

Master Thesis

MASTER IN EUROPEAN ECONOMIC AND FINANCIAL CRIMINAL LAW (LL.M.)

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**The fight against money laundering, terrorist financing and
tax fraud - a global policy challenge**
-The quest for legal certainty, legitimacy and efficiency-

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ABSTRACTS

In English

Money laundering, terrorist financing and tax fraud are global policy challenges. Rules, standards and guidelines have been elaborated on different policy levels: The global policy level is seconded by regional policy levels. Sometimes there is even a sub-regional policy level (i.e. the European Union). Finally, yet importantly, the individual States legislate themselves and there might even be different policy levels within a given State. The result is a highly complex multi-layered setting. Coordination between the different layers and actors is difficult. Global policies are challenged by the requirements of legal certainty, legitimacy and efficiency.

Legal certainty is at stake: There are no globally accepted definitions of money laundering, terrorist financing or tax fraud. Due to an overlapping mixture of hard and soft law rules, it is at first glance not possible to know what rules are applicable to or in a given State. Many different texts must be screened and many questions need to be answered beforehand. Moreover, the relevant legal texts are not a source of clarity, especially for a non-lawyer.

Experts originating from a group of States construct legal standards and guidelines. Compliance is checked, again by experts, through evaluation mechanisms. Via naming and shaming even so called non-binding rules are “imposed” at a worldwide scale. There is a shift away from traditional concepts such as State sovereignty. A legitimacy debate has arisen.

States might, at an international level, commit themselves to implement global standards, but might in practice promote own interests. Overall efficiency will be assessed on the examples of France and the US, two important States that are members of the most significant international organizations and parties to the essential conventions. Weaknesses and legal loopholes within national systems have been identified via the two case studies. Such gaps affect the efficiency of the global approach.

In French

La lutte contre le blanchiment d'argent, le financement du terrorisme et la fraude fiscale sont trois défis politiques mondiaux. La nécessité de les adresser à un niveau global a été reconnue et des règles, recommandations et standards ont été émis à plusieurs niveaux : à échelle globale, régionale, subrégionale (Union Européenne) et nationale. Parfois il y a même plusieurs niveaux au sein d'un même Etat. Le cadre normatif est extrêmement complexe. La thèse expose les principaux instruments et acteurs. La coordination reste difficile. L'approche globale est mise en question par les nécessités de certitude légale, de légitimité et d'efficacité.

La certitude légale est mise à mal: Il n'y a pas de définitions universellement reconnues de blanchiment d'argent, de financement du terrorisme et de fraude fiscale. Pour déterminer quelles règles un pays doit respecter et quelles normes doivent être appliquées dans un pays, il faut effectuer des recherches considérables et analyser plusieurs textes en parallèle. Ces textes ne sont pas source de clarté (surtout pour des non-juristes) et engendrent de nouvelles questions.

Des normes et recommandations sont émises par des experts issus d'un groupe très restreint d'Etats. Le respect de ces normes est contrôlé par le biais d'évaluations accomplies de nouveau par des experts. En cas de non-respect, les pays sont listés ce qui impacte négativement les échanges internationaux dudit pays. La question de la légitimité des standards globaux surgit.

Même si un Etat s'est politiquement engagé à implémenter certains standards, ceci ne veut pas dire qu'il le fait en pratique. L'efficacité de l'approche mondiale est analysée sur base de l'étude des Etats-Unis et de France. Les deux sont membres des organisations internationales essentielles, ont adhéré aux principaux instruments et ont contribué à l'élaboration des standards globaux. Ces études de cas ont permis d'identifier des faiblesses nuisant à l'efficacité.

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ABBREVIATIONS

AML	Anti-Money Laundering
AMLF	Anti-Money Laundering Forum
BCBS	Basel Committee on Banking Supervision
BEPS	Base Erosion Profit Shifting
CJEU	Court of Justice of the European Union
CTF	Counter Terrorist Financing
CoE	Council of Europe
ECtHR	European Court of Human Rights
EPPO	European Public Prosecutor's Office
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
FinCEN	Financial Crimes Enforcement Network
FIU	Financial Intelligence Unit
GAL	Global Administrative Law
G7	Group of Seven
G8	Group of Eight
G10	Group of Ten
G20	Group of Twenty
GAL	Global Administrative Law
GDP	Gross Domestic Product
GPML	Global Program against Money Laundering
GTMO	Guantanamo Bay
ICIJ	International Consortium of Investigative Journalists
IMF	International Monetary Fund
IMF-IEO	Independent Evaluation Office of the IMF
IGO	Intergovernmental Organization
IO	International Organization
MLA	Mutual Legal Assistance
OAS	Organization of American States

OECD	Organization for Economic Cooperation and Development
OFAC	Office of Foreign Assets Control
OLAF	European Anti-Fraud Office
TF	Terrorism Financing
TFTP	Terrorist Finance Tracking Program
TI	Transparency International
TJN	Tax Justice Network
TXF	Tax Fraud
UBO	Ultimate Beneficial Owner
UCLAT	Unité de Coordination de la Lutte Anti-Terroriste
US	United States of America
UNSC	United Nations Security Council
WB	World Bank

INTRODUCTION

The “9/11” terrorist attacks exposed, that not even, the so called most powerful country of the world, namely the United States (supported by its allies) was able to tackle international terrorism on its own.¹ A definition of terrorism is “[t]he use or threat of violence to intimidate or cause public panic, especially as means of achieving a political end.”² The threat of terrorism is persisting; terrorist attacks have even increased in frequency since the New York terrorist attacks.³

The financial crises of 2007-2008 revealed how easy States can be destabilized. Tax fraud (“TXF”) and Money Laundering (“ML”) have a huge impact on the budget of the States. A financial crisis is even favourable for ML. Financial institutions lack liquidity and criminal organizations often have a huge amount of liquid assets.⁴ Tax fraud or tax evasion is defined in the Black’s law dictionary as “[t]he wilful attempt to defeat or circumvent the tax law in order to illegally reduce one’s tax liability”.⁵ A definition of Money Laundering (“ML”): “[t]he act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced.”⁶

The 2016-2017 offshore leaks revelations (Panama Papers and Paradise Papers) scandalized the public. The international community needed to act and increase the fight against organized TXF and ML. At international level, States had taken tax evasion too lightly.⁷ Already in 2011, the Corruption Perception Index of

¹ Delmas-Marty, Mireille. “Le relatif et l’universel” (Paris, Éd. du Seuil, 2004) ; Page 37.

² Garner, Bryan & Black, Henry. “Black’s law dictionary”; Abridged 10th edition; (Thomson Reuters, 2015) ; Page 1251.

³ Gardner, K. “Fighting terrorism the FATF way” (2007). Global Governance, 13(3); Page 326.

⁴ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment” (Saint-Denis, Connaissances et Savoirs, 2016) ; Page 279.

⁵ Garner, Bryan & Black, Henry. “Black’s law dictionary”; Page 1242.

⁶ Garner, Bryan & Black, Henry. “Black’s law dictionary”; Page 842.

⁷ European Parliament; Unger, Brigitte; “Offshore activities and money laundering: recent findings and challenges”; March 2017; European Parliament; Directorate General for Internal Policies; Policy Department A; Economic and Scientific Policy; Page 7.

Transparency International emphasized that the debt crisis in Italy and in Greece was partially due to the unwillingness to address tax evasion.⁸

At nearly the same time, the Malaysian 1MDB scandal made aware how much misappropriated money and corruption is existing and how the money is laundered despite all national and international anti-money laundering (“AML”) measures. It was possible to hide the true ownership behind so-called shell companies and to invest huge amounts of criminal money (i.e. real estate property, jewellery and art).⁹

Altogether, criminals are very flexible and misuse globalisation for their criminal ends. States however still, at least partly, adhere to the traditional concept of State sovereignty and therefore the fight against organized trans-border crime is not as effective as it could be.¹⁰

ML, terrorism financing “TF” and organized trans-border TXF need to be addressed by a common worldwide approach. Globalization cannot be fair if one turns a blind eye on non-compliant States and territories. The economic balance (market stability) is at stake. There is a need to level the playing field; all players must apply the same rules. International political forums like the G7 have given the impetus towards the adoption of common policy standards.

There are many international actors involved and coordination is knotty. There is a complex intermixture of soft law and hard law, of preventive and repressive measures. However, there is a legitimacy debate concerning those “common rules”.

⁸ Compin, F. “Tax fraud: A socially acceptable financial crime in France?” (2015). *Journal of Financial Crime*, 22(4): Page 435.

⁹ CNBC.com: “What happened to 1MDB's money?; 1 March 2018.

¹⁰ Andreas, Peter in Mitsilegas, Valsamis, Alldridge, Peter, Cheliotis, Leonidas. “Globalisation, criminal law and criminal justice: Theoretical, comparative and transnational perspectives” (Oxford, Hart Publ., 2013); Pages 45-47.

Despite all efforts, there are no globally accepted definitions for ML, TF or TXF. There is a legal certainty deficit.¹¹

A fourth major global challenge is corruption. This thesis will only marginally deal with corruption. It is notice worthy that one cannot disregard corruption because it affects negatively the fight against ML, TF and TXF. Cooperation between States is hampered.

The aim of this research is to assess, at international and national level, the legal certainty, the legitimacy, and the overall efficiency of the complex multi-layered international reaction to ML, TF and TXF.

This master thesis falls into four chapters, each with several sections.

The first Chapter exposes the three challenges, their specialities and interconnections with the aim of assessing possible synergies of the countermeasures.

The second Chapter concerns the major actors, their roles and functions. Subsequently the difficult coordination of the complex multi-layered framework is analysed.

The third Chapter deals with legitimacy and the risks of the global standards, guidelines and United Nation Security Council resolutions.

In Chapter four, the approach of individual States within the multilateral framework is analysed. States may on the one hand express commitments towards a globalized approach, and on the other hand however adopt a different national approach. On basis of a comparison of the policy lines adopted by the United States of America (“the US”) and France, two of the most influential States in the world, overall efficiency of the global policy standards will be assessed and loopholes will be identified.

¹¹ Delmas-Marty, Mireille. “Le relatif et l'universel”; Page 261.

CHAPTER 1 – Three challenges of collective interest

SECTION 1 – The fight against money laundering

The practice of laundering proceeds of crime is very old. However, the criminalization of ML itself is relatively new.¹² There is no globally recognized definition of ML.¹³

ML aims at reintegrating criminal (and undeclared) money into the legal system. The term dates back to Al Capone and Meyer Lansky who used a chain of automatic laundering machines and car wash companies to mix illegal small-denomination bills and coins, stemming from prohibition violations, with legally earned money to hide the illegal origin of the criminal money. The legal business was the cover story to explain the big amounts of cash money.¹⁴

The Mafiosi Charles “Lucky” Luciano and Meyer Lansky professionalized ML techniques by introducing politically independent islands in their laundering proceedings. The aim was to cut the link between the crime and the criminal assets¹⁵. Henceforth, “off-shore” territories or associated countries started playing an important role in ML process.

There are three main steps in the ML process: First, the criminal money is placed in the legitimate financial system. Then the money is layered, meaning moved through offshore territories. Each transaction in the layering process distances the assets further from the predicate offense. The aim is to establish the picture of a respectable origin. Thirdly, the money is cleaned and ready for use.

¹² Koutouzis, Michel, & Thony, Jean-François. “Le blanchiment” (Paris, PUF, 2005) ; Page 3.

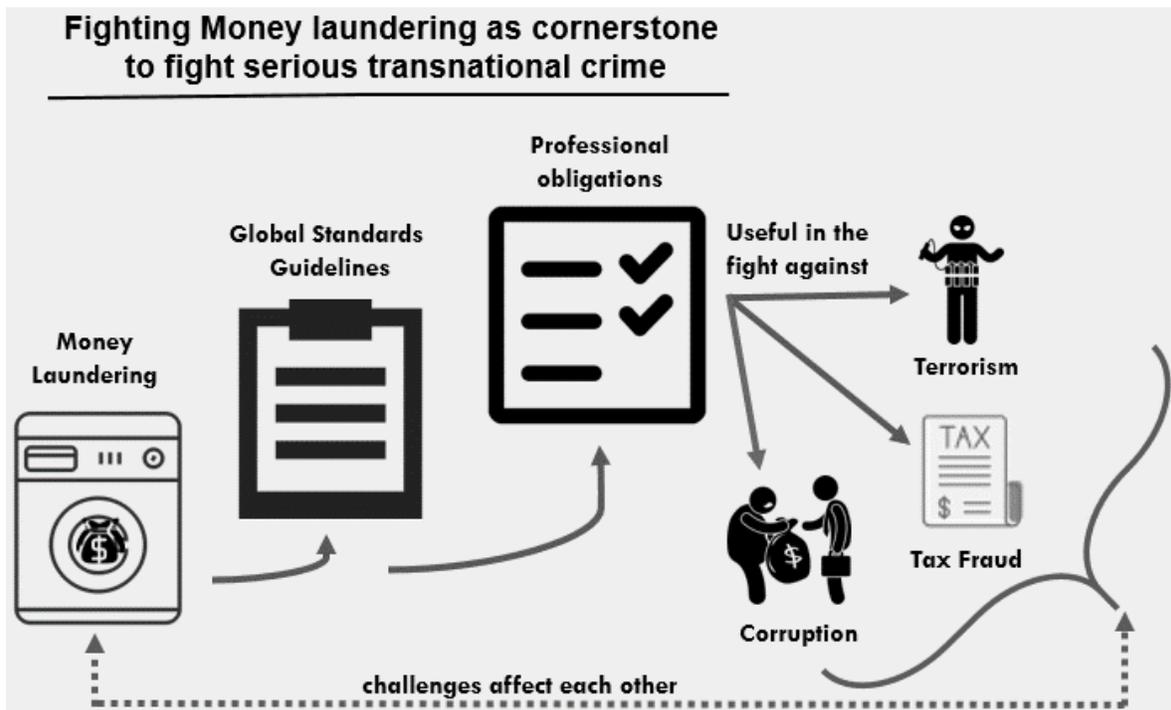
¹³ Koutouzis, Michel, & Thony, Jean-François. “Le blanchiment”; Page71.

¹⁴ Sullivan, Kevin. “Anti–Money Laundering in a Nutshell” (Apress, 2015); Pages 1-7.

¹⁵ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 17.

At an international level, the fight against ML started with the US war against narcotics and the “Narcodollars” (the money of the Columbian drug cartels, i.e. Pablo Escobar).¹⁶

Effective money laundering rules are essential to address all kinds of serious and organised crime. It is the idea that crime should not pay that echoes in the AML measures (i.e. asset recovery). It is notice worthy that the major part of the AML measures is of a preventive nature (i.e. the FATF recommendations¹⁷).



Graph drafted by the thesis author and integrated in the text for better reading.

¹⁶ Meister, Michael in Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers” (Les Presses de Sciences Po, 2017) ; Page 92.

¹⁷ FATF report;” International standards on combating money laundering and the financing of terrorism & proliferation -The FATF Recommendations”; adopted by the FATF Plenary in February 2012; updated February 2018.

SECTION 2 – Joint Counter Terrorist Financing measures

Even though terrorism is an ancient challenge, the international community struggled for twenty years to agree on a common definition.¹⁸ There is still no universally accepted definition, the current one stems from the US and was integrated into the United Nations (“UN”) International Convention for the Suppression of the Financing of Terrorism¹⁹.

The fight against TF is preventive in nature²⁰. In terrorism matters, States aim for absolute prevention, they must safeguard the physical integrity of every person present on its territory.

Since the “9/11” terrorist attacks, on the impulsion of the US, ML and the TF have become an inseparable couple.²¹ On the 29th – 30th of October 2001, there was an extraordinary meeting of the Financial Action Task Force (“FATF”) in Washington. The FATF, initially created to elaborate and recommend AML measures, accepted to issue special recommendations on TF as well.²²

Legal scholars criticize putting together TF and ML: On the one hand, ML (and TXF) concern valuable transactions, the aim is to launder the money for financial gain. On the other hand, TF financial transactions are lower and the aim of TF is not per se a financial benefit but to finance acts of terrorism. Terrorist attacks are not that onerous. The 9/11 attacks for instance cost around 500.000 USD and the Madrid bombings of 2004 cost around 8.000 EUR²³. The administration of a terrorist

¹⁸ Calothy, C. “Face au terrorisme, progrès et limites d'une coopération internationale tous azimuts” (2016). *Pouvoirs : Revue D'Etudes Constitutionnelles Et Politiques*, 158(3), Page 125.

¹⁹ Delmas-Marty, Mireille. “Le relatif et l'universel”; Page 302.

²⁰ FATF Guidance; “National Money Laundering and Terrorism Financing Risk Assessment”; February 2013; Page 10.

²¹ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale” (Paris, L'Harmattan, 2011) ; Page 211.

²² Delmas-Marty, Mireille. “Le relatif et l'universel”; Page 301.

²³ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Page 212.

organisation and its propaganda machinery might cost a lot more. Likewise, ML (and TFX) are global economy threats whereas terrorism and TF are issues of global security.



Graph drafted by the thesis author and integrated in the text for better reading.

It is nonetheless a fact that terrorism is a predicate offense to ML and addressing TF and ML together makes sense because preventive measures such as better compliance efforts are useful for both.

SECTION 3 – The emergence of political will to tackle tax fraud

Tax fraud is very old. Already in Ancient Greece and in the Roman Empire tax payers concealed assets to evade taxes.²⁴ Hence, at national level, States prosecuted TXF long before ML or TF. In 1931, US courts sentenced Alphonse Gabriel Capone for eleven years of federal prison because of tax evasion (and not for ML). There were no AML laws at that time.²⁵

TXF comprises the hiding from tax authorities of revenues to avoid paying due taxes. The concealed money may however also be a mixture of legal and illegal money. It creates inequality between honest and dishonest taxpayers. Moreover, it affects the State budget negatively. General welfare decreases and thereby hampers the redistributive function of taxes.²⁶

At international level, there is still reluctance to address TXF effectively. It has proven impossible to elaborate a common definition of international tax fraud. States still consider that taxes relate to the core of their sovereignty. The successful fight against transnational TXF would presuppose that all States are ready to tackle it together and assist each other. Unfortunately, not all States even consider TXF as a criminal offense and therefore not as a predicate offense to ML.²⁷

States are reluctant to act against TXF, as it can be an important tool to render its territory more competitive and attractive. Economic Interests hinder harmonization of tax laws.²⁸ Moreover, tax fraud may be subject to criminal and or administrative

²⁴ Chavagneux, Christian & Palan, Ronen. “Les paradis fiscaux” (Paris, Ed. La Découverte, 2007) ; Page 27.

²⁵ Sullivan, Kevin. “Anti–Money Laundering in a Nutshell”; Page 37.

²⁶ Compin, F. “Tax fraud: A socially acceptable financial crime in France?”; Page 432.

²⁷ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 464.

²⁸ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Pages 167-169.

sanctions depending on the domestic system. This is also a further potential obstacle to international approximation.²⁹

The global economic crisis of 2007/2008 underlined the need of acting against TXF. States, trying to keep their budget balanced, started to act against tax evasion. If the need for tax income increases (i.e. during a financial crisis), States do no longer accept that taxpayers reduce their tax base artificially.³⁰ In addition, the disclosure of the Panama Papers and the Paradise Papers in “Offshore Leaks” by the International Consortium of Investigative Journalists (“ICIJ”) raised public awareness. At a global level, each and every one could grasp the extend of the financial impact of offshore tax havens (“*[a] jurisdiction especially a country that imposes little or no tax on the profits from transactions carried on there or on persons resident there*”³¹) and TXF. It is not just a trivial offense. It was clearer than ever that there are huge loopholes in the national systems put into place to counter tax fraud. Such revelations are risky, at least if there are no concrete countermeasures. If many people evade taxes, this may be an incentive for other taxpayers to do so as well.³²

States are more and more willing to overcome a purely national approach. Increasing transparency through fostering information exchange and cooperation (i.e. terminating absolute banking secrecy) develops into a collective interest.³³

²⁹ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Pages 171 & 172.

³⁰ Lefebvre, M., Pestieau, P., Riedl, A., & Villeval, M. “Tax evasion and social information: An experiment in Belgium, France, and the Netherlands” (2015). *International Tax and Public Finance*, 22(3); Page 402.

³¹ Garner, Bryan & Black, Henry. “Black’s law dictionary”; Page 1242.

³² Lefebvre, M., Pestieau, P., Riedl, A., & Villeval, M. “Tax evasion and social information: An experiment in Belgium, France, and the Netherlands”; Page 403.

³³ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Page 65.

Given public awareness, the pressure to increase transparency led to a situation that one does not only tackle tax fraud but extends the fight to tax avoidance as well.³⁴

³⁴ Hunault, Michel. "La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers"; Page 39.

SECTION 4 – Interconnection and similarities and possible synergies

The G20, since the Pittsburgh Summit (24th-25th of September 2009) expressed the need to develop rigorous legislation to fight the three global challenges ML, TF and TXF.³⁵ Very recently, Christine Lagarde, Director of the International Monetary Fund (“IMF”) highlighted TXF and TF as major priorities at the FATF plenary meeting in Valencia (21th - 23th of June 2017).³⁶ Again, the three aims are underlined together at quasi world level. These statements are not groundless, as all three challenges share similarities:

Secondly, TF and TXF are both predicate offenses to ML, hence increasing the efficiency of AML measures strengthens the fight against TF and TXF, especially the deprivation of assets.³⁷

Thirdly, increasing transparency is beneficial to countering all three infractions. Banking secrecy and opacity of corporate structures hinder the effective enforcement of all countermeasures. Within a given State, transparency can be increased by imposing so-called compliance obligations to the private sector. The challenges are of trans-border nature and the scope must be widened to a global level in order to close remaining loopholes in the preventive and repressive system.

ML and TF, we already saw it, have become an inseparable couple. The political will to address TXF at global level is very recent. Hence it is worthy to dedicate a special thought to TXF. Making TXF a predicate offense of ML is a giant leap towards highlighting the importance to fight it. Not all States considered tax evasion as serious crime (i.e. Germany and Switzerland).³⁸ To fight ML effectively, TXF must be

³⁵ Kingah, S., & Zwartjes, M. “Regulating money laundering for terrorism financing: EU–US transnational policy networks and the financial action task force” (2015). *Contemporary Politics*, 1-13; Page 347.

³⁶ Lagarde, Christine: “Working Together to Fight Money Laundering & Terrorist Financing”. Speech before the FATF Plenary Meeting in Valencia; 22 June 2017.

³⁷ Jourová Věra; “Tackling money laundering: Crucial to tax evasion and terrorist financing prevention”; Euractiv.com; 28 June 2017. <26/02/2018>.

³⁸ European Parliament; Unger, Brigitte; “Offshore activities and money laundering: recent findings and challenges”; Page 35.

addressed as well and vice-versa.³⁹ There are many interconnections and possible synergies:

Firstly, the tax evaders must reintroduce the proceeds of TXF into the regular financial system to use them. This is done through ML.⁴⁰

Secondly, the tax legislation constituted a legal loophole in the fight against ML. Money launderers have declared illegal money as money stemming from tax fraud (not declared revenues) to launder it.^{41,42} Tax evaders accept penalties to reintegrate illegal money in the legal system.

Thirdly, the proof for TXF is relatively hard to bring. It seems easier to fight ML. The inclusion of TXF as predicate offense to ML allows to seize and confiscate illegal money as undeclared income. ML needs not to be proven by the same standard of evidence than one would have to prove TXF itself.⁴³

³⁹ Foudjem, Celestin, & Lopez, Christian. "Blanchiment de capitaux et fraude fiscale"; Pages 9, 35

⁴⁰ Koutouzis, Michel, & Thony, Jean-François. "Le blanchiment"; Page 5.

⁴¹ Foudjem, Celestin, & Lopez, Christian. "Blanchiment de capitaux et fraude fiscale"; Page 309.

⁴² Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment"; Page 168.

⁴³ Alltrige, Peter in Ligeti, Katalin & Simonato Michele. "Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU" (Hart Studies in European Criminal Law, 2017); Page 111.

CHAPTER 2 – Setting International Standards

There is a great variety of international actors involved in the policymaking process in the matters of ML, TF and TXF. The different layers must be coordinated.

SECTION 1 – A complex multi-layered framework

The uprising need and political determination to address ML, TF and TXF more efficiently, promoted the elaboration of multilateral treaties, standards and rules on different policy levels. The result is a very complex multi-layered setting. We distinguish between four layers. First, the world policy level, second, the regional policy level, third the sub regional policy level, fourth the national policy level.

GLOBAL LEVEL	REGIONAL LEVEL	SUBREGIONAL LEVEL	NATIONAL LEVEL
<p>Political forums Political impetus</p> <hr/> <p>The UN Important conventions on ML, TF, TXF (and corruption)</p> <hr/> <p>The FATF</p> <ul style="list-style-type: none"> • Recommendations • Peer Evaluation • Listing <hr/> <p>The OECD</p> <ul style="list-style-type: none"> • Tax Fraud Actions • Corruption Convention • Transparency <hr/> <p>Other Global Actors</p> <ul style="list-style-type: none"> • NGOs • Wolfsberg eleven 	<p>Council of Europe Conventions on ML, TF, TXF (and corruption)</p> <hr/> <p>Organization of American States</p> <ul style="list-style-type: none"> • Fewer conventions than the Council of Europe • No convention on Tax Fraud 	<p>The European Union</p> <ul style="list-style-type: none"> • The EU is active in the fields of ML, TF, TXF (and corruption) • most integrated legal order at an international level • wide conferral of powers, the EU can at an international level go further than any other IO • EU legislation may potentially serve as a blueprint for future regional or worldwide initiatives • important agencies such as Europol, Eurojust, OLAF or EPPO 	<p>Individual States</p> <ul style="list-style-type: none"> • There might be different levels within a given States • France and the US will serve as case studies in Chapter 4 to assess overall efficiency of the complex multi-layered framework

Table drafted by the thesis author and integrated in the text for better reading.

Given the similarities and interconnections between the three defies as set forth in chapter 1, the actors often intervene in more than one field.

SUBSECTION 1 – The World policy level

States meet at political forums where they give the needed impetus for the creation of international organizations (“IO”) and intergovernmental organizations (“IGO”) such as the United Nations (“UN”), the Financial Action Task Force (“FATF”) or the Organisation for Economic Co-operation and Development (“OECD”). In principle IOs are highly sectorial. There is a fragmentation of IOs, they were created to solve arising issues at an international level. There are even networks of cooperating IOs. So many have been created that there often is an overlap of competences and sometimes even a conflict.⁴⁴

⁴⁴ Kingsbury, Benedict and Casini, Lorenzo. “Global Administrative Law Dimensions of International Organizations Law” (January 20, 2010). *International Organizations Law Review*, Vol. 63, No. 2, 2009; NYU School of Law, Public Law Research Paper No. 10-04; Page 4.

PARAGRAPH 1 – Necessary Impetus by Political forums

Political Impetus		
The Group of Seven		
Political Impetus	Date	Context
Creation of the FATF	1989	Prevention of ML and TF
Triggered the meeting between OECD and FATF	18/01/1999	Extension of reporting obligations to tax offenses
The Group of Ten		
Creation of the Basel Committee on Banking Supervision	1974	<ul style="list-style-type: none"> • Issues AML Guidelines and principles • Regroups the G10 national banking supervising authorities
The Group of Twenty		
Fight against Tax Havens	2007-2008	A reaction to the financial crisis of 2007-2008
The G20 and the OECD are active partners in tax matters. The BEPS Project is one of the outcomes of this collaboration.	2009	<ul style="list-style-type: none"> • Gives impetus to list tax havens • Takes up the OECD tax haven list

Table drafted by the thesis author and integrated in the text for better reading.

Political forums have progressively been creating a framework to combat global challenges. In recent times, the world forums have especially begun to promote tax transparency. The Group of Seven (“G7”) fostered cooperation between the OECD and the FATF.⁴⁵ The OECD and the Group of Twenty (“G20”) have become partners in tax matters.

The Basel Committee on Banking Supervision (“BCBS”), set up in 1974 by the G10, is regrouping its national banking supervising authorities. It is an acknowledgment that banks can be involved in ML.⁴⁶ BCBS elaborates guidelines and principles on the fight of ML such as identification of suspicious transactions, KYC requirements and cooperation duties.⁴⁷ The “Basel Statement Principles” are applicable on all

⁴⁵ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Page 331

⁴⁶ Mitsilegas, Valsamis. “Money laundering counter-measures in the European Union: A new paradigm of security governance versus fundamental legal principles” (The Hague, Kluwer Law International, 2003); Page 47.

⁴⁷ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 59.

supervising authorities.⁴⁸ Basel II agreements brought a shift in risk evaluation: each bank evaluates itself the risks it faces.⁴⁹

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PARAGRAPH 2 – The United Nations

The UN is the most important international Organization (“IO”). It assembles 193 sovereign States.

The United Nations		
Money Laundering		
Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances "Vienna Convention"	20/12/1988	<ul style="list-style-type: none"> • First International definition of money laundering without using the term of ML. (Article 3-1 b) i) • First international convention qualifying ML as criminal offense (article 5-1) • Confiscation of proceeds of crime (article 7-5) • Fostering mutual legal assistance: Parties to the convention cannot invoke banking secrecy as a ground for refusal of mutual legal assistance (article 3-4 a)
United Nations Convention against Transnational Organized Crime "Palermo Convention / UNTOC"	15/11/2000	<ul style="list-style-type: none"> • Definition of content of organized crime and extension of ML to organized crime • Harmonizes the definition of certain criminal offenses • Minimum maximum sentence of 4 years of prison to be a predicate offence to ML • Enhances judicial cooperation: Parties to the convention cannot invoke banking secrecy as a ground for refusal of mutual legal assistance • Parties must foresee a criminal infraction on ML
Go AML		The UN helped developing “Go AML”, an FIU information exchange program.

Table drafted by the thesis author and integrated in the text for better reading.

⁴⁸ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 388.

⁴⁹ Favarel-Garrigues, G., Godefroy, T., & Lascoumes, P. “Reluctant partners?: Banks in the fight against money laundering and terrorism financing in France” (2011). Security Dialogue, 42(2); Page 182.

Terrorism & Terrorist Financing		
International Convention for the Suppression of Terrorist Bombings "Terrorist Bombings Convention"	15/12/1997	<ul style="list-style-type: none"> • Criminalize the act of terrorist bombings • Either extradite or prosecute the accused • Render mutual legal assistance
International Convention for the Suppression of the Financing of Terrorism	09/12/1999	<ul style="list-style-type: none"> • Definition of terrorism (article 2-1) • Criminalizes acts and financing acts of terrorism. • Extension of ML to TF
UN Global Counter-Terrorism Strategy Resolution A/RES/60/288	2006	<ul style="list-style-type: none"> • Measures to prevent and combat terrorism • Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard • Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism
United Nations Security Council		<ul style="list-style-type: none"> • Preventive measures in form of sanctions targeting suspects • Sanctions are imposed on a global scale
International Convention for the Suppression of Acts of Nuclear Terrorism	13/04/2005	<ul style="list-style-type: none"> • Criminalize acts of nuclear terrorism • Prevent, investigate and punish • Render mutual legal assistance
Tax Fraud		
United Nations Model Double Taxation Convention between Developed and Developing Countries	03/07/1995	
UN expert committee on international cooperation in tax matters	11/11/2004	<ul style="list-style-type: none"> • Promotion of international tax cooperation between national tax authorities • Close the cooperation gap between UN Member States (the majority of States is neither member of OECD nor of the Group of 20).
Corruption		
UN Convention against corruption "UNCAC"	31/10/2003	<ul style="list-style-type: none"> • Universally binding anti-corruption instrument • Widely subscribed anti-corruption treaty (177 party States) • Specific chapter 8 on asset recovery: The assets ought to return to the victim country • States should render mutual legal assistance for confiscation

Table drafted by the thesis author and integrated in the text for better reading.

The UN has elaborated important conventions to counter ML, TF and corruption. There is no multilateral UN convention on TXF but there is a UN model convention on double taxation and an expert Committee to promote cooperation in tax matters.

The UN conventions have laid down the foundation of information exchange and State cooperation.⁵⁰ The Vienna convention was the first instrument of global scale defining ML in the context of narcotics. Given the important number of ratifications, some scholars conclude that this could be sufficient to constitute international customary law, meaning rules binding the whole international community no matter if a State is a party to the convention or not.⁵¹ The Palermo convention extended ML to organized crime. The International Convention for the suppression of the financing of Terrorism asked States to criminalize TF. It extended ML to the act of terrorist financing.⁵²

In the area of terrorism prevention, the UN Security Council (“UNSC”) is composed of 15 members (5 permanent members and ten members elected for two years). The UNSC has the power to take preventive and repressive measures. It can for example directly target individual suspects (and not only States). They are a part of the post 9/11 counter terrorism measures.⁵³ Through the UNSC, sanctions can be imposed globally. This is a one of a kind mechanism and shows how important terrorism prevention has become.⁵⁴ The Council of the EU acknowledges that “*[i]n the case of measures implementing UN SC Resolutions, the EU legal instruments will need to adhere to those Resolutions. However, it is understood that the EU may decide to apply measures that are more restrictive.*”⁵⁵

⁵⁰ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 390.

⁵¹ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 61.

⁵² Delmas-Marty, Mireille. “Le relatif et l'universel”; Page 245.

⁵³ Mitsilegas, Valsamis. “EU criminal law after Lisbon: Rights, trust and the transformation of justice in Europe” (Oxford Portland, Hart Publishing, 2016); Page 236.

⁵⁴ Mitsilegas, Valsamis, Alldridge, Peter, Cheliotis, Leonidas. “Globalisation, criminal law and criminal justice: Theoretical, comparative and transnational perspectives”; Page 153.

⁵⁵ Council of the European Union; “Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy; Page 5.

Notwithstanding the EU solution, UNSC resolutions must in general be enforced at a State level, leaving very little discretion on implementation.⁵⁶

Assistance	
United Nations Office on Drugs and Crime "UNODC"	<ul style="list-style-type: none">• Assist Member States in their struggle against illicit drugs, crime and terrorism• Global Program against Money-Laundering (GPML), Proceeds of Crime and the Financing of Terrorism• Provides technical assistance against money-laundering• Launched in 2018 a counter-terrorism programme
Go AML	The UN helped developping "Go AML", an FIU information exchange program

Table drafted by the thesis author and integrated in the text for better reading.

The UN is much more than just a sum of its treaties. The UN intends to close loopholes in the AML system by aiding States to put in place an AML policy consistent with internationally recognized standards.⁵⁷ The Global Program against Money Laundering "GPML" offers technical assistance and encourages preventive actions. The UN also helped to develop "Go AML", an FIU information exchange program.⁵⁸ The FIUs play a role in the detection of ML, TF (and TXF). They thereby form the nexus linking the prevention phase and the repression phase; they act as intermediaries between the professionals of the private sector and law enforcement.⁵⁹ FIU's are sometimes considered as a "*buffer between the financial*

⁵⁶ Mitsilegas, Valsamis. "EU criminal law after Lisbon: Rights, trust and the transformation of justice in Europe"; Page 241.

⁵⁷ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment"; Page 62.

⁵⁸ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment"; Page 321.

⁵⁹ Favarel-Garrigues, G., Godefroy, T., & Lascoumes, P. "Reluctant partners?: Banks in the fight against money laundering and terrorism financing in France"; Page 180.

sector and law enforcement authorities".⁶⁰ They gather suspicious transactions reports and disseminate the information to the competent national authorities.⁶¹

Linked Institutions		
IMF	from 1944 on	<ul style="list-style-type: none">• Foster fiscal transparency• huge influence on tax policy especially in developing countries• Address FinTech and the negative side of crypto currencies
World Bank	from 1944 on	<ul style="list-style-type: none">• Addresses corruption as a major challenge• Puts forth 10 ways to fight corruption

Table drafted by the thesis author and integrated in the text for better reading.

There are two institutions linked to the UN, that are notice worthy: The International Monetary Fund "IMF" and the World Bank "WB". The IMF is responsible for the financial stability and its missions consist of fostering international cooperation and facilitating trade. It governs around 188 States and is therefore a quasi-global player. It disseminates the global AML standards and launches itself campaigns.⁶² The IMF employs a group of experts that are send throughout the world to give guidance to States and assist them in putting into place efficient AML and TF systems.⁶³ The WB, with the aim to reduce poverty, is addressing corruption as a major challenge.

⁶⁰ Penna, Marc in Ligeti, Katalin & Simonato Michele. "Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU"; Page 269.

⁶¹ Carpentier, Jean-Baptiste in Hunault, Michel. "La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers"; Page 167.

⁶² Sullivan, Kevin. "Anti-Money Laundering in a Nutshell"; Page 144.

⁶³ Koutouzis, Michel, & Thony, Jean-François. "Le blanchiment"; Pages 78 & 79.

PARAGRAPH 3 – The FATF and its global network

The FATF was created in 1989 to fight ML.⁶⁴ It is sometimes described as “*the leading international organization, responsible for combating criminal finance*”.⁶⁵ Its recommendations on ML and TF are approved at global level. There are 35 MS, two regional bodies and nine regional bodies (i.e. CoE Moneyval).⁶⁶ Altogether FATF recommendations are applied in 180 States throughout the world.⁶⁷ The recommendations have become internationally recognized norms in the fight against ML and TF.⁶⁸ They are preventive in nature and increase transparency and detection of offenses.

States should assure that their financial system is not abused by criminals to execute illegal transactions. The recommendations in themselves are not binding, however through the effect of mutual evaluation and the naming and shaming of non-compliant states and territories they somehow become binding after all. Mutual evaluations are not only a verification of the level of compliance of a given State, the findings and recommendations are also very useful for the other States to improve their own system. Therefore, all States should carefully take into consideration the mutual evaluation reports issued by FATF.

The FATF recommendations are often incorporated into regional and national law instruments; they provide the States with an “*AML template to follow*”.⁶⁹ The mandate

⁶⁴ Lagarde, Christine (2017). Working Together to Fight Money Laundering & Terrorist Financing. Speech before the FATF Plenary Meeting in Valencia on 22 June 2017.

⁶⁵ Andreas, Peter in Mitsilegas, Valsamis, Aldridge, Peter, Cheliotis, Leonidas. “Globalisation, criminal law and criminal justice: Theoretical, comparative and transnational perspectives”; Page 50.

⁶⁶ Penna, Marc in Ligeti, Katalin & Simonato Michele. “Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU”; Page 269.

⁶⁷ Di Castri, Simone & Grossman, Jeremiah & Sihin, Raadhika. “Proportional Risk-Based AML/CFT Regimes for Mobile Money. A Framework for Assessing Risk Factors and Mitigation Measures“ (25 August 2015); Page 27.

⁶⁸ Meister, Michael in Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers”; Page 98.

⁶⁹ Sullivan, Kevin. “Anti-Money Laundering in a Nutshell”; Page 9.

of FATF needs to be renewed every 8 years. Also, the political forums extended the competences of FATF firstly to TF and secondly to proliferation of arms of mass destruction. FATF issued a list of infractions that every State despite its national specialities, needs to include as predicate offense of ML.⁷⁰

States should adapt a risk based approach and thereby use their resources wisely and in accordance to their risk evaluation. Where the risk is high, monitoring should be enhanced. According to the level of risks, the level of vigilance should be adjusted.

Transparency is a major FATF concern. Recommendation 24 aims at reducing opacity. Identifying the ultimate beneficial owner of companies and bank accounts would allow seeing through complex structures.

Tracing financial operations is of utmost importance to fight ML, TF and TXF. FATF is very active in this field. States should monitor suspicious financial transactions.

The FATF became the source of the normative framework to increase principally prevention but also to a lesser extend repression of the three challenges.⁷¹ The recommendations are considered to constitute the international standards on ML and TF.⁷²

In listing non-compliant States, FATF showed that it has nonetheless a sort of compelling power to sanction States by “naming and shaming”. Being listed as non-compliant means that all operators that intend to do business with actors of the listed State need to increase the monitoring of those transactions. This hampers economic development of the listed State.⁷³

⁷⁰ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Page 217.

⁷¹ Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers”; Page 36.

⁷² Fort, JeanLouis in Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers”; Page 81.

⁷³ Fort, Jean-Louis in Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers”; Page 76.

PARAGRAPH 4 – The OECD

Organisation for Economic Co-operation and Development		
Tax Fraud		
Harmful Tax Competition Report	21.04.1998	<ul style="list-style-type: none"> • Harmful tax competition is a global issue • Harmful tax practices reduce global welfare • A dialogue with non OECD States must be engaged • Issue of 19 recommendations to counter harmful tax competition
Global Forum on Transparency and Exchange of Information for Tax Purposes	early 2000s	Peer review in tax matters
Listing of non compliant States	2000-2002	
Seoul declaration	2006	Repression of tax violations via criminal and civil enforcement
Base Erosion- Profit Shifting	19.07.2013	Action 15 = Multilateral Tax Instrument replacing bilateral tax conventions
Berlin Tax Pact	2014	<ul style="list-style-type: none"> • Abolish banking secrecy related to tax reasons • Foster information exchange
Task force on Tax Crimes (TFTC)	08.11.2017	
Centre for Tax Policy and Administration (CTPA)		Transnational network of tax professionals (OECD employees)
Committee on Fiscal Affairs (CFA)		Brings together senior tax officials of OECD Member States (public servants & national representatives)
OECD Forum on Tax and Crime		Brings together Tax, ML and TF experts to assess the extend of tax crime and to promote countermeasures.
OECD model convention with respect to taxes on income and on capital		Model for bilateral tax conventions
Corruption		
Paris Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions	1997	<ul style="list-style-type: none"> • International convention on foreign bribery • It obliges to criminalize, investigate, prosecute and sanction foreign bribery (Both company and individuals) • Sanctions should be proportional, effective and dissuasive • Prohibition to allow fiscal deduction of the costs of bribes for costs of business
Global Network on Law Enforcement Practitioners on Corruption		Sharing of good practices, good policies and contacts
Go For Zero Corruption "GRECO"		<ul style="list-style-type: none"> • Monitors compliance with the organisation's anti-corruption standards • Publishes country reports on the findings
Transparency		
World forum on transparency		Under OECD umbrella

Table drafted by the thesis author and integrated in the text for better reading.

The OECD is considered as “*the main informal world tax organization*”.⁷⁴ The OECD is not a supranational organization and thus its rules, guidance and actions do not

⁷⁴ Cockfield, A. "Big data and tax haven secrecy" (2016). Florida Tax Review, 18(8); Page 496.

amount to law. The latter nevertheless create considerable obligations on members and non-members.⁷⁵

It has elaborated a model convention that is limiting banking secrecy and fostering international cooperation. This model forms a common base for information exchange (on demand, automatic and spontaneous).

The OECD is considered to be a “*leader in the field of peer review of national governments*”.⁷⁶ OECD established three lists.⁷⁷ The white list contained the States that are considered to be compliant to OECD standards. The grey list contained the States that took a commitment to become compliant. The black list named non-compliant States.⁷⁸ In order to be removed from that black list, States needed to inter alia commit themselves to lifting the banking secrecy concerning the disclosure of tax fraud offenses.⁷⁹

Since the 1990's, OECD fights for tax transparency. Taxes should be paid where the activities took place. The program Base Erosion, Profit Shifting (“BEPS”) has been elaborated to avoid that benefits are shifted to tax havens. So, not only TXF is addressed but also tax avoidance. Tax avoidance is “*[t]he act of taking advantage of legally available tax planning opportunities in order to minimize one's tax*

⁷⁵ Christians, Allison. “Hard Law & Soft Law in International Taxation”. Wisconsin International Law Journal, Vol. 25, No. 2, Summer 2007; Univ. of Wisconsin Legal Studies Research Paper No. 1049; Page 7.

⁷⁶ Carotti, Bruno & Dimitropoulos, Georgios in Cassese, Sabino & Carotti, Bruno & Casini, Lorenzo & Cavalieri, Eleonora & MacDonald, Euan & Macchia, Marco & Savino, Mario. “Global Administrative Law: The Casebook”; third edition; (2012); Page 306.

⁷⁷ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 172.

⁷⁸ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 275.

⁷⁹ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Pages 411 & 412.

liability".⁸⁰ The program should provide governments with the tools to ensure effectiveness of their taxation rules.⁸¹ Fifteen specific actions should render the taxation of cross border activities fair and intelligible. More transparency should also reduce tax fraud.⁸²

The OECD Base Erosion, Profit shifting ("BEPS") project was the outcome of an "*unprecedented participation by developing countries in the development of commonly agreed tax standards*."⁸³ Compliance is checked through peer review. Also, mandatory spontaneous information exchange is introduced.⁸⁴ Altogether, the BEPS program consists of 15 actions. It is notice worthy that action 15 aims at developing a multilateral instrument that would replace all bilateral tax treaties between the parties. This would provide consistency in the tax field.

The Global forum on Transparency and Exchange of information for Tax purposes ("GFTE") regroups 138 members and 14 observers (mainly international organizations) and is placed under the umbrella of OECD.⁸⁵ Compliance with OECD and UN Tax standards is assessed via a two phased mutual evaluation process. The first step is a check on the legal framework, meaning the law in the books. The second step reviews the effective implementation of the rules, the law in action.⁸⁶

In 2014, 51 States signed the Berlin Tax Pact to abolish banking secrecy related to tax reasons. Another 30 States promised to join. On the 15th January 2018, there

⁸⁰ Garner, Bryan & Black, Henry. "Black's law dictionary"; Page 1241.

⁸¹ OECD; "OECD/G20 Base Erosion and Profit Shifting Project Explanatory Statement"; 2015 Final Reports; Page 4.

⁸² Guzzo, Mariano. "Global Actions Against Aggressive Tax Planning: International Business Models According OECD" (February 20, 2015); Page 5.

⁸³ OECD; "OECD/G20 Base Erosion and Profit Shifting Project Explanatory Statement"; Page 5.

⁸⁴ OECD; "OECD/G20 Base Erosion and Profit Shifting Project Explanatory Statement"; Page 7.

⁸⁵ Eric, Robert in Hunault, Michel. "La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers"; Pages 119 & 120.

⁸⁶ Global Forum on Transparency and Exchange of Information for Tax Purposes; Peer review of the United States; 2013; Page 5.

were 98 State Parties. There should be no bank secrecy and there should be reliable information on the UBOs of the bank accounts.

PARAGRAPH 5 – Other important global actors

There are very important and respected Non-Governmental Organizations (“NGO”) such as Transparency International (“TI”). The latter has offices in more than a hundred States. It deals mainly with corruption. It evaluates States all over the world. Its measurements are useful to evaluate territorial risks⁸⁷ In its corruption inquiry TI discovered that three quarters of the 178 States it analysed have been badly corrupted.⁸⁸

The Wolfsberg eleven, an association of eleven global banks shapes guidelines for banks and regulators to tackle ML risks inherent in the private banking sector.⁸⁹ It is important to let the private sector participate in addressing global challenges. It has important data. ML, TF and TXF take place within normal commercial activity and might be indistinguishable from normal, perfectly legal commercial activity. Enforcement clearly needs the implication of the private sector. However, one needs to be aware that the professionals of the financial sector are not necessarily victims but can potentially also be actors either through unintentional or through conscious association with criminal organisations.⁹⁰

⁸⁷ Sullivan, Kevin. “Anti–Money Laundering in a Nutshell”; Page 145.

⁸⁸ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 139.

⁸⁹ Sullivan, Kevin. “Anti–Money Laundering in a Nutshell”; Pages 141 & 142.

⁹⁰ Mitsilegas, Valsamis. “Money laundering counter-measures in the European Union: A new paradigm of security governance versus fundamental legal principles”; Pages 33 & 34.

In some States (i.e. Switzerland) the demarcation line between private and public has become so blurred that private sector regulators have competence in ML and may sanction non-compliant companies.⁹¹

In Law enforcement cooperation, Interpol is a worldwide police organization that promotes information exchange, mutual legal assistance and administers important databases.

⁹¹ Delmas-Marty, Mireille. "Le relatif et l'universel"; Page 260.

SUBSECTION 2 – The regional policy level

There are regional treaty making organizations such as the Council of Europe (“CoE”) or the Organization of American States (“OAS”).

PARAGRAPH 1 – The Council of Europe

The CoE is an important international organization of the European continent. It has elaborated important international treaties on ML, TF, TXF and corruption. Its treaties are sometimes even adhered to by non-European States.

Council of Europe		
Money Laundering		
Convention on Laundering , Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention)	08/11/1990	<ul style="list-style-type: none"> Confiscation of proceeds of crime or equal value States must take the necessary measures to confiscate the proceeds of crime relating to the predicate offenses (article 2)
Convention on Laundering , Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention)	16/05/2005	<ul style="list-style-type: none"> Predicate offenses to ML = Offence sanctioned by a minimum maximum threshold of 1 year of prison penalty States may exclude tax offenses from confiscation Confiscation of proceeds of crime or equal value (article 3)
MONEYVAL		<ul style="list-style-type: none"> Committee of Experts on the Evaluation of Anti-Money Laundering Measures Permanent monitoring mechanism Since June 2006, an associate FATF member
Terrorism & Terrorist Financing		
European Convention on the Suppression of Terrorism	27.01.1977	Facilitate the extradition of persons having committed acts of terrorism
Protocol amending the European Convention on the Suppression of Terrorism	15.05.2003	Extends the list of offences that have to be "depoliticised"
Convention on Laundering , Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention)	16/05/2005	<ul style="list-style-type: none"> Terrorism can be financed not only through money laundering from criminal activity, but also through legitimate activities. Increase the effectiveness of existing international texts on the fight against terrorism First international treaty covering both the prevention and repression of ML and TF Need for quick access to financial information
Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism	22.10.2015	<ul style="list-style-type: none"> Extends the list of terrorist acts Promotes the rapid exchange of information
Tax Fraud		
Convention on Mutual Administrative Assistance in Tax Matters	25.01.1988	<ul style="list-style-type: none"> Administrative co-operation covering all compulsory taxes, with the exception of customs System of reservations expressly provided for in the text
Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters	27.05.2010	Exchange of information, multilateral simultaneous tax examinations, service of documents and cross-border assistance in tax collection

Table drafted by the thesis author and integrated in the text for better reading.

Corruption		
Criminal law convention on Corruption	27.01.1999	<ul style="list-style-type: none"> • Criminalises a large number of corrupt practices • Enhances international co-operation • States should enable confiscation and provide for MLA in criminal matters
Additional Protocol to the Criminal Law Convention on Corruption	15.05.2003	<ul style="list-style-type: none"> • Extends the convention to cover judicial authorities • Parties must criminalise active and passive bribery of domestic and foreign arbitrators and jurors.
Civil Law Convention against Corruption	04.11.1999	First international attempt to define common rules in the field of civil law and corruption
Greco Working Group on Corruption	1999	Evaluates if States comply with anti corruption standards through an evaluation and a compliance procedure

Table drafted by the thesis author and integrated in the text for better reading.

PARAGRAPH 2 – The Organization of American States

The OAS is the regional organization regrouping the Americas. Just like the CoE, it has actively been elaborating multilateral regional treaties. However, there are fewer treaties relating to ML, TF and corruption and no convention at all on TXF.

Organization of American States		
Money Laundering		
Inter-american convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials	14.11.1997	Sharing techniques, practices, and legislation to combat money laundering related to illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.
Terrorism & Terrorist Financing		
Inter-American Convention Against Terrorism (including TF & ML)	03.06.2002	<ul style="list-style-type: none"> • Reaction to 9/11 • Terrorist acts are extended to financial crimes. • Fosters adherence to the relevant UN treaties and asks States to respect the relevant FATF guidelines. • There should be no safe haven for terrorists.
Corruption		
Inter-American Convention Against Corruption	06.03.1997	<ul style="list-style-type: none"> • Recognition of the international reach of corruption • Promotes and facilitates cooperation between states

Table drafted by the thesis author and integrated in the text for better reading.

SUBSECTION 3 – The sub regional policy level

The European Union is an IO at sub regional level. The EU is active in combatting ML, TF, TXF and corruption.

The European Union		
Money Laundering		
10/06/1991	Council Directive 91/308/EEC "1st AML Directive"	Prevention of the use of the financial system for the purpose of money laundering
26/06/2001	Council Framework Decision 2001/500/JHA	Money laundering, identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime
04/12/2001	Directive 2001/97/EC "2nd AML Directive"	Prevention of the use of the financial system for the purpose of money laundering
26/10/2005	Regulation 1889/2005/EC	Controls of cash entering or leaving the Community
26/10/2005	3rd AML Directive 2005/60/EC "3rd AML Directive"	Prevention of the use of the financial system for the purpose of money laundering and terrorist financing
01/08/2006	Commission Directive 2006/70/EC on Directive 2005/60/EC	<ul style="list-style-type: none"> • Definition of 'politically exposed person' • Definition of the technical criteria for simplified customer due diligence procedures • Definition of exemptions on grounds of a financial activity conducted on an occasional or very limited basis
15/11/2006	Regulation 1781/2006/EC	Information on the payer concerning transfers of funds
06/12/2007	Council decision 2007/845/JHA	<ul style="list-style-type: none"> • Cooperation between Asset Recovery Offices of the Member States • Tracing and identification of criminal assets
03/04/2014	Directive 2014/42/EU	Freezing and confiscation of instrumentalities and proceeds of crime in the European Union
20/05/2015	Directive 2015/849/EU "4th AML Directive"	Prevention of the use of the financial system for the purpose of money laundering and terrorist financing
20/05/2015	Regulation 2015/847/EC	Information accompanying transfers of funds
05/07/2016	Proposal COM/2016/0450 final - 2016/0208 (COD) "5th AML Directive"	Prevention of the use of the financial system for the purpose of money laundering and terrorist financing
21/12/2016	COM (2016) 819 final - 2016/0412 (COD)	Mutual recognition of freezing and confiscation orders
	EU Commission list of non compliant territories	Not identical with the FATF list
Terrorism & Terrorist Financing		
13/06/2002	Council Framework Decision 2002/475/JHA	Combating terrorism
26/10/2005	3rd AML Directive 2005/60/EC "3rd AML Directive"	Prevention of the use of the financial system for the purpose of money laundering and terrorist financing
20/05/2015	Directive 2015/849/EU "4th AML Directive"	Prevention of the use of the financial system for the purpose of money laundering and terrorist financing
05/07/2016	Proposal COM/2016/0450 final - 2016/0208 (COD) "5th AML Directive"	Prevention of the use of the financial system for the purpose of money laundering and terrorist financing
15/06/2012	Council of the European Union: Guidelines on implementation and evaluation of restrictive measures (sanctions)	http://data.consilium.europa.eu/doc/document/ST-11205-2012-INIT/en/pdf
24/06/2015	Council of the European Union Best practices on restrictive measures (Sanctions)	http://data.consilium.europa.eu/doc/document/ST-10254-2015-INIT/en/pdf

Table drafted by the thesis author and integrated in the text for better reading.

Tax Fraud		
26.07.1995	Council Act C 316/49	Convention on the protection of the European Communities' financial interests and its Protocols
28.11.2006	Council directive 2006/112/EC	Common system of value added tax
Corruption		
26.05.1997	Council Act 97/C 195/01	Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union
22.07.2003	Council Framework Decision 2003/568/JHA	Combating corruption in the private sector

Table drafted by the thesis author and integrated in the text for better reading.

Even if its legislation is only binding its Member States, it is of great importance. It the most integrated legal order at an international level.⁹² Due to wide conferral of powers, the EU can at an international level go further than any other IO. It has the power to adopt secondary legislation that is binding on its members without needing the consent of all States. EU Member States (“MS”) must effectively implement and enforce EU law (principle of sincere cooperation). The Commission is reviewing the implementation measures of the MS and has the power to bring an action for infringement before the Court of Justice of the European Union. The EU is fostering judicial cooperation and asset recovery through the principles of mutual trust and mutual recognition. EU legislation may potentially serve as a blueprint for future regional or worldwide initiatives.

The EU has important agencies such as Europol, Eurojust, OLAF (the European Anti-Fraud Office) or EPPO (the European Public Prosecutor’s Office).

Agencies	
Europol; Regulation 2016/794/EU (11.05.2016)	Regulation 2016/794/EU (11.05.2016) on the European Union Agency for Law Enforcement Cooperation (Europol)
Eurojust; Council Decision 2002/187/JHA: (28 February 2002)	Judicial cooperation in criminal matters Reinforcing the fight against serious crime
European Anti-Fraud Office "OLAF"; Regulation 883/2013/EU (11.09.2013)	<ul style="list-style-type: none"> • Fraud against the EU budget • Corruption and serious misconduct within European institutions • Develop anti-fraud legislation and policies
European Public Prosecutors Office "EPPO" Concil Regulation 2017/1939 (12/10/2017)	Prosecution of fraud against the EU budget

Table drafted by the thesis author and integrated in the text for better reading.

⁹² Cassese, Sabino & Carotti, Bruno & Casini, Lorenzo & Cavalieri, Eleonora & MacDonald, Euan & Macchia, Marco & Savino, Mario. “Global Administrative Law: The Casebook”; Page XXIX.

SUBSECTION 4 – The national policy level

Given the superposition of norms on the same topics, it is rather difficult to assess the rules applicable in a given State at a given time. One must analyse to what treaties that State adhered at what time and whether there were reservations or not. In short, one must respect a mass of texts in parallel. Moreover, one needs to assess the position granted to international norms within the domestic legal framework. Also, transposition or incorporation of the international provisions is often delayed.⁹³ In Chapter 4, the situation of two individual States will be assessed.

In the doctrine, there is the idea that the superposition of norms must stop in the name of legal certainty.⁹⁴ However, having a single answer to these global challenges would mean that the cultural differences and legal traditions are not to be taken into consideration.

The acting of two individual States within the multi-layered framework will be analysed in Chapter 4.

⁹³ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 128.

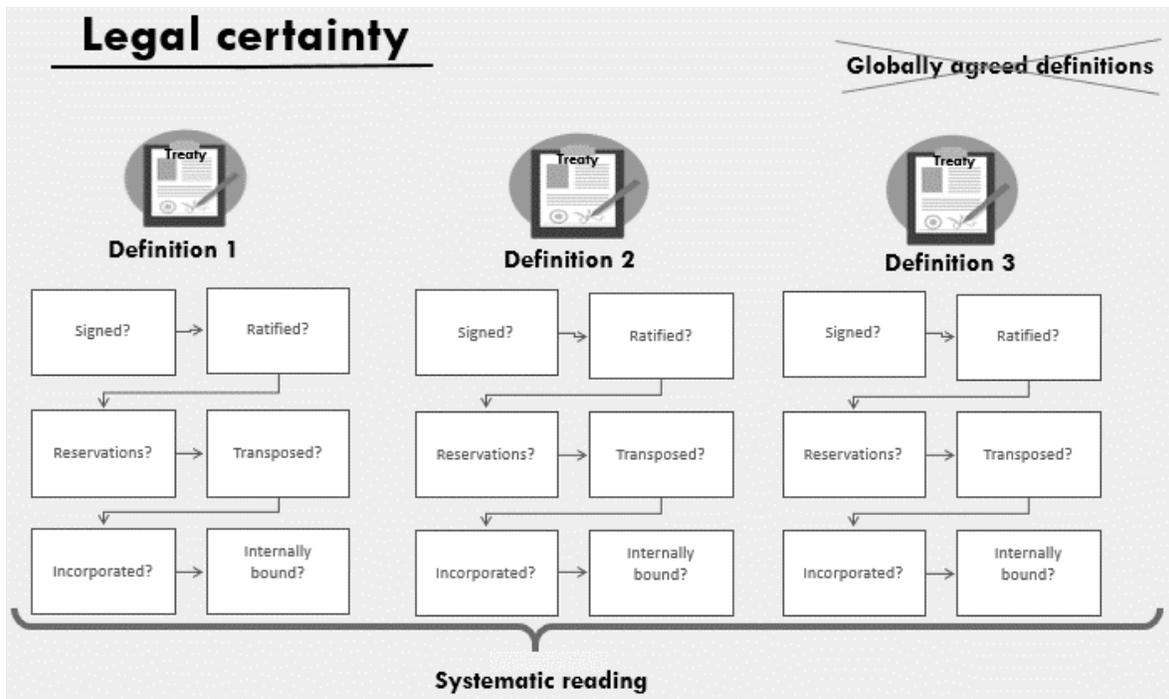
⁹⁴ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 115.

SECTION 2 – The quest for legal certainty

To increase legal certainty, an integrated approach must be targeted. A major problem is that there are no universally agreed definitions of ML, TF or TXF. Each instrument sets its own definitions. There are conventions on different levels, hence, there are more definitions of the same crime.

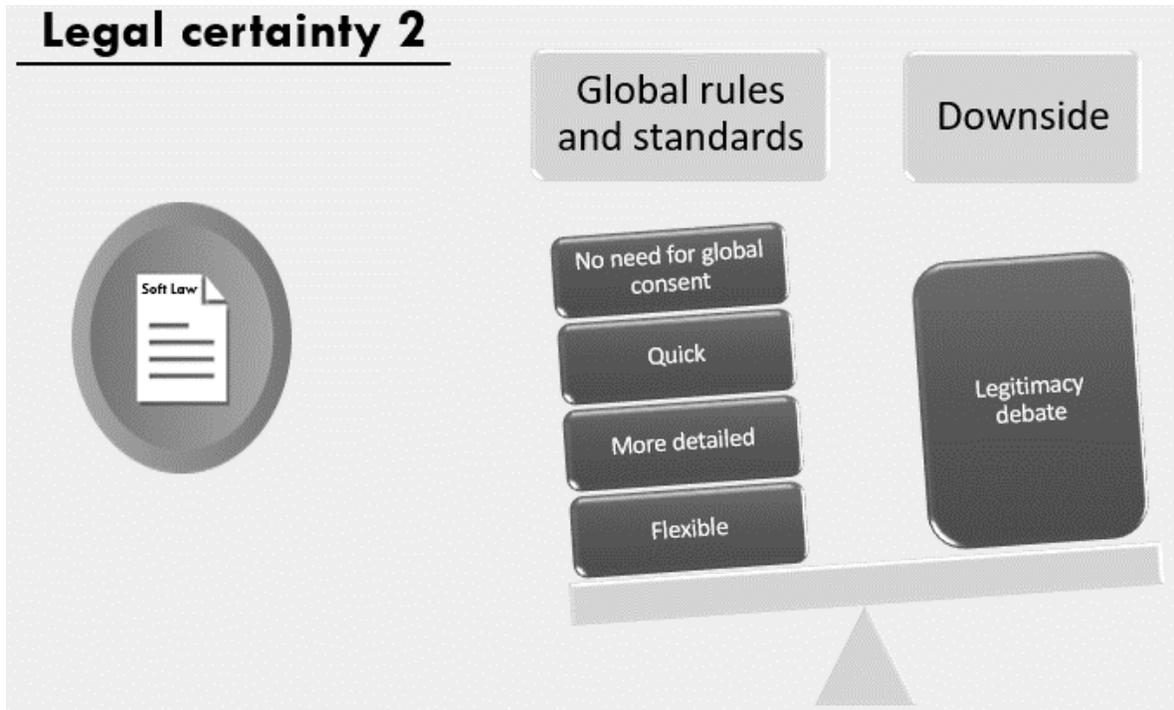
Due to the overlapping mixture of hard and soft law rules, it is at first glance not possible to know what rules are applicable to or in a given State. Many different texts must be screened and many questions need to be answered beforehand. Moreover, the relevant legal texts are not a source of clarity, especially for a non-lawyer.

Concerning the hard law conventions, one must assess if a given State has signed and ratified the treaty, if it has included reservations, if the State is internally bound upon signature and ratification or if it needs to transpose or incorporate the treaty into national law etc. These questions need to be answered for each applicable convention. One might have to do a systematic reading of all applicable international and national texts. This is not straightforward.



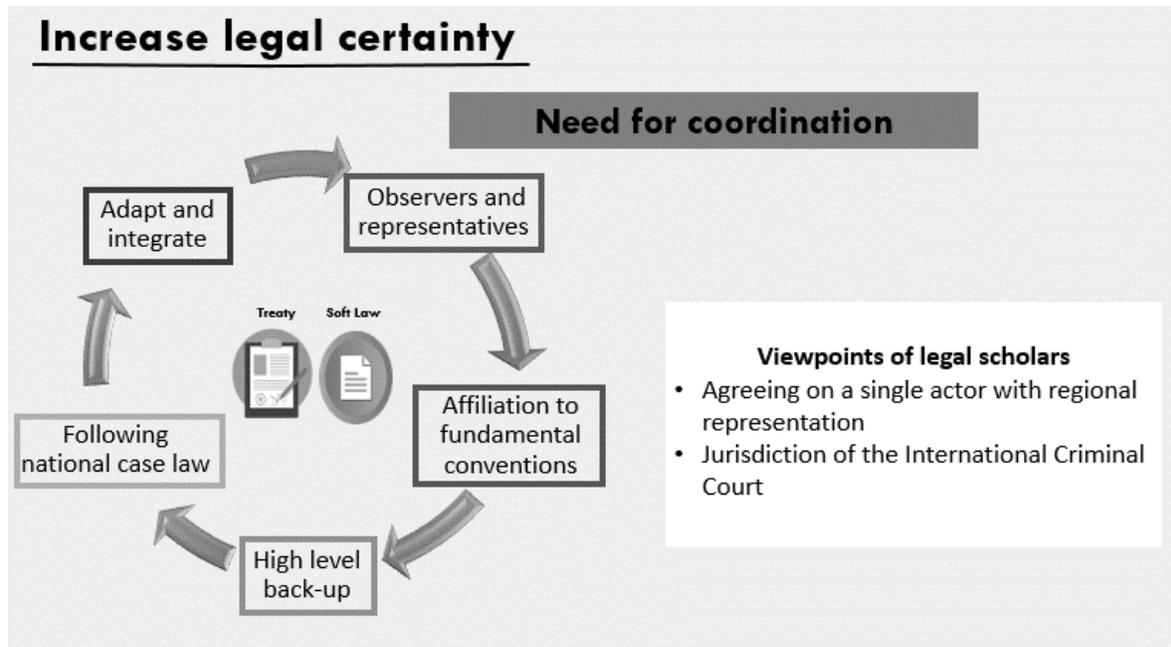
Graph drafted by the thesis author and integrated in the text for better reading.

The global soft law rules seem to be a better alternative to the traditional hard law concept. The standards and guidelines are of a preventive nature. Once elaborated and disseminated, they are applied to each and every State and territory. It is more reactive and quicker. There is no need for global consent and therefore this approach permits to adopt more specific rules. However, there is a legitimacy debate on those global standards. This is dealt with in chapter 3.



Graph drafted by the thesis author and integrated in the text for better reading.

The actors and the instruments must be coordinated to form an integrated whole. Several techniques can be distinguished.



Graph drafted by the thesis author and integrated in the text for better reading.

SUBSECTION 1 – Adapt and integrate

The constant update and development of the standards, recommendations and guidelines permits to integrate the rules elaborated by other IOs and IGOs. Also, new treaties take the soft law instruments into account and vice versa. This makes the overall framework more consistent.

At the global level, IMF and FATF are closely cooperating.⁹⁵ Both insist on implementing and applying AML standards.

The FATF takes up recommendations of other IOs, considers the international conventions (i.e. the UN and the CoE) and elaborates its own recommendations in line with the corresponding international norms.⁹⁶ The FATF integrates in its

⁹⁵ Lagarde, Cristine (2017). Working Together to Fight Money Laundering & Terrorist Financing. Speech before the FATF Plenary Meeting in Valencia on 22 June 2017.

⁹⁶ Mitsilegas, Valsamis. "Money laundering counter-measures in the European Union: A new paradigm of security governance versus fundamental legal principles"; Page 44.

recommendations rules and definitions contained in UN conventions.⁹⁷ The FATF demands i.e. that ML must be incriminated as foreseen by the Vienna and the Palermo Convention.⁹⁸

Even though we have international conventions aiming at putting forth common standards, there is a lack of implementation standards. States are struggling with the adjustment of their national systems to the agreed standards.⁹⁹

Peer evaluation and naming and shaming procedure as elaborated by the FATF have been copied by the OECD and the CoE. The FATF on its side has been inspired by mutual evaluations as practiced by the UN in the HR field.¹⁰⁰

The FATF for example copied the self-assessment risk approach that was elaborated in the banking sector by Basel II¹⁰¹ and was also inspired by the Wolfsberg rules. The latter seem to have been inspired on their turn by domestic laws.¹⁰²

OECD Principle 7 of the 10 principles to fight tax crime echoes recommendation 3 of the FATF, namely that tax crimes should be considered as predicate offence to ML.¹⁰³

⁹⁷ Meister, Michael in Hunault, Michel. "La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers"; Page 96.

⁹⁸ FATF Mutual Evaluation Report of France; 25 February 2011; Page 84.

⁹⁹ Kingah, S., & Zwartjes, M. "Regulating money laundering for terrorism financing: EU-US transnational policy networks and the financial action task force"; Page 348.

¹⁰⁰ Delmas-Marty, Mireille. "Le relatif et l'universel"; Page 258.

¹⁰¹ Favarel-Garrigues, G., Godefroy, T., & Lascoumes, P. "Reluctant partners?: Banks in the fight against money laundering and terrorism financing in France"; Page 182.

¹⁰² Ivory, Radha in Ligeti, Katalin & Simonato Michele. "Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU"; Page 184.

¹⁰³ OECD; "Fighting Tax Crime": The Ten Global Principles"; 8 November 2017; Page 54.

At a regional level, the Inter-American Convention Against Terrorism obliges State parties to consider the recommendations of the FATF to guide domestic measures to prevent and fight the financing of terrorism. The Strasbourg convention of the CoE was inspired and based upon the FATF recommendations¹⁰⁴

At a sub-regional level, the European Union legislator adopts its directives in line with the FATF standards.

SUBSECTION 2 – Observers and representatives

The different IOs send representatives to one another to ensure coordination and consistency of the measures. The EU sends for instance representatives to the OECD and the FATF.

Moreover, there are common meetings. Representatives of FATF and of OECD for example met on 18th January 1999 to discuss to what extent the dispositions on ML can be used to fight tax offenses. The impetus to this meeting was given by the G7. To fight the tax excuse FATF issued an interpretive not on recommendation 15 stating that also suspicious transactions linked to tax offenses needed to be disclosed.¹⁰⁵

The UN, the IMF, the WB, BCBS, the Egmont Group, the OECD, Interpol, the OAS, Eurojust, Europol, the ECB are observer to the FATF.

According to article 13 of the OECD Convention, the EU Commission is authorized to take part in the OECD work.¹⁰⁶

¹⁰⁴ Delmas-Marty, Mireille. “Le relatif et l'universel”; Page 280.

¹⁰⁵ Fomdjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Page 310.

¹⁰⁶ OECD; “*Harmful Tax Competition: An Emerging Global Issue*” (Paris, OECD Publishing, 1998); Page 3.

SUBSECTION 3 – Affiliation to fundamental conventions

States are encouraged to become a member to the most fundamental conventions. The FATF, in accordance with recommendation 35, controls if States comply with UN Conventions and resolutions.¹⁰⁷ States should sign, ratify and incorporate (if needed) the international treaties such as the UN conventions¹⁰⁸ or the relevant CoE conventions.

The Inter-American Convention Against Terrorism asks its parties to sign and ratify the relevant UN anti-terrorism instruments.

SUBSECTION 4 – High level back-up

G7 and G20 regularly take up issues dealt with by FATF or the OECD, endorse and support them with the needed political weight. Due to resistance in the tax field, there has been a lot of political support. G7 and G20 reinforced for example OECD efforts to increase tax transparency by adopting tax information exchange and by reaffirming the importance of TXF countermeasures. The OECD tax convention model has been reinforced by the G20 and the UN expert committee on taxes.¹⁰⁹ Also, the BEPS Program was endorsed by the G20 in September 2013.¹¹⁰

Also UNSC strengthens the FATF special recommendations on terrorism. It asks the international community to implement those recommendations and asks for State action.¹¹¹

¹⁰⁷ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 222.

¹⁰⁸ Meister, Michael in Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers”; Page 93.

¹⁰⁹ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 275.

¹¹⁰ OECD; “Harmful Tax Competition: An Emerging Global Issue”; Page 7.

¹¹¹ Calothy, C. “Face au terrorisme, progrès et limites d'une coopération internationale tous azimuts” ; Page 132.

SUBSECTION 5 – Following national case law

International Organizations like the OECD are following national cases to enhance the system. So, there is also a kind of coordination between the international and the national level. The case matrixes are circled around and sometimes States find out that one of their companies is being tried in another State. This might result in interstate cooperation. The raise of public opinion is very powerful to make States reform their system.

SUBSECTION 6 – Additional viewpoints of legal scholars

Despite the elements of coordination, that trigger a kind of harmonization between the layers and an accordance on the most fundamental conventions, some scholars believe that legal certainty should be enhanced by agreeing on a single organ replacing the actual setting. This would allow to have only one centralized naming and shaming list.¹¹² Such authority could be represented by regional sub organs.

Other scholars believe that International Criminal law and the International Criminal Court should also play a role in trans-border organized crime. International Criminal law is an emerging concept that is partly replacing the traditional concept of strict State sovereignty.¹¹³ The scope of application of jurisdiction of the ICC has been widened to cover also the crime of aggression. Scholars argue that such enlargement could eventually pave the way towards international enforcement of other global challenges. However, it is very doubtful that all States would agree to confer jurisdiction to the ICC. The US, have for instance always been reluctant to confer jurisdiction to the ICC. They do not want other judges rule on their military commanders.

¹¹² Delmas-Marty, Mireille. "Le relatif et l'universel"; Page 262.

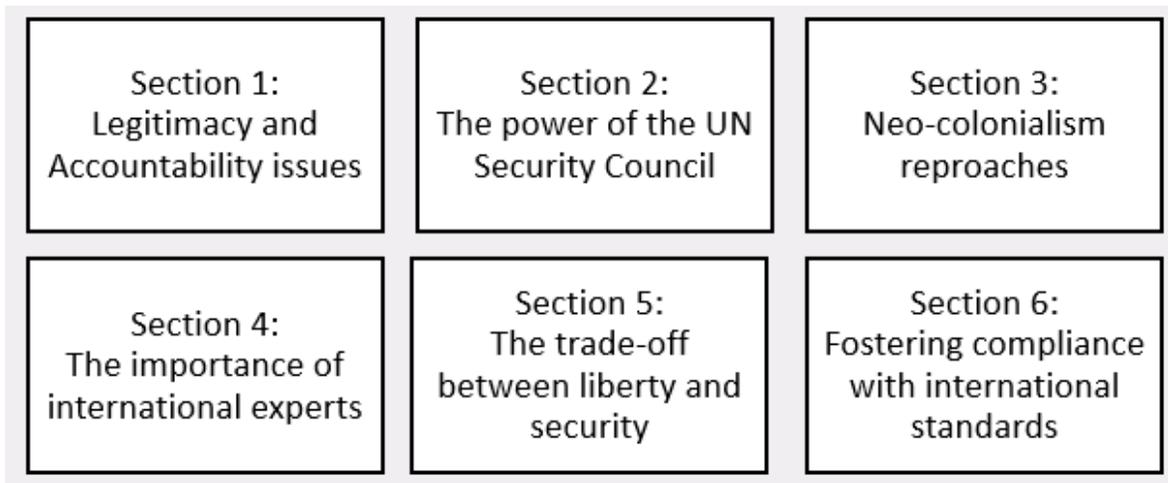
¹¹³ Cotterrell, Roger in Mitsilegas, Valsamis, Alldridge, Peter, Cheliotis, Leonidas. "Globalisation, criminal law and criminal justice: Theoretical, comparative and transnational perspectives"; Page 13.

IO norms may sometimes be binding and sometimes be non-binding. The way those norms are adopted varies from one IO to another and also from subject matter to subject matter. The common denominator is that they all have a significant effect on the international community. Even if they amount to soft law, there is usually monitoring by an expert committee.¹¹⁴

¹¹⁴ Kingsbury, Benedict and Casini, Lorenzo. "Global Administrative Law Dimensions of International Organizations Law"; Page 20.

CHAPTER 3 – The legitimacy of global standards

There is a shift from national crime control towards international or transnational prevention of serious crime.¹¹⁵ Legal scholars call the quasi-legal standards issued at global level Global Administrative Law “GAL”. There is no supreme body, this makes the order highly complex. Many regulatory regimes are coexisting It is based on shared competences and networking¹¹⁶ It is about preventive measures imposed at a worldwide scale to enhance transnational security.¹¹⁷ We roughly distinguish between the standards elaborated by the IOs such as the FATF and OECD recommendations and the resolutions of the UNSC.



Graph drafted by the thesis author and integrated in the text for better reading.

¹¹⁵ Mitsilegas, Valsamis. “Money laundering counter-measures in the European Union: A new paradigm of security governance versus fundamental legal principles”; Page 20.

¹¹⁶ Cassese, Sabino & Carotti, Bruno & Casini, Lorenzo & Cavalieri, Eleonora & MacDonald, Euan & Macchia, Marco & Savino, Mario. “Global Administrative Law: The Casebook”; Page XXIV.

¹¹⁷ Mitsilegas, Valsamis. “EU criminal law after Lisbon: Rights, trust and the transformation of justice in Europe”; Page 237.

SECTION 1 – Legitimacy and Accountability

Traditional law making (i.e. domestic laws and international treaties) is being “*complemented by the emergence of powerful “soft” law initiatives*”¹¹⁸, such as the FATF and the OECD recommendations and guidelines.

GAL, as opposed to a hard law convention, does not need consent of the parties or addressees. The IO standards are not ratified like treaties. There is no room for reservations and States have little margin of discretion.¹¹⁹ It is therefore more flexible, speedy and efficient. Even though those standards are not strictly binding (soft law), they trigger national law reforms around the world.¹²⁰

The global standards are not an expression of the will of the people, but rather the outcome of the impetus of and the influence of the most powerful States. Neither the IOs, nor the experts are politically responsible. They are not submitted to direct public scrutiny.¹²¹ There are issues about accountability, fairness and transparency.¹²² Also, such global rules often derive from the executive powers of States without involving the legislative.¹²³ It is not always assessable what force is pushing legal change at a given moment in time.¹²⁴ WB and IMF are for example influenced by wealthy States setting up the institutions’ agenda. It is also said that those institutions actions are non-transparent.¹²⁵ The United States have a tremendous amount of influence over the IMF. The US dispose all by themselves a

¹¹⁸ Mitsilegas, Valsamis, Aldridge, Peter, Cheliotis, Leonidas. “Globalisation, criminal law and criminal justice: Theoretical, comparative and transnational perspectives; Pages 153.

¹¹⁹ Gathii, James, “The Financial Action Task Force and Global Administrative Law” (2010). Journal of the Professional Lawyer, Forthcoming; Albany Law School Research Paper No. 10-10; Page 7

¹²⁰ Mitsilegas, Valsamis, Aldridge, Peter, Cheliotis, Leonidas. “Globalisation, criminal law and criminal justice: Theoretical, comparative and transnational perspectives”; Pages 179 &180.

¹²¹ Christians, Allison. “Networks, Norms and National Tax Policy”; Page 23.

¹²² Tripathi, R. “Concept of Global Administrative Law” (2011). India Quarterly, 67(4); Page 356.

¹²³ Mitsilegas, Valsamis. “EU criminal law after Lisbon: Rights, trust and the transformation of justice in Europe”; Page 238.

¹²⁴ Christians, Allison. “Networks, Norms and National Tax Policy”; Page 31.

¹²⁵ Gathii, James, “The Financial Action Task Force and Global Administrative Law”; Page 8.

blocking minority in case of voting.¹²⁶ They also have incredible influence on the World Bank, as they are the principal funders.^{127& 128}

It must however be acknowledged that IO standards are often backed up by political forums or higher IOs. Sometimes they are subsequently being implemented by new treaties. This gives those norms more legitimacy. Also, States might actively participate in the standard setting “*through notice and comment*”.¹²⁹

IOs seem to be a good compromise. The international community would not accept if States would directly impose standards. It seems less intrusive if this is done through an IO. Also, a system based on State consent is no longer viable. There are too many global issues and it is very difficult to come to an agreement.¹³⁰ If States could come to an agreement, there still would be a risk of States refusing to sign or ratify the treaty or they could put forth reservations. Even in the highly integrated order of the EU, based on common traditions and common values, it is sometimes very difficult to consent. The IO soft law approach might be the only option to change State behaviour. This is especially the case in matters of strong state sovereignty such as taxation.¹³¹ States might easier accept rules that *prima facie* are not binding, even though peer pressure and evaluations aim at reconciling rival goals.¹³²

¹²⁶ Millet, Damien, & Toussaint, Éric. “50 questions, 50 réponses sur la dette, le FMI et la banque mondiale” (Bruxelles : Paris, CADTM ; Syllepse, 2002) ; Pages 77 & 81-82.

¹²⁷ Millet, Damien, & Toussaint, Éric. “50 questions, 50 réponses sur la dette, le FMI et la banque mondiale”; Page 86.

¹²⁸ Hanhimäki, Jussi. “The United Nations : A Very Short Introduction” (Oxford, Oxford University Press, 2008); Page 5.

¹²⁹ Savino, Mario & De Bellis, Maurizia in Cassese, Sabino & Carotti, Bruno & Casini, Lorenzo & Cavalieri, Eleonora & MacDonald, Euan & Macchia, Marco & Savino, Mario. “Global Administrative Law: The Casebook”; Page 252.

¹³⁰ Casini, Lorenzo in Cassese, Sabino & Carotti, Bruno & Casini, Lorenzo & Cavalieri, Eleonora & MacDonald, Euan & Macchia, Marco & Savino, Mario. “Global Administrative Law: The Casebook”; Page 28.

¹³¹ Christians, Allison. “Networks, Norms and National Tax Policy”; Page 1.

¹³² Christians, Allison. “Networks, Norms and National Tax Policy”; Pages 2 & 3.

Legitimacy and accountability issues are even more blatant if one considers the actions of NGOs. They are global observers and independency enables NGOs to provide unbiased State monitoring and to publish reliable reviews. NGOs such as Transparency International are very important global actors. There was no delegation of power and no authorization. "*Who guards the guardians?*"¹³³ There is no single entity towards whom NGOs are accountable to. NGOs stem from the civil society and as such they should be accountable to the international civil society. They are however not knotted to a specific group of people. Only a few NGOs have internal mechanisms for accountability. Another curious development has occurred. There are NGOs watching other NGOS (i.e. NGO Watch, One World Trust).¹³⁴

OECD evaluations are often used by national lawmakers to guide legal change and promote new legislation.¹³⁵

¹³³ Charnovitz, Steve. "Accountability of Nongovernmental Organizations (Ngos) in Global Governance" (April 1, 2005). GWU Legal Studies Research Paper No. 145; Pages 13-15; Pages 19-21.

¹³⁴ Charnovitz, Steve. "Accountability of Nongovernmental Organizations (Ngos) in Global Governance"; Pages 13-15 & 21-22.

¹³⁵ Christians, Allison. "Networks, Norms and National Tax Policy"; Pages 25 & 26.

SECTION 2 – The power of the UN Security Council

The UNSC has large powers, it has the task to maintain international peace and security. Its resolutions are not formally subjected to review by other UN organs¹³⁶ In the case of terrorism and TF, some of the global countermeasures are imposed by resolutions of the UNSC. After 9-11 a first set of measures was targeting Osama bin Laden and Al Qaida.

Subsequently resolution 1373 aimed expressly to prevent and suppress the financing of terrorist acts and the resolution called upon states to become, as soon as possible, parties to the relevant existing conventions such as the 1999 International Convention for the Suppression of the Financing of Terrorism (§3d). Obligations are imposed on States for an indefinite period.

There is a lot of critic regarding the UN Security Council resolutions because this body is considered to be undemocratic and unrepresentative. Moreover, there are tensions between the obligations put forth by the resolutions and the rule of law and the procedural safeguards. The Un resolutions leave little discretion on how to implement them.¹³⁷

At regional level, the ECtHR ruled in the Al-Jedda case that national courts must interpret UNSC resolutions in respect of the fundamental human rights principles: *“Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in*

¹³⁶ Arato, Julien in Cassese, Sabino & Carotti, Bruno & Casini, Lorenzo & Cavalieri, Eleonora & MacDonald, Euan & Macchia, Marco & Savino, Mario. “Global Administrative Law: The Casebook”; Pages 61-63.

¹³⁷ Mitsilegas, Valsamis. (2016). “EU criminal law after Lisbon: Rights, trust and the transformation of justice in Europe.”; Pages 236-262.

*harmony with the requirements of the Convention and which avoids any conflict of obligations.”*¹³⁸

At sub regional level, the Court of Justice of the European Union (“CJEU”) had to review (action for annulment) in Kadi I¹³⁹ the Union’s implementing act of the regulation 137/2001 implementing Un Security Council resolution 1267. The CJEU put forth that the Union is based on the rule of law and that the union is reviewing if the necessary safeguards (information of the grounds of the measures, right to review, defence rights) are in place. It annulled the Union’s regulation because of lack of justification.

The court did neither question the power of the UN to issue lists of individuals that are subjected to invasive measures nor the competence of the community to implement those decisions. As a reaction to the CJEU ruling, the UNSC has begun to publish the reasons along with the resolutions and offers a review. The office of the Ombudsperson has been established to assist the Sanctions Committee with the delist requests. The Sanctions Committee is however not obliged to follow the Ombudsperson’s recommendations.¹⁴⁰ Since regulation 1286/2009, the Commission takes actions to list a natural or legal person only after reasons have been stated by the Sanctions Committee.

Kadi continued to be listed and the CJEU (now post Lisbon) had to issue another ruling. The CJEU found that the measures against Mr Kadi cannot be considered as merely temporary and therefore criminal in nature: 10 years is a substantial period in a human’s life span. The CJEU therefore considered the measures a

¹³⁸ ECHR; Al-Jedda versus the United Kingdom; 7 July 2011; §102.

¹³⁹ CJEU; C-402/05; Yassin Abdullah Kadi and Al Barakaat International Foundation versus Council of the European Union and Commission of the European Communities (“Kadi I”); 3 September 2008.

¹⁴⁰ Mitsilegas, Valsamis. (2016). “EU criminal law after Lisbon: Rights, trust and the transformation of justice in Europe”; Pages 259 &260.

disproportional encroachment on fundamental rights. The CJEU further noted that the UN's safeguards are insufficient to effective judicial protection.¹⁴¹

We must acknowledge that the UN has made efforts to increase legitimacy and accountability. An Ombudsman was introduced and resolutions need to be reasoned.

¹⁴¹ CJEU; C-584/10; Commission and Others versus Kadi ("Kadi II"); 18 July 2013.

SECTION 3 – Neo-colonialism reproaches

There is a distortion between the States of the Northern Hemisphere and those of the Southern Hemisphere. The latter consider that the adoption of the international norms is a trick of the rich States unable to face their own financial challenges.¹⁴² They are not happy about further constraints imposed on them because of globalisation.

In taxation matters, there is the claim that the global standards are an expression of neo-colonialism. The OECD policies and the world forum are essentially based on the legal frameworks of the Western systems. The OECD faces the opposition of several States that consider that the “tax victim” States are themselves responsible of their incapacity to adopt attractive taxation rules. Among these States the Centre of Freedom and Prosperity (“CF&P”), a coalition fostering fiscal competition, has been regrouping off shore territories to contradict the legitimacy of the OECD rules on taxation.¹⁴³ The less developed States put forth that tax evasion and tax fraud are conceived because of over taxation within the rich States.¹⁴⁴

Also implementing international standards has a cost.¹⁴⁵ Some developing States do not have the means to comply with all requirements. There is a need to raise funds to support developing States. For some regions, it is hard to find „sponsors “.

¹⁴² Koutouzis, Michel, & Thony, Jean-François. “Le blanchiment”; Page7.

¹⁴³ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Page 430.

¹⁴⁴ Chavagneux, Christian & Palan, Ronen. “Les paradis fiscaux”; Page 5.

¹⁴⁵ Henry, Gérard-Marie. “Le FMI” (Studyrama, 2006) ; Pages 20-21.

SECTION 4 – The importance of international experts

We already saw that the multi-layered framework is built on the pillars of a handful of very powerful States, but there is a further downfall. Experts play a very important role in GAL. There are not many experts and they mostly originate from the most influential States.

Experts contribute to the elaboration of standards, monitor and evaluate States' compliance. Very often the same experts are the representatives or the observers to more than one IO. Those experts, that are not really accountable gain a tremendous amount of power and influence.

There is i.e. disapproval about IMF experts that are sent to States because States get the impression of IMF experts governing sovereign States. They are ordering governments to take such and such actions. Those IMF experts are not politically responsible.

SECTION 5 – The trade-off between liberty and security

Personal freedoms and collective security are balanced.¹⁴⁶ In terrorism matters, security seems to outweigh individual rights. Under the pretext of security and the fight against terrorism, society is willing to accept restrictions of individual rights.

In the US, the 9-11 terrorist attacks allowed to considerably enhance AML measures as well. This was not possible before, because such rules were considered as being too expensive and would diminish competitiveness.¹⁴⁷ The Patriot act deals not only with terrorism but also with ML and TXF.¹⁴⁸

We already mentioned the critics about the grouping of ML and TF countermeasures. Eventually the two were put together to rush through more intrusive AML legislation. In the name of security and basically using the terrorism pretext people seem to easier accept that their fundamental rights are being limited. There is an inherent risk that the means accepted to fight terrorism are used or misused for other purposes.

There is also the risk that the public is intentionally misled through stirring up fear. Impressive numbers on the impact of ML are provided to the public.

According to the 2005 FMI calculations a sum of 80.000 billion USD would have been laundered (= 5% of the global GDP).¹⁴⁹ Andreas Peter, a legal scholar, emphasizes that the published numbers are too high by intention.¹⁵⁰

¹⁴⁶ Gostin, Lawrence. When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified? Florida Law Review, Vol. 55, p. 1105, 2003; page 4.

¹⁴⁷ Kochan, Nick. "The Washing Machine: How Money Laundering and Terrorist Financing Soils Us" (Texere, 2005); Page 239.

¹⁴⁸ Kochan, Nick. "The Washing Machine: How Money Laundering and Terrorist Financing Soils Us"; Page xvii.

¹⁴⁹ Fort, JeanLouis in Hunault, Michel. "La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers"; Page88.

¹⁵⁰ Andreas, Peter in Mitsilegas, Valsamis, Alldridge, Peter, Cheliotis, Leonidas. "Globalisation, criminal law and criminal justice: Theoretical, comparative and transnational perspectives"; Pages 49-52.

Even if we speak of GAL, this does not mean that there are no guarantees. There are among others rules on transparency and due process.¹⁵¹ IOs are being reviewed by other IOs. The OECD introduced this new kind of peer review.¹⁵²

¹⁵¹ Casini, Lorenzo in Cassese, Sabino & Carotti, Bruno & Casini, Lorenzo & Cavalieri, Eleonora & MacDonald, Euan & Macchia, Marco & Savino, Mario. "Global Administrative Law: The Casebook"; Page 25.

¹⁵² Carotti, Bruno & Dimitropoulos, Georgios in Cassese, Sabino & Carotti, Bruno & Casini, Lorenzo & Cavalieri, Eleonora & MacDonald, Euan & Macchia, Marco & Savino, Mario. "Global Administrative Law: The Casebook"; Page 306.

SECTION 6 – Fostering compliance with international standards

All three policy areas are subject to monitoring and peer evaluation by experts.

Monitoring and/or listing of States

Monitoring and Evaluation		
Money Laundering		
FATF	IMF-IEO	CoE MONEYVAL
Terrorist Financing		
FATF	IMF-IEO	
Tax Fraud		
OECD / Global Forum on Transparency and Exchange of Information for Tax Purposes	IMF-IEO	
Corruption		
OECD (Anti Bribery Convention)	GRECO	IMF-IEO

- FATF = Financial Action Task Force
- GRECO = Group of States against Corruption
- IMF-IEO = International Monetary Fund- Independent Evaluation Office
- MONEYVAL= Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism

Graph drafted by the thesis author and integrated in the text for better reading.

There is a need to coordinate State evaluations to avoid that a State is being reviewed by different organizations at the same time. If such is the case, common assessments might be more fruitful.

Besides monitoring and evaluation, there is also a Naming and shaming process of non-Cooperative Countries or Territories. This process creates a lot of pressure and should push States towards the adoption of consistent legislation. The listing of States and individuals might be conceived as economical sanction for political reasons.¹⁵³

¹⁵³ Sullivan, Kevin. "Anti-Money Laundering in a Nutshell"; Page 145.

Sanctioning / Naming and Shaming	
Money Laundering	
FATF	Listing of non compliant States and territories
EU	
Terrorism & Terrorist Financing	
UNSC List	Sanctioning list
OFAC List	
Tax Fraud	
OECD	Listing of tax havens
EU	
Transparency	
FSF	FSF identified and listed offshore centres in categorising them according to their level of compliance in the issue of transparency. It distinguishes cooperative, semi cooperative and non-cooperative States.

Table drafted by the thesis author and integrated in the text for better reading.

The naming and shaming of non-compliant States is a very powerful tool and creates a tremendous amount of international pressure. Liechtenstein, while listed, suffered important financial losses. Likewise, there was a decrease of 50 % of companies created in the Bahamas between early 2001 and 2002. Despite the territories being removed from lists, the criminal authorities might still experience that there is reluctance to cooperate.¹⁵⁴

Naming and shaming is subject to criticism. IMF opposed the blacklisting of the FATF because it hampers economic development of the concerned States. The FATF stopped the blacklisting in 2002.¹⁵⁵

Also the process is highly political and powerful States might take influence. The US managed to obtain a reassessment of the Bahamas from the black list to the grey list.

¹⁵⁴ Foudjem, Celestin, & Lopez, Christian. "Blanchiment de capitaux et fraude fiscale"; Pages 413 & 414.

¹⁵⁵ Kochan, Nick. "The Washing Machine: How Money Laundering and Terrorist Financing Soils Us"; Page 250.

The lists are contradicting each other. The EU list on non-compliant States and territories is not the same as the FATF list. Serbia is not listed in the EU and Panama has been removed.

In 2010, France adopted a white list of States for which there was no need to issue declarations of suspicious transactions. However, this list was highly problematic as some EU Member States were not listed while States such as Iran were listed. By listing Iran on the white list, France even contradicted the FATF lists. Iran was considered highly problematic with regards to terrorism.¹⁵⁶

¹⁵⁶ Jetha, Fahrnaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Pages 176 &177.

CHAPTER 4 – States acting within the global framework

Not every State takes ML, TF and TXF seriously. Despite legislation that at first look seems promising and government statements that express the willingness to comply with the FATF standards, this is not always the case.

The lack of universally accepted definitions and the differences of national legislations hinder effective cooperation between States. Divergences do not only exist for the definitions, but also concerning the sanctions (i.e. asset recovery).¹⁵⁷

States must keep pace with the elaboration of the global standards and provide for effective enforcement. Enforcement is done through competent national authorities that should have the power to sanction shortcomings.

Despite the general idea that citizens should pay taxes, many States keep a close connection to tax havens and tend to protect them.¹⁵⁸ This is i.e. the case for the US and Bahamas and France and Monaco.¹⁵⁹

The purpose of this chapter is to analyse how individual States act within the globally imposed set up. The US and the French approach will be analysed.

¹⁵⁷ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment" (Saint-Denis, Connaissances et Savoirs, 2016) ; Pages 243&244.

¹⁵⁸ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment" (Saint-Denis, Connaissances et Savoirs, 2016) ; Page 31.

¹⁵⁹ Vernier, Éric, & Lebègue, Daniel. "Fraude fiscale et paradis fiscaux : Décrypter les pratiques pour mieux les combattre" (Paris, Dunod, 2014) ; Page151.

		France	USA
G7		Member	Member
The United Nations		Member	Member
ML	Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	X	X
	United Nations Convention against Transnational Organized Crime	X	X
Terrorism & TF	International Convention for the Suppression of Terrorist Bombings	X	X
	International Convention for the Suppression of the Financing of Terrorism	X	X
	International Convention for the Suppression of Acts of Nuclear Terrorism	X	X
	United Nations Security Council	Permanent Member	Permanent Member
Corruption	UN Convention against corruption "UNCAC"	X	X
Linked Institutions	IMF	Member	Member
	World Bank	Member	Member
FATF		Member	Member
	Last evaluation	Very high level of compliance	Robust regime but with serious gaps
OECD		Member	Member
TXF	Global Forum on Transparency and Exchange of Information for Tax Purposes	Compliant	Largely Compliant
	Berlin Tax Pact	Member	Not a party but "supports tax push"
	Base Erosion- Profit Shifting	X	X
Corruption	Paris Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions	X	X

Table drafted by the thesis author and integrated in the text for better reading.

At global policy level, France and the US are members of the most important IOs and parties to the essential conventions. France seems at first glance to be very compliant with the international standards whereas the US is also compliant but to a lower extend.

Council of Europe		France Member	The US Observer
ML	Convention on Laundering , Search, Seizure and Confiscation of the Proceeds from Crime	X	
	Convention on Laundering , Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism	X	
Terrorism & FT	European Convention on the Suppression of Terrorism	X	
	Protocol amending the European Convention on the Suppression of Terrorism	X	
	Council of Europe Convention on the Prevention of Terrorism	X	
	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism	X	
	Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism	X	
TXF	Convention on Mutual Administrative Assistance in Tax Matters (CoE & OECD)	X	X
	Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters	X	Only signature
Corruption	Criminal law convention on Corruption	X	Only signature
	Additional Protocol to the Criminal Law Convention on Corruption	X	
	Civil Law Convention against Corruption	X	
Organization of American States		Observer	Member
ML	Inter-american convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials		X
TF	Inter-American Convention Against Terrorism (including TF & ML)		X
Corruption	Inter-American Convention Against Corruption		X
The European Union		Member	

Table drafted by the thesis author and integrated in the text for better reading.

It is notice worthy that France is an observer to the OAS. Likewise, the US is an observer to the CoE and even joined some CoE conventions.

SECTION 1 – The US approach

Important United States initiatives	
Creation of the UN	During WW2 the creation of the UN was initiated by the US and should assemble the Allied States.
US war on Drugs	Initiated the elaboration of the Vienna Convention of the UN
US war on Terror	<ul style="list-style-type: none">• Initiated the elaboration of the UN terrorist convention• Proposed its definition of terrorism
The Egmont Group	<ul style="list-style-type: none">• Multilateral information exchange forum initiated by the US Financial Intelligence Unit.• Fosters cooperation in the areas of ML and TF
Corruption	OECD Convention on foreign bribery was created by the impulse of the US.

Table drafted by the thesis author and integrated in the text for better reading.

The US is a global player. It is a very important State. It is a big originator of significant international initiatives such as the Egmont Group. It was established on the initiative of FinCEN, the US Financial Intelligence Unit. The aim is to create a multilateral information exchange forum. It grew to 155 FIUs.¹⁶⁰

Even though the US are great initiators, we'll see that they are at the same time also very protective of their own interests.

¹⁶⁰ Sullivan, Kevin. "Anti-Money Laundering in a Nutshell"; Page 143.

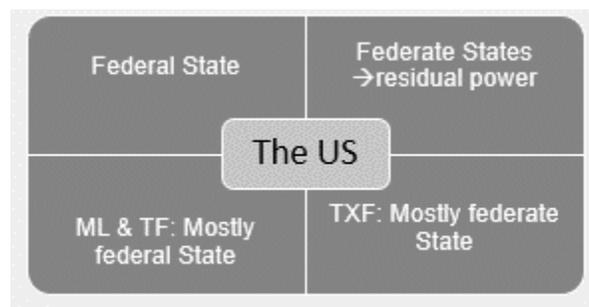
SUBSECTION 1 – The constitutional setup

Federal Constitution	
Article 1	The presidency
Article 2	The US Supreme Court
Article 3	The supremacy clause: Federal Law overrides national law
Article 6	Supremacy of treaties

Table drafted by the thesis author and integrated in the text for better reading.

The US is a federal Republic of fifty federate States, plus the District of Columbia. It also disposes of several territories that are not considered as individual States (i.e. Puerto Rico, the Virgin Islands, Guam etc).

The US federal Constitution is the highest norm of the country and it is rigid. The federal Constitution attributes specific powers to the federal government; the residual powers belong to the federate States. There is no almighty federal government but political power is shared between the federal State and the federate States. Each federate State has its own rigid constitution. Due to the so-called Pre-emption Doctrine, federal law may override State law.¹⁶¹ In short, one territory is governed by two distinct powers, the federal power and the federate power with different legal norms and different courts. Every citizen is citizen of both the federal State and a federate State.



Graph drafted by the thesis author and integrated in the text for better reading.

¹⁶¹ Hay, Peter. "Law of the United States: an overview" (C.H. Beck, Brussels, 2010); Page 7.

If the US becomes a party to an International treaty, these treaties are considered the supreme law of the US.¹⁶² This supremacy clause is interpreted in the sense that treaties and executive agreements take primacy over State law. The US Supreme Court has however regularly held that the Federal constitution prevails over a treaty.¹⁶³ The US is a member of all the analysed IOs acting at a global level and is a party to all the major treaties. At regional level, the US is a member of the OAS and of the North American Union (not analysed here); the North American States are linked through the North American Free Trade Agreement (“NAFTA”). It is notice worthy that the US are also a party to some CoE instruments in tax and corruption matters.

The organization of the individual States echoes that of the federal State. There are always three distinct branches with checks and balances: the legislative, the executive and the judicial. The executive heads are the US President respectively the State governors.¹⁶⁴

There is a trend towards increasing federal powers. Especially federal criminal law statutes are on the rise.¹⁶⁵ There is an overlap of State criminal law and federal criminal law. The federal legislator, the Congress and the Senate, have for instance legislated in matters affecting interstate and foreign commerce such as the financial system, serious crime and terrorism.¹⁶⁶ There are federal agencies, regulators and investigative bodies besides the actors of individual States.

¹⁶² Johns, Margeret & Perschbacher, Rex. “The United States Legal System: An Introduction” (Carolina Academic Press, 2012); Page 90.

¹⁶³ Dycus, Stephen; Berney, Arthur; Banks, William; Raven-Hansen, Peter. “National security law”; (New York, Wolters Kluwer, 2011); Pages 173-175.

¹⁶⁴ Johns, Margeret & Perschbacher, Rex. “The United States Legal System: An Introduction”; Pages 83-89.

¹⁶⁵ Hay, Peter. “Law of the United States: an overview”; Page 300.

¹⁶⁶ FATF Mutual Evaluation Report of the United States; 01 December 2016; Page 17.

Multilateral Agencies	
Federal Reserve board	
FDIC	
NCUA	
OCC	Responsible for the examination of the compliance of banks with the Bank Secrecy Act.
FlinCEN	Originally created in 1990 to assist law enforcement, but its missions were broadened. It should ensure coordination of national agencies and foster international cooperation. It gathers information and elaborates strategic analyses. It is also the administrator of the Bank Secrecy Act.
US Marshals Services	Managing of assets

Table drafted by the thesis author and integrated in the text for better reading.

Regulators	
Office of the Comptroller of the Currency	Regulates and supervises national banks
FlinCEN	Originally created in 1990 to assist law enforcement, but its missions were broadened. It should ensure coordination of national agencies and foster international cooperation. It gathers information and elaborates strategic analyses. It is also the administrator of the Bank Secrecy Act.
Investigative bodies	
FBI (federal police)	
DEA	
International Revenue Service Criminal Investigation	

Table drafted by the thesis author and integrated in the text for better reading.

The US see themselves as the best legal system. They are very keen on initiating worldwide reforms; however, when it comes to working together on new solutions, the US are rather reluctant to accept proposals that are diverging from US law.¹⁶⁷

Moreover, the US are trying to impose some of its standards on other countries by expanding its jurisdiction: The US Patriot Act for example has an impact on foreign banks. Every bank dealing in USD must pass through US institutions and therefore such foreign banks must refrain from dealing with blacklisted persons and entities.¹⁶⁸

¹⁶⁷ Delmas-Marty, Mireille. "Le relatif et l'universel"; Page 38.

¹⁶⁸ Kochan, Nick. "The Washing Machine: How Money Laundering and Terrorist Financing Soils Us"; Pages 240-241.

SUBSECTION 2 – The fight against Money Laundering

Money Laundering		
Federal crime		<ul style="list-style-type: none"> Article 18 USC §1956: Laundering of monetary instruments Article 18 USC §1957: Engaging in monetary transactions in property derived from specified unlawful activity
Federal Regulations		
Bank Secrecy Act (BSA)	1970	<ul style="list-style-type: none"> Obliges financial institutions to develop and uphold AML programs Financial institutions are required to maintain records of the transactions File currency transactions reports for cash transactions exceeding 10.000 USD.
Money Laundering Control Act	1986	Adopted to close loopholes of the BSA such as structured cash deposits
Annunzio - Wylie AML Act	1992	<ul style="list-style-type: none"> Amended the BSA and introduces reporting obligations on any suspicious transactions. Safe harbour provision grants immunity from Civil liability arising from the emission of suspicious activity reports. encourage banks to file reports
Money Laundering Suppression Act	1994	<ul style="list-style-type: none"> Aims at providing more clarity on who must report suspicious transactions and who is exempted. Introduced a Bank Secrecy Act Advisory Group Introduced a new federal offense: operating an unregistered money service business First International instrument combining ML and TF Confiscation of proceeds of crime or equal value States must take the necessary measures to confiscate the proceeds of crime relating to the predicate offenses (article 2)
Money Laundering and Financial Crimes Strategy Act	1998	Points out geographical areas of high risk
Foreign Money Laundering Deterrence and Anticorruption Act	1999	
US Patriot Act	26.10.2001	<ul style="list-style-type: none"> Extended the definition of financial institutions Strengthened the Banking Secrecy
Federal Agencies		
ICE		Immigrations and Customs Enforcement
US customs		Import and export of cash
FBI (federal police)		White Collar Crime Task Force
ACAMS		Association of Certified Anti-Money laundering Specialists
DEA Special Operations Division		Identify ML organizations
US Treasury		
Federal Reserve		
US Postal Inspection Service		Prevent misuse of postal services (i.e. Money orders)
American Banking Association		

Table drafted by the thesis author and integrated in the text for better reading.

The US have been confronted to major criminal organizations and organized crime. It initiated the fight against money laundering in the context of its war against drugs.
¹⁶⁹ The US initiative led to the UN Vienna Convention of 1988.

¹⁶⁹ Mitsilegas, Valsamis. "Money laundering counter-measures in the European Union: A new paradigm of security governance versus fundamental legal principles"; Pages 36 & 37.

ML is a federal crime; federate States address it also through the Uniform Money Services Act.¹⁷⁰ The US have at global scale the highest number of criminal convictions for ML.¹⁷¹

A 2007 Transparency International study on corruption showed that the US are not fully compliant with their international ML commitments. Legal loopholes have been identified. The US presented severe deficiencies in nine out of ten analysed areas. A main issue is ML in the real estate sector. The US failed to extend due diligence obligations (especially the effective identification of UBOs) to non-financial professionals. The lack of proper implementation of the Patriot Act rendered the rules and procedures ineffective.¹⁷² Even though the Patriot Act included non-financial professionals, the Treasury Department exempted them. Many cash purchases of real estate by international clients have been identified (59% of real estate purchases by international clients are done in cash).¹⁷³

The FATF did in 2016 its latest peer review of the US. The experts acknowledged that the US system has significantly developed since the previous assessment.¹⁷⁴ The federal State is the main actor in the fight against ML and TF. AML is not a main concern of the federate States.¹⁷⁵ The federal authorities are successful in prosecuting money launderers; there are over 12.000 convictions per year. Asset recovery is also very efficient.

¹⁷⁰ Garner, Bryan & Black, Henry. "Black's law dictionary"; Page 842.

¹⁷¹ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment" (Saint-Denis, Connaissances et Savoirs, 2016) ; Page 252.

¹⁷² Kochan, Nick. "The Washing Machine: How Money Laundering and Terrorist Financing Soils Us"; Page 246.

¹⁷³ Transparency International; Martini, Maíra. "Doors wide open - Corruption and Real Estate in Four Key Markets"; 29 March 2017;

¹⁷⁴ FATF Mutual Evaluation Report of the United States; 01 December 2016; Page 6.

¹⁷⁴ FATF Mutual Evaluation Report of the United States; 01 December 2016; Page 6.

¹⁷⁵ FATF Mutual Evaluation Report of the United States; 01 December 2016; Pages 7-8 & 23.

However, the US has not remedied to one key finding of the previous FATF, namely, the adequate identification of UBOs of companies, the “*timely access to adequate, accurate and current beneficial ownership information*”.¹⁷⁶ Money launderers misuse legal entities for ML purposes.¹⁷⁷ Besides, the resource consuming identification process of UBOs negatively affects mutual legal assistance.

The financial sector is submitted to strict reporting obligations.¹⁷⁸ The regulators may impose penalties if they think that an insufficient amount of suspicious activities reports has been filed.¹⁷⁹ There is however a lack of compliance in the non-financial sector (especially lawyers). High value real estate transactions remain holes in the US AML framework.

¹⁷⁶ FATF Mutual Evaluation Report of the United States; 01 December 2016; Page 4.

¹⁷⁷ FATF Mutual Evaluation Report of the United States; 01 December 2016; Page 10.

¹⁷⁸ FATF Mutual Evaluation Report of the United States; 01 December 2016; Page 9.

¹⁷⁹ Mayer Frank, Zack Richard; Webinar: Suspicious Activity Reporting (SAR) under the Bank Secrecy Act and Anti-Money Laundering: What You Need to Know About the Safe Harbor and Limitations to Immunity”; 12 December 2012.

SUBSECTION 3 – Addressing Terrorist Financing

Terrorism & Terrorist Financing		
Federal crime		18 USC §2331 (Definition of terrorism)
		18 USC §2339A (Providing material support to terrorists)
		18 USC §2339C (Prohibitions against TF)
US Patriot Act	26.10.2001	<ul style="list-style-type: none"> • Investigatory obstacles to fight terrorism ought to be removed • Information sharing should be increased • Criminal laws against terrorism should be enhanced. • Grants the US treasury powers to deal with foreign money laundering purposes affecting US Banks
National Counter Terrorism Center		Analyses information concerning terrorism
Office of Intelligence and Analysis of the US Treasury		Identify and attack terrorist groups' financial infrastructure
Homeland Security	2002	Tracking terrorists and terrorism Networks
Department of State; Bureau of Counterterrorism		Designate Foreign Terrorist Organizations
Operation Green Quest		Multiagency task force on TF
OFAC		Administers and enforces sanctions against terrorists
CIA		
Immigration and Nationalization Service		
FBI		

Table drafted by the thesis author and integrated in the text for better reading.

The US is very active in the field of terrorism and TF. It is its top priority. The US are particularly exposed to terrorism inter alia due to its important financial centre, its way of life and the world-wide operation of its forces. There are 104 countrywide operating Joint Terrorism Task Forces.¹⁸⁰

The US were, post 9-11, the driving force behind the adoption of counter terrorism measures¹⁸¹, President George W. Bush declared the war on terror.¹⁸² It is said that the President's highest priority is to protect the US citizens.¹⁸³ Their policy response

¹⁸⁰ FATF Mutual Evaluation Report of the United States; 01 December 2016; Pages 8 & 20.

¹⁸¹ Mitsilegas, Valsamis. "EU criminal law after Lisbon: Rights, trust and the transformation of justice in Europe"; Page 236.

¹⁸² Favarel-Garrigues, G., Godefroy, T., & Lascoumes, P. "Reluctant partners?: Banks in the fight against money laundering and terrorism financing in France"; Page 180.

¹⁸³ Pearlman, Adam. "GQ: The Guantanamo Quagmire"; (June 9, 2016). Stanford Law & Policy Review, Vol. 27, 2016; Page 107.

was the adoption of the Patriot Act on 26/10/2001. The fight against terrorism has since US impetus become a recurrent international concern.¹⁸⁴

Terrorist actions are in the US considered as acts of war. By order of the Executive, terrorists have been captured and detained. Many individuals have been sent to Guantanamo Bay ("GTMO") in execution of Operation Enduring Freedom post 9/11.¹⁸⁵ The CIA was ordered to prevent a subsequent terrorist attack by all means. High value detainees were subjected to torture in so called terrorist black holes (lawless regions throughout the world). Suspects were tortured outside US soil by non US forces: "*We didn't kick the shit out of them [(terrorists)]. We send them to other countries so they can kick the shit out of them.*" The receiving States were not bound by US constitutional safeguards.¹⁸⁶

The US have been the driving force behind the development of the confiscation mechanisms.¹⁸⁷ They have implemented rules for civil forfeiture to be applied to criminal property. With the US war against terrorism, the property of terrorist was targeted. Confiscating the means to commit terrorist acts was conceived as an essential preventive tool.¹⁸⁸ The US are very efficient in non-conviction based forfeitures. They put the presumed illegal money at trial and the person claiming to be the legal owner must prove this at trial.¹⁸⁹

The Office of Foreign Assets Control ("OFAC"), a division of the Department of the Treasury, is publishing lists containing thousands of persons and companies

¹⁸⁴ Calothy, C. "Face au terrorisme, progrès et limites d'une coopération internationale tous azimuts"; Page 125.

¹⁸⁵ Pearlman, Adam. "GQ: The Guantanamo Quagmire"; Pages 103-104.

¹⁸⁶ Pearlman, Adam. "GQ: The Guantanamo Quagmire"; Pages 111-113.

¹⁸⁷ Fernandez-Bertier, Michaël in Ligeti, Katalin & Simonato Michele. "Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU"; Page 65.

¹⁸⁸ Fernandez-Bertier, Michaël in Ligeti, Katalin & Simonato Michele. "Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU"; Page 91.

¹⁸⁹ Casella, Stefan in Ligeti, Katalin & Simonato Michele. "Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU"; Page 265.

subjected to sanctions. US banks and subsidiaries are not allowed to do business with those persons.¹⁹⁰ This list is a huge pressuring tool. A bank or company that is being listed is excluded from the US market and cannot do dollar transactions. Every transaction involving dollars must be cleared by an intermediate bank on US soil.¹⁹¹ Being on an OFAC list is thus like an economic sanction. The lists are constantly changing. Banks are getting sanctioned in case of lack of oversight or “wire stripping”: In the latter case, relevant information is stripped of, so that the payments would not be blocked.

¹⁹⁰ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment” (Saint-Denis, Connaissances et Savoirs, 2016) ; Page 317.

¹⁹¹ Sullivan, Kevin. “Anti–Money Laundering in a Nutshell”; Page 146.

SUBSECTION 4 – Countering Tax Fraud

Tax Fraud	
Internal Revenue Code and Regulations	
DOJ Tax Division	
Internal Revenue Service-Criminal Investigation	Sole federal tax administration
Federate State tax administration	Every State has its own

Table drafted by the thesis author and integrated in the text for better reading.

Tax fraud and tax evasion are highly politicized in the US. President Clinton supported OECD tax rules. President George W. Bush however criticized fiscal pressure and considered that tax evasion would be a legitimate response to over taxation.¹⁹² The US declared that they did not intend to dictate to other States how they should deal with taxation. And that they would not contribute to tax harmonization.¹⁹³ President Obama decided in 2016 to reform the non-transparent taxation regimes of the federate States Nevada and Delaware. This is a response to the findings of the Panama Papers.

The US used to and still pursue their own interest in taxation matters. There are federal taxes, State taxes and local taxes. The level of taxation is mainly decided at federate State level.¹⁹⁴ The Bank Secrecy Act (“BSA”) has introduced the obligation to report financial transactions to the Federal Government. The aim is to use that information in civil, administrative and criminal proceedings.

At national level, The US Senate estimates its losses from tax evasion to around 100 billion dollars a year.¹⁹⁵ In 2003, the Internal Revenue Service (“IRS”) began

¹⁹² Delmas-Marty, Mireille. “Le relatif et l'universel”; Page 317.

¹⁹³ Chavagneux, Christian & Palan, Ronen. “Les paradis fiscaux”; Page 90.

¹⁹⁴ Vernier, Éric, & Lebègue, Daniel. “Fraude fiscale et paradis fiscaux : Décrypter les pratiques pour mieux les combattre”; Page 139.

¹⁹⁵ OECD. “Fighting tax evasion”; <http://www.oecd.org/ctp/fightingtaxevasion.htm> <05/05/2018>.

addressing tax havens pursuant to the Enron scandal. Especially financial intermediaries promoting tax shelters are tackled.¹⁹⁶

The US adopted a very harsh approach towards foreign companies established on its soil. They redressed their tax declarations if they considered that the declared yields are too low in comparison to those of principal competitors. The US sanctioned foreign companies very severely, whereas its policy towards national companies was divergent. Until 1997, US companies could for example fiscally deduct bribes and the Foreign Sales Corporation Act permitted its national companies to establish themselves fictively in off shore centres to avoid taxes. The US policy was extremely protective of their own companies to make them more competitive. Also, the coalition against OECD tax policies seem to be lobbied by the US congress.¹⁹⁷ The European Commission filed a complaint to the World Trade Organization and the US Congress had to terminate the relevant provisions of the Foreign Sales Corporation Act.¹⁹⁸

Now, the Patriot Act forbids US companies to shift their money to offshore accounts, they are however accepting money from foreign companies seeking tax shelter in the US. The US want to safeguard the inflow of foreign capital, even if it concerns assets of foreign tax evaders.¹⁹⁹ The US authorities also used tax havens because opacity and confidentiality was very useful for covert operation (for instance CIA operations).²⁰⁰

Some small States such as the State of Delaware adopted low taxation to attract companies. This was favoured through lobbying by lawyers, accountants and

¹⁹⁶ Reuven S. "The OECD Harmful Tax Competition Report: A Retrospective After a Decade" (2009). Brooklyn Journal of International Law, Volume 34, Issue 3; Page 792.

¹⁹⁷ Foudjem, Celestin, & Lopez, Christian. "Blanchiment de capitaux et fraude fiscale"; Page 430.

¹⁹⁸ Foudjem, Celestin, & Lopez, Christian. "Blanchiment de capitaux et fraude fiscale"; Pages 425&426

¹⁹⁹ Kochan, Nick. "The Washing Machine: How Money Laundering and Terrorist Financing Soils Us"; Pages 243, 251.

²⁰⁰ Chavagneux, Christian & Palan, Ronen. "Les paradis fiscaux"; Page 80.

enterprises. Delaware has in 2009 been presented by the Tax Justice Network as the opaquest territory of the world. There were more legal entities than physical persons.²⁰¹ Still, in 2018 the State of Delaware and the State of Nevada remain opaque due to their “*highly secretive shell companies*.”²⁰²

Currency transaction reports must be made by the financial institutions for transactions over 10.000 USD. Also, a report concerning the International Transportation of Currency or Monetary Instruments must be issued if a person imports or exports amounts over 10.000 USD. Those reports are to be addressed to the US tax authorities.²⁰³

FinCEN was originally created to assist law enforcement, but its missions were broadened. It should ensure coordination of national agencies and foster international cooperation. It gathers information and elaborates strategic analyses.²⁰⁴

At an international level, the US have elaborated their own tax convention model (even if they are a member to the OECD and the UN) and are concluding many bilateral cooperation contracts.²⁰⁵ The Foreign Account Tax Compliance Act (“FATCA”) compels bankers throughout the world to automatically exchange information on accounts opened by US nationals in their institution. It deals inter alia with the US tax players that moved their assets abroad to avoid taxes. It covers also companies that are substantially being controlled by US citizens.²⁰⁶ Noncompliance

²⁰¹ Vernier, Éric, & Lebègue, Daniel. “Fraude fiscale et paradis fiscaux : Décrypter les pratiques pour mieux les combattre”; Pages 130 & 139.

²⁰² Tax Justice Network; Financial Secrecy Index 2018; Narrative Report on USA.

²⁰³ Fomdjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Page 267.

²⁰⁴ Sullivan, Kevin. “Anti-Money Laundering in a Nutshell”; Page 41.

²⁰⁵ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment” (Saint-Denis, Connaissances et Savoirs, 2016) ; Page 276.

²⁰⁶ Sullivan, Kevin. “Anti-Money Laundering in a Nutshell”; Page 46.

would lead to an exclusion of the US market²⁰⁷, a sanction that no international bank can survive. A bank absolutely needs to have access to the dollar and to deal with US companies. The US also extended their rules to all the foreign companies listed on the US stock market.

FATCA forbids US citizens to hide money abroad. However, foreigners can hide their assets in US tax havens. The US criticize tax havens abroad but do not mention their own tax havens at all (i.e. Delaware and the Caribbean islands). Saint Kitts and Nevis and the Bahamas have been considered as tax havens both by FATF and OECD.²⁰⁸ The US managed to obtain a reassessment of the Bahamas from the black list to the grey list.

The 2013 Phase II evaluation by the Global Forum on Transparency and Exchange of Information for Tax Purposes found that the US is largely compliant with the OECD and UN standards. There is however a lack in the identification of UBOs and the keeping of accounting information concerning the single member limited liability companies.²⁰⁹ Information gathering and communication has been considered as being too slow, the United States competent authorities should speed up the process and take the necessary measures.²¹⁰

The US ranks second best in the 2018 financial secrecy index of the Tax Justice Network (“TJN”). The TJN also held that the US address very actively foreign tax

²⁰⁷ Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers”; Page 26 & 27.

²⁰⁸ Fomdjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Pages 84 & 85.

²⁰⁹ Global Forum on Transparency and Exchange of Information for Tax Purposes; Peer review of the United States; Page 47.

²¹⁰ Global Forum on Transparency and Exchange of Information for Tax Purposes; Peer review of the United States; Page 91.

havens, but promote inbound tax evasion and illicit money transactions. They are a tax haven for foreigners.²¹¹

²¹¹ Tax Justice Network; Financial Secrecy Index 2018; Narrative Report on USA.

SECTION 2 – The French system

France is a very influential State; it is a permanent member of the UNSC. It has also been targeted by terrorists. France has played a major role in the creation of the relevant IOs. France is in general a good example of a State complying with international standards. Being a Member State of the European Union is considerably limiting France's margin of discretion. France is being supervised by the European Commission. The EU is a more integrated legal order than the US federalized framework.

French impetus	
FATF	creation of the FATF
TXF	Important impetus to <ul style="list-style-type: none">• counter tax fraud,• adress tax havens• enhance transparency.
UN	Founding Member
OECD	Founding Member
Council of Europe	Founding Member
European Union	Founding Member
The Egmont Group	Founding Member

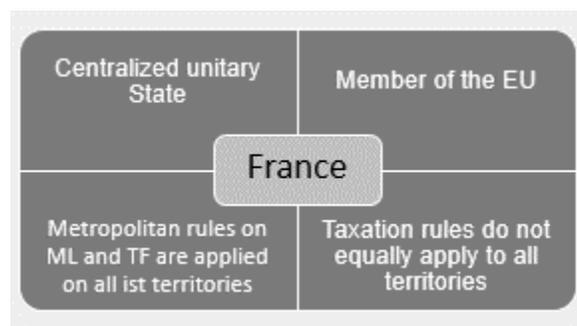
Table drafted by the thesis author and integrated in the text for better reading.

SUBSECTION 1 – The constitutional setup

France is a social democratic Republic.²¹² It is a centralized unitary State, it is one and indivisible. All of its territories, even those that are overseas are inseparable. Local government authorities must apply the metropolitan rules. However, due to remoteness there is a lack of effectiveness.²¹³ In criminal matters, i.e. ML and FT, the French metropolitan law applies. It is notice worthy that in tax matters, the French Tax Code and the information exchange requirements do not equally apply on all overseas territories.²¹⁴

France is a member of the European Union. It is widely active in EU policy shaping.

France is a monist State, international law treaties, after ratification and approval by the Parliament, take primacy over domestic law: *“Treaties or agreements regularly ratified or approved have, from the time of publication, an authority superior to that of laws, provided, in the case of each agreement or treaty, that it is applied by the other party.”*²¹⁵



Graph drafted by the thesis author and integrated in the text for better reading.

²¹² Global Forum on Transparency and Exchange of Information for Tax Purposes; Peer review of France; 2013; Page 12.

²¹³ FATF Mutual Evaluation Report of France; 25 February 2011; Page 4.

²¹⁴ Global Forum on Transparency and Exchange of Information for Tax Purposes; Peer review of France; 2013; Page 13.

²¹⁵ Article 55 of the French Fifth Republic Constitution (04 October 1958).

SUBSECTION 2 – The fight against Money Laundering

France Money Laundering	
"Blanchiment Général": Article 324-1 of the Criminal Code	<ul style="list-style-type: none"> • 5 years imprisonment / 375.000 EUR • 10 years imprisonment / 750.000 EUR (if aggravated)
"Blanchiment douanier": Article 451 of the Customs Code	2-5 years imprisonment / 1 to 5 times the amount of the offense
"Blanchiment de trafic de stupéfiants": Articles 223-34 to 223-38 of the Criminal Code	10 years imprisonment / 750.000 EUR
"Blanchiment en lien avec une entreprise terroriste": Article 421-1-6 of the Criminal Code	ML of the proceeds of acts of terrorism done through an individual or collective enterprise
Non justification of assets Article 321-6 of the criminal Code	Possession of assets going beyond normal revenues of a person
Monetary and Financial Code: Article L-561-5 - L,561-54 & R 561-1 - R.561-54 L-461-22	<ul style="list-style-type: none"> • ML = autonomous offense • Due diligence requirements • Immunities granted to bona fide declarants of suspicious transactions
L. 123-24 of the Commercial Code	All traders must have a bank account
FICOBA	Database of bank accounts

Table drafted by the thesis author and integrated in the text for better reading.

France belongs to the FATF founding members, even more, it gave the necessary impetus for its creation during the “sommet de l’Arche” that was held in Paris in 1989.²¹⁶ France has been classified as one of the three top performers in the fight against ML and TF.²¹⁷

The real estate sector (especially valuable objects on the Côte d’Azur) used to be very attractive for ML.²¹⁸

France constantly renewed, refined and extended its AML system. It took into account FATF evaluations of other States, kept pace with the developing

²¹⁶ Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers”; Page 36.

²¹⁷ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment” (Saint-Denis, Connaissances et Savoirs, 2016) ; Page 455.

²¹⁸ FATF Mutual Evaluation Report of France; 25 February 2011; Page 41.

recommendations and implemented the relevant legislative instruments of the European Union, even though the Commission needed to bring an infringement procedure for non-transposition of common AML rules, namely the third AML directive.²¹⁹

France latest evaluation by the FATF was in 2011. Despite the numerous efforts and the high level of compliance with FATF recommendations, FATF wrote that even if France is a good example to be followed, some weaknesses have been identified.

Regulatory Organs	
Autorité de contrôle prudentielle et de résolution	Bank and insurance supervision
Autorité des marchés financiers	Supervision of other financial institutions
Tracfin	FIU of France created in 1990 Founding member of the Egmont Group

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TRACFIN, the French FIU, has the power to gather all information of administrations, public services and disseminate them to the competent enforcement (police, customs) and judicial authorities (prosecutor). It has access to exchange platforms providing for quick information exchange and allowing to overcome the difficult traditional cooperation channels. TRACFIN faced however shortcomings in human resources.²²⁰ More financial analysts should be recruited according to the FATF evaluation.²²¹

Confiscation of assets was considered insufficient, especially with regard to companies.²²² The sanctions ought to be more dissuasive.²²³

²¹⁹ CJEU; C-170/09; European Commission versus French Republic; 25 February 2010.

²²⁰ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment" (Saint-Denis, Connaissances et Savoirs, 2016); Page 304.

²²¹ FATF Mutual Evaluation Report of France; 25 February 2011; Page 214.

²²² FATF Mutual Evaluation Report of France; 25 February 2011; Page 133.

²²³ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment" (Saint-Denis, Connaissances et Savoirs, 2016) ; Page 214.

The scope of ML obligations was considered to be too limited. Casinos, real estate agents, notaries and lawyer were not yet covered, which obviously impacted on the declarations addressed to TRACFIN. Moreover, the long distance to its overseas territories is problematic, as a lack of effective supervision has been acknowledged. Only few declarations of suspicious transactions were addressed to TRACFIN by those territories.²²⁴

The last published mutual evaluation of France dates back to February 2011. It is nonetheless a fact that France is constantly improving its AML system. It has been for example been implementing the fourth AML Directive of the EU. Since 01st August 2017, France implemented the effective beneficial owner register containing the information on the UBOs of French companies.²²⁵ On 14th May 2018 the Council of the EU approved by qualified voting the draft 5th AML Directive [(2016/0208 (COD))]. The future implementation of the 5th Directive will probably trigger further improvements of France's framework.

²²⁴ Jeta, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment" (Saint-Denis, Connaissances et Savoirs, 2016) ; Pages 192-197.

²²⁵ Tai, Dominique. "New anti-money laundering measures for British companies" (Brownejacobson.com, 12/09/2017) <17/05/2018>.

SUBSECTION 3 – Addressing Terrorist Financing

Terrorism & Terrorist Financing	
Criminal Code: Article 421-1	10 years prison / 225.000 EUR
Criminal Procedure Code: Article 689-10	Universal jurisdiction in the matter of financing of terrorism
Criminal Procedure Code: Articles 706-16 to 706-22	Centralisation of all terrorist cases in Paris
Direction Générale du Trésor	Freezing of assets linked to TF
Customs	Identify activities linked to TF
Unité de Coordination de la Lutte Anti-Terroriste "UCLAT"	Centraliation, analyses and dissemination of information

Table drafted by the thesis author and integrated in the text for better reading.

The 2015 terrorist attacks in Paris showed that the fight against TF is of utmost importance. France is complying with the FATF recommendations on TF. Most findings of the FATF regarding ML are by analogy applicable on TF. Besides, the FATF acknowledged that "*France has a very comprehensive array of legal tools for criminalising terrorist financing.*"²²⁶ TF is criminalized and terrorist asset forfeiture is possible. TF information are centralized, analysed and disseminated (i.e. by the Unité de Coordination de la Lutte Anti-Terroriste "UCLAT").

FATF in its 2011 evaluation said that the number of Criminal convictions for terrorism and TF was considered to be quite low.²²⁷ Also, the implementation of UNSC Resolutions was considered non-satisfactory, freezing and the confiscation of terrorist assets was considered ineffective.²²⁸

²²⁶ FATF Mutual Evaluation Report of France (executive summary); 25 February 2011; Page 4.

²²⁷ FATF Mutual Evaluation Report of France; 25 February 2011; Page 45.

²²⁸ FATF Mutual Evaluation Report of France (executive summary); 25 February 2011; Page 29.

SUBSECTION 4 – Countering Tax Fraud

Tax Fraud	
General Tax Code: Article 1741	5 years / 500.000 EUR
Tax Code: Article 209 B	Anti abuse measures for incomes generated in tax havens
Tax Procedures Code	
ADONIS	Database regrouping all taxpayers (physical persons)

Table drafted by the thesis author and integrated in the text for better reading.

France is very active in fighting TXF and tax evasion.²²⁹ TXF is a predicate offense to ML. TXF does not need to be prosecuted to bring proceedings for ML.²³⁰ It suffices that the judge assesses if the constituent elements of the predicate offense are given. In that case, the offender can be prosecuted for ML, even if the predicate offense has been committed in another State²³¹ There is no need to prove the criminal intent.²³² This has been criticized, TXF is not universally considered as a serious crime.²³³

France has its own blacklist of non-cooperative countries in tax matters. States that do not provide sufficient administrative cooperation are for example being listed.²³⁴ In 2010, a white list of States was adopted. There was no need to issue declarations of suspicious transactions with regards to the listed States. However, this list was highly problematic, as some EU Member States were not listed while States such as

²²⁹ Global Forum on Transparency and Exchange of Information for Tax Purposes; Peer review of France; 2013; Page 15.

²³⁰ Court of cassation. 20/02/2008, Bul n° 43, pourvoi n°07-82.977.

²³¹ Véron, Michel. "Droit pénal des affaires" (Paris, Dalloz,2013) ; page121.

²³² Crim., 02 /07/1998, Tapie, cited in Delmas-Marty, Mireille & Giudicelli-Delage, Geneviève. "Droit pénal des affaires" (Paris, PUF, 2000) ; Page 433

²³³ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment" (Saint-Denis, Connaissances et Savoirs, 2016) ; Page 237.

²³⁴ Jetha, Fahranaz. "Une nécessaire harmonisation internationale de la lutte anti-blanchiment" (Saint-Denis, Connaissances et Savoirs, 2016) ; Pages 171&172.

Iran were listed. By listing Iran on the white list, France even contradicted the FATF lists. Iran was considered highly problematic concerning terrorism.²³⁵

The Cahusac case, the discovery of a hidden account of the budget minister used for ML and TXF led to public awareness. France reacted by increasing transparency. The so-called “Loi Sapin” has been amended in 2018 to become “loi Sapin 2”. The aim is to reinforce transparency to fight against corruption and to promote confidence in the financial markets.²³⁶

Tax crimes are not part of the penal code but of a specific tax code (Code Général des impôts). In relation to tax deduction of bribes, France played a pioneer role, as it excluded such deduction even before the OECD convention on foreign bribery came into force.²³⁷

France has been evaluated by the Global Forum on Transparency and Exchange of Information for Tax Purposes as being fully compliant.²³⁸ France has been a member of the global forum since the beginning. It has been very active in increasing transparency and fostering information exchange. French authorities can access all tax relevant data and trusts must be registered. The relevant professionals of the private sector are submitted to obligations (i.e. Know Your Customer). Treaty partners have been satisfied with the availability and the information provided by France. It has “*one of the world largest networks of tax treaties and bilateral and multilateral exchange agreements*”.²³⁹

²³⁵ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment” (Saint-Denis, Connaissances et Savoirs, 2016) ; Pages 176 & 177.

²³⁶ Hunault, Michel. “La lutte contre la corruption, le blanchiment, la fraude fiscale... : L'exigence d'éthique dans les mouvements financiers”; Page 30.

²³⁷ Delmas-Marty, Mireille. “Le relatif et l'universel”; Page 249.

²³⁸ Global Forum on Transparency and Exchange of Information for Tax Purposes; Peer review of France; 2013; Page 43.

²³⁹ Global Forum on Transparency and Exchange of Information for Tax Purposes; Peer review of France; 2013; Page 13.

Suspicious transactions reports must also be filed in relation to tax fraud.^{240 & 241} However, those suspicious transactions reports did have some adverse effects. The institutions submitted to the declaring obligations tend to disclose everything just to avoid sanctions. In France, the bona fide declaration of suspicious transactions grants the declarant criminal, civil and disciplinary immunity.²⁴² Too much information is affecting the effectiveness of the system. There is even reporting of licit operations. The “cover your ass” approach is adopted because professionals want to avoid proceedings for complicity.²⁴³

Even though France is highly compliant in tax matters, there are remaining loopholes that the State is unable to bridge. The taxation gap in France is estimated at between 42 and 51 billion EURO per year.²⁴⁴ Credit institutions cannot oppose their banking secrecy to tax authorities.²⁴⁵ However, the most important national banks have created subsidiaries in offshore centres.²⁴⁶ This has two major reasons. First, they tend to avoid taxes and second, they can shift the more suspicious business to such subsidiaries that are less controlled. In France, those banks are fully compliant.²⁴⁷ These banks have been asked to disclose their activities in offshore centres or to close the branches.

²⁴⁰ FATF Mutual Evaluation Report of France; 25 February 2011; Page 38.

²⁴¹ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 219.

²⁴² Article L.561-22 of the Monetary and Financial Code.

²⁴³ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Pages 165&166.

²⁴⁴ Compin, F. “Tax fraud: A socially acceptable financial crime in France?”; Page 434.

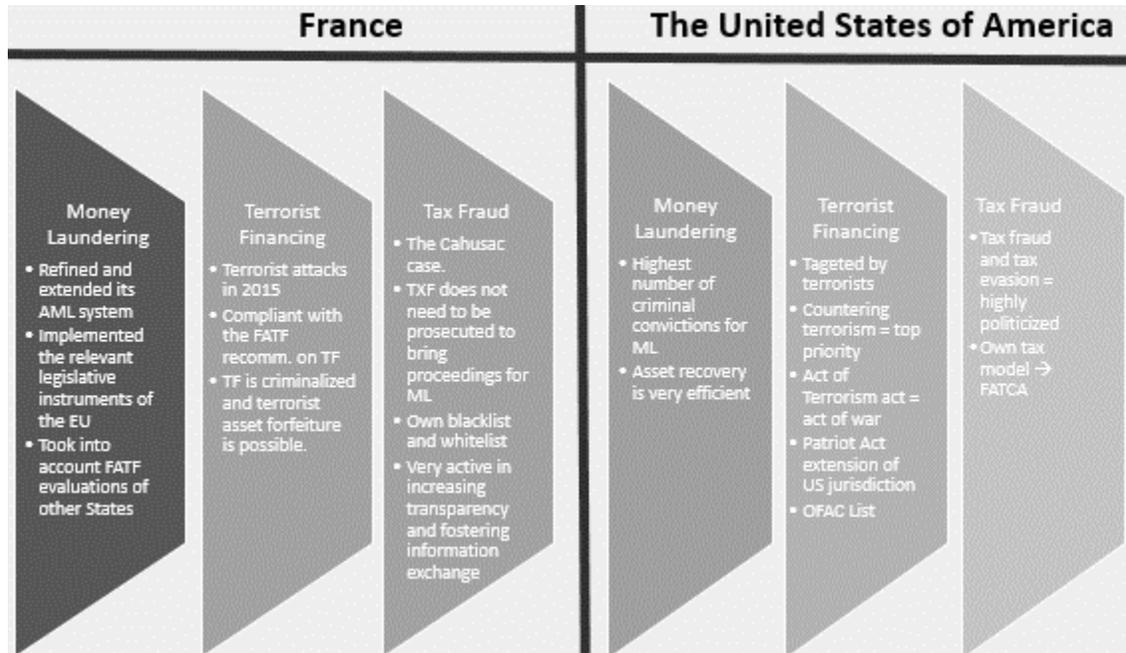
²⁴⁵ L..43 Code Général des impôts.

²⁴⁶ Jetha, Fahranaz. “Une nécessaire harmonisation internationale de la lutte anti-blanchiment”; Page 119.

²⁴⁷ Foudjem, Celestin, & Lopez, Christian. “Blanchiment de capitaux et fraude fiscale”; Page 427.

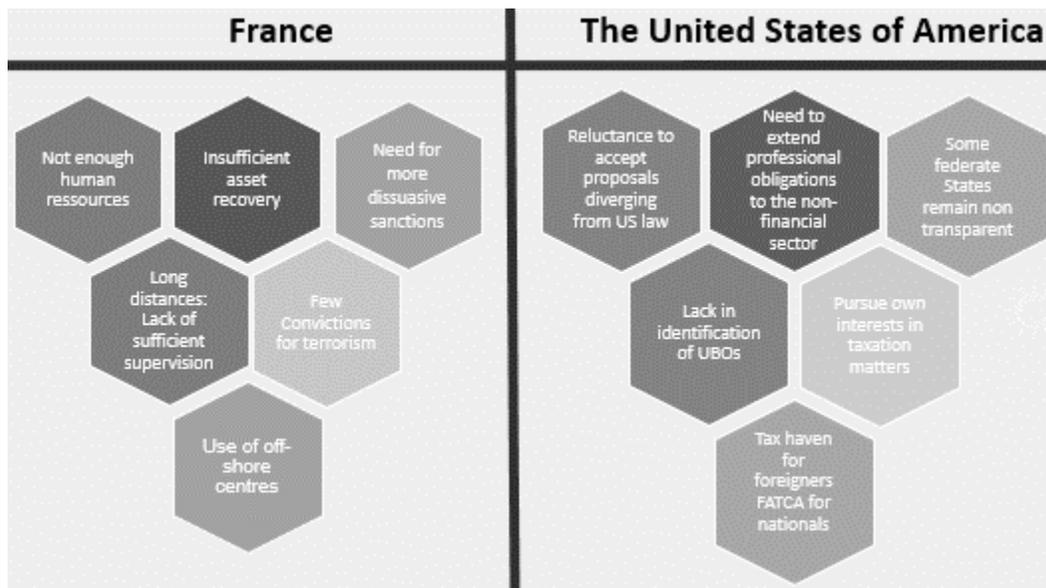
SECTION 3 – Overall efficiency

To conclude on overall efficiency of the worldwide setting, we assessed France and the US, two important States, that are actively participating in the conception of the global standards. There has been a lot of improvement in the fight against ML, TF and TXF



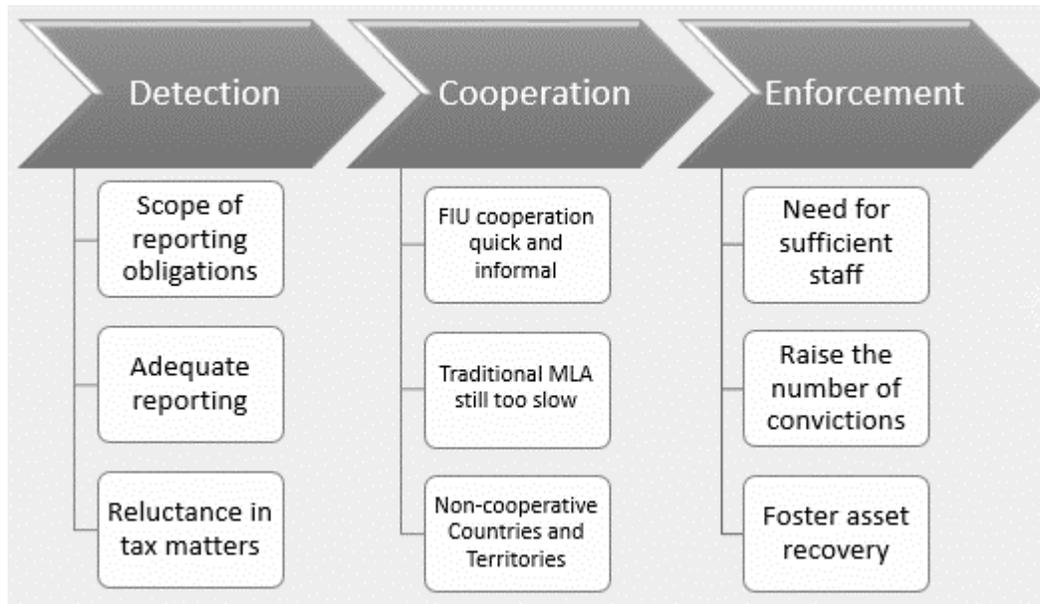
Graph drafted by the thesis author and integrated in the text for better reading.

However also gaps that still need to be bridged have been identified.



Graph drafted by the thesis author and integrated in the text for better reading.

On the examples of the two States, it is possible to identify some key aspects that need to be addressed to increase overall efficiency.



Graph drafted by the thesis author and integrated in the text for better reading.

SUBSECTION 1 – Detection

In the two analyzed States, that are both solid and confirmed countries at a global scale, deficiencies have been identified concerning the scope of reporting obligations. Most obligations are imposed on the financial sector, while other sectors might also present risks such as the real estate sector. The scope of the measures against ML, TF, and TXF needs to be extended according to the risks that are inherent to the different sectors. We must however acknowledge that those risks have been identified, which is already a first step towards bridging the gap.

For instance, a transparency international study has identified within G20 countries, 10 legal loopholes that permit money laundering through the purchase of expensive real estate assets. The US was one out of four assessed countries. As already mentioned, one major finding was that non-financial professionals such as real estate agents, notaries or lawyers were not at all or not fully submitted to stringent due diligent requirements such as the identification of UBOs. States relied too much on the sole checks of their financial institutions. The real estate sector is especially

exposed, because the purchase of very valuable assets permits to launder a big amount of money at once.

Too much reporting is also bad, as we saw in the French system, where there is a lot of reporting with the aim to avoid criminal liability. The professionals should do the necessary checks before flooding the FIUs with reports.

Even if States commit themselves to fight ML, TF and TXF, this does not mean that they do comply with their promises. Especially in tax matters, States are still reluctant to take all the necessary steps. The US is effectively fighting against money leaving the jurisdiction but is accepting tax evader from abroad. France is committing itself to TXF. The result is that there is an exodus of assets. We saw that French national banks have subsidiaries in off shore territories and escape the strict rules of their forum. Big financial groups relocate their risky activities to territories that are less supervised. These loopholes do not only enable ML but do also permit tax evaders to hide their property from the authorities.

SUBSECTION 2 – Cooperation

The internationally promoted cooperation between FIUs is very quick and informal. However, traditional MLA is still required to gather the evidence. MLA is ineffective because it is too slow to keep pace with the high speed of criminal transactions. We saw for instance that in the US, according to the 2016 FATF evaluation, collecting information about UBO's of companies is very difficult. It is easier to hide criminal assets, especially if the executing State is not willing to put resources on complex MLA requests. Execution of information requests from France to the US to get mere evidence from a US online service provider usually takes ten months.²⁴⁸ Such delays are highly inefficient in a globalized world.

Non-cooperative Countries and Territories eventually facilitate ML, TF and TXF. Some think that blacklisting those NCCT's would be highly ineffective and even counterproductive because this might even encourage criminal activities.²⁴⁹

²⁴⁸ Calothy, C. "Face au terrorisme, progrès et limites d'une coopération internationale tous azimuts"; Page 129.

²⁴⁹ Masciandaro, Donato, "Combating Black Money: Money Laundering and Terrorism Finance, International Cooperation and the G8 Role" (June 2004). Università di Lecce Economics Working Paper No. 56/26; Pages 2 & 18.

SUBSECTION 3 – Enforcement

There is an enforcement gap. The FATF report identified for France a need to recruit sufficient personnel to analyse and investigate. The FATF considered that there were not many convictions, especially concerning TF.

Statistics seem to indicate that only few people are convicted despite of all the different measures. Some reasons are put forth: First, the resistance of the courts to use the reversal of the burden of proof²⁵⁰, second many States only punish the major crime and do not sum up the different offenses. Often, courts only sanction the predicate offenses as “harder crime”. Hence, the impact of ML enforcement is limited.²⁵¹

Tracing the money and recovering criminal assets is extremely important. The idea that no one should profit from his own wrongdoing is very ancient, it goes back to Roman law.²⁵² Through asset recovery, one hits not only the criminals committing the predicate offenses but eventually also the bosses of the criminal organization. The idea of asset recovery was initially closely linked to corruption and to ML.²⁵³

Despite the fact that the community agrees on the idea that crime should not pay, the confiscation rules are extremely divergent. The UN, the FATF and the CoE have been aware of the importance of asset recovery and have been strengthening seizure and confiscation mechanisms.²⁵⁴ However, even at sub regional level (i.e. the EU), States that at first glance seem to share common values have different approaches on the question what assets can be confiscated via which kind of

²⁵⁰ European Parliament; Unger, Brigitte; “Offshore activities and money laundering: recent findings and challenges; Page 47.

²⁵¹ European Parliament; Unger, Brigitte; “Offshore activities and money laundering: recent findings and challenges”; Page 48.

²⁵² Fernandez-Bertier, Michaël in Ligeti, Katalin & Simonato Michele. “Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU”; Page 57.

²⁵³ Ligeti, Katalin & Simonato Michele. “Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU” (Hart Studies in European Criminal Law, 2017); Pages 2 & 4.

²⁵⁴ Fernandez-Bertier, Michaël in Ligeti, Katalin & Simonato Michele. “Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU”; Page 67.

procedure and what level of proof is necessary. At sub regional level, the European Union is for the first time in its history elaborating a regulation that will be directly binding on all States to bring harmonization in the matter of asset recovery.

Confiscation has also a preventive purpose. Depriving criminals of their assets hinders them from committing further crimes. This is especially important for terrorism prevention.²⁵⁵ According to FATF special recommendation 6, States should be able to freeze assets linked to TF. Al Qaida, supported by dubious professionals, wired money from and to tax havens. Al Qaida was able to cover real beneficial ownership of their assets.²⁵⁶ Depriving terrorists of their assets is a preventive measure that hampers terrorist operations. Seizing assets permits to dismantle the organizations.²⁵⁷

²⁵⁵ Mazzacuva, Francesco in Ligeti, Katalin & Simonato Michele. "Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU"; Page 111.

²⁵⁶ Kingah, S., & Zwartjes, M. "Regulating money laundering for terrorism financing: EU-US transnational policy networks and the financial action task force"; Page 342.

²⁵⁷ Gardner, Kathryn L. (2007). Fighting terrorism the FATF way.(Financial Action Task Force). Global Governance, 13(3), Page 326.

CONCLUSION

The international community needs to reconsider the traditional concept of State sovereignty. No State can efficiently address by itself global issues such as ML, TF, TXF (or corruption); the international community must address them through a worldwide approach.

Furthermore, these challenges are interlinked. States cannot turn a blind eye on either one of the challenges, as this would render inefficient the fight against the others. One can however address them all in a common approach. The AML framework is very useful to address the other crimes as well. Increasing transparency is a very useful preventive tool in the fight against ML, TF, TXF and corruption.

The global setup to fight ML, TF and TXF is extremely complex. There are several overlapping layers: The global scale, the regional level, the sub regional sphere and the individual States. Even within a given State there might be more levels (i.e. the US). The regional and sub-regional levels make sense since they can elaborate norms that are closer to the realities of the regional groups of States. Norms of the top level will always remain quite vague because they must be adaptable for each State. The situation may vary immensely between the different groups of States. The EU often can be a triggering element, to adopt for the first time at an international level a definition, a measure, etc.

There is a need for legal standards that are applicable and respected around the globe. It is essential that States sanction non-compliance and render mutual legal assistance to other countries. Despite the recognition of those needs, there still are no universally accepted definitions of ML, TF and TXF. This raises concerns about **legal certainty**. There is an inconsistent patchwork of national approaches.

Without doing important researches, it is not straightforward to know what rules apply to what State. Concerning the traditional hard law conventions, one must assess to what treaty a State is a party, if it ratified and if there have been reservations. The different actors promote the adherence to the essential conventions. If the vast majority of the States is a party to the most important treaties, we are approaching universal definitions. In addition, constant update, development and integration of norms elaborated on the different levels makes the overall framework more consistent. Through systematic reading of the different conventions, one should be able to perceive a red line. Moreover, the different organizations send representatives to one another. This is an essential mechanism of coordination.

Concerning the soft law standards, legal certainty might not be such a big issue, but there are doubts about **legitimacy**. The fact that only a few experts, in general stemming from the most developed States, elaborate standards is a major concern, even though they only amount to soft law. Peer evaluations, naming and shaming of non-compliant States and territories kind of makes recommendations, actions and requirements binding after all. There is a huge economic impact and political pressure on non-compliant States.

Even though there are many critics about legitimacy of Global Administrative Law, it is the only viable situation. GAL allows addressing major global issues in a much more flexible way. States that criticize those global standards would probably never sign, ratify and transpose a hard law convention with the same content. Moreover, political forums often back the standards and guidelines. National lawmakers use the standards and recommendations to promote new legislation and change the legal settings. Finally, yet importantly, the most important organizations such as the FATF have regional bodies that can take into account regional legal specialities.

In terms of **efficiency**, there are still some gaps to bridge. The scope of reporting obligations is not always wide enough. A Transparency International study has for example identified considerable risks in the real estate sector. States need to extend

obligations to other sectors rather than merely relying on the reporting obligations imposed on the financial sector.

In terms of cooperation, new forms of communication based on exchange (i.e. FIU cooperation) is much more efficient. Traditional cooperation through MLA is very slow and ineffective in a “follow the money” approach. Criminal assets can be moved between asset classes and forums using different ML techniques. By directly addressing foreign FIUs the national FIU are able to freeze directly the money at destination without having to address States through which money has already transited. Opacity is a concern. Even in an advanced State such as the US, it is sometimes very difficult to identify UBOs of legal entities.

In terms of enforcement, States need to invest sufficient resources to promote the processing of the suspicious transactions reports and the subsequent criminal investigations. The number of convictions must be increased. States should not only focus on the predicate offenses but should sum up all the offenses. Asset freezing and asset confiscation is a major concern. There is still too much variety among the States.

In short, the fight against ML, TF and TXF is a never-ending story, so are the quests for legal certainty, legitimacy and efficiency. The legal framework needs to be adjusted quite frequently. Only if all actors and States share common minimum rules and if those rules are being enforced and if States do render adequate mutual legal assistance, overall efficiency will increase.

Word Count

Abstract in English	299 words
Abstract in French	298 words
Thesis excluding title page, table of contents and other indexes, footnotes, bibliography, tables, and any other appendices	14.602 words

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