LIABILITY OF TAX LAWYERS

Alexandra Lévesque[1]

1. Introduction

The complexity and uncertainty of tax laws ensures the need for individuals, corporations and other business entities to depend on lawyers for advice and interaction with tax officials and other public authorities. In some cases, a tax lawyer will even go further than that, for instance when he acts in a fiduciary capacity on behalf of his client.

The growing importance of cross-border trade since the nineties and the fiscal dumping officially organized by some countries have induced many companies to foster elaborate fiscal strategies whose intricacy calls for tax lawyers' expertise. It may be hard at times to draw a line between a fiscal optimization, which is legal and other schemes that break the law. Recently, regulations have been put forward in order to fight tax evasion and money laundering. European directives require lawyers to report any suspicious transaction which they might be aware of. The strong reaction of the legal profession into that breach of its traditional freedoms has so far limited the extent of this legal obligation to unquestionably criminal activities such as laundering organised crime money or financing terrorism.

The development of anti-money laundering and tax avoidance in a globalized world has given rise in many countries to new legislation since the eighties. The repression of clearly prohibited activities like the laundering of the money of crime has extended to other practices like tax avoidance and abuse of law. The intricate schemes that those practices imply, often founded on loopholes in national legislation, call for the lawyer's expertise. The consequence of that new situation

1 Alexandra Lévêque is a Master's student of Corporate Law at Paris-Dauphine University. She holds an LLM in Tax Law with Merit from Queen Mary University of London and a Master1 of Business and Tax Law with merit from Université Panthéon-Assas. She also holds a diploma from the Institute of Commercial Law of Panthéon-Assas. She is currently working on the Ethics of Taxation with a focus on corporate social responsibility.

will be discussed with regard to tax lawyers, who are at risk of being involved, willingly or not, in such illicit operations.

Even if the information obtained in the course of the client's defence is now exempt from reporting to national authorities, the other activities of the tax lawyer, like financial advice and carrying-out of transactions on behalf of his clients, remain under the obligation of mandatory disclosure. Reporting suspicion on their client's doings without even being allowed to inform them of the fact is a clear breach of the lawyer-client privilege. It also raises a major deontology problem.

The conflict between the efficiency required in the combat against tax crime and the traditional freedoms of the legal profession is a fundamental issue is by no means settled at the present time. It is interesting to address the subject, at a time where multinational companies are seeking the help of tax lawyers to find ways to escape taxation, but also at a time where human rights have to be defended against a public opinion that is becoming more and more concerned by the resources distracted from national budgets by individuals or companies escaping taxation.

In order to understand the situation of the tax lawyer in an era of suspicion against tax optimisation, one needs some basic information. It should include a thorough inventory of the services provided by the tax lawyer (2.1) and a review of the rules of the profession (2.2). The question of tax fraud (3.) will then be addressed as one notes a progressive criminalisation of "tax optimisation" oriented techniques that tends to shed doubts on what is actually allowed or prohibited (3.3).

These changes in public attitude combined with a harsher legislation affect the profession in the sense that they might increase the liabilities of the tax lawyer (4.). Different kinds of liability have to be considered since the tax lawyer is liable as a member of the legal profession (4.1), as a representative of his clients (4.2), but also as an officer of the legal system (4.3).

Legal liability can arise from various areas of law and tax lawyers should always be aware of the consequences of their deeds. Section 5 discusses the precautions that they should take in order to protect themselves.

In the United States, for a long time, many individuals and companies have relied on their tax lawyers for tax optimisation and preparation of tax returns. The Senate Fiscal Committee has stressed "the important role tax advisors play in our tax system". American tax lawyers are also leaders in the more disputable practices of tax shelters and optimum use of trans-border differences. Europe is now following suit; the local codes of conduct and liability regimes are converging under the OECD guidance. This is the reason why this paper has chosen to deal globally with the issue without delving into the details of national differences. In particular,

it will be assumed that the duties of tax lawyers toward their national tax authorities are not dissimilar to the duties of their American colleagues toward the IRS. To insist on the universality of the tax lawyer's liabilities and of the fight against tax fraud, examples will be equally chosen on both sides of the Atlantic, mainly in United States and in France.

2. The Tax Lawyer's trade

Different from other members of the legal profession, a Tax Lawyer is a hybrid of a lawyer and a fiscal advisor. Defending his client before the Courts is only part of his work; he also acts as a counsel and an expert in taxation and those activities may entail special responsibilities toward taxation authorities. So, before addressing the question of the liabilities of the tax lawyer, one would need to better understand how he intervenes and to be aware of the rules he has to comply with.

2.1 Services provided by a tax lawyer

The preamble of the US Model Rules of Professional Conduct draws up a list of the different aspects of the tax lawyer's business: "*A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice*"[2].

- He defends his clients before the courts (just as any lawyer does),
- He advises them on matters of taxation, makes them optimize their tax obligations and helps them develop a fiscal strategy for their companies.
- He prepares tax returns on behalf of his clients,
- He writes and controls legal documents, drafts contracts, proceeds to incorporation of subsidiaries, assists companies in negotiations with other companies and/or tax authorities.[3]

In addition to his general duties as a lawyer, Watson[4] claims that a tax lawyer has a general duty to "protect the revenue", "to contribute to improvement of the tax laws and their administration" and to ensure that the tax system is "functioning

2 Dennis Campbell and Christian Campbell, *Professional Liability of Lawyers* (first published 1995, Lloyd's of London Press Ltd 1995).

3 Michael Hatfield, ' Ethics of Tax Lawyering' (2011), CALI eLangdell Press <http://www.cali.org/books/ethics-tax-lawyering -second -edition> accessed 8 July 2016

4 Watson, Tax Lawyers, *Ethical Obligations, and the Duty to the system*, Kansas Law review, Vol.47, p.850 (1999)

honestly, fairly and smoothly". He is bound to be honest and law abiding in his interaction with his client and with the tax authorities.

The main reason for a company or for a wealthy individual to hire a tax lawyer is to benefit from a personal scheme allowing for a reduced tax load. This is usually achieved by the lawyer being provided with documents called "tax shelter opinions" and doubts have been expressed on the validity and the morality of some of those constructions.

"In common usage, a 'tax shelter' is a complicated tax scheme intended to generate substantial tax benefits that do not correspond to the underlying economic realities of the scheme. In other words, it is a complicated and abusive tax plan. Tax shelters tend to be marketed as investments and the people who market them hire tax lawyers to provide written tax opinions designed to protect the investors from penalties". The technical definition of a tax shelter, as given by the American Internal Revenue Service (IRS), includes 'any plan or arrangement if a significant purpose of such a plan or arrangement is the avoidance of Federal Income Tax" (IRC §6662(d)(2)(C)". While many tax shelters proposed by tax lawyers are based on perfectly legal grounds, some may nevertheless be considered abuses of law if the purpose of the tax shelter is exclusively fiscal.

2.2 The rules of the profession

2.2.1. Basic principles

> "*Tax lawyers' formal responsibility to their clients is immense, yet their informal responsibility to the "system" and to third-party non-clients has, during the past 40 years, become increasingly important in defining the role of the tax lawyer in the American system of justice*"[5].

In America as well as in Europe, the local Bar Associations have set and codified moral rules at the turn of the 20th century:

1- The lawyer must not submit to any external influence or pressure.

2- The interest of the client must always be his priority,

3- He must respect the relationship of confidence with the recipient of his services and provide him with objective information

4- He has an obligation of confidentiality to his client (with some restrictions)

5- He will not advise a violation of law and is bound to persuade his client to refrain from illegal conduct.

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5 Michael Hatfield, ' Ethics of Tax Lawyering' (2011), CALI eLangdell Press <http://www.cali.org/books/ethics-tax-lawyering -second -edition> accessed 8 July 2016

In addition to those duties, Watson believes that tax lawyers, as members of the legal profession have a general duty to "protect the revenue", "to contribute to improvement of the tax laws and their administration" and "to ensure that the tax system is "functioning honestly, fairly and smoothly".

In 1908, when a forerunner, the American Bar Association (ABA) issued its Canons of Professional Ethics for the first time, the main point at stake was the "duty of zealous representation" which binds the lawyer to his client. In the sixties, the ABA began to realise that the duty of a lawyer applies to the whole society rather than to a mere individual and that it had become "a duty to the system". In 1983, the revised ABA model rules started to be binding. Similar rules of ethics have been set up by National Bar Associations in most countries. They encourage good behaviour among lawyers and therefore provide an ethical basis for their liabilities. Those Codes of conduct will be specifically addressed below.

2.2.2. The ABA Model Code and formal opinions

The rules of conduct issued by Bar Associations for the use of their members are frequently incorporated later into local law. In the United States, the Canons of Professional Ethics were promulgated as early as 1908 but one had to wait until 1969 for the issue of a Model Code of professional responsibility with mandatory standards. In August 1983, the code was reviewed in order to be adapted to modern legal reality. The rules it contains have been adopted, sometime with modifications, by the judicial institutions of each of the States of the Union (except California which has its own code) and are legally enforceable against lawyers.

The cornerstone of the 1983 ABA Model Rules of Professional Conduct is that a lawyer is not only the representative of his client at the same time a "*public citizen having special responsibility for the quality of justice."* The second statement was considered to be of such paramount importance that the "*duty of zealous representation*" was relegated to a general statement back in the Preamble. After the scandals of Enron, WorldCom and Tyco, the ABA realised in 2002 that it had gone too far. The Model Rules were once more amended and a qualifier was added on the "duty of zealous representation"; the lawyer still owes the duty to his client, but only after making an independent determination to ensure that the client's interests are "legitimate." Lawyers representing corporations and other entities have even been allowed to reveal confidential client information under certain circumstances.

Although they have been written by a private association, the Model rules are binding on all American tax lawyers since the US Tax Court adopted them. In order to keep out of criminal activities and avoid breaching the duty of zealous

representation of his client, a lawyer is requested not to engage in criminal or fraudulent conduct (rule 8.4), therefore he may consider withdrawing from the representation of his client when one of the following conditions is met:

> *"- The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent,*
>
> *- The client has used the lawyer's services to perpetrate a crime or fraud,*
>
> *- The client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement".* (Rule 1.6).

When he discovers at an early stage that the client keeps sending fraudulent tax returns, the lawyer must immediately "*withdraw from representing the client in order to avoid being a party in the fraud*". Things become more complicated when he discovers only later "*that the client has misled or defrauded the government or another third party*". In these circumstances, the lawyer already owes obligations to his client and cannot let him down; he has to immediately advise him of the "non-compliance, error or omission" (C.F.R § 10.21, 1998) and must determine whether the client's wishes amounted to fraud. It is sometime difficult to distinguish actual fraud from wilfulness or negligence. If the faulty action is actually found to be fraud, the client must be warned of the severe consequences of committing tax fraud and urged to file an amended return. If he does not comply, then the lawyer is entitled to withdraw from representation but he is still bound to maintain the confidentiality of the information provided by the client during their relationship.

In addition to the previous requirements, tax lawyers have special duties to the system[5]. Firstly, the Model Rules imposes limitations on the "zealous representation" of their clients[6].

Secondly, their complying with the Model Rules serves as a surrogate for the sentiment that lawyers should act honestly and ethically in all circumstances. Thirdly, in the context of a tax lawyer's activity, the term "system" specifically refers to the relevant set of laws and to the administration responsible for their application in order to collect revenue for the State. In practice, one should keep in mind that the lawyer has a duty not to an abstract "system", but to the Internal Revenue Service, which enforces laws on behalf of the Federal government.

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6 David J. Moraine, 'Civil Liability of Tax Attorneys and Duties to the System'(2010), Vol.27 Issue 6, GPSOLO <http://connection.ebscohost.com/c/articles/55119394/civil-liability-tax-attorneys-duties-system> accessed 15 July 2016

One of the main activities of a tax lawyer is to express "tax shelter opinions" to clients prepared to make investments in order to reduce their tax load. In 1982, the ABA released Formal Opinion 346 (tax law opinions in tax shelters investment offerings) to warn tax lawyers against expressing a false opinion in overlooking the risks of a deal or not considering some legal rights or obligations. "A false opinion is one who ignores or minimizes serious risks or misstates the facts or the law, knowingly or through incompetence".

A lawyer expressing a false opinion is breaking the law since he "exceeds the duty of representing his client zealously within the bounds of the law". In particular, "the lawyer who accepts as true facts advanced by a promoter, when he should know that a further enquiry would disclose that these facts are untrue, definitely gives a false opinion".

Formal opinion 346 also extended a responsibility of the author to non-clients that would rely on his opinions in the guidance of their own affairs. The ABA extended the lawyer's duty to the obligation to refrain from providing an opinion that "ignores or minimizes serious legal risks or misstates the facts or law to the persons who may read or rely on the advice should the lawyer's identity be contained in the offering materials". In 1992, Formal Opinion 92-366 provided that "a lawyer has an on-going obligation to disaffirm work product, regardless of the effect on client confidentiality, if the failure to do so would have the effect of assisting a client's continuing or future fraud". In 1993, Formal Opinion 93-357 set the lawyer's obligations when dealing with bank examiners: Lawyers have no right to mislead those agents but they must be careful to keep confidentiality, refusing to disclose information when "disclosure is not absolutely necessary to avoid perpetuation of the fraud".

In IRS Circular 230 (published 1966), the Administration issued for the first time precise rules of practice, specifying duties and restrictions in the representation of clients before the IRS and establishing the right of the government to bar from practice any lawyer who would not meet the required standards.

Under Circular 230, a lawyer is bound to disclose confidential information to the government upon request. However, the requirement is at variance with the attorney client privilege, which prohibits such disclosures. Indeed, under the Model Rules, disclosure is only permitted in response to a court order but on the other hand, under Circular 230, the lawyer is bound by an independent obligation to produce the information upon request. That conflict between ethical obligations constitutes a major deontological problem, both in US and in Europe. We shall come back to the point later.

2.2.3. The European Union Code of Conduct

In 2006, the CCBE (Council of Bar and Law Societies in Europe), the European Counterpart of the American Bar Association produced a *Charter of Core Principles of the European Legal Profession* consisting of a list of ten core principles that " *are common to the whole European legal profession, even though these principles are expressed in slightly different ways in different jurisdictions*", including independence, confidentiality and professional secrecy, competence requirements, avoidance of conflicts of interest and respect of the rule of law. The Charter has been recognized by the Court of Justice of the European Union in the Wouters case (C-309/99) and others.

The CCBE also adopted a "*Code of conduct for European lawyers*" in October 1988 and amended it for the last time in 2006[7]. That set of rules has been recognized by all EU member States and by the European Commission; all European lawyers have to comply with them in their trans-border activities within the European Union, the European Economic Area and the Swiss Confederation. The document contains definitions of good practices relating to the lawyer's behaviour, his relations with clients and with the Courts. The CCBE Code applies to all cross-border activities, avoiding many conflicts between national rules. It provides a guide for the national Bar and Law societies when they adopt their own internal rules of conduct for lawyers practicing within their jurisdiction. It also prevails "*over national ethics or other standards for the practice of law between international arbitral tribunals".* [7]

The Code of Conduct for Lawyers in the European Community describes confidentiality as a

> "*primary and fundamental right and duty of the lawyer*" which is "*not limited in time*". It also requires a lawyer " *to cease to act if there is a risk of breach of confidence and to refrain from acting for a new client where the knowledge possessed by him of the former client's affairs would breach a confidence entrusted to him or give an undue advantage to the new client".*

2.2.4. National Codes of Conduct

Although all codes of conduct in the United States and in Western Europe respect the same core values of competence, independence, confidentiality, loyalty and

7 International Code of Ethics for Lawyers Practicing before International Arbitral Tribunals, ICCA Congress 2010 < http://www.arbitration-icca.org/media/0/12763302939400/stevens_bishop_draft_code_of_ethics_in_ia.pdf > accessed 14th June 2016 7 (Rule 1, International Code of Ethics for Lawyers Practicing before International Arbitral Tribunals, ICCA Congress 2010).

avoidance of conflicts between lawyers, they also reflect the differences between the legal, cultural and disciplinary systems of those countries. Maya Goldstein Bolocan[8] has made an extensive comparison of the professional legal ethics on both sides of the Atlantic: she found differences in the American and European approaches of subjects like confidentiality or conflicts of interest in her book[8]. The Codes reflect the difference between common law and civil law jurisdictions in the conduct of litigations. US Codes are more formal and legalistic whereas European codes express their norms in less precise terms since they coexist with ethical rules already set by law. Professor Cramton[9] points out that:

> *"Each principle …takes a different shape as one moves from country to country, and the differences are much greater between the United States and the Western European countries than between the Western European countries themselves. In addition, the relative priority is different. The US profession places highest regard to the fidelity to the client and the European professions give greater priority to professional independence"*

For instance, in US the Attorney-Client Privilege can always be waived at the request of the client while in the civil law countries of Europe, the duty to preserve professional secret goes far beyond the client's mandate: if the client frees the lawyer from his obligation, the latter must carefully verify "*if the client would have to fear disadvantages or damages through the disclosure, in which case the duty of secrecy prevails"*[10]

In America, the differences between versions of the ABA Model rules applicable in different States are minor ones, at least in terms of professional ethics. Inside the European Union, the CCBE Code regulates all cross-border activities and the National Codes are progressively falling in line with it.

3. From Money Laundering to Tax Avoidance

The notion of money laundering used to be associated primarily with drug trafficking and organised crime however the increasing flow of other illegal

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8 Maya Goldstein Bolocan, 'Professional Legal Ethics : a comparative perspective', CEELI Concept Paper Series, 2002. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=321700 accessed 15 july

9 R.Cramton, *Lawyers' practice and ideals: a comparative view*. (The Hague and London :Kluwer Law International 1999), p.267

10 D.A.O. Edwards, QC," *Report on "The Professional Secret, Confidentiality and Legal Professional Privilege in the nine Member States of the European Community"*, Commission consultative des barreaux de la Communauté Européenne, February 2004

transfers of funds using the same channels suggests that they should be dealt with in the same way; the remark applies to the proceeds of laundering corruption money, to those of tax evasion and even to some other transactions near the edge of legality.

3.1 Money laundering

The weak point in the drug trafficking trade is that, at a certain stage of the criminal process, the proceeds of crime need to enter the legal financial system. The conversion of tainted funds, flowing from the underground to the open, is called money laundering. This is the stage where the anti-money laundering organizations have the greater chance to access to flow of criminal money waiting to be transformed into legitimate assets. The hidden nature of the transactions makes it difficult to estimate the amount of laundered money lying around but it undoubtedly represents a non-negligible part of the world financial activity. The United Nations Office on Drugs and Crime [11]gives an estimate of $2.1 Trillion per year, 2.7% of the World Gross Domestic Product, only for the laundering generated by drug trafficking and organised crime. The World Bank and the International Monetary Fund have released higher figures for the total amount of money laundered in the world, a percentage of 3 to 5% of the global GDP[12]. According to the Commission, European countries lose between 3 and 5% of their GDP to tax crimes of all kinds.

3.1.1 Definition

> "*Money laundering is generally defined as the process by which the proceeds of crime and the true ownership of those proceeds are changed so that the proceeds appear to come from a legitimate source*"[13].

The transformation proceeds in three steps:

a. The *placement* where the proceeds of crime enter the financial system, this is where the risks of detection of the transformation are highest assuming that banks and financial institutions do actually enforce efficient anti-money laundering (AML) rules.

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11 United Nations Office on Drugs and Crime (UNODC), *World Drug Report* (United Nations Publications, 2010) <https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf> accessed 10th of July

12 *Communication COM (2015) 136 final on tax transparency to fight tax evasion and avoidance* <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/com_2015_136_en.pdf> accessed 19 july 2016

b. The *layering* i.e. the passing of the money through elaborate transactions usually involving several companies and trusts located in different jurisdictions,

c. The *integration*: where the money reappears in the form of lawful funds or assets that may then be invested legally.

3.1.2. A short history of money laundering

Money laundering is as old as money itself. Chinese merchants around 2000 BC were investing in faraway countries in order to protect their wealth from the greed of their rulers. More recently, a great time for money laundering was the prohibition period where American organized crime made a large amount of illegal money and invested some of it in Chicago laundries, which suggested the present name of the process. In the eighties, the first anti-money laundering provisions allowed the tax authorities to seize targeted bank accounts until the prospective owner proves that they are legitimate money.

The 9/11 attacks urged all countries around the world to take measures against terrorism financing. In 2002, the Group of the seven most developed countries (G7) revived a Financial Action Task Force (FATF) which had been created in 1989 to improve the monitoring of cross-border transactions and to promote exchange of information between countries. That policy-making body was commissioned by the G7 in 1989 to fight money laundering. The Task Force released, in 1990, forty recommendations, which were revised for the last time in 2012 and have become the *de facto* international standards for the world. To comply with the recommendations of FATF, most countries have established some kind of anti-money laundering (AML) legislation. After years of weak law enforcement, both Europe and the United States have finally engaged in cracking down on money laundering and other tax crimes[13].

3.2. The Anti-money Laundering Legislations

3.2.1. United States

The key preventive laws are the Bank Secrecy Act (BSA) of 1970 and the Patriot Act of 2001. The criminal sanctions are based on the Money Laundering Control Act of 1986 and have been further strengthened by the Anti-money Laundering Act of 1992. Other measures, requiring financial institutions to report to IRS, have been taken in 2004.

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13 *Anti-money laundering, practice note updated 22 October 2013, the Law Society, UK* < http://www.lawsociety.org.uk/support-services/advice/practice-notes/aml/ > accessed July 12th2016

3.2.1.1. Preventive measures

The Bank Secrecy Act (BSA) consists of a collection of laws, from 1970 onwards, meant to prevent crime money from entering the United States. BSA is directed toward financial institutions and requires that those institutions keep track of foreign financial accounts owned or controlled by US residents, that they keep record of any cross-border circulation of currency and other monetary instruments and that they report all transactions in cash exceeding $ 10,000 or looking suspicious.

The USA Patriot Act, adopted in the wake of the 9/11 attacks, imposed stronger requirements to the financial institutions in terms of internal anti-money laundering programs and identification of their customers, the Act extended those obligations to other professions such as jewelers, pawnbrokers, car dealers, travel agencies etc. and *specified that corruption should fall into the same category of crime as money laundering*.

3.2.1.2 Criminal sanctions

The Money Laundering Control Act of 1986 (Title 18, section 1956 of the United States Code) prohibits transactions using funds associated with "Specified Unlawful Activities" (SUA). SUAs are violations of Federal, State or foreign laws like bankruptcy, embezzlement, theft and so on. The scope of Title 18 is vast since, as soon as the origin of some funds is unknown, one cannot exclude that they originated in a SUA.

Therefore it is against the law to enter into a transaction while concealing the source, ownership or control of the funds; the next section of the Financial Code (Title 18, section 1957) prohibits in the same way spending more than $10 000 on a SUA account. The Anti-Drug Abuse Act of 1988 further improved the control of dirty money by extending the same obligations to other businesses like car-dealers or real estate and required those professions to report on large transactions. Money Laundering Acts of 1994 and 1998 imposed financial institutions to integrate Anti-Money Laundering Procedures in their daily activities. All of the reported information feeds into a central database operated by the US's Financial Crimes Enforcement Network (FinCEN) in Virginia. Many banks have been heavily fined for non-compliance to the Anti-Money Laundering rules.

A famous example is the Riggs Bank in Washington which was driven out of business by its failure to apply adequate AML controls and for turning a blind eye to the illegal money transfers performed by some Foreign heads of State (Joseph Lester, John Roth: criminal prosecution of banks under the Bank Secrecy Act. US

Attorneys' Bulletin, September 2007). In December 2014, HSBC paid a $1.9 Billion fine for laundering hundreds of millions of dollars belonging to drug lords, terrorists and countries subject to sanctions.

3.2.2. European Union

The European Union issued a first directive in 1990[14] to incite financial institutions to make the laundering of the proceeds of crime more difficult and, on that occasion, the Union stated for the first time that money laundering was a criminal offence. A second directive[15] (2001) extended anti-money laundering restrictions to legal professionals, including tax advisors. A third directive[16] (2005) extended the due diligence obligations to all beneficial owners. The Directive was also brought in line with the new Financial Action Task Force recommendations, requiring that "countries, competent authorities and financial institutions identify, assess and understand the risks to which they are exposed and take measures commensurate to those risks in order to mitigate them effectively". The new risk approach to AML regulations suggested to concentrate the efforts on adequate due diligence measures. The Directive 2015/849 or fourth directive, published on June 5, 2015[17] extends the scope of the previous Directives to the whole gambling sector and pays particular attention to the case of "politically exposed persons", that is people who perform or have performed leading public functions and have therefore a higher risk to be exposed to bribery or corruption.

The Key measure of the fourth Directive is the creation, in each Member State, of a mandatory national register recording the names of the persons holding companies or other legal entities in the country. The registers aim at unmasking the ultimate beneficial owners of those companies and trusts, as part of the fight against corporate tax evasion. The directive establishes in each Member State an independent authority, the Financial Intelligence Unit (FIN), entrusted with keeping those records and bound to cooperate with the other FINs. Those

14 Council Directive 91/308/EEC of the 10th June 1991 on prevention of the use of the financial system for the purpose of money laundering (1991) OJ L 166

15 Council Directive 2001/97/EC of the 4th December 2001 on the prevention of the use of the financial system for the purpose of money laundering(2001) OJ L 344

16 Council Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (2005) OJ L 30

17 Council Directive 2015/849/EC of the 25th of May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (2015) OJ L 141

authorities are free to request, analyse or circulate the information that they have collected.[18]

In addition, the document expressly assigns crimes related to direct and indirect tax fraud to the category of "predicate offences". The assimilation of tax evasion to money laundering in the fourth Directive is a key stage in the increased repression of fiscal offences.

The Council has reluctantly adopted the above provisions at the request of the European Parliament. It could hardly do otherwise after the revelations of LuxLeaks but it managed to render the Directive largely ineffective, as far as tax evasion is concerned, by requiring the identification of the ultimate beneficial owner of a trust only "*when the trust has fiscalconsequences"*. Since the trust is usually the last link of the chain of bank accounts, which is used to protect personal assets from taxation, it rarely generates income. Therefore the beneficial owners and the trustees are not legally bound to register their trusts and certainly will not do so. [19]The conclusion is that trusts hiding taxable assets will remain privileged tools in the hands of dishonest lawyers organizing tax evasion. The financial community always complains about the extra work induced by compliance with any rules and even the final mitigated version of the fourth Directive still meets with opposition. On July 22, 2016 the French Conseil d'Etat[20] has suspended the decree establishing an on-line register of trusts "having consequences on taxation in France" and referred the matter to the Conseil Constitutionnel.

3.3 Progressive criminalization of tax "optimization"

The Panama papers have given hints on the importance of corruption in some countries. Like drug money, the sums resulting from large-scale corruption have to remain hidden until they find a way to be laundered. The process is not technically different from that of other forms of money laundering but corruption is politically more difficult to eradicate since it has usually been deeply rooted for a long time.

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18 La lettre d'information de TRACFIN "les principales innovations de la 4ème Directive anti-blanchiment et le financement du terrorisme", octobre 2015.

http://www.economie.gouv.fr/files/lettre_tracfin_12.pdfaccessed 19 July 2016

19 Chantal Cutajar, "Identification du bénéficiaire reel, un leurre au sein de la 4eme directive blanchiment ? "(11 May 2005) La semaine juridique n°19, p. 554

20 Conseil d'Etat, Ordonnance 22 July 2016 <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-ordonnance-du-22-juillet-2016-Mme-B> accessed July 30th2016

Indeed even if the focus has always been so far on the topics of drug money and organized crime, the subject of corruption has recently come to the fore. An important event in this respect was the first Anti-Corruption Summit that Prime minister David Cameron called in London on May 12, 2016 to strengthen cross-border investigations on those activities. It had brought together "a unique coalition of governments, businesses, civil society, law enforcement, sports committees and international organizations to step up global action to expose, punish and drive out corruption wherever it exists".[21]

The Prime Minister said that "the evil of corruption…lies at the heart of the most urgent problems we face" and asked the world leaders to "stand united, to speak in the silence, and to demand change". As a first step in the right direction, he announced that "any foreign company that wants to buy UK property or bid for central government contract here will have to join a new public register of beneficial ownership information before they can do so". The register, which was to be launched in June 2016, will list not only the new buyers but all the foreign companies under which name more than 100 000 properties have been bought in England. Other countries have followed UK's example. The Guardian reported that "a small group of countries including France, Nigeria and the Netherlands will join the UK in committing to set public their registers of beneficial ownership…Some UK overseas territories, *not including the Cayman Islands or the British Virgin Islands* will join the UK and 33 other governments in agreeing to automatically and regularly share their registers of company ownership" *but not let them go public*.[22]

The US did not sign the agreement and David Cameron pointed out that "some US States fall far short on tax transparency and are less open than the UK's crown dependencies". He was of course referring to opaque States like Delaware or Wyoming. Let us hope that Brexit will not impede these early attempts to fight large-scale corruption.

3.3.2. Tax evasion and other aggressive schemes

In the past**,** the combat against money laundering was identified with the seizure of the proceeds of crime and protection against terrorism, the trend is now to extend the regulatory framework built for that purpose to other suspicious transactions

21 Prime Minister's Office and David Cameron MP, "Anti-Corruption Summit: London 2016" (1st published, 12 May 2016). <*https://www.gov.uk/government/news/pm-announces-new-global-commitments-to-expose-punish-and-drive-out-corruption*> *accessed 19 July 2016*

22 Patrick Wintour and Heather Stewart, "David Cameron to introduce new corporate money-laundering offence", *The Guardian* (London, 12 may 2016). <http://www.theguardian.com/politics/2016/may/11/david-cameron-corporate-money-laundering-offence-anti-corruption-summit> accessed July 27th

aimed at hiding income and assets and to prohibit financial packages whose only purpose is to shun normal taxation. The aggressive tax policies of large international corporations, who virtually escape taxation everywhere in the world, have been widely criticised in the media and have shocked public opinion. We are now reaching a transition period where the previous weaknesses in the repression of tax evasion, hampered by a lack of cooperation between governments, are slowly giving way to a convergence of policies. The European Parliament has recently drawn attention to the role of tax havens in facilitating illegal practices. [23]

Increased attention has also been brought to the legal processes through which some multinational enterprises "are capable to enjoy lesser burdens than others by means…of their panoply of legal advisors who detect and effectively abuse with impunity whatever gap exists in the legal framework". The elaborate schemes by which tax lawyers allow wealthy people to escape taxation in their home country are also under scrutiny.

Since the 2008 meltdown, whose direct consequence has been an explosion of deficits in all developed countries, governments are desperately short of cash and try to retrieve the resources that have been distracted by the various tax evasion schemes. Therefore, notwithstanding the incompleteness of the present AML systems, one notes a definite trend toward extended application of the anti-money laundering regulations to tax evasion and tax avoidance practices.

Two types of measures are useful in that respect: 1) the schemes by which a corporation transfers its profits to countries where there is little or no capital tax are counteracted by requesting that those profits be taxed in the country where they have been generated and 2) the hiding of assets or incomes of private persons needs to stop when it has been disclosed to their domestic tax authorities.

The OECD has addressed the problem at the request of G20 and issued recommendations to its members (BEPS Action 13). In order to implement those recommendations, the Commission has presented an Action Plan to reform corporate taxation. The leading idea is that the tax should be paid where the profits are generated. The first component of the plan is the Anti-Tax Avoidance Directive n°2016/011, currently submitted to the Council and Parliament. It addresses tax avoidances practices that take advantage of the disparities between national tax systems. The Directive has been adopted by the EU council on June 21, 2016 and will be remembered as a milestone in the taxation of multinational

23 Rui Tavares, *Special Committee on Organised Crime, Corruption and Money Laundering (2012-2013)Thematic Paper on Money Laundering, Relationship between Money Laundering, Tax Evasion and Tax Havens*.(Greens/EFA, 2013). <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/crim/dv/tavares_ml_/tavares_ml_en.pdf> accessed 24th of July 2016

corporations in Europe [24]. A revised proposal of a Common Consolidated Corporate Tax Base, (CCTB), creating a single set of rules used by all European tax authorities for computing capital tax in all Member States is part of the same Tax Transparency Package and will be discussed in Brussels shortly.

3.3.3. From tax evasion to tax planning

Tax evasion is open fraud, representing the attempt of a taxpayer to avoid assessment or payment of a tax voted by Parliament. It is qualified as a crime and is punished by fine or prison, tax avoidance is only the legal use of tax laws in ways that were not intended by the legislator but no scenario is really black and white. In most countries and in most cases of actual tax fraud, the tax officials are mainly interested in recovering the outstanding taxes, plus interest and will only impose a civil penalty. It needs a very serious tax offence for the auditor to qualify the fraud as criminal and send the taxpayer to court.

All the same, the complexity of tax law provisions and the differences between national taxation regulations sometimes make it difficult to draw the line between tax avoidance, which is prohibited, and tax optimization which is what the clients expect from tax lawyers. One should use the term "tax planning" when the proposed tax shelter is acceptable and tax avoidance when it is not. The line between the two may be blurred by the increasing sophistication of the so-called tax shelters and there has been a definite trend recently toward criminalizing tax optimization.

Legal professionals are directly targeted in the 4th European Directive "when participating in financial and corporate transactions, including providing tax advice where there is the greatest risk of the services of those legal professionals being misused for the purposes of laundering the proceeds of criminal activity or for the purpose of terrorist financing"

In 1934, the US Supreme Court corroborated a judge's statement that *"anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the treasury; there is not even a patriotic duty to increase one's taxes"*. [25]In Europe at least, it is not guaranteed that such a liberal position could be maintained today. The tax administrations have a growing tendency to refer to the notion of tax abuse, for instance in the case of tax shelters including transactions without economic justification or suspicious operations in tax havens. The lawyers who organize those schemes may well find themselves prosecuted together with their clients.

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24 (n.11)

25 293 U.S. 465 (1935)

France has lately taken a lead in the indictment of counsels who help their clients to get round the law. Several cases are pending and the final judgments have not yet been delivered but one notes a new tendency to a joint liability of tax lawyers with their clients. The law of December 6, 2013 "relating to the fight against tax fraud and serious economic and financial crime" aims at punishing, not only the persons guilty of tax fraud but also those aiding an abetting them and in particular their counsels. When those counsels comply with the letter of the law but violate its spirit, a major ethical problem is raised. A good example of such a situation is the famous Ricci-Fleurance case which will be mentioned below.

3.3.4. The Enforcement of Anti-Money Laundering regulations

The international tax system has undergone a real change since a G20 meeting asked OECD in 2009 to submit recommendations to thwart tax evasion. The final package of the OECD/G20 project on "Base Erosion and Profit Shifting", launched in 2013, has been endorsed by the G20 heads of States and finance ministers in St Petersburg in October 2015. The BEPS project addresses the corporate tax policy of global companies like Apple, Amazon and Starbucks who pay very little tax in the countries where they make their profits. As a first step, 31 countries have signed a tax cooperation agreement establishing country by country reporting of the profits made and tax paid by companies whose turnover exceeds $750 million and allowing for automatic exchange of these data between tax administrations. This is only one of the 15 BEPS action points on the agenda of OECD and the work on tax evasion is continuing in cooperation with the OECD member states, other large non-member states and representatives of developing countries. A more effective fight against tax avoidance will incite tax lawyers to reconsider their attitude and focus on the positive role that they can play in improving compliance.

In its "Study into the role of Tax intermediaries"[26], the OECD has written that "*tax intermediaries play a vital role in all our tax systems by helping taxpayers understand and comply with their tax obligations in an increasingly complex world"*. This cooperative approach has been set forth in a new report last May[27]. The argument is that new technologies, such as online accounting and filing are currently leading to integrated systems, where taxation is just part of the day-to-day operations and where tax lawyers will be able to offer new tax or tax related services. The automatic character of the processes warrants full compliance and

26 OECD *'Study into the role of Tax intermediaries'* (2008) <http://www.oecd.org/tax/administration/studyintotheroleoftaxintermediaries.htm> accessed 30thJuly 2016

27 OECD, '*Rethinking Tax Services. The Chaning Role of Tax Service Providers in SME Tax Compliance*'(2016) <http://www.oecd.org/tax/rethinking-tax-services-9789264256200-en.htm> accessed 29th July 2016

brings down administration costs on both sides. Tax authorities are encouraged to cooperate with the taxpayer in developing adequate communication strategies.

In the fourth Directive [28] there is a clear trend towards criminalizing tax optimization. Indeed, legal professionals are directly targeted "when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity or for the purpose of terrorist financing". [29]The next section deals with the responsibilities and liabilities of the tax lawyer in a dangerous world.

4. The liabilities of the tax lawyer

First and foremost, the tax lawyer is a lawyer. He enjoys all the privileges of the profession and needs to fulfil all the obligations that come with it. Just as any other lawyer, he defends his clients before the administrative and judicial law courts and drafts legal deeds where his civil responsibility is engaged. In addition, he performs other tasks, more specific of a tax lawyer like optimizing the tax load of client companies and wealthy individuals and, in that respect, he has to be careful not to be involved in any illegal action that could entail any criminal liability.

4.1 Civil liability

A tax professional gets involved in a variety of commercial matters and this is why his responsibilities can be as diverse as the activities he is engaged in. Among others, there are four types of situations where the tax lawyer is definitely engaging his civil liability:

1- When the tax lawyer writes a deed, he is responsible for negligence and errors and is liable for their consequences;

2- When he gives advice to his client, he must be very careful not to render himself liable to prosecutions from the client or from a third party.

3- When he is defending his client before a Court, he is protected by the legal professional privilege;

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28 Council Directive 2015/849/EC of the 25th of May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (2015) OJ L 141

29 Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing COM (2013) 45 final

4- When, as an advisor to his client, he produces tax shelter opinions or helps him to optimize his tax load in any way, the tax lawyer is not covered anymore by his legal professional privilege.

4.1.1. Risk of being sued for malpractice

A client can sue a lawyer for breach of contract when he does not meet the characteristics normally expected from a professional; the most frequent motives of the suits are alleged incompetence, negligence and insufficient communication with the client:

4.1.1.1 Lack of competence

The very first rule of the ABA Code of conduct reads:

> "*a lawyer shall provide competent representation to his client"*

The comment associated with the rule goes into more detail:

> *"in determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors incompetence include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is being able to give the matter and whether it is feasible to refer to the question"*

A lawyer should restrain of accepting a client if he feels that he does not have the competence or the access to competent advice required for a successful handling of the case. The Cour de Cassation [30]clearly identified these obligations:

- enlighten the parties to the case
- ensure the validity of the deeds
- ensure the efficiency of the drafted instruments.

Similar rules apply in most countries. In France, a recent judgment[30] confirms the liability of a tax lawyer who failed to inform his clients of the long-term taxation consequences of the solution that he had recommended. The responsibility of the lawyer has since extended after law n° 2011-331 of march 28, 2011 "on the modernization of regulated professions". The new law had established a new category of legal acts, "les actes d'avocat", whose value lies between that of a private deed and that of an authentic act. It is nothing else than a private deed countersigned by counsels on both sides (or by a single lawyer when all parties

30 Cass.1ère Civ., October11, 1966

agree) and its purpose is to bring legal certainty to the document. The lawyer is then liable for the validity and the efficiency of the deed, for the identity of the signatory and the content of the act. When he drafts the deed, he is bound "to inform and fully enlighten the parties on the effects and the range of the planned operation, in particular on its tax consequences and is not discharged from his responsibility by the competence of a party or the assistance of a personal adviser "[31].

The lawyer bears full responsibility for what he has written towards a person happening to sign a deed that he had drafted, even if this person is somebody that he has never met[32].

4.1.1.2 Negligence

The ABA Model rule 1.3 states that "*a lawyer shall act with reasonable diligence and promptness in representing a client*". As the comment to the rule points out, "*a client's interest often can be adversely affected by the passage of time or the change of conditions*". In neglecting a client, the lawyer renders himself liable to sanctions like suspension and the return of paid fees.

In Holland v. Flournoy, an attorney neglected to file the appeal of a foreclosure action and, in consequence, the case was dismissed. [31]. The lawyer was suspended for five months and required to return the received fees. The Court pointed out that "negligence is the sole basis of the complaint, there being no suggestion of moral turpitude". [32] See also Eytchison v. Flournoy [33] where an attorney was suspended for having done nothing for two years on a particular case.

However, in such cases, the client has to prove that following the advice of the lawyer was the direct cause of his loss. An English judge turned down a claim for negligence because the plaintiff was unable to prove that he had suffered a loss as a result of the breach of duty of the adviser[34].

4.1.1.3. Lack of communication

The lawyer should be aware that he only acts as a representative of his client and cannot take decisions on his own without ensuring that his client agrees. In that

31 Cass civ (1) 9 november 2004 (02-12415)

32 Eytchison v. Flournoy

33 195 So. 142, 142 (Fla. 1940)

34 Tax Adviser Escapes huge Liability claim despite negligence"(2016) <brunelpi.co.uk/component/k2/item/242-tax-adviser-escapes-huge-liability-claim-despite-negligence-published-june-2016.html> accessed July 30th 2016

respect ABA rule 1.4 gives a non-exhaustive list of circumstances where the lawyer is bound to communicate with his client, he should:

> "*(1) promptly inform the client of any decision or circumstance with respect of which the client's informed consent…is required.*
>
> *(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;*
>
> *(3) keep the client reasonably informed about the status of the matter;*
>
> *(4) promptly comply with reasonable requests for information;*
>
> *(5) consult with the client about any relevant information on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the rules…"*

Full information of the client is of prime importance as demonstrated in the case where a French lawyer had drafted a document recording an exchange of shares between two companies, but where the tax authorities had found that the taxes on the capital gain resulting from the sale had not been paid. The company assigned responsibility to the lawyer even if there was no proof that he had filed the company tax returns on that particular year. The Cour de cassation confirmed the lawyer's responsibility[35] since:

> "*Mr X was bound to inform his clients that they needed to fill a special form in their tax return to ensure that the act he had worded retained the full fiscal efficiency that his clients had a right to expect".*

In case of a strong disagreement with the client in regard to the handling of the case[36], in particular when the latter insists in doing or intending to do illegal actions, the lawyer is bound by his obligation of confidentiality to remain silent on the breaches of law he has witnessed. His only possibility to avoid being implicated in the wrongdoing as an accomplice is to withdraw from the representation of his client.

4.1.2. Liability when writing a tax opinion letter

Tax lawyers usually provide advice in writing on two particular occasions:

- when they build up detailed tax optimization schemes for their clients
- when they make an evaluation of some investment in terms of tax outcome.

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35 Cass civ(1) 2 october 2007(06-16936)

36 'Tax Adviser Escapes huge Liability claim despite negligence"(2016) <brunelpi.co.uk/component/k2/item/242-tax-adviser-escapes-huge-liability-claim-despite-negligence-published-june-2016.html> accessed July 30th 2016

Having a transaction covered by a lawyer's opinion letter is a reasonable insurance that no penalty would have to be paid by the company or the investor in case the tax authorities denied the recommended scheme. This is a great incentive to borderline financial packages and, more generally an encouragement to misconduct. Indeed the small percentage of firms audited each year in the US gives a company a fair chance to escape IRS investigation and even the firms caught by IRS and covered by an opinion letter will only pay the amount of tax due plus interest, but usually no penalty at all. This is known as the "audit lottery" where you cannot lose. In principle the responsibility lies on the lawyer who has written the document, so that, in order to be relieved from that liability, he must carefully set appropriate disclaimers in his opinion letter, recite the appropriate law, specify how it applies to the facts in question and clearly state what he actually guarantees and what he does not. This is the reason why opinion letters are usually full of "more likely than not" and other caveats.

Penalties are usually waived by the IRS when a tax payer has relied on professional advice that IRS considers as given in good faith. Sometimes the responsibility is shared. In *Whitney v. Buttrick*[37], a client claimed that his lawyer had been negligent in structuring a transaction that resulted in an imposition of a substantial income tax. He alleged that the lawyer had wrongly informed him that the sale of his interest in the relevant business could be tailored to avoid tax. At trial, the lawyer was found 75% negligent and the plaintiff 25% negligent so the lawyer had to pay 75% of the taxes owed by his client.

The most frequent – and the most questionable - are the so-called tax shelter opinion letters. They concern complex aspects of tax law and suggest various financial arrangements. The chief counsel of the IRS made a list of their usual characteristics[38]:

> "*little economic substance or business justification, conflict with the legislator's deliberations or the objective of law, high complexity and exploitation of the asymmetry or abnormalities of the tax system".*

Tax shelters fall into three categories. The fully legitimate ones relate to tax favoured investments set up by the governments as incentives for developing particular activities of national interest - like oil exploration or real estate in US -. A grey area contains those that happen to yield results under the current law because of unintended tax preference, Abusive ones involve transactions that would not stand in court. As Dr. Korb points out, those investments allow

37 376 N.W. 2d 274, (Min. Ct.App. 1990)

38 Donald L. Korb, « *Shelters, Schemes, and Abusive Transactions : Why Today's Thoughtful U.S. Tax AdvisorsShould Tell Their Clients to "Just Say No," » (2008),* Wolfgang Schon ed.2008, Tax And Corporate Governance288, 297

claiming *"deductions or credit that may produce significant tax savings either because the return is not examined by the IRS or, if it is examined and the deduction is disallowed, the tax will be deferred at a low interest cost*. Lawyers who delve into those practices should be very careful not to have to pay for their clients.

Liability to non-clients deserves special attention, a tax lawyer's opinion analysing the effect of a "tax shelter" investment is frequently presented by the promoters when they advertise their offers. The Treasury Department in 1980, and the American Bar Association two years later, were concerned about the false opinions that some lawyers might render on those occasions because of insufficient or biased information.

Treasury Department's amended Circular 230 establishes rules of practice to be followed before issuing a tax shelter opinion: the rules require "due diligence" from the lawyer to ensure that the material available to him "fully and fairly describes relevant facts as well as legal issues", they demand that the opinion itself be "properly described in the offering material" and "bars the issuance of anything less than an overall favourable opinion". When he is not a hundred per cent sure that the tax shelter project is sound and fully legal, the lawyer should restrain of participating in its implementation. Carelessness could entail disbarment and/or suspension of practice before the IRS.

Advice relating to a company can be required from a lawyer, for instance before a prospective sale. Then he must be cautious: "if the lawyer knows, or reasonably should know that the evaluation is likely to affect the client's interest materially and adversely", he should seek the client's informed consent before issuing the advice (Model rule 2-3b). On the other hand, he is bound to give a well-founded opinion. When he needs information to form that opinion and where the client has rejected his request, the lawyer cannot simply quit. SEC requires that he take "affirmative steps" such as referring the matter to the board of directors of the company. Resignation should be the last resort.

4.1.3 Actions in tort

Lawyers have been sued by their clients and sometimes instead of their clients for assisting them in actions which supposedly amounted to a tort to a third party. That third party claims that the legal services provided by the lawyer have helped the client into entering into a fraud or the breach of a fiduciary duty. Such actions for

making lawyers responsible for the torts caused by their client are known as "in-concert liability claims". They are usually based on the following arguments[39]:

a) the client owes a duty to the claimant

b) the lawyer knows that there is such a duty

c) the client breaches the duty or commits a tort

d) the lawyer knows that the client has broken a duty or committed a tort

e) the layer has assisted him in breaking the law

f) the result is a damage for the third party

At first sight, such a sequence of facts seems difficult to establish but a lawyer who concentrates on the wishes and expectations of his client without asking himself how his actions affect third parties may well be exposed to in-concert liability claims.

Thomwood v. Jenner & Block [40] is an example of a claim for fraud against a lawyer. Jenner & Block were assisting a client who intended to buy partnership interest from a fellow partner. Unknown to the vendor, the buyer was currently striking a deal that rendered the partnership very valuable. The attorneys were accused of assisting the buyer without mentioning that deal to the seller. They had participated in the negotiation, written all the documents and even counselled the selling partner. The Illinois Court of Appeals held "that the alleged acts constituted knowing substantial assistance, which was sufficient to state a claim for aiding and abetting the alleged fraud committed by the purchasing partner".

Another way of making an in-concert liability claim against a lawyer is to invoke a breach of fiduciary duty. The trick is to demonstrate that the lawyer acted in a fiduciary capacity on behalf of his client and that his legal services were used to breach the duty owed to the claimant. By setting up for his client a trust or another financial vehicle to hide his assets from creditors, a lawyer can be accused of helping him breach the fiduciary duties owed to this claimant. When the tax lawyer is well aware that the solutions that he recommends effectively breach duties to a third party, the conditions for in-concert liability will be met.

Lawyers should not underestimate their responsibility over the use of the legal services that they provide and they should always keep in mind the possibility that

39 Daniel E. Tranen, "The Risks Lawyers Face from Aiding and Abetting and Civil Conspiracy Claims" (2012) Risk Management Article <http://www.attorneys-advantage.com/sites/attorneys/Documents/Final%20September%20X-9972-0912.pdf> accessed 5 july 2016.

40 344 Ill. App.3d 15 (2003)

a third party might be affected by the improper use of those services by the client. Tax lawyers should be especially cautious in the matter since their liability could be engaged even in circumstances where they never had any contact with the said third party. The argument that convinced the Court in the two preceding cases was only that the lawyer allegedly knew or could have known that his client was breaching a duty owed to a third party.

The best way for lawyers not to be sued for a breach of duty to a third party is to perform honest services and to keep in mind the goals of their clients and their possible misdemeanours. When those goals could lead to committing a tort, it is the duty of the lawyer to counsel his client against the implementation of such plans. If the client cannot be dissuaded from committing a tort, the lawyer would do best to withdraw.

4.2. Criminal liability

4.2.1. Private wrongdoings

Breaking the law is not expected from members of the legal profession however, as anyone else, a lawyer may turn into a swindler and, when he does, he incurs criminal sanctions.

There is nothing specific to the sanctions incurred to a tax lawyer acting as a private citizen except that, whenever the offences are in relation to his professional activity, he is exposed, in addition to the prosecutions and penalties inflicted by the legal system, to disciplinary measures from his bar association (suspension, disbarment etc). The most frequent criminal offences also happen to be breaches of the professional codes of conduct; they relate to the cheating of clients, bribery and conflicts of interest and are subject to the professional sanctions foreseen in those codes. One of the more serious cases reported involved the sale of weapons known as Angola gate in which a French lawyer received two years in prison in 2011 for concealing and laundering proceeds of an illegal trade[41]. Other lawyers have been charged for the sole benefit of a client as in the criminal case where a Marseille tax lawyer bribed a tax official for receiving advice in the course of an audit[42].

41 CA Paris 29 april 2011

42 Agence France Presse, ' Escroquerie: mandat de depot pour un avocat marseillais' (Marseille, 12 juin 2014) <http://www.leparisien.fr/marseille-13000/escroquerie-mandat-de-depot-pour-un-avocat-marseillais-12-06-2014-3917713.php> accessed 15thJuly 2016

4.2.2. Aiding and abetting fraudulent clients

In France, recent trials have drawn attention to the responsibility of a tax lawyer in the frauds and crimes of his client when he helps him in their perpetration.

In the Wildenstein case, a famous art dealer was accused of having failed to declare hundreds of paintings and other assets in his inheritance declaration after his father died. Those possessions were in fact hidden in trusts established in tax havens. The tax authorities claim that his father's heritde amounted to a minimum of 616 M€ when he only acknowledged 40. Also indicted were a French lawyer, Olivier Riffaud and his Swiss colleague Peter Altorfer. Riffaud was accused of having helped the Wildenstein family to draw money from the trusts without informing the tax authorities and to have covered up those transfers by "giving mendacious justification for the influx of cash money through false loan agreements and invoices". He was charged with the offence of "aggravated laundering of tax fraud" The trial began in January 2016 and the court has not yet returned its verdict[43].

In November 2015, a public prosecutor brought fourteen former executives of the Wendel group to the Paris criminal Court for a complex financial arrangement designed to reduce the taxes on their profits. Their shares were artificially placed in a shell company set up for the occasion so that the profits did not to appear as dividends but in the form of capital gains which were taxed more favourably. The trick was to put the new shares in a civil company, called CDA, in order to make them eligible for suspension of taxation until the tax authorities would become legally unable to sue their owners.

In that particular case, the prosecutor also sent Pierre Pascal Bruneau, a lawyer from the famous law firm Debevoise & Plimpton, before a criminal court for compliant behavior. According to the public prosecutor,

> "*the intervention of Pierre Pascal Bruneau has resulted in the elaboration and implementation of a disputable scheme, but also in giving it an appearance of reality under the recommendations of the Debevoise law firm expressed in terms contrary to its exchanges with the CDA partners"*

France has lately taken the lead in the indictment of counsels who help their clients break the law. The cases are so recent that final judgments are still waited upon but there is a new trend toward a joint liability of tax lawyers with their clients.

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43 David Bensoussan, " Procès Wildenstein: quand les conseillers fiscaux sont visés par les juges", Challenge(Paris, 4 january 2016) http://www.challenges.fr/france/20160104.CHA3449/proces-wildenstein-quand-les-conseillers-fiscaux-sont-vises-par-les-juges.htmlaccessed 16th july 2016

The law of 6th December, 2013 "relating to the fight against tax fraud and serious economic and financial crime" aims at punishing, not only the persons guilty of tax fraud but also those aiding and abetting them and in particular their counsels. [44]

The Fleurance case is a perfect illustration of the new crack down on "too bright" tax lawyers and the sentence of the Criminal Court has actually thrown the French legal community into a panic. Mrs Ricci, a rich French woman, had found herself on the Falciani list of undeclared bank account holders of HSBC Geneva and was convicted of tax fraud for that reason; in order to avoid paying a heavy fine, she immediately moved to Switzerland but wanted to protect her real estate assets in France from seizure by the taxation authorities. Her tax lawyer, Me Fleurance advised her to convert her properties, subject to French capital tax and other taxes, into transferable securities which are exempt of tax for a non-resident. In order to carry out those plans, the lawyer implemented a complex system of non-trading investment companies borrowing funds to buy property, to the effect of organizing Mrs Ricci's insolvency in France. Fleurance received a suspended sentence of one year in prison for making those arrangements and was declared jointly liable for the payment of the sums owed by Mrs Ricci to the French tax authorities. The judgment established for the first time the joint financial responsibility of the tax lawyer with his client and is currently being appealed.

Two points of law:

According to Me Fleurance, the arrangements were quite legal and only meant to bring down Mrs Ricci's capital tax but the lawyer did not succeed in convincing the judge of his innocence: In his judgment, the latter explained that

> "*Henri-Nicolas Fleurance, a business lawyer experienced in tax engineering, has exceeded the limits, that have nothing obscure for a skilled professional, which separate tax optimization from organization of insolvency, consulting assignment from complicity in a tax crime*".

In none of the above three cases were the financial arrangements formally unlawful but they were obviously considered by the court as abuses of law. They reflect a reassessment of the French jurisprudence after Wikileaks and the Panama papers which is here to stay. The increased severity of French courts toward tax evaders and their supports raises two questions:

1) Can a lawyer be convicted on the grounds of financial arrangements that are legal, at least from a formal point of view and should abuse of law be referred to in those cases? The judges carefully avoided answering the question by prosecuting the lawyers respectively a) in the Wendel case, for

44 Bensoussan

implementing a disputable scheme, b) in the Wildenstein case, for mismanaging a trust, c) in the Ricci case, for organising the client's insolvency.

2) Can defendants receive two penalties for the same facts? In two recent procedures, the accused were sentenced with fiscal and judicial penalties for the same facts and claimed that the *non bis in idem* rule was violated. One of the claimants was Jerome Cahuzac, a minister who had been found to have hidden foreign accounts, but has since regularised his situation after receiving a tax adjustment notice; he was nevertheless prosecuted for fraud and money laundering for the same facts. The tribunal referred to the Conseil Constitutionnel for a preliminary ruling (question prioritaire de constitutionnalité). The question was whether the articles of the General Tax Code regulating tax assessments (Art.1729), criminal penalties (Art.1741) and specially the conjunction of the two, were in conformity with the Constitution. The Conseil gave a positive answer, holding that the pursued objective "justifies supplementary procedures in the most serious cases of fraud". The answer stresses the difference between, on the one side a financial sanction for understatement of tax liability "which warrants the collection of the common contribution" and on the other side, criminal penalties for fraud that act as deterrents and to which publicity "confers an additional exemplarity". The "double penalty" is accepted in this particular case because of the constitutional value of the fight against tax fraud.

In the United States, in matters of tax fraud, criminal and civil sanctions are always treated independently. Even when the taxpayer receives an acquittal in a criminal tax case, the IRS can still impose civil penalties against him. The difference with France lies in the order of operations. The IRS disposes of the criminal phase before imposing civil sanctions; the French tax administration goes the other way round.

4.3. Liability of a Tax Lawyer as a Member of the Legal Profession

4.3.1. When he is bound by professional rules

A tax lawyer has a responsibility to his client. For instance, when he prepares a tax return on his behalf, he is bound to use all legal and ethical means available to minimize taxes and is liable to his client for any negligence resulting in overpaying tax or receiving a tax adjustment. In the case of *Edward H. Clark v. Comm.* [45] a lawyer had advised a married couple to submit a joint return, supposed to yield less tax than two separate returns. It was found that, on the contrary, that option

45 *40 B.T.A. 333 (1939)*

resulted in an excess payment of $19.941. The lawyer had to repay that sum to his client.

Most Bar Associations in the world have issued rules of conduct for their members and those rules have frequently been incorporated into national law. For instance, in the United States, the American Bar Association has issued the US Model Rules of professional conduct and the US Tax Court has adopted them: in order to avoid being accused of criminal activities or breach of the duty of zealous representation of his clients, a lawyer is advised not to engage in criminal or fraudulent conduct (rule 8.4), and needs to follow the rules of ethics of the US Tax Court (which has adopted the Model Rules); he may also withdraw from representing a client (rule 1.6) subject to one of the following conditions:

"- the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent,

- the client has used the lawyer's services to perpetrate a crime or fraud,

- the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement".

4.3.2. When he defends his client in court

As a counsel, a tax lawyer is under a duty of loyalty, prudence and due diligence. He should base his legal advice on the state of the law at the time the advice is given: e.g. a tax lawyer had suggested an accounting procedure contrary to the doctrine of the taxation authorities because a recent judicial decision allowed for it; the tax officer disagreed, the client received a tax assessment and filed a lawsuit to the lawyer for professional liability: The Cour de Cassation supported the lawyer: "To take into account the last judgment of the Conseil d'Etat, even if it were contrary to its previous jurisprudence and in opposition to the doctrine of the tax authorities, does not constitute a fault or an imprudence imputable to a tax consultant"[46].

4.3.3. When he provides other services

Where he acts as a consultant, a tax lawyer must make a "reasonable effort" to identify his client and ensure that the money he may have to handle or receive in payment of his services is not criminal money. Just as banks, lawyers, and tax

46 Cass com 29 march 1994 (91-21191)

lawyers especially, are bound by strict "know your client" rules in order to ensure that they deal with *bona fide* clients.

4.4. Liability of the tax lawyer as an officer of the legal system

4.4.1. As a counsel

A tax lawyer is bound to provide legal information to his clients and to persuade them to refrain from illicit conduct. That makes him an objective collaborator of his country's tax authorities and entails his responsibility when he gives advice or assistance to a client in matters of taxation.

When a tax lawyer completes a tax return on behalf of his client, he must be sure that, "in view of the information that he detains about his client's situation", the document is "fully conforms to legal requirements". [47]The complexity of the tax codes and their ambiguities do not always allow for a certain interpretation and the lawyer must be careful in verifying his client's statements.

A common case is that of a lawyer being asked by a client to prepare an income tax return that, he believes, has little chance of being sustained administratively or judicially. Under the U.S. Internal Revenue Code (I.R.C. § 6694, preparer understatement penalty), the lawyer is bound to disclose the fact to the Government even if the client refuses to yield. This is contrary to the Model Rules, where disclosure cannot be accepted as a duty to the IRS because ABA claims that IRS is not a tribunal.[48] In order to meet both the requirements of the ABA and the IRS, there is no other way for the lawyer that to withdraw from representing the client if the latter refuses to comply with the law.

4.4.2 As an advocate of his client

The work of a tax lawyer differs from other kinds of law practices by the fact that the opposing party to his client in court is always the same, the Internal Revenue Service (IRS) in the case of US lawyers, a national tax authority in other countries.

The American Bar Association (ABA) recalls that the relationship with the IRS is always "adversarial or potentially adversarial"[49]. Under the Model Rules (rule 3.3), the lawyer has a special duty of candour to the Court but that duty does not apply to the IRS, which should not be regarded as a judicial institution because of its lack of impartiality.

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47 Cass com 6 February 2006 (06-10109)

48 ABA Formal Opinion 85-352, "Tax return advice; reconsideration of formal opinion 314", The American Bar Association (1985) <http://faculty.smu.edu/hlischer/_private/Academic/2010F/ABA_Formal_Opinion_85-352.htm> accessed 24thJuly 2016

The Model Rules require for a lawyer to be truthful when dealing with others on their client's behalf but also point out that he "has no affirmative duty to inform an opposite party of relevant facts". Lawyers advising clients in tax matters must balance the demands of their clients against the public interest. What happens when the two duties conflict?

For instance, in the case where the IRS agent makes an error in the client's favour and the client wants to take advantage of that error, does the lawyer's duty of candour override the duty of confidentiality to the client or vice versa?

Watson [49] discussed the subject in some detail, she distinguishes between mathematical or factual errors discussed orally - that should be corrected on the spot since the lawyer's silence could constitute disreputable conduct - and other types of error where a disclosure requires the agreement of the client. Any disloyal attitude on the part of the lawyer would entail suspension of practice before the 1RS[50].

4.4.3 As a provider of other legal services.

Most tax lawyers focus on business deals or tax structuring. When their corporate client strikes an agreement including detailed tax provisions, the tax lawyer is the best suited to draft clauses that reflect the intentions of the parties and he should ensure that those clauses do not entail unanticipated consequences. As a consultant, he is no more protected by the legal professional privilege. A French law, adopted in December 2013 enhanced the criminal liability of a counsel "*having actively participated in an aggressive tax fraud on behalf of a client*". A year later, another law provided that a person who *"brought aid and assistance or has been involved in actions, manoeuvres or concealments directly leading to reminders or tax adjustments* " was accountable for a fine of not less than 10 000€. The Conseil Constitutionnel censured the second law because it felt that it was leaving too wide a margin of discretion to the tax administration.

4.4.4 As a reporter of suspicious transactions, a long-standing problem

In United States, the paramount obligation of "zealous representation of the client" prevails over all other considerations however the Model Rule 1.13 establishing that duty has been amended in 1983 to permit lawyers to reveal client's confidential information in some specific instances. The lawyer still owes the duty of zealous representation, but only after verifying personally "*that the interests of*

49 Watson

50 IRS Circular 230, part 10, pp.50 et seq. https://www.irs.gov/tax-professionals/circular-230-tax-professionals

the client are "legitimate". The modification is an attempt to cope with the new ABA rules describing the lawyer as "a public citizen having special responsibility for the quality of justice" and anxious to contribute to the combat against money laundering. American lawyers seem to be less allergic to due diligence rules than their European colleagues.

Circular 230, published in 1966 has set, for the first time in the US, the rules of practice applicable to attorneys representing clients before the IRS, it regulates the profession and gives a right to the Government to bar from practice any lawyer who would not meet" *the required standards"*. Under Circular 230, a lawyer is bound to provide confidential information relating to his client upon request of the government. There is a clear discrepancy between the Model Rules' prohibition to disclose any confidential information without a ruling of a court and the provisions of Circular 230. The contradiction has not been solved but it is hoped that the possibility for the lawyer to withdraw, implied by the amendment to Model rule 1.13, will be an efficient tool to settle such problems.

Although American lawyers have been said to be "the gatekeepers to the financial system"[51], they are also staunch defenders of their legal professional privilege and have escaped so far all mandatory reporting of suspicious transactions. Lawyers, contrary to financial institutions, do not fall under the Bank Secrecy Act and are subject to existing criminal and civil law only when they are personally involved in money laundering and criminal financing or when they help their clients to participate in such crimes. The ABA has tried to fill the legislative gap by issuing a rather general guide of good practices [52]under a risk-based approach inspired by the FATF guidelines. The guide is neither precise nor compelling, it calls for voluntary compliance and suggests to screen prospective clients by using due diligence techniques : identify the client, identify the beneficial owner of the client, understand the business and objectives – to avoid being drawn into criminal undertakings.

There has been more of a regulatory approach in Europe and four directives have been adopted on the subject between 1991 and 2015. Article 6 of the Directive 91/308/EEC on the *prevention of the use of the financial system for the purpose of money laundering* provides that persons subject to the directive have to inform, "*on their own initiative*" the authorities in charge of AML of any fact that could be an indication of money laundering. The previous Directive, amended by Directive 2001/97/EC provided that lawyers should be exempt of those provisions "when

51 Kevin L. Shepherd, "The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance For U.S. Lawyers',2010<http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/jpl10_04shepherd.authcheckdam.pdf> accessed 19th July 2016

52 ibid

ascertaining the legal position of a client or representing a client in legal proceedings" but that they should be subject to obligations of client identification, record keeping and reporting of suspicious transactions, "when participating in financial or corporate transactions, including providing tax advice".

In most Member States, the authorities responsible for implementing AML measures, such as the Belgian "Cellule de Traitement des Informations Financières" or TRACFIN in France were interpreting the rules in a restrictive way and insisted to be systematically informed by the lawyers of suspicious transactions. That request generated a storm of protests all over Europe. The most criticized point was the obligation for a lawyer to report to a government administration. Using confidential information to denounce a client was not only immoral but would completely destroy a lawyer-client relationship built on mutual trust. Bar Associations pointed out that a lawyer addressing an AML service would break professional secrecy and that it would constitute an offence. When the lawyer was offering services that were not covered by the Legal professional privilege, he had no legal protection when retaining confidential information but, on the other side he was still under a duty of confidentiality as a lawyer. In fact, the directive offered a way out in providing that "Member States were allowed to nominate "the bar association or other self-regulatory bodies… as the body to which reports on possible money laundering cases may be addressed by those professionals" but that looked as an insufficient protection to many members of the profession.

When Directive 2001/97/EC was transposed into Belgian law in 2004, the Belgian Bar associations and the Council of the Bar and Law Societies of the European Union required annulment of several articles of the new law. The arguments were a) that the trust that a client bestows to a lawyer applies in a general sense and not only to particular tasks and b) that the separation between essential and ancillary activities is legally untenable and gives rise to serious legal uncertainty. Under those conditions, the right of the client to a safe trial was not guaranteed. The preliminary ruling of the European Court of Justice disagreed and held that, since the lawyer is exempt from reporting when he defends his client or represents him before the courts, the right of the client to a safe trial was safeguarded.

The third Directive 2005/60/EC imposed further measures of client identification and vigilance. In 2007, the French Bar Association issued professional rules recalling the obligation for a lawyer to report to the president of his Bar association any suspicion he may have about a client when he participates in some financial or real estate transactions on behalf of a client when he acts as a trustee. A French Tax lawyer, Patrick Michaud asked the Conseil d'Etat to require a preliminary ruling from the European Court of Justice on the conformity of a mandatory declaration of suspicion with the European Convention of Human

Rights, which the institution refused to do. Patrick Michaud followed suit before the European Court of Human Rights (ECHR), claiming that to put a lawyer under an obligation of reporting suspicious transactions contradicted Article 8 of the Declaration of Human Rights which protects privacy. The Court ruled that the obligation of a declaration of suspicion "does not disproportionately affect professional secrecy" since the information received by lawyers in the exercise of their judicial functions does not fall within the scope of the said obligation.

The ECHR balanced the lawyer's professional secrecy requirements against the importance of the combat against illicit money laundering that might finance drug trafficking or terrorism. In France, the relevant law (CMF, art. L 561-3) draws up a list of activities subject to declarations of suspicion. Those are only required where the lawyer assists his client in buying or selling property, opens bank accounts or sets up and manages companies, trusts and endowments on his behalf.

The solution found to avoid breaking confidentiality in those cases is the following: the suspicious lawyer addresses his declaration to the president of the local Bar under shared professional secrecy; the president, elected by his peers to guarantee the rules of the profession, ensures that the conditions determined by law are met and does not transmit the document otherwise. There is some controversy on the nature of the "president's filter". For TRACFIN, it is a mere control of legality and the president has no power of opportunity. For the President, it is a free decision. In fact, lawyers have not completely accepted the deal and clearly prefer cutting up ties with their clients to denouncing them. They do meet the requirements of vigilance, prudence and dissuasion – when their advice is required on an illegal scheme - but systematically refrain from denouncing a client whatever the circumstances. For instance, in 2012 TRACFIN has received 24,294 declarations of suspicion from financial institutions and 4 from lawyers.

5. Warnings and Conclusions

In the golden years of Reaganomics, deregulation and financialisation have changed the world economy; financial services have taken the lead over manufacturing industries. The dramatic increase of international trade keeps enhancing cross-border exchanges and offers new possibilities of tax planning to multinational corporations and investment funds.

One of the key techniques for maximising investor's profits in a globalised world is the reduction of the tax load of companies and private individuals; therefore tax lawyers are now at the heart of all corporate strategies.

The complexity and uncertainties of tax law have brought them to the fore and all economic actors need their expertise. These tax lawyers have sometime taken advantage of the situation to cross the red line and the questionable schemes that they have implemented for their clients have recently drawn the attention of governments and brought some lawyers to court. Under those circumstances, the profession needs to reform; two ways of moving forward are suggested: avoid assisting clients in unlawful activities and engage in a win-win collaboration with tax authorities.

United States are currently taking a tough line against tax evasion and tend to impose stronger requirements to financial institutions:, namely to know their clients and report suspicious transactions to the IRS but lawyers have no such obligations yet. According to the Wall Street Journal [53] Over the years, US legislators have introduced proposals that would impose such reporting but they have met heavy opposition from lawyers and did not go anywhere. The ABA said that the proposals were an attack on a bedrock of the U.S. legal system, the attorney-client privilege. On the other hand, the placement and investment of laundered money requires attorneys' expertise. UK has imposed adequate laws to ensure honest transactions and, in 2013, the UK Solicitors Regulation Authority indicated that 3,935 suspicion reports had been filed by the legal industry. Sooner or later, the United States will have to do the same.

Most developed countries are making some progress in the combat against tax fraud. According to a FATF evaluation, the UK legislation is one of the most comprehensive in the world and its loopholes are currently being closed. More important still, the emphasis has shifted from the legislative framework to the effectiveness of the regulation. [54] In France, a Minister presented a bill on the subject in 2013 as "breaking off with ten years of voluntary powerlessness".

TRACFIN, the French anti-money laundering unit is increasingly efficient in its combat against track evasion and so many French people have voluntarily brought back their money from Switzerland.

The current trend is to put tax lawyers at the forefront of the battle against money laundering and tax evasion. In such an uncomfortable situation, a professional

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53 Joel Schectman « U.S. Lawyers are a money laundering blindspot, some argue », Risk and Compliance(May 11,2016) <http://blogs.wsj.com/riskandcompliance/2015/05/11/u-s-lawyers-are-a -money -laundering-blindspot-some-argue/> accessed 2th of July 2016

54 Helena Wood « FATF 2018: Assessing the UK's Anti Money-Laundering Efforts », RUSI 17 June 2015 <https://rusi.org/commentary/fatf-2018-assessing-uk's-anti-money-laundering -efforts> accessed 2th July 201

would do best to keep himself out of trouble by properly identifying the client and its beneficial owner, in refraining from dubious practices and in sticking to the rules provided by his Bar Association. In the long run, he might be well advised to return to his careful tax optimisation work and forget about too fanciful tax shelters. The technical changes foreseen by OECD and discussed in section 3.3.4 could hopefully lead to a new situation where the present relationships of conflict existing between tax lawyers and tax officials would be replaced by a mutually beneficial cooperation.