had been filed by their informants, concerning (unspecified) cases that were not to do with actual clients, and did therefore not involve the clash of principles lawyers worried about. In 2011-15, there were only 18 reports by lawyers to the Swedish financial police. With respect to AML issues, two lawyers were disbarred in 2003 and since then, there have been no further enforcement measures for AML/CFT against lawyers.[73]

The Swedish lawyers interviewed were confident that they could identify risky clients and transactions and that their clients were clean, but so too were many of the Scandinavian banks who much later 'discovered' that they may have been laundering billions of Russian money of uncertain origin via their Estonian branches. (Though lawyering in Sweden is a much more personalised activity than high volume international banking.) After some time, Swedbank's board agreed to a request to waive attorney-client privilege regarding their Norwegian attorney Erling Grimstad's assignments for Swedbank, and handed over reports

[72] Anna Horgby, Daniel Särnqvist, Lars Korsell, *Money laundering and other forms of money management. Criminal, undeclared, and murky money in the legal economy*, The Swedish National Council for Crime Prevention, Stockholm 2015, report 2015:22

[73] FATF, p.119, para 372.

written by Grimstad to the Swedish Financial Supervisory Authority.[74] This was in the context that about €5bn flowed through Swedbank's high-risk non-resident portfolio in 2008 and 2018; about €10bn each in 2009 and 2010; about €15bn in 2011, 2013 and 2014; and about €20bn each in 2012, 2015 and 2016; and that the flow was zero by 2018. Danske's own gross transaction figures for non-residents showed a peak of more than €25bn in 2013 before the business was closed at the end of 2015. [75] The extent of Swedish lawyer involvement in the Estonian offshore activities is unknown but has not been highlighted in media coverage to date.

Switzerland

Unlike many other jurisdictions, the Swiss approach expects significant internal development before something is reported as a SAR. In 2019, attorneys and public notaries made 5 SARs to the FIU, out of the 7,705 made to MROS that year.[76] The record number was 31 in 2011, and altogether, 99 reports from this source were made in the past decade. By way of contrast, though the number of Swiss lawyers is not separated out, the Panama Papers show that 1,339 Swiss lawyers, financial advisers and other intermediaries had set up more than 38,000 offshore entities over the last 40 years. These entities listed 4,595 officers - or administrators - that are also connected to Switzerland. [77]

Legal professionals, such as lawyers, notaries and tax advisors, only fall within the scope of the AMLA to the extent that they perform financial intermediation in the sense of art. 2(3), that is when they qualify as "persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets". Such professionals are therefore not subject to the AMLA when their work is limited to preparing or executing non-financial aspects of the transactions. As underlined by the FATF in its 2016 MER, "[t]his means in particular that acts related to setting up companies, legal persons and legal arrangements, in which lawyers, notaries or fiduciaries may be involved without being parties to transactions such as transfers, are outside the scope of the [AMLA]".

[74] https://uk.reuters.com/article/us-swedbank-moneylaundering/swedbank-to-allow-prosecutor-to-question-lawyer-over-money-laundering-idUKKBN1W20PF
[75] https://www.ft.com/content/2f99ab58-4fee-11e9-b401-8d9ef1626294, March 26 2019.
[76] *Annual Report 2019*, Money Laundering Reporting Office Switzerland MROS, Bern.
[77] 'Switzerland overhauls anti-money laundering laws', 28 June 2019, https://www.internationalinvestment.net/news/4002880/switzerland-overhauls-anti-money-laundering-laws

Financial intermediary category	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Bank	822	1080	1050	1123	1495	2160	2502	4262	5440	6927	**26861**
Money transmitter	184	379	363	74	107	57	129	144	272	311	**2020**
Asset manager	40	27	49	74	40	45	64	87	60	69	**555**
Fiduciary	58	62	65	69	49	48	45	50	40	58	**544**
Credit card company	9	10	22	14	9	13	21	14	71	98	**281**
Other FI	4	2	4	1	3	5	21	21	143	48	**252**
Insurance	9	11	9	19	11	12	89	24	35	26	**245**
Casino	8	6	6	8	9	3	14	28	28	57	**167**
Attorney and Notary Public	13	31	12	9	10	6	5	4	4	5	**99**
Loan, leasing and factoring and forfeiting business	1	5	1	4	3	7	10	14	16	22	**83**
Commodity and precious metal trader	1	1	3	10	3	6	3	11	3	26	**67**
Securities trader	4		1	1	10	3	3	16	9	20	**67**
Foreign exchange trader	6	7		5			3	2	3	26	**52**
SRO		1			2				1	8	**12**
Supervisory authority					2			2	1	2	**7**
Currency exchange		3				1		1		0	**5**
Distributor of investment funds						1		3		1	**5**
Dealer (according to Article 9a AMLA)								1		1	**2**
Total	1159	11625	1585	1411	1753	2367	2909	4684	6126	7705	31324

There are intensely controversial legislative proposals which were aimed at compliance with the FATF Recommendation and criticisms of lawyer regulation in the Swiss MER, but were rejected by the Swiss legislature in 2019-20, and at the time of writing (November 2020), these are unresolved. According to the Federal Supreme Court, financial intermediation activities in which lawyers and notaries are bound by professional secrecy in the sense of art. 321 CC are those which are specific to the profession (*activités typiques*; *anwaltsspezifische Dienstleistungen*).[78]

With respect to lawyers, professional secrecy applies, for instance, to "deposit transactions and, if appropriate, related short-term investments in relation to upfront payments or procedural fees, securities, public-law contributions, etc., as well as payments to or from a party, a third party or an authority relating to an inheritance partition in progress or to the execution of dispositions because of death, the pending liquidation of a matrimonial regime in the context of a divorce or separation, a civil or public law before ordinary or arbitral tribunals as well as enforcement proceedings". As regards notaries, professional secrecy could apply to "the transfer of the purchase price of a real state through the notary's client assets account which authenticates the deed of sale". Professional secrecy could also for instance apply to "the reimbursement by the notary of mortgage debts on the purchase price or the payment of taxes related to a real estate transaction using funds transferred by a co-contractor". Conversely, financial intermediation activities in the context of which lawyers and notaries are *not* bound by professional secrecy in the sense of art. 321 CC and are therefore subject to the reporting requirement as per art. 9 AMLA

[78] ATF 132 II 103, c. 2. *Contra:* B. Chappuis, *La profession d'avocat. Tome I: Le cadre légal et les principes essentiels*, 2nd ed., Schulthess, Geneva/Zurich, 2016, pp. 295–296. According to this author, financial intermediation activities carried out by lawyers and notaries are never specific to the profession. As a result, the author considers that lawyers and notaries who carry out financial intermediation activities are always subject to the obligation to report.

are those which are not specific to the profession (*activités accessoires*; *akzessorische (anwaltliche) Geschäftstätigkeit*). FINMA defines such activities as those where "the commercial component prevails over the activity of lawyer". This includes notably activities which are usually carried out by asset managers, fiduciaries or banks, like asset management or investment.

Swiss law does not allow lawyers and notaries to send their SARs to their Self-Regulatory Organisation (Selbstregulierungsorganisation des Schweizerischen Anwaltsverbandes und des Schweizerischen Notarenverbandes, SAV/SNV). Lawyers and notaries must send their mandatory and voluntary SARs directly to their FIU – MROS - which will then forward the relevant information as well as the results of its analysis to the competent prosecution authority if deemed necessary. The Federal Council indeed considers that "it is up to the lawyers and notaries themselves to distinguish, in the context of their practice and in each individual case, whether it is a case related to their main or accessory activity"[79] and therefore whether they are bound by professional secrecy or not.

Likewise, there is no special rule regarding the content of SARs filed by privileged professions. These SARs must include the same information as those filed by any other financial intermediaries. Under Swiss law, there are no special rules on the prohibition on tipping off for privileged professions; indeed, there is no provision allowing them to dissuade a client from engaging in illegal activity.

Among the many extraordinary provisions in Swiss legislation is the treatment of reporting data when requested by a member of the public who has been or may have been reported. On the basis of art. 8(1) Federal Act on Data Protection, any person may request information from MROS as to whether data concerning him/her is being processed. MROS must then usually provide the person with all available data in its database concerning him/her, including the available information on the source of the data, and inform him/her of the purpose of and, if applicable, also the legal basis for the processing, as well as the categories of the personal data processed, the other parties involved with the file and the data recipients.

However, pursuant to art. 8 Federal Act of 13 June 2008 on the Federal Police Information Systems, to which art. 35(1) AMLA refers, MROS is required to defer providing information to the requesting person in the following cases: if the data processed concerning the requesting person relate to overriding interests for criminal prosecution that require the maintenance of secrecy, or if no data concerning him/her are being processed. In these two cases, MROS must inform the person concerned of the postponement of its reply and let him/her know that he/she can ask the Federal Data Protection and Information Commissioner to verify whether any data

[79] FF 1996 III 1057, 1089. During the consultation process preceding the Federal Council's decision on the AMLA, the Swiss Bar Association and the Swiss Association of Notaries proposed, however, a special regulation on reporting by lawyers and notaries. Under this proposal, lawyers and notaries would not submit their reports to MROS, but to their self-regulatory body. This body would be responsible for deciding whether the report concerned facts covered by professional secrecy or whether it could be transmitted to MROS.

concerning him/her are being processed in accordance with the law and whether overriding interests related to the maintenance of secrecy justify the postponement. MROS provides the information to the requesting persons as soon as the interests relating to the maintenance of secrecy can no longer be invoked, but at the latest after the expiry of the retention period, provided that this does not cause excessive work. Individuals for whom no data has been processed are informed by MROS three years after receipt of their request. If a person gives good reason to consider that he/she will be seriously and irreparably damaged by the postponement of the reply, the Federal Data Protection and Transparency Officer may recommend that MROS immediately and exceptionally provide the requested information, as long as this does not pose a threat to internal or external security.[80]

There is no centralised Beneficial Ownership Register in Switzerland, and though companies are required to maintain such a list, Swiss law does not require companies or lawyers to verify the accuracy of the beneficial ownership information disclosed to them, making the list somewhat pointless except where people are honest. Arts. 697*l*(1) and 790*a*(5) CO only require companies to keep a list of the beneficial owners disclosed to them.

United Kingdom

The structure of lawyer supervision of AML in the UK is quite elaborate. An Office for Fair Trading report, Competition in the Professions, identified in 2001 a number of issues that might disadvantage consumers in the legal services sector. Following that, Sir David Clementi undertook an independent review of the regulatory framework for legal services in England and Wales. His 2004 report argued that a new oversight body was needed to bring consistency and clarity to the regulation of lawyers, and a sharper focus on the interests of consumers. The Legal Services Board was subsequently established under the Legal Services Act 2007. The Act sets up a framework that includes eight regulatory objectives which aimed at a clear focus on regulation in the public interest,[81] and splitting off from the Law Society, the Solicitors Regulation Authority was established to regulate professional conduct of solicitors, taking its enforcement cases to the Solicitors Disciplinary Tribunal or sometimes, in collaboration with the police, to the criminal courts.

The SRA conducts thematic reviews of AML issues with increasing rigour and expertise, and takes over the management of firms in cases where it finds sufficient wrongdoing (AML failings, fraud or other breaches) to intervene to protect the clients, and closes down the firm. The management of collateral damage is not always easy in times of sprawling merged franchises. In the last five years, the SRA has taken more than 60 cases, linked to potential improper money movements, to the Solicitors Disciplinary Tribunal. These cases have seen more than 40 solicitors

[80] Art. 8(7) Federal Act on the Federal Police Information Systems.

[81] https://www.legalservicesboard.org.uk/our-work/regulatory-performance

being struck off, voluntarily coming off the roll, or suspended from practising. At the beginning of May 2019, the SRA had more than 160 live investigations into law firms linked to money laundering issues. In 2018, the Solicitors Disciplinary Tribunal struck off 80 people, fined 85, indefinitely suspended one and suspended 20: but no money laundering breaches were mentioned among the reasons given for striking off.[82]

In influencing the SRA's approach to enforcement, it sets out the following criteria of harm and attitude to regulation:[83]

Mitigating features	Aggravating features
Steps taken to comply with the requirement they are in breach of.	No steps taken to comply with the requirement they are in breach of.
A clear plan to achieve compliance and to ensure likelihood of repetition is low, with a reasonable timeframe for completion.	Failure or refusal to comply, act on our advice or to take appropriate steps to reduce likelihood of repetition.
There has been minimal impact on the risk the firm may have been used for money laundering and/or terrorist financing.	There has been a significant impact on the risk that the firm may have been used for money laundering or resulted in money laundering, terrorist-financing or harm to the public.
Isolated incident	It is a repeated failure demonstrating a pattern of behaviour or culture.
The non-compliance of the firm was primarily due to circumstances outside of their control.	There is evidence the non-compliance of the firm was intentional or was despite full knowledge of the requirements.

In a major thematic AML/CTF review in 2018, the SRA noted[84]

- Overall, most firms we visited are taking appropriate steps to understand and reduce the risk of money laundering, and to comply with the new regulations.

[82] *Annual Report 2018*, Solicitors Disciplinary Tribunal.
[83] https://www.sra.org.uk/sra/corporate-strategy/sub-strategies/enforcement-practice/anti-money-laundering/
[84] https://www.sra.org.uk/sra/how-we-work/reports/preventing-money-laundering-financing-terrorism/

- We were also encouraged that some firms are going beyond the minimum requirements, for example to test training and compliance.
- We found examples of good practice, including having a variety of ways to establish the source of a client's funds and wealth.
- Yet we did find areas of concern. Not all firms were keeping records of their decisions, and many had not made progress with putting a firm-wide risk assessment in place. We recognise that they had been given limited opportunity to implement the new regulations, but we expect firms to move towards compliance as a matter of urgency.
- Firms are generally carrying out appropriate customer due diligence (CDD).
- There were also a small number of firms who have a significant amount of work to do to improve both processes and practice. This is a serious issue. If firms fail to comply we will take regulatory action, and following our review have referred six firms into our disciplinary processes.

Its most recent thematic reviews have been on cybersecurity and investment scams. In its report on the latter, the SRA notes:[85]

> We have warned that it is professional misconduct for a solicitor to act or to continue to act in a dubious investment scheme. We will take disciplinary action against any solicitors who fail to carry out reasonable enquiries to satisfy themselves that transactions they are involved in are not fraudulent or who take unfair advantage of buyers.
>
> In the last five years, we've taken 48 solicitors and two firms to the tribunal, resulting in 16 strike offs, eight suspensions and £870,000 worth of fines. We have also issued guidance and published three warning notices about the key signs of dubious investments in 2013, 2016 and 2017.

Other reviews will not be discussed here, but money laundering is an inherent feature of investment frauds. A combined guidance is negotiated by the Legal Sector Affinity Group, which in its current draft is 178 pages long, and has to be approved by HM Treasury before becoming public. Because of recent legislative changes, this will revise the 2018 guidance.[86] It sets out in detail the procedural requirements for firms.

In 2018, OPBAS (Office for Professional Body Anti-Money Laundering Supervision) was created to try to generate greater consistency between the supervisory professional bodies, including all the legal and accounting professional bodies in the UK, a wider jurisdiction than the SRA and LSB, which have no jurisdiction over Scotland and Northern Ireland. Finally, there is the Law

[85] *Investment schemes that are potentially dubious: A thematic review to enhance our understanding of typical schemes and explore how and why solicitors become involved*, August 2020, Solicitors Regulation Authority.
[86] https://www.sra.org.uk/solicitors/resources/money-laundering/money-laundering/

Society of England and Wales (and separate bodies for Scotland and for Northern Ireland) itself, most of whose regulatory functions were separated out and passed over to the SRA. Every law firm is required to have an MLRO, who may also be a sole lawyer, though one person firms are increasingly rare, and in large firms, they need one at Board level to ensure that AML receives sufficient senior attention. The Law Society arranges for AML training, advice services on AML matters, and hosts the Money Laundering Task Force as a Committee.

The UK is a unitary jurisdiction for some purposes (e.g. financial services regulation), but not for others (e.g. regulation of the professions, where Scotland and Northern Ireland have their own separate processes). In 2018-19, the number of SARs from independent legal professionals was 2,774; in 2020, there are 149,621 practising solicitors with current certificates. [87] This compared with 164 SARs in 2000 and 176 in 2001: the Law Society's Money Laundering Task Force was created in 2000. Important for this and other sectors is the *distribution* of reports, which measure the concentration among different firms, but these are not publicly available data and are held only by the UKFIU. It would be surprising if many firms made more than one or two reports annually, and most would make none: there is one SAR per 54 solicitors, but that may be a poor measure of risk. An MLRO working in the regulated sector must make a SAR if they know or suspect, or have reasonable grounds for knowing or suspecting, that a person is engaged in money laundering. More detailed guidance is given by the Law Society about the process. [88]

All firms must ensure that they have a full risk assessment in place and that they comply with the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, as amended by the money laundering and terrorist financing (amendment) regulations 2019.[89] However, the SRA's 2019 review found that more than a third of firms surveyed had not made a full assessment and 'without this, firms might have vulnerabilities that they do not know about'.[90]

Legal Professional Privilege

The disclosure obligations and POCA framework largely was designed for a financial services framework in which there is a duty of confidentiality but there is no LPP. As FATF observes:

> There may be cases in which these professionals conduct activities that are clearly covered by the legal privilege (i.e. ascertaining the legal position of their client or

[87] The Legal Services Board Market Structure Research shows that as at 1 April 2020, the number of persons authorised to undertake reserved legal activities by their respective regulator were: 146,913 Solicitors with practising certificates; 16,982 practising Barristers; 7,156 practising members of the Chartered Institute of Legal Executives, most of whom work for Solicitors' firms; 1,404 Licensed Conveyancers in England and Wales; 740 registered Trade Mark Attorneys; 2,163 United Kingdom registered Patent Attorneys; 750 Notaries and 733 authorised Law Costs Draftsmen.
[88] https://www.lawsociety.org.uk/en/topics/anti-money-laundering/suspicious-activity-reports
[89] One of the changes brought about is in regulation 30(a), which sets out a requirement to check trust and company beneficial ownership registers before establishing a business relationship, and to report any discrepancies found to Companies House.
[90] https://www.sra.org.uk/risk/outlook/priority-risks/anti-money-laundering/

> defending or representing their client in judicial proceedings) alongside activities that are not covered by it. In addition, within a single matter, privilege may attach to some but not all communications and advice.[91]

The decision about LPP is made in a context in which there is complicated case law around common law concepts of legal advice and assistance, relevant legal context, purpose, and even what constitutes 'a client'. 'Privileged circumstances' is narrowly defined. The case law does not deal adequately with the decision-making process of the lawyer in deciding whether information is, or is not, subject to LPP or is provided in privileged circumstances.

The structure of the legislation (a reporting obligation and then an exception or a defence) highlights that lawyers need actively to consider whether LPP applies, rather than simply assume that it does. This is appreciated by FATF, which stated

> In situations where legal professionals are claiming legal professional privilege or professional secrecy, they must be satisfied that the information is protected by the privilege/professional secrecy and the relevant rules.[92]

The UK has its own specific approach to Legal Professional Privilege, as the FATF recognises and approves. Essentially, if the communication with clients is covered by LPP and the crime/fraud exception does not apply (i.e. the conduct is not – or not consciously to the solicitor - furthering a criminal act), the solicitor cannot make a disclosure under the Proceeds of Crime Act 2002 (POCA).

If the communication was received in privileged circumstances and the crime/fraud exception does not apply, the solicitor is exempt from the relevant provisions of POCA, which includes making a disclosure to the NCA.[93]

If neither of these situations applies, the communication will still be confidential. However, the material is disclosable under POCA and can be disclosed, whether as an authorised disclosure, or to avoid breaching section 330 (i.e. money laundering). Sections 337 [in force] and 339ZF of POCA 2002 permit the solicitor to make such a disclosure and provides that s/he will not be in breach of a professional duty of confidentiality when s/he does so. The Legal Sector Affinity Group provides helpful logic diagrams (Annex A to this report), to help lawyers decide when they should report or not.

S. 330 of the Proceeds of Crime Act 2002 adopts an objective negligence standard, but it is not always clear when negligence attaches. Lawyers are required to file a SAR if they "know or suspect" someone has engaged in money laundering *or* if they have "reasonable grounds" for

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[91] *FATF Guidance for A Risk Based Approach: Legal Professionals* (June 2019) p10

[92] *FATF Guidance for A Risk Based Approach: Legal Professionals* (June 2019) p11

[93] There is no need to rehearse the issues in depth here. But see Sarah Kebbell, ""Everybody's Looking at Nothing"—the legal profession and the disproportionate burden of the Proceeds of Crime Act 2002." *Criminal Law Review* 2017.10: 741-753.

suspicion. But do "reasonable grounds" refer to those suspicions that lawyers may have after having been made aware of something e.g. following reading a document or having a conversation? Or do they refer to those suspicions that the lawyer *could* have had if they *had* made themselves aware, e.g. by reading a file that they did not read or chose not to read (and who is to know that?).

Typically, criminal and, *a fortiori*, disciplinary cases in the UK involving lawyers arise from their misuse of their clients' funds for their own financial benefit and follows conviction for an offence, though the Solicitors Regulation Authority inspects firms and can proceed for breaches of regulation such as proper keeping of accounts without reference to the police or the National Crime Agency. Prosecuted frauds by solicitors tend to be committed by sole practitioners or small firms with very few partners (though risk-based supervision models now keep these in check more than in the past); some of the larger ones may be prosecuted by the Serious Fraud Office. The laundering in such cases is usually self-laundering, and in any event is seldom very complex, often being used to repay debts, continue gambling, pay for illegal drugs, etcetera. The accounts manipulation essentially involves covering up funds taken from client deposits and extracted as cash. For the purpose of these legal proceedings, the obligation on a lawyer to report as suspicious his or her own behaviour would be a marginal issue compared with the solicitor's theft of the client funds and the laundering thereof.[94]

However, there are also cases in which criminals persuade solicitors to allow their firms' bank accounts to be used rather like banks' correspondent accounts in accepting cash and wire transfers. (For example, one convicted solicitor placed large amounts of cash in his account representing it to be deposits on property.) They also accept multiple identity documents from the same person without seeing any originals. One of the symptoms is a substantial amount of business that is not normal for a firm of this type, but this may not be apparent to a jury or, for that matter, to the firm's bankers unless they are practising high quality ongoing due diligence. (They can perhaps be put off by inventive explanations couched behind legal professional privilege if they enquire, though this would not stop them from making a suspicious transaction report.)

Solicitors have also allegedly permitted their allegedly criminal clients to use their premises for meetings, for sending and receiving faxes, and as addresses to register lease vehicles used by criminals, thereby obscuring the link with offenders for investigative purposes. Innocent explanations are possible, but certificates of leasing and vehicle ownership might be expected to place them on alert. Solicitors have also allegedly been involved in assisting non-UK resident landlords to avoid UK withholding tax on rental income by inserting a UK third party who later

[94] David Middleton and Michael Levi, 'Let Sleeping Lawyers Lie: Organised Crime, Lawyers and the Regulation of Legal Services', *British Journal of Criminology*. 2015, 55(4): 647-668; David Middleton and Michael Levi, 'The role of solicitors in facilitating 'Organized Crime': Situational crime opportunities and their regulation', *Crime, Law & Social Change* 42 (2- 3): 123–161. For a more general discussion of legal structures and their exploitation by organised crime, see Kenneth Murray. "When opportunity knocks: mobilizing capabilities on serious organized economic crime." *Public Money & Management*, *40*(5), 397-406.

cannot be traced as the nominal payee of the rent, in a parallel to the 'straw men' in the 'missing trader' carousel frauds. Some of these multifarious activities are unintended facilitation – small firms are selected partly because they are reckoned not to conduct serious due diligence on clients - but others involve blackmail, threats and favours for lawyers, perhaps after criminals' friends (including car dealers and casinos) conduct a credit check on a lawyer and discover his or her financial vulnerability. Speculatively, such pressure may be enhanced during remote working and the decline of turnover during the covid-19 pandemic, but it may take years for any such evidence to emerge. Such processes ought to be part of the firmwide risk assessments that are mandated in the regulated sector. The approach to be taken in such risk assessments is the subject of guidance, and consulting firms are available to assist. However it is a bold venture to expect lawyers (or, for that matter, other financial services professionals) to be able to conduct good risk analyses when doing so is a challenge to criminologists and to security professionals.

The Law Society Money Laundering Taskforce

The role of the Money Laundering Task Force is to advise on all matters relating to money laundering and sanctions including:

- to advise on guidance to solicitors about their professional and legal duties
- to advise on the approach the Society should take in responding to proposals for legislative change from government or elsewhere and in promoting changes to legislation; and
- to comment on and review all anti money laundering (AML) and sanctions related consultations sent to the Society.

The Task Force was founded informally in 1999 and then formally in 2000 to represent the concerns and interests of solicitors when dealing with the draft EU 2nd Money Laundering Directive 2001 and its attempts to regulate lawyers and accountants,[95] the Cabinet Office *Recovering the Proceeds of Crime* report in 2000,[96] and the subsequent Proceeds of Crime Bill which became law in 2002. It was founded as a small separate committee of the Law Society with a strong criminal lawyer and international focus, with help from Law Society staff. Initially chaired by white collar crime specialist Louise Delahunty and assisted by then Law Society Policy Adviser Alison Matthews, later when in private practice its Chair, it wrote a guidance for the profession which was the most comprehensive for any bar association at that point, and argued successfully in Parliament for consent and fast tracking provisions for lawyers' money laundering reports in the Proceeds of Crime Act 2002. This approach was premised on the view that government measures would be imposed on them anyway and that the government (politicians and senior civil servants) and law enforcement agencies needed to understand better

[95] The Second Directive adopted a broad definition of money laundering, including predicate offences such as corruption. It raised the possibility of application to lawyers participating in financial or corporate transactions, which was met with fierce opposition by the European Parliament. A compromise was reached and professionals, such as lawyers, were excluded.
[96] *Recovering the Proceeds of Crime,* Performance and Innovation Unit, London: Cabinet Office, 2000. This author was a member of its Steering Committee.

the practical implications for the profession of the implementation measures that it was proposing: a view still applicable today. The Task Force also considered that the profession needed to be educated about these important developments in their social and legal responsibilities. At this time, the Law Society was the regulator for the profession: the Solicitors Regulation Authority was not created until 2007.

The MLTF also tried to give sector specific guidance, for example to family lawyers, and on what 'suspicion' meant. It organised regional meetings for law firms' Money Laundering Reporting Officers, giving not just typologies discussions and reviews of cases, but creating networks of local lawyers who knew each other and trusted each other enough to discuss 'hypotheticals' if they were uncertain what to do. The Law Society also began to hold national conferences on financial crime, and MLTF members addressed specialist groups such as property crime lawyers.

It was only much later that larger commercial 'city firms' came in with expertise in regulation rather than mainly in criminal cases, reflecting the expansion in the remit of EU Directives and FATF, and with the primary focus of control being on prevention/ regulation rather than on prosecutions for money laundering. Nowadays, the MLTF is heavily occupied in framing the legal profession's response to the UK Government's proposals, including its Economic Crime Levy, Law Commission proposals on SARs Reform and on Proceeds of Crime, HM government Public-Private Partnership efforts, and post-Brexit challenges, as well as on communications within the profession on AML good practices, responding to the Solicitors Regulation Authority and OPBAS. It does not act as a review or reference body for solicitors, still less a continental-style filter, though the Law Society does operate a helpline through which solicitors can discuss their obligations and obtain (paid for) professional assistance: the helpline is clear that their advice does not count as legal professional advice which can be relied upon in legal proceedings, not least because of the legal and financial liabilities that would produce.

In short, the Law Society provides the following free of charge in relation to its role as an AML supervisor:

- Sector-specific guidance on solicitors' AML obligations
- Advice and information on a dedicated AML webpage
- Roadshows, conferences and training events
- Updates to the profession through a dedicated AML newsletter, which includes money laundering cases and disciplinary tribunals
- Webinars
- An AML Helpline and email Practice Advice Service (PAS)
- AML Directory is the list of solicitors offering up to 30 minutes' free AML advice to members, available on its website

Chargeable services include:

- Bespoke advice on a firm's compliance procedures
- Publications such as the AML Toolkit (whose 3rd edition is in preparation) and books
- Events, including the annual AML and Financial Crime Conference

Following the risk-based approach set by FATF and supported by the National Risk Assessment and the SRA, its guidance and materials remind members of the risk-based nature of AML compliance, though there is room for debate about the quality of the evidence base for those risks.

Firm Risk Assessments

Firms that are within scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 are required (since June 2017) to have a written firm-wide risk assessment in place, set out at Regulation 18 of the money laundering regulations. The risk assessment must:

- take into account information the SRA publishes
- address the risk factors set out in the money laundering regulations, namely:
    - the firm's customers
    - the countries or geographic areas in which it operates
    - the products or services the firm provides
    - the firm's transactions
    - how the firm's products and services are delivered
- take into account, and be appropriate to, the size and nature of the business.

The SRA called in 400 firms' anti-money laundering risk assessments in Spring 2019, finding high levels of non-compliance with the money laundering regulations, with 21% not compliant. [97] The SRA had substantial concerns about a significant minority and referred 26 firms into its disciplinary processes as an outcome of the review.

"Of the 400 firms we contacted:

- **83 risk assessments were not compliant:**

[97] https://www.sra.org.uk/solicitors/guidance/firm-risk-assessments/. See also https://www.lawsociety.org.uk/topics/blogs/getting-your-risk-assessment-in-order

- **40 firms did not send us a firm risk assessment, instead sending us something else**
- **43 firms did not address one or more of the Regulation 18 criteria.**

We found that 135 of the risk assessments we received (38%) were dated after our request went out. A proportion of these may have been updates of earlier risk assessments, however others may have been a newly created document, suggesting that some firms within our sample did not have an existing risk assessment at the time our request was received.

When we reviewed of our records and the firms' own websites, we found that many risk assessments were not appropriate to:

- the size of the firm's business
- the services the firm offered
- the geographical area in which the firm operated.

We also found that the use of templates had an impact, with risk assessments based on a template being generally lower quality. Those risk assessments which were not based on a template tended to be better. If you are choosing to use a template, you must make sure to tailor it to your firm and avoid copying and pasting specimen text….

We expect firms to be compliant in this area and have provided a variety of resources to help firms draft an effective firm risk assessment:

- a sectoral risk assessment, setting out common risks
- the Legal Sector Affinity Group AML guidance
- a checklist to help firms prepare for a firm risk assessment (DOC 8 pages, 44KB)
- a template (DOC 5 pages, 42KB) which we have developed using learning from our review and which firms can use to frame their risk assessment – unlike the other templates we have seen, this does not include specimen text."

There is detailed advice given about positive and negative approaches to firms' risk assessment (https://www.sra.org.uk/solicitors/guidance/firm-risk-assessments/), repeated at financial crime conferences (though these are not well attended by smaller firms). Some consultant members of the MLTF are commissioned by firms to give advice if they consider that the AML Toolkit published by the Law Society is insufficient.

Scotland has its own separate regulatory body which carried out a review of law firms' compliance with trust or company service provision,[98] identifying

■ the failure of some firms to fully consider and acknowledge the provision of trust or company services and the associated risks in their firm level risk assessment ■ a failure to address those services in their policies, controls and procedures (PCPs) to mitigate the risks ■ poor AML file management and record keeping to evidence compliance with the Regulations and the Law Society of Scotland Practice Rules ■ a failure to produce AML-specific files relating to client matters and relationships in a timely manner ■ inadequate ongoing monitoring of client relationships and documenting "Know Your Client (KYC)." It gave good and bad examples of law firms' risk assessments. The Scottish Law Society has many of the same services provided by its counterpart in England and Wales, though the nature of business in the jurisdictions varies.[99]

General Comments

Of importance in the context of FinCEN leaks, the freezing of assets is addressed by the 4AMLD but not also by the FATF. According to Article 35(1) 4AMLD, the content of which is reflected in Italian, UK and German laws (but not Spanish law), obliged entities shall not carry out transactions which they know or suspect to be related to money laundering or terrorist financing until they have filed a SAR and have complied with any further specific instructions from the FIU.[100] An exception applies, however, where refraining from carrying out transactions is impossible or is likely to hinder investigations or judicial proceedings. However obliged entities in Switzerland are required to freeze assets only upon receiving a notification from the FIU (MROS) stating that the SAR has been forwarded to the competent authorities. Pending such a notification, which should be received within 20 working days, the financial intermediary is required to continue executing the orders of the customer. Another distinctive feature of the Swiss legal framework as regards the freezing of assets is that, compared to the other legal frameworks analysed, it specifies that five working days is the maximum amount of time during which assets shall be frozen.

Maillart[101] notes that the scope of the reporting duty of privileged professions is narrower under the FATF Recommendations than under the EU, as the former only covers cases where, on behalf

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[98] *Trust or company service provision by the Scottish legal profession: Thematic Review,* Law Society of Scotland, 2020.

[99] https://www.lawscot.org.uk/members/business-support/financial-compliance/anti-money-laundering/

[100] German law is more permissive than Art. 35(1) 4AMLD, allowing the obliged entity which has filed an SAR to carry out the suspicious transaction once the third working day (which does not include Saturdays) after the day on which the SAR was filed has elapsed without the execution of the transaction having been prohibited by the FIU or the competent public prosecution office. Similarly, if no reply is provided by the UK FIU within seven working days, it is considered that a defence is afforded to the reporting obliged entity and that it is allowed to carry out the suspected transaction. Where the UK FIU refuses consent, however, the transaction or activity must not proceed for a further 31 calendar days, or, if earlier, until further notified by the FIU. The moratorium period of 31 calendar days can be extended.

[101] 827-828.

of a client, they *engage* in a financial transaction in relation to one of the aforementioned activities, and not also when they *assist* in the planning or carrying out of the transaction. Switzerland is even more restrictive, since legal professions are deemed obliged entities only to the extent that they perform financial intermediation in the sense of Article 2(3) of the AML law, i.e. when they qualify as "persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets." The thresholds associated with this definition are very high and thus often not met by the legal professions.

Whatever the ambit of the reporting obligation is, the law in all the jurisdictions provides that notaries and other independent legal professionals are not subject to the obligation to report where they are bound by professional secrecy, i.e. when the matter relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings. In Germany, however, the reporting obligation remains in force if the obliged entities knows (and not merely suspects) that the contracting party has used or is using the client relationship for the purpose of money laundering or terrorism financing or another criminal offence. A mere suspicion is not enough; the professional must, from their subjective perspective, be sure that the client relationship has been used or is being used for a criminal purpose. This must be quite a rare phenomenon, akin to a conspiracy charge in common law countries, and it is not obvious (absent live recording or a self-incriminating file note) how it could be proven.

In Germany, the UK and Switzerland, all regulated persons (including the legal professions) are required to submit their SARs directly to the FIU. In contrast, Spanish law requires notaries and registrars to submit their SARs to their designated self-regulatory bodies, which then have to forward the information to the FIU promptly and unfiltered. In Italy, lawyers, notaries, other independent legal professionals, as well as tax advisors, auditors and external accountants, can choose whether to file their SARs with the FIU or with their self-governing organisations. Such special rules for privileged professions are consistent with Article 34(1) 4AMLD and the Interpretative Note to FATF Recommendation 23.

There are also big differences in attitudes to data protection. In Spain and the UK, the FIU is allowed to refuse access to its files by persons whose personal data are being processed or held by it. However German law allows the FIU to provide the person concerned, upon request, with details of the available information concerning him/her if the analysis of an SAR has not yet been concluded, provided that this will not interfere with the purpose of the analysis. At the request of the person concerned, the FIU may also provide such information if the analysis of an SAR has been concluded but its results were not forwarded to the criminal justice authorities. The German FIU is however no longer allowed to provide information to the person concerned once it has transmitted the matter to the criminal justice authorities and if the procedure by these authorities is ongoing. (Major investigations everywhere may take years.) The FIU must also refuse to

provide information if such disclosure would negatively impact international relations, matters concerning the internal or external security of Germany, the conduct of another criminal investigation, or the conduct of ongoing judicial proceedings.

The Swiss FIU is also authorised to disclose details about an operational analysis to the person concerned under specific circumstances. According to Swiss data protection law, to which the AML law frequently refers, people may request information from the Swiss FIU as to whether data concerning them is being processed. The FIU is required then to provide them with all available data concerning them, including the available information on the source of the data, and inform them of the purpose of (even the legal basis for) the processing, as well as the categories of personal data processed, the other parties involved with the file and who received the data. The FIU must however postpone disclosing information to the requesting person if the data processed concerning him/her relate to overriding interests for criminal prosecution.

Other jurisdictions of interest

Australia

Though changes have been long promised (and perhaps delayed by the postponement of the on-site visit to conduct the Australian MER in 2019-2020),[102] the legal profession is not obliged to report any suspicions to AUSTRAC or to any other body, though the Law Council views their professional standards as adequate and notes that in Australia (at least to the time of revision in 2016), no legal practitioners have been prosecuted for or convicted of money laundering.[103] The transfer of the reform file from the Attorney General to the Home Office apparently meant a long delay in implementation! Lawyers have obligations under the *Financial Transaction Reports Act 1988* (FTR Act) to report transactions involving cash of AUD10,000 or more. However, lawyers and other professional 'gatekeepers' (such as accountants and real estate agents) are generally not subject to regulation under Australia's *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), unless they provide a designated service under the Act, which rarely occurs. Significant cash transaction reporting from solicitors shows the volumes of money moving through trust accounts controlled by legal professionals. This reporting comes in two categories: threshold transaction reports (TTRs) under the AML/CTF Act and significant cash transaction reports by solicitors (SOLTRs) under the FTR Act. For 2012-16, approximately AUD148 million was reported in TTRs based on analysis of a sample of legal property and/or trust related entities. This compares with almost AUD33 million in SOLTRs. In 2014, there was almost AUD36 million reported in incoming TTRs (i.e. deposits into Australian legal entity accounts), and over AUD10 million in total was reported in SOLTRs, perhaps but not

[102] https://www.afr.com/property/residential/international-body-suspends-anti-money-laundering-law-evaluations-20191118-p53bid

[103] https://www.lawcouncil.asn.au/docs/94749cb5-3c56-e711-93fb-005056be13b5/1601-Policy-Guideline-Anti-Money-Laundering-Guide-for-Legal-Practitioners.pdf, p.11. Whether this is a matter of praise or condemnation is not stated.

necessarily an indication of underreporting of SOLTRs. The unclassified section of a classified AUSTRAC report concludes:[104]

> Legal professionals have significant cash transaction reporting (SCTR) requirements under s15A of the FTR Act for cash amounts of AUD10,000 or more, but these can be easily avoided through the use of structured payments to law firms. Given the limited reporting requirements applied to solicitors, legal trust accounts are increasingly at risk of being a vehicle to move illicit funds. Although legal trust accounts are subject to auditing from legal practice bodies, law enforcement authorities require a search warrant to view trust accounting records. This has been identified as a 'catch 22' for law enforcement. Without a warrant they cannot obtain sufficient intelligence to link the legal professional to ML operations. Without sufficient intelligence to link the legal professional to ML activity, obtaining a warrant is challenging.

In a markedly different tone, the Law Council's policy document of 2016 concludes:[105]

> The Law Council has been actively engaged with the Government in representing the interests of the legal profession in relation to Tranche 1 and Tranche 2 of the AML/CTF legislation and will continue to do so vigorously. The Law Council will also continue working with its Constituent Bodies to provide up-to-date information to legal practitioners in relation to AML/CTF issues. The Law Council will keep this Guide and other guidance materials updated to ensure continuing education of the legal profession on AML/CTF risk management.

Since 2016, indeed currently, there have been major scandals involving Australian banks, casinos, and real estate money laundering, as well as alleged political corruption, though the role of lawyers in those scandals has not been a central issue.

United States

American lawyers are not subject to the general AML responsibilities, including compliance with those gatekeeper requirements concerning suspicious activity reporting, CDD or record- keeping. Although not part of a set of wider AML obligations, U.S. lawyers must not retain a fee received from illicit funds; receive currency of $10,000 or more unless they file currency transaction reports; or transact, facilitate or advise with respect to a transaction with Specially Designated or "blocked persons", namely drug traffickers, terrorists and former foreign leaders of certain nations like North Korea, or with any other person subject to U.S. economic sanctions, without a prior license from the U.S. Treasury Department. The US legal profession is organized into 50 separate state bars and represented at the national level by the American Bar Association (ABA), a voluntary association of lawyers across the

[104] *Exploitation of Legal Professionals*, AUSTRAC Strategic Intelligence Report 2016, para 48.
[105] Supra, at p.21

country. The national role played by the ABA is manifested in the production of benchmark standards of professional conduct for the profession and in the exclusion of federal or state lawmakers from primary responsibility for the regulatory oversight of lawyers or production of rules of conduct. So although the FATF has been a huge institutional success globally, it has not been able to overcome the resistance of several powerful countries, of which the greatest is the US. Hence, the *voluntariness* of the professional guidelines, which otherwise mirror the KYC and CDD provisions of other countries, combined with a preference for modestly enforced ethical guidelines.[106]

On April 29, 2020, the American Bar Association issued Opinion 491[107] reminding lawyers that they are responsible for conducting sufficient inquiry into the facts and circumstances of a matter a client or prospective client asks them to undertake if there is a "high probability" that the client is seeking to use the lawyer's services to commit a crime. It states:

> [W]here facts known to the lawyer establish a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity. . . . Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under [Model] Rule 1.2 (d), other rules may require the lawyer to inquire further in order to help the client avoid crime or fraud, to avoid professional misconduct, and to advance the client's legitimate interest. . . . If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under [Model] Rule 1.16….A lawyer's reasonable evaluation after inquiry and based on information reasonably available at the time does not violate the rules. This opinion does not address the application of these rules in the representation of a client or prospective client who requests legal services in connection with litigation.

This is the latest stage in a *longue durée* process of resistance to central regulation (a more general theme in American politics, not restricted to the American legal profession), and there exists no serious evaluation of its likely impact on actual professional conduct: this would anyway require it to be assessed in the manner of the UK regulators.

A now dated research study examined 123 case files of defendants who had been convicted and sentenced in 2009 in the US Second Circuit on federal money laundering charges.[108] It noted that 98.4 per cent of convictions were obtained through a plea, and found that

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[106] *See* Jack Sahl, *Lawyer Ethics and the Financial Action Task Force: A Call to Action,* 59 N.Y.L SCH. L. REV. 457-486, 2015.
[107] https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-491.pdf
[108] Lawton Cummings and Paul Stepnowsky, "My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money-Laundering through Commercial Transactions" (2011). *Faculty Scholarship*. 971.
https://digitalcommons.law.umaryland.edu/fac_pubs/971

'lawyers facilitated money laundering, both wittingly and unwittingly, in twenty-five per cent of the cases examined'. Of the 10 cases pertaining to lawyers in the final data set of 40 cases, four involved 'lawyer self-directed schemes' where the lawyer had committed a predicate crime, such as fraud or embezzlement, and then had laundered his/her own illicit gains. This left only six cases where lawyers were unwittingly involved in facilitating money laundering, five of which pertained to real estate transactions. Cummings and Stepnowsky concluded that there was no demonstrable evidence to support government proposals that 'lawyers act as agents of the government by filing SARS with a federal entity', since lawyers who deliberately launder their own illicit monies will not report suspicious transactions, and any suspicious reporting regime could only possibly be of value in cases where lawyers unwittingly facilitate money laundering, a view shared by Terrill and Breslow.[109] (Though if they were truly unwitting, why would the lawyer have made a SAR? If at all, presumably via education to raise their consciousness.) In this study, only 6 out of 123 cases had lawyers who were unwitting dupes of money laundering, and more than 80 per cent of these cases concerned real estate money laundering.

Conclusions

There are many different approaches to the regulation of misconduct and alleged misconduct by lawyers and to their obligations to report clients whose transactions raise suspicions (outside the giving of legal advice). Nougayrede[110] writes of these national variations as reflecting different cultural traditions about interference with the legal profession. I might conclude that the UK (as with other spheres of fraud and AML control) is an outlier of cooperative public-private approaches that include but are not restricted to those involving the professions (constrained by matters of practicality and interest), and the US is at the other extreme of self-regulation at a State level but not regulated at Federal level. This report has not dealt with the appropriateness or otherwise of the various legal constructions for protecting privacy over wealth around the world, which are the object of much criticism from NGOs, investigative journalists and from law enforcement.[111] It has not dealt with whether it is right to blame lawyers for helping clients use such constructions that

[109] Laurel Terry, "US legal profession efforts to combat money laundering and terrorist financing." *NYL Sch. L. Rev.* 59 (2014): 487. John Terrill & Michael Breslow, "The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach." *NYL Sch. L. Rev.* 59 (2014): 433.

[110] Delphine Nougayrede, "Anti-Money Laundering and Lawyer Regulation: The Response of the Professions," *Fordham International Law Journal* 43, no. 2 (December 2019): 321-362.

[111] See, for some examples of the upper range of such analyses, Catherine Belton, *Putin's People: How the KGB Took Back Russia and Then Took on the West*, 2020, London: William Collins; Tom Burgis, *Kleptopia: How Dirty Money is Conquering the World*, 2020, London: William Collins; Nicholas Lord, Liz Campbell, and Karin Van Wingerde, "Other people's dirty money: professional intermediaries, market dynamics and the finances of white-collar, corporate and organized crimes." *The British Journal of Criminology* 59.5 (2019): 1217-1236; Kenneth Murray, "In plain sight – developing strategic responses to corporatised organised crime" *Journal of Financial Crime*; 2020: 619-63; Jason Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*, 2017, Cornell University Press.

their country has stated are legal (or for lobbying for their continued legality). It has teased out some of the differences of legislative and practical organisation of AML obligations, some of which are in a state of flux due to pressures from the FATF and EU. Some metrics of efficiency and effectiveness are more visible than others, but none of the jurisdictions (or the FATF and EU themselves) have grappled successfully with the problem of how to judge effectiveness (or cost-effectiveness) in assessing lawyer performance in money laundering and crime reduction of different kinds.

It should be appreciated that the kind of behaviour upon which lawyers might be expected to report varies from small income for divorcing couples not disclosed to tax or social security officials, through purchasing homes and small businesses in poor areas, to multi-million pound business deals and luxury home purchases for the beneficial ownership (disclosed or undisclosed) of overseas public officials, businesspeople and/or organised/white-collar criminals. This is a huge range of crimes and social harms. Setting aside the representation of their clients in legal matters, which are out of scope, getting lawyers to report suspicions of their clients/transactions seems to be an issue of symbolism and tone, and having an obligation for lawyers to consider the legality (even to some, legitimacy) of sources of funds and the rationale for legal constructions does not seem in principle to be wrong.[112] If no-one other than the lawyer knows about it and the client is able to do what s/he wishes, refusal to act alone for them is little deterrence or prevention, though it would protect the individual lawyer or law firm and might irritate the client or potential client. Though prosecutions may be rare, the extension of overseas tax evasion and bribery/corruption as predicate offences for money laundering is a potential game changer in the volume of crime that touch upon the work of the transaction lawyer, and the Cullen Commission might like to reflect on how the different systems discussed here deal with such issues when making their recommendations for reform.

[112] It is easy to underestimate the difficulties for lawyers and other regulated persons in satisfying themselves that *all* the funds are sourced legally. How, for example, is one to make these judgements about people from relatively opaque economies such as China and Russia? Should there be blanket exclusions for people who do not meet 'risk appetite' or simply 'best efforts'?