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POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**

Economic and Monetary Affairs

Employment and Social Affairs

Environment, Public Health and Food Safety

Industry, Research and Energy

Internal Market and Consumer Protection



Rules on independence and responsibility regarding auditing, tax advice, accountancy, account certification services and legal services

STUDY for the PANA Committee

DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

**Rules on independence and
responsibility regarding auditing, tax
advice, accountancy, account
certification services and legal services**

STUDY

This study maps the rules on independence and responsibility that are applicable at national, EU, and international level that govern the service provision by intermediaries such as companies working in auditing, tax advice, accountancy and account certification or by legal advisors (attorneys, solicitors, legal consultants, in-house lawyers, etc.). The mapping forms the basis for policy recommendations to encourage intermediaries to deliver a positive contribution to combatting tax evasion, tax avoidance and money laundering.

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EXECUTIVE SUMMARY

This study maps the rules of independence and responsibility of three main intermediaries – lawyers, accountants/auditors, and tax advisors in relation to money laundering, tax avoidance and tax evasion. Through mapping of rules at the national, EU, and international level, the study is able to provide policy recommendations to encourage intermediaries to deliver a positive contribution to combatting tax evasion, tax avoidance and money laundering. The jurisdictions covered for this study are the United Kingdom, Germany, Luxembourg, Cyprus, Switzerland, British Virgin Islands, and the United States of America.

Background

This study has been requested in the context of the PANA Committee’s investigation of alleged contravention and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion. Our team focused on mapping the rules on independence and responsibility that are applicable on national, EU and, where relevant, international level that govern services provided by intermediaries such as companies working in auditing, tax advice, accountancy and account certification or by legal advisors.

Independence in relation to the auditing profession can be defined as including the following key elements:

- an absence of conflicts of interest,
- an absence of financial or other dependence on the audit client,
- not having relationships with clients that could impair the auditor’s objectivity and ability to identify and disclose any irregularities revealed in the course of the auditor’s work.

Its result is in effect the conditional probability that, given a breach has been discovered, the intermediary will report the breach (DeAngelo, 1981).

There are several reasons why the independence of an auditor could be threatened. Provision of certain non-auditor services such as tax advisory, or consultancy to audited entities has been noted as one such threat. This has been identified by the European Parliament, and consequently the European Parliament issued Directive 2014/56/EU and Regulation 537/2014 that prohibits the provision of certain non-audit services such as specific tax, consultancy and advisory services to the audited entity, to its parent undertaking and to its controlled undertakings within the Union.¹ These new EU audit rules became applicable on 17 June 2016. We critically assessed how these and other rules regulating the professions impact tax avoidance and tax evasion behaviour. Findings in prior literature in the area of audit and tax guided us in this task.

¹ However, Regulation 537/2014 clarifies that it should be possible for Member States to decide to allow the statutory auditors and the audit firms to provide certain tax and valuation services when such services are immaterial or have no direct effect, separately or in the aggregate, on the audited financial statements.

Objectives

The key issue is to understand the concept of independence and responsibility with regard to professions other than auditing/accounting where there is currently no requirement to be independent. Our focus is therefore on professions such as lawyers and tax advisors.

Our research allows us to critically assess the relevant rules in place and their efficacy. Our evidence-based findings will be the basis for any recommendations to the European Parliament's PANA on the potential of reform to current rules. The key findings of the study are as follows:

- The concept of independence is different for professionals other than auditors. For other professionals it relates principally to avoidance of conflicts of interest and financial independence from third parties
- Traditional independence of the legal profession from external influence, including the key element of legal professional secrecy, or legal professional privilege, has only limited relevance here, but independence can be seen in a role for tax advisors as gatekeepers between taxpayers and the tax system
- Circular 230 in the US and the new Standards of the UK tax advisors profession offer examples of a "gatekeeper" role for tax advisors
- Main elements of independence here: the avoidance of conflicts of interest, and financial and economic independence from third parties
- Main elements of responsibility in this analysis: the duty of care to clients and the duty to maintain confidentiality
- The current 3rd and new 4th AML Directives implement the international AML Recommendations of FATF
- Money laundering is effectively converting property to disguise its origins in criminal activity, known as predicate offences, which will in future expressly include tax crimes
- Legal and accounting professionals and tax advisors, have certain AML obligations to perform due diligence in respect of their clients and to disclose any suspicions that they have of money laundering, subject only to the requirements of legal professional secrecy or privilege
- The 4th AML Directive will require companies and trusts to make information available on their beneficial ownership, which will be available professional advisers for purposes of due diligence
- **United Kingdom** had the second largest number of intermediaries listed in the Panama Papers
- Accounting in the UK is regulated by Financial Reporting Council (FRC) and ICAEW. They appear to have a harder stance on misconduct – there was one case of exclusion from membership in December 2016 alone.
- The tax advisory profession in the UK is self-regulated. Tax disciplinary board deals with disciplinary matters of its members. It issued sanctions against 4 members in 2015, of which only one was an expulsion.
- The legal profession in the UK is self-regulated through an independent body and a disciplinary tribunal. The Solicitors Disciplinary Tribunal heard about 170 cases and struck off about 75 solicitors in the last year.
- AML legislation in UK applies to auditors, accountants, tax advisers and lawyers, but not to in-house professionals

- An interesting recent change is addition of new sanctions on professionals and others who promote tax avoidance schemes to comply with the Disclosure of Tax Avoidance Scheme (DOTAS), including penalties up to £1 million and public identification as a non-complier.
- Finance Act 2016 has provision to fine professionals and others who take deliberate action to help others evade paying tax on offshore income and assets up to 100% of the tax they helped evade
- **Germany** has the strongest EU economy in terms of GDP. Panama Papers find 197 offshore entities linked to Germany
- Accounting in a liberal profession in Germany and is overseen by Audit Oversight Committee. Two cases of reprimand with fines of EUR 5000, and EUR 15,000 for tax evasion was noted.
- Lawyers are members of Bundesrechtsanwaltskammer (BRAK), which is a self-regulatory organization. Survey statistics suggest that in 85% of the cases of money laundering analysed the suspects acted intentionally.
- Germany is one of the few countries where tax advising is a regulated profession and statutorily required to follow the rules of conduct. The Federal Ministry of Finance is the supervisory authority. There is no requirement to make enforcement cases public.
- All intermediaries in Germany need to follow the Anti Money laundering guidelines and there is a duty to report suspicious behavior
- German AML legislation includes tax evasion as a predicate offense for money laundering. This goes beyond the FATF recommendation
- **Luxembourg** based intermediaries obtained most offshore entities from Mossack Fonseca in the European Union
- Accountants (*comptables*) are regulated in Luxembourg as a liberal profession. Accountants may be penalised by a court for misconduct.
- The legal profession in Luxembourg is a self-regulated profession. The joint disciplinary and administrative council of the Luxembourg and Diekirch Bar Associations supervise it. The bar association does not mention that any decision and sanctions have been imposed.
- Tax advising is not a separate profession in Luxembourg
- The relatively strong independence and responsibility requirements for lawyers are primarily ensuring that the professionals work in the interests of the clients

- All intermediaries need to follow the AML/CTF requirements
- Although the bank secrecy has de facto been eliminated, Luxembourg still tries to protect secrecy in other areas. An example of this prosecution of whistle-blowers
- **Cyprus** is a small economy. The business services sector is one of the most dynamic and its activities have been supported by Cyprus' network of about 50 double tax treaties
- Accountants in Cyprus are members of Institute of Chartered Public Accountants of Cyprus (ICPAC). The enforcement of accountants is quite weak, only 3 disciplinary actions were issued in 2014. Statistics for other years is missing
- The legal profession in Cyprus is self-regulated through a disciplinary board. The lawyer's code of conduct puts considerable emphasis on independence
- Cyprus does not have a separate tax advisor profession
- The AML enforcement body, MOKAS is active, but has very few convictions
- Corporation tax in Cyprus is calculated based on audited financial statement
- **Switzerland** is a global financial center and tax haven
- The Swiss AML/CFT requirements only apply to financial intermediaries and cash handlers
- Tax advisors, lawyers and accountants are self-regulated, with the requirements primarily safeguarding the interests of clients
- Sanctions being imposed in Switzerland under AML/CFT regulation are considered insufficient to combat money laundering and terrorist financing
- **British Virgin Islands (BVI)** is one of the world's largest offshore corporate domicile – has about 500,000 active companies. It has a tax neutral environment. Companies need not file financial statements, nor have them audited
- BVI has no regulation for accounting or auditing profession. The proposed Professional Accountants Act (2015) is yet to be made into a law
- The legal profession in BVI is self-regulated. The disciplinary tribunal and the Virgin Islands general legal counsel, the two bodies expected to enforce the legal profession, have not yet been established

- BVI does not have a separate tax advisors profession
- All intermediaries need to follow the Anti-Money Laundering guidelines
- BVI has weak enforcement of AML – Mossack Fonseca’s BVI operations was only fined \$440,000. Disciplinary Tribunal, the enforcer of legal profession not established yet
- **United States of America** regulates all professional representing taxpayers before the IRS, including requirements as to independence and responsibility
- US imposes disclosure rules on promoters of tax avoidance schemes similar to the UK DOTAS rules, but has also had conduct requirements for professionals giving written opinions on certain tax shelter schemes

Following our in-depth analysis, we have the following **policy recommendations**:

- Development of an EU framework for compulsory common ethical standards for tax advisors in each country should be pursued
- An independently self-regulated tax advisor profession can balance the public interest with the need for independence from the tax authority
- Common standards for the disclosure of tax avoidance schemes should be established
- Penalties for promoters failing to disclose schemes as required at a proportionate level to encourage compliance
- It should be an offence for professionals assisting in tax evasion. It should also extend to the level of professional firms
- Encourage the improvement of professional standards and standards for exchange of information in tax havens
- Encourage the improvement of enforcement and its deterrent effect, particularly through improved public statistics on enforcement measure regarding professionals advising on tax
- Ensure that full advantage is taken of the inclusion of tax crimes as predicate offences under the 4th AML Directive

1. INTRODUCTION

Tax professionals, whether they are accountants, lawyers or members of a separate tax advisory profession, broadly speaking, can perform three different roles for their clients: the preparation of tax returns, giving advice on a client's tax position (tax planning), or representing the client in a tax dispute before the tax authority or before tribunals and courts (litigation and other dispute resolution). Lawyers are rarely involved in the first role, but they predominate in performing the third role, especially before tribunals and courts. This report is principally concerned with the second role, tax advice.

The Panama Papers demonstrate that different tax advising professionals may perform different functions for one client, especially in the case of a tax plan that involves more than one jurisdiction. An accounting firm in the client's home jurisdiction might propose a strategy. Lawyers might be involved in preparing contractual documentation to implement the strategy. The advice of professionals in other jurisdictions might be needed to complete the details of the strategy. Professionals in a number of jurisdictions, including relevant tax havens, might set up any entities needed to implement the strategy. Any rules to improve the incentives placed on tax professionals need to take into account the different functions that professionals perform in providing tax advice, and the fact that there may not be a single professional (or professional firm) that is responsible for the whole of a particular tax strategy.

The concept of independence in this analysis was initially motivated by that concept as it operates in relation to accountants performing audit functions. The role of the auditor is to verify that the accounts of a company present a true and fair view of the financial position of the company. The auditor is appointed by the shareholders while the company pays the auditor's fees. He or she is required to act impartially in the interests of the stakeholders in the company. The auditor must preserve sufficient independence from the company in order to ensure this impartiality.

The other professionals studied in this report do not have the same sort of relationship to their clients. They act directly for their clients and in their clients' interest. The data presented in this report show that existing rules concerning independence for these professionals principally relate to the avoidance of conflicts of interest. Chapter 3 discusses the nature of the concepts of independence and responsibility that are relevant to this analysis.

This analysis seeks to explore issues relating to independence and responsibility in relation to the accounting, legal and tax advisor professions. We start with an overview of the relevant concepts of independence and responsibility Anti-Money Laundering (AML) and Counter-Terrorism Financing (CTF) rules, then proceed to an in-depth view on the accounting, tax and legal profession in the UK before presenting our case studies on Germany, Luxembourg, Cyprus, Switzerland, the British Virgin Islands and the US, which allow us to develop our recommendations.

2. METHODOLOGY

MAPPING AND LEGAL ANALYSIS

Our team has started the mapping of rules and responsibilities that is key to the study. To allow for a systematic data collection, the first step was to produce a pilot for the UK, which then guided subsequent mappings across other jurisdictions. For the mapping, it was necessary to identify the relevant regulatory bodies for each jurisdiction and understand which binding (laws) and non-binding (self-regulation) etc. rules exist and what their enforcement value is. While the Directive 2014/56/EU has set EU-wide standards for the auditing profession in terms of independence, the nature of the client relationship in professions such as tax advisor and legal advisor is different and so are the independence requirements.

CASE STUDY JURISDICTIONS

Our methodology is based on a case study approach that will allow us to analyse the most relevant jurisdictions. The case study selection aims to demonstrate a good spread between “good” and “bad” examples across the EU, include an offshore location where legal advice is provided and can also draw on inspiration from the US. We have agreed jointly with the EP on the following cases: Switzerland, Luxembourg, Germany, UK, Cyprus, and the British Virgin Islands.

For this selection, we consulted the rankings on the Panama Papers made by the ICIJ². This allowed us to include the EU jurisdictions in the top 10 of jurisdictions where most intermediaries are located or which serve as a tax haven (United Kingdom, Luxembourg and Cyprus). Switzerland is a relevant location for the intermediaries that traditionally also work for EU citizen and therefore also part of our selection. The British Virgin Islands is included since most offshore entities were incorporated by Mossack Fonseca in the jurisdiction. In turn, Germany represents the EU countries where relatively few intermediaries and ultimate beneficiary owners were based (De Groen, 2017).

² <https://offshoreleaks.icij.org/>.

3. BASIC CONCEPTS AND GENERAL RULES

KEY FINDINGS

- The concept of independence is different for professionals other than auditors. For other professionals it relates principally to avoidance of conflicts of interest and financial independence from third parties
- Traditional independence of the legal profession from external influence, including the key element of legal professional secrecy, or legal professional privilege, has only limited relevance here, but independence can be seen in a role for tax advisors as gatekeepers between taxpayers and the tax system
- Circular 230 in the US and the new Standards of the UK tax advisors profession offer examples of a “gatekeeper” role for tax advisors
- Main elements of independence here: the avoidance of conflicts of interest, and financial and economic independence from third parties
- The main elements of responsibility in this analysis are the duty of care to clients and the duty to maintain confidentiality
- The current 3rd and new 4th AML Directives implement the international AML Recommendations of FATF
- Money laundering is effectively converting property to disguise its origins in criminal activity, known as predicate offences, which, under the FATF 2012 Recommendations and the 4th AML Directive will include tax crimes
- Legal and accounting professionals and tax advisors, when they engage in certain activities, have AML obligations to perform due diligence in respect of their clients and to disclose any suspicions that they have of money laundering, subject only to the requirements of legal professional secrecy or privilege
- The 4th AML Directive will require companies and trusts to make information available on their beneficial ownership, which will be available their professional advisers for purposes of diligence

CONCEPTS OF INDEPENDENCE AND RESPONSIBILITY IN PROFESSIONS GIVING TAX ADVICE

The concept of independence as it operates in relation to accountants performing audit functions reflects the fact that, while the company pays the auditor’s fees, the auditor must preserve sufficient independence from the company in order to be able to act impartially in the interests of the stakeholders in the company.

The other professionals studied in this report do not have the same sort of relationship to their clients. They act directly for their clients and in their clients’ interest. As the data presented in this report show, the rules concerning independence for these professionals principally relate to the avoidance of conflicts of interest, as well as financial independence from third parties.

The constitutional importance of an independent judiciary is well known. It is argued that it needs to be supported by a similar independence of the legal profession. This

is, however, a different concept from that applicable to auditors. The independence of the legal profession refers to lawyers' being able to represent the interests of their clients independent from external influence of third parties, especially governments. A key element of this is legal professional secrecy, or the equivalent common law concept of legal professional privilege, to protect confidential client information. International Bar Association (2016: 6, 8). This type of independence is relevant to this analysis to a limited degree in relation to the financial independence of tax advisors. Professional secrecy is a significant element of the rules of responsibility (towards clients in particular) in this analysis. Nevertheless, there is a line of literature that suggests that a concept of independence is relevant at least to lawyers who provide tax advice. In the US for several decades and as late as the 1950s 'a critical mass of tax lawyers appeared to see their role as helping clients fulfil their civic duty to engage in an accurate self-assessment of tax obligations' (Regan, 2014: 338). Thus authors such as Regan (2014) and Holmes (2010) argue that tax lawyers can be seen both as advocates (for their clients) and as trustees (to assist clients in complying with the law and its purpose and to protect the integrity of the legal system), and that it is feasible to expect them to play a role as gatekeeper for the tax system. The concept of the gatekeeper, developed in a wider context by Kraakman (1986), is as one who:

'can prevent misconduct by withholding services or certifications that are necessary for the wrongdoing to succeed – that is the "gate" through which the wrongdoer must pass. As part of this dynamic, the gatekeeper can provide helpful compliance monitoring and guidance functions as she works to assist the potential offender through the gate. A gatekeeper, however, should not be confused with a whistle-blower.' (Holmes, 2010: 191)

The gatekeeper as such does not have a role to report misconduct, and still acts for the interests of the client, but with a responsibility to deter misconduct where this can be done at a proportionate cost. Thus, the gatekeeper concept for tax lawyers (and arguably other tax-advising professionals) would require them to balance the advocate and trustee views of their relationship to their clients.

In order to develop the gatekeeper role, the responsibility of tax professionals to their clients would have to be redefined to incorporate this notion of independence. One way of doing this would be along the lines of the US Circular 230, described in ch. 10 below. It is interesting that amendments were made to the Circular in 1980 to change the view that tax advisors had of their responsibility to their clients. Under self-regulation it had been considered acceptable for lawyers and accountants to advise a client to proceed with a transaction even if its tax consequences had only a 10 to 20% chance of being sustained should the transaction be challenged by the tax authority. In a broad range of cases Circular 230 now requires that opinions must only be issued if they conclude that the transaction would be 'more likely than not' to succeed if challenged. The analysis defines independence in relation to the auditing profession as including the following key elements:

- an absence of conflicts of interest,
- an absence of financial or other dependence on the audit client,
- not having relationships with clients that could impair the auditor's objectivity and ability to identify and disclose any irregularities revealed in the course of the auditor's work.

The tax advisor profession in the UK has recently adopted a Standard that also has an element of this gatekeeper role. See ch. 4 below.

The key issue regarding responsibility identified by the analysis in relation to the auditing profession is:

- the extent to which it includes a responsibility to detect and report irregularities including fraud to the client or to relevant authorities.

ANTI-MONEY LAUNDERING LEGISLATION IN THE EU

Sources and Scope of Anti- Money Laundering Rules

Anti-money laundering legislation in EU Member States is based on a number of EU directives. The main current directive is the Third Anti-Money Laundering Directive (the "3rd AML Directive").³ It is in the process of being replaced by the Fourth Anti-Money Laundering Directive (the "4th AML Directive").⁴ Member States are required to implement the 4th Directive by 26 June 2017.⁵ Both are based on standards agreed internationally through the Financial Action Task Force (FATF). The AML Directive is based on the 2003 version of the FATF Recommendations (FATF, 2003). The 4th AML Directive is based on the 2012 version (FATF, 2012).

The FATF Recommendations apply to all the countries included in this Analysis. Switzerland and the United States are members of FATF (as are the EU, the United Kingdom and Germany),⁶ and the British Virgin Islands is a member of the Caribbean Financial Action Task Force (CFATF), whose members agree to implement the FATF Recommendations.⁷

The AML Directives define money laundering effectively as converting or transferring property derived from criminal activity in order to disguise or conceal its origin or to assist someone in committing or evading the consequences of such activity, as well as concealing the nature, location, movement or ownership of such property, or acquiring, possessing or using such property. In each case, knowledge that the property is derived from criminal activity is required, but this may be inferred from objective factual circumstances.⁸ Following the FATF Recommendations, which do not provide a separate definition, these definitions are based on the wording of the Vienna and Palermo Conventions.⁹

³ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:en:PDF>.

⁴ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L0849>.

⁵ Article 76, 4th AML Directive.

⁶ FATF, 'FATF Members and Observers' (2017) available at <http://www.fatf-gafi.org/about/membersandobservers/>.

⁷ CFATF, 'What are the FATF Recommendations and how do they affect our Members?' (2016), available at <https://cfatf-gafic.org/index.php/what-are-the-fatf-recommendations-and-how-do-they-affect-our-members>.

⁸ Article 1(2) and (5) of the 3rd AML Directive, and Article 1(3) and (6) of the 4th AML Directive.

⁹ The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention), Article 3(1)(b) and (c)(i) and (iv) and (3), and the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention), Article 6(1) and (2)(f). The Conventions are available at https://www.unodc.org/pdf/convention_1988_en.pdf and http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC_Convention/TOCebook-e.pdf, respectively. See FATF (2012: 34).

Criminal activity is defined in terms of what are referred to as “predicate offences”. Originally focused on drug trafficking, the FATF Recommendations provide that they should include all serious offences, offences subject to a maximum penalty of one year in prison, or subject to a minimum penalty of six months in prison, depending on the approach of each country. They should include at least a range of offences in each of a list of designated categories, which now include tax crimes.¹⁰ The 3rd AML Directive defines criminal activity as including, in addition to offences relating to illicit drugs, terrorism and organised crime, all offences subject to these maximum or minimum penalties.¹¹ One of the main changes made in the 4th AML Directive is to expressly include tax crimes relating to direct and indirect taxes that have such penalties.¹²

BINDING AND NON-BINDING RULES OF INDEPENDENCE AND RESPONSIBILITY

Under FATF Recommendations 22 and 23 lawyers, notaries, other legal professionals and accountants have obligations only when they are assisting clients with certain specific activities, such as managing client assets and accounts, organising contributions to create, operate or manage companies, or creating, operating or managing companies or trusts. Note that this does not include merely giving legal advice or legal opinions without actually carrying out the transactions advised on,¹³ and so would include giving tax advice unless done in the course of one of the listed activities. For the EU, however, the 3rd and 4th AML Directives extend the scope to cover all activities of auditors, external accountants and tax advisor.¹⁴

Within these activities, professionals must perform customer due diligence when establishing business relations, when carrying out occasional transactions with a value above €15,000, when there is a suspicion of money laundering or terrorist financing when they have doubts about previously obtained information identifying the customer (client). They are then required to identify the customer reliably, to identify the beneficial owner, including reasonable measures to verify the identity of the beneficial owner, to understand the purpose and nature of the business relationship, and to conduct on-going due diligence throughout the transaction to confirm that it is consistent with their knowledge of the client. The exact scope of the due diligence required can be adjusted according to the risks involved. Records on clients and transactions need to be kept for five years, so as to be able to respond to information requests from the relevant authorities.¹⁵

In addition, professionals must report suspicions, including reasonable grounds for suspicion, of criminal activity, including attempts to commit a predicate offence. The reports are to be made directly to the national financial intelligence unit (FIU) or via a self-regulatory body where permitted by national law. Professionals cannot be held liable under other laws or contractual provisions for a report made in good faith, and they are obliged not to disclose to the client or to third parties that a disclosure has

¹⁰ FATF (2012: 34, 117-18). The concept of designated categories of offences was introduced in FATF (2003).

¹¹ Article 3(4) and (5), 3rd AML Directive.

¹² Article 3(4), 4th AML Directive.

¹³ FATF (2008), paras 12-13.

¹⁴ Article 2(1)(3) of each AML Directive. It is unclear whether the reference to “tax advisors” includes lawyers and notaries when giving tax advice. Although the operative terms of the AML Directives refer to tax advisors separately, Recital (19) to the 3rd AML Directive says that legal professional should be subject to the obligations under the Directive when providing tax advice. This ambiguity appears even more strikingly from the wording of Recital (9) to the 4th AML Directive.

¹⁵ FATF (2012), Recommendations 10 and 11.

been made.¹⁶ On the other hand, professionals are not obliged to make a report regarding information obtained where professional secrecy obligations (legal privilege) apply, *i.e.* in ascertaining the client's legal position, representing the client in judicial proceedings or advising on instituting or avoiding proceedings.¹⁷

The main innovation introduced by the 4th AML Directive, following the terms of FATF (2012), Recommendations 24 and 25, is the requirement that companies and other legal entities and trusts and other legal arrangements hold information on their beneficial ownership and make it available as required by the Directive. In particular, for the purposes of this analysis, they must make it available to professionals performing the due diligence obligations outlined above, although the professionals are not to treat that information as their exclusive source of due diligence information. The information is also to be made available through a central register.¹⁸ As Member States are not yet required to implement these provisions, and as they have only limited impact on professional intermediaries, they are not discussed further here.

¹⁶ Articles 22, 26, 27 and 28, 3rd AML Directive, articles 33, 34, 37, 38 and 39, 4th AML Directive.

¹⁷ Article 23, 3rd AML Directive, article 34(2), 4th AML Directive. Recitals (20) and (9) of the 3rd and 4th AML Directives respectively confirm that the conditions listed are intended to describe circumstances where the obligation of professional secrecy applies. Recitals (21) and (10) respectively extend this to non-legal professionals who are entitled to perform these tasks. See also FATF (2012), Interpretive Note to Recommendation 23. Recital (20) to the 3rd AML Directive adds that the protection of professional secrecy does not apply where professionals are implicated in, or in assisting their clients in, money laundering or terrorist financing.

In the 4th AML Directive the exemption from reporting only applies "to the strict extent" that the information received is covered by professional secrecy.

¹⁸ Articles 30 and 31, 4th AML Directive.

4. UNITED KINGDOM

KEY FINDINGS

- UK had the second largest number of intermediaries listed in the Panama Papers
- Accounting in the UK is regulated by Financial Reporting Council (FRC) and ICAEW. They appear to have a harder stance on misconduct – there was one case of exclusion from membership in December 2016 alone.
- The tax advisory profession in the UK is self-regulated. Tax disciplinary board deals with disciplinary matters of its members. It issued sanctions against 4 members in 2015, of which only one was an expulsion.
- Legal profession in the UK is self-regulated through a disciplinary tribunal. The Solicitors Disciplinary Tribunal heard about 170 cases and struck off about 75 solicitors
- AML legislation applies to auditors, accountants, tax advisors and lawyers, but not to in-house professionals
- An interesting recent change is addition of new sanctions on professionals and others who promote tax avoidance schemes to comply with the Disclosure of Tax Avoidance Scheme (DOTAS), including penalties up to £1 million and public identification as a non-complier.
- Finance Act 2016 has provision to fine professionals and others who take deliberate action to help others evade paying tax on offshore income and assets up to 100% of the tax they helped evade

RELEVANCE TO THE CURRENT STUDY

In the United Kingdom London is one of the world's leading financial centres and is also a leading centre for professional services (Z/Yen Group Ltd, 2010: 30). The UK does not have any significant bank secrecy laws (IMF, 2011: 11). English law is often used for international contracts, and two-thirds of the litigants in the Commercial Court of England and Wales are foreign (Portland Communications, 2016). Its three Crown Dependencies, Jersey, Guernsey and the Isle of Man, as well as a number of its Overseas Territories, including the British Virgin Islands, included in these case studies, are well known as offshore financial centres. Consistently with this, 1,924 of the roughly 14,000 intermediaries with which Mossack Fonseca worked according to the Panama Papers were based in the UK, the second largest number after Hong Kong SAR (Carvajal, et al., 2017).

OVERVIEW OF PROFESSIONS INCLUDED

There are separate legal systems in England and Wales, Scotland, and Northern Ireland. They are based on common law, except in Scotland, which has an uncodified civil law system modified by exposure to the common law. For convenience, only the position in England and Wales is dealt with here.

In the UK, anyone can call themselves an accountant irrespective of their professional qualification. Statutory auditors are regulated under the Companies Act 2006 as amended by The Statutory Auditors and Third Country Auditors Regulations 2016 (S.I. 2016/649) (which implements Regulation (EU) No 537/2014 and Directive 2014/56/EU) However, there are two main bodies that accountants can be affiliated

with – the Institute of Chartered Accountants of England and Wales (ICAEW) and the Association of Chartered Certified Accountants (ACCA). There are also four other bodies which accountants can gain membership to. These bodies act as recognised supervisory bodies for statutory auditors under the supervision of the Financial Reporting Council (FRC). The focus here is on the regulation of accountants and auditors by the ICAEW and the FRC.

By far the largest legal profession in England and Wales is that of solicitor (approximately 142,000). The only other relevant legal profession is that of barrister, of whom there are only about 15,000. All the legal professions are regulated under the Legal Services Act 2007 (LSA). Each profession has an approved regulator. For solicitors the Solicitors Regulation Authority (SRA), an independent body of The Law Society, performs this function, while for barristers it is the Bar Standards Board, an independent body of The General Council of the Bar.

Solicitors give legal advice, including tax advice and assist with the legal aspect of transactions, for example by preparing legal documents, such as contracts and documents for establishing and registering companies, to transfer property, and wills and other documents creating trusts. They also conduct litigation for clients. However, it is barristers or solicitors who are solicitor-advocates who appear in the higher courts. Barristers also give formal legal opinions on transactions, including on the tax aspects. In most instances, barristers deal only indirectly with clients, being brought in by solicitors or other professional advisors.

Only qualified persons may hold themselves out to be a solicitor, barrister or other legal professional. However, it is only “reserved legal services” that must be provided by a legal professional. This does not include legal advice that does not involve, for example, the preparation of legal documents. Thus an accountant or a tax advisor may offer advice on the legal aspects of a client’s tax affairs, provided that the advisor does not claim to be a solicitor.

In the UK, anyone can equally call themselves a tax advisor irrespective of their professional qualification. There are two main professional bodies that regulate tax advisors, the Chartered Institute of Taxation (CIOT) and the Association of Taxation Technicians (ATT). The members of both are self-regulated. The tax profession does not have any statutory regulations, but does have conduct guidelines.

PROFESSIONAL OBLIGATIONS UNDER ANTI-MONEY LAUNDERING LEGISLATION

The AML/CTF regime in the UK is well regarded, but was improved following a mutual evaluation report by FATF in 2007 and to implement the 3rd AML Directive (IMF, 2011). The Directive is implemented under the Proceeds of Crime Act 2002 (POCA). POCA extends the scope of AML activity covered in the UK in that money laundering can arise from relatively minor acts, including minor tax evasion and it is not necessary that there has been a deliberate attempt to obscure the ownership of illegitimate funds.

The predicate offences in the UK include the offences of cheating the public revenue (the common law offence regarding serious tax evasion), fraudulent evasion of income tax, concealing documents required to be produced under the POTAS scheme (see below).

The scope of the professional secrecy exceptions from AML obligations is similar to that for legal professional privilege and its crime/fraud exception in England and

Wales, except that they also apply to auditors, external accountants and tax advisors. Suspicions of money laundering must be disclosed to the national crime agency (NCA).

The regulatory supervisors for each profession, including the SRA (solicitors) and the CIOT and ATT (tax advisors) supervise the regulated sector. They have powers to obtain information with or without a warrant, to enter premises with or without a warrant, and to obtain court orders in support of these powers. In addition to the supervisors' powers to impose civil penalties, there are a number of offences under the AML legislation for failure to disclose, tipping off a client or prejudicing an investigation for which the penalty can include imprisonment for up to two to 14 years.

The role of the supervisory authorities means that failures to comply with the AML legislation may come to light in the course of other investigations of compliance with more general ethical and administrative requirements.

Although preventive measures and internal controls were considered to be good, particularly following the 2007 changes, enforcement of AML rules in the UK at the highest level in the periods 2001 to 2007 and 2007 to 2010, by the senior regulator at the time, the Financial Services Authority seemed to have resulted in a relatively low number of cases: 18 in the first period, and 7 in the second (IMF, 2011). There is no separate information on enforcement of AML rules by the professional regulatory bodies.

PROFESSIONAL OBLIGATIONS UNDER UK TAX LEGISLATION

UK tax legislation imposes a number of rules on independence and responsibility on all professionals giving tax advice in the UK, including accountants, tax advisors and lawyers.

Under the rules of the disclosure of tax avoidance scheme (DOTAS) in Finance Act 2004, Part 7, professionals and other persons promoting to taxpayers a tax planning scheme that falls within any of a number of 'hallmarks' must report the scheme to the tax authority, Her Majesty's Revenue and Customs (HMRC), and taxpayers using such a scheme must report this on their tax returns. Tax professional who fail to comply with this requirement risk being labelled a POTAS (Promoter of Tax Avoidance Schemes) under Finance Act 2014, Schedule 34.¹⁹ Failing to comply with the DOTAS regime can have several adverse consequences including penalties up to £1 million, being publicly identified as a 'monitored' promoter, and enhanced information powers for HMRC against the professional.

Finance Act 2016 has given HMRC new powers to impose on professionals who help others evade UK tax in relation to offshore income or assets fines of up to 100% of the tax they helped evade.

A 'tax agent' (someone who assists clients with their tax affairs) may be subject to sanctions for engaging in dishonest conduct with a view to bringing about a loss of tax revenue, typically equivalent to assisting dishonestly in tax evasion. HMRC has special powers under Finance Act 2012, Schedule 38, to obtain information where it suspects such dishonest conduct, and can impose a penalty of between £5,000 and £50,000.

¹⁹ The objective of POTAS scheme is to deal with the threat posed by tax advisors whom HMRC considers to be big risk. The aim of DOTAS scheme is to obtain early information of tax arrangements and how they work.

The POTAS scheme was only introduced in 2014. HMRC expects that the POTAS scheme will work mainly through a strong deterrence effect. HMRC does not expect to issue many conduct notices, but expects that the conditions will typically be complied with, so that very few monitoring notices are likely to be issued.

The Criminal Finances Bill, currently before Parliament, would strengthen the UK AML regime in a number of respects, but it would also introduce offences for corporate failure to prevent the facilitation of UK and foreign tax respectively. If a person giving tax advice facilitates evasion by a client, that is likely to be an offence under current law as aiding, abetting, procuring the offence, or performing “an act capable of encouraging or assisting the commission of [the offence], intending to encourage or assist in the offence, or believing that the offence will be committed and that the act will encourage or assist its commission.”²⁰ However, it is difficult to hold the firm (e.g. a law firm or accounting firm) for which the person advising works, as corporate criminal liability in the UK is generally limited to actions of an individual who is a “directing mind” of the corporate entity (Dawson, et al., 2016:29).

The new offences, therefore, have three elements: criminal tax evasion by a taxpayer (either of UK tax or of foreign tax in a way that would be an offence under both UK and the relevant foreign law), criminal facilitation of the evasion by an “associated person”, and a failure by a “relevant body” on whose behalf the associated person was advising the taxpayer. The relevant body can be a company or other corporate entity or a partnership or similar entity. The relevant body is protected from liability if it can prove either that it had reasonable prevention procedures in place or that it was not reasonable to expect it to have any prevention procedures in place. The Chancellor of the Exchequer will have to produce guidelines as to possible prevention procedures.²¹ The requirement that the prevention procedures be “reasonable” has been chosen following consultation as an alternative to “adequate” to indicate that they only have to be proportionate, not fool-proof.²²

BINDING AND NON-BINDING RULES OF INDEPENDENCE AND RESPONSIBILITY

Auditors and Accountants

The accountancy bodies issue guidelines on conduct, including the ICAEW Code of Ethics.²³ The guidelines are not binding law; however, any breach may lead to disciplinary inquiry by the FRC and the accountancy bodies.

Independence in the accounting profession mainly takes the form of financial independence awareness of familiarity issues. The ethics guidelines encourage members to put in safeguards against such independence issues.

Responsibility of an accountant involves providing professional services with professional competence, integrity, and maintaining confidentiality. However, the accountant also has a responsibility to act in the interest of the public. In situations,

²⁰ Dawson, et al. (2016: 31), quoting the Serious Crime Act 2007, s. 45.

²¹ Criminal Finances Bill 2016-17, cls 41-44. The current version at time of writing is HL Bill 104, the version as introduced to the House of Lords following consideration by the House of Commons, available at <http://services.parliament.uk/bills/2016-17/criminalfinances/documents.html>. A draft of the guidance was published with the draft bill in HMRC (2016).

²² See the Explanatory Notes to HL Bill 104, para 294, available at <https://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0104/17104en06.htm>, and Dawson (2016: 38).

²³ The Code of Ethics is available at <http://www.icaew.com/en/technical/ethics/icaew-code-of-ethics/icaew-code-of-ethics>.

where there is evidence of fraud or misconduct, the member has a duty to report it after considering confidentiality requirements.

Lawyers

The conduct of solicitors is regulated by the SRA Handbook,²⁴ made under the Solicitors Act 1974. The Handbook includes the SRA Principles 2011,²⁵ the SRA Code of Conduct 2011²⁶ and the SRA Disciplinary Procedure Rules 2011.²⁷

The duties imposed on solicitors generally apply both to solicitors in private practice, and to in-house solicitors, that is solicitors employed by a business to act professionally for that business.

Independence for solicitors requires them to act in their clients' interest. This means that they must not act for a client where there is a conflict between the interest of the client and that of another client (unless the clients give informed consent and the solicitors considers that it will benefit the clients) or that of the solicitor (Chapter 3 of the Code). This would limit a solicitor advising a client where the solicitor was involved in and could benefit from the client's business. Similarly, where the solicitor is also part of another advisory business, the solicitor must make clear in which capacity the solicitor is advising the client, and a solicitor must not compromise the ability to independently (*i.e.* without conflict of interest) advise a client when recommending others, such as financial advisors, to the client (Chapter 12 of the Code).

In terms of **responsibility**, under the Chapter 4 of the Code of Conduct solicitors have a duty to keep the affairs of their clients confidential, unless there is an obligation to disclose. This is a professional duty. It is to be distinguished from legal professional privilege. The Code does not refer to any previous role that a solicitor has had, such as previous employment with the tax authority, HMRC.

Legal professional privilege applies to solicitors and barristers, including those working in-house (Law Society, 2013: ch. 6). Advice privilege protects confidential communications between a lawyer and client either giving or seeking legal advice, including related communications regarding a transaction on which the lawyer is giving legal advice. Litigation privilege is wider and protects confidential communications between a lawyer and a client, agent or third party with respect to litigation in progress or reasonably in prospect regarding advice on or evidence to be used in the litigation. Privilege does not cover documents already in existence, even if communicated to the lawyer.

Under the crime/fraud exception advice to assist a client in not committing a crime or to warn a client that a proposed action could be a crime is protected by privilege, but privilege does not cover documents that are part of criminal activity, or communications made in order to obtain advice with the intention of committing an offence.

In addition, if a lawyer advises a client on a transaction that the lawyer knows or suspects, on the basis of *prima facie* evidence, constitutes a principal money laundering offence, privilege no longer exists and the transaction must be disclosed under the AML rules.

²⁴ <https://sra.org.uk/solicitors/handbook/welcome.page>.

²⁵ <https://sra.org.uk/solicitors/handbook/handbookprinciples/content.page>.

²⁶ <https://sra.org.uk/solicitors/handbook/code/content.page>.

²⁷ <https://sra.org.uk/solicitors/handbook/discproc/content.page>.

Tax Advisors

The Joint Professional Standards Committee of the CIOT and the ATT have developed the Professional Rules and Practice Guidelines (PRPG),²⁸ Professional Conduct in Relation to Taxation (PCRT)²⁹ to regulate the conduct of their members. PCRT has been developed in collaboration with five other tax and accounting organisations, including the ICAEW.

Responsibility of a tax advisor under the PRPG involves providing tax services with professional competence, integrity, and maintaining confidentiality. However, the tax advisor also has a responsibility to act in the interest of the public.

Independence for tax advisors requires that advisors maintain financial independence. The PRPG encourage the members to not have any other financial involvement with client such as through investment in the client's business or lending money to the client. Tax advisors must also remain professionally independent by avoiding conflicts of interest.

Providing consultation or secondment to HMRC could lead to potential conflict of interests. In this case, the PRPG and PCRT require that the member should draw the HMRC's attention to any unintended consequences he identifies. The member should also avoid involvement in the affairs of any taxpayer he was aware of or dealt with at HMRC for a significant period.

PCRT sets out guidelines applicable specifically to giving tax advice. The most important change in the new version is the addition of a new Standard on advising on tax planning in response to a request from the UK government in 2015. This requires members not to promote tax planning to achieve results that are "contrary to the clear intention of Parliament" or that are "highly artificial or highly contrived" seeking to exploit shortcomings in the law (PCRT, para. 2.29). The co-author bodies note that this should not affect the vast majority of tax advice, and that it does not override legal privilege or statutory or professional regulation (ATT and CIOT, 2017: 4).

ENFORCEMENT

The FRC provides audit enforcement through its Conduct Committee and, where necessary, Disciplinary Tribunals.³⁰ Both the FRC and the accountancy bodies have powers to issue sanctions ranging from fines to expulsion. A preliminary reading of disciplinary actions taken by ICAEW suggests that it takes a much harder stance than the TDB does for tax advisors (see below). For example, in the month of December 2016 alone, there was one exclusion from membership of ICAEW and several fines.

Under the Disciplinary Procedure Rules 2011³¹ the SRA deals with breaches by solicitors by issuing a written rebuke or a fine. The SRA can also bring more serious cases before the independent Solicitors Disciplinary Tribunal, which can strike off or suspend a solicitor or impose greater fines than the SRA.³²

²⁸ Most recent edition effective 31 March 2011, available at <http://www.tax.org.uk/professional-standards/professional-rules/professional-rules-and-practice-guidelines>.

²⁹ Most recent edition effective 1 March 2017, available at <http://www.tax.org.uk/pcrt2016>.

³⁰ <https://frc.org.uk/Our-Work/Enforcement/Enforcement.aspx>

³¹ <https://sra.org.uk/solicitors/handbook/discproc/content.page>.

³² Solicitors Act 1974, s. 47.

The SRA is active in enforcement; however, there is little published information from which to determine how effective it is. The SRA published 50 decisions issued between 14 and 30 March 2017.³³ In two cases a referral was made to the Solicitors Disciplinary Tribunal, two rebukes were issued, and in three cases a settlement was reached involving admissions by the solicitors. There were no fines. Interventions were made in eleven cases due to breaches of the Principles. The remaining cases did not involve breaches of the Principles. In 2016 the Solicitors Disciplinary Tribunal heard about 170 cases and struck off about 75 solicitors.³⁴ It is not readily possible to say whether any of the cases related to tax advice.

The CIOT and the ATT have together established the Taxation Disciplinary Board (TDB) to deal with disciplinary matters of their members. Although the PRPG and PCRT do not have binding statutory force, any breach may lead to disciplinary action by the TDB.

In 2015 the TDB considered 54 complaints. Hearings were held in five cases, resulting in sanctions against four members, of which two were censures, one was a suspension, and one was expulsion (TDB, 2016). Most of the complaints were either withdrawn or rejected at a stage prior to hearing as trivial or outside the jurisdiction of the TDB.

³³ <http://www.sra.org.uk/consumers/solicitor-check/recent-decisions/recent-decisions.page> (as at 3 April 2017).

³⁴ Calculated from Solicitors Disciplinary Tribunal Sanction Spreadsheet 2016, available at <http://www.sra.org.uk/consumers/solicitor-check/recent-decisions/recent-decisions.page>.

5. GERMANY

KEY FINDINGS

- Germany has the strongest EU economy in terms of GDP. Panama Papers find 197 offshore entities linked to Germany
- Accounting in a liberal profession in Germany and is overseen by Audit Oversight Committee. Two cases of reprimand with fines of EUR 5000, and EUR 15,000 for tax evasion was noted.
- Lawyers are members of Bundesrechtsanwaltskammer (BRAK), which is a self-regulatory organization. Survey statistics suggest that in 85% of the cases of money laundering analysed the suspects acted intentionally.
- One of the few countries where tax advising is a regulated profession and statutorily required to follow the rules of conduct. The Federal Ministry of Finance is the supervisory authority. There is no requirement to make enforcement cases public.
- All intermediaries need to follow the Anti-Money laundering guidelines and there is a duty to report suspicious behaviour
- German AML legislation includes tax evasion as a predicate offense for money laundering. This goes beyond the FATF recommendation

RELEVANCE TO THE CURRENT STUDY

Germany is the strongest EU economy in terms of GDP.³⁵ Due to its large economy and finance centre, and strategic location in Europe and its strong international linkages, Germany is susceptible to money laundering and terrorist financing.³⁶ The ICIJ's Offshore Leaks Database finds 197 offshore entities that are linked to Germany.³⁷ The increasingly important role of auditors, tax advisors and lawyers in combatting AML and CTF has been recognized in a 2002 law in Germany.³⁸ This law introduced a duty to report suspicious behaviour similar to that which existed already for banks. Following a series of balance sheet scandals in the US and in Germany (such as Enron and Ceyoniq, Phenomedia), reforms of the audit sector were also undertaken through a series of three laws which included the creation of the Auditor Oversight Body (*Abschlussprüferaufsichtsstelle*).³⁹ The FATF's 2009 report on Germany,⁴⁰ which found numerous deficits in the status quo regarding AML and CTF strategies, gave rise to a further refinement of the law in 2011.⁴¹

³⁵ Eurostat, GDP and main components, last update 15 March 2017.

³⁶ <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Germany%20full.pdf>

³⁷ ICIJ, Offshore Leaks Database, <https://offshoreleaks.icij.org/search?utf8=%E2%9C%93&q=&c=DEU&j=&e=&commit=Search>

³⁸ Geldwäschebekämpfungsgesetz of 8. August 2002, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//%5B@attr_id%27bgbl102s3105.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl102s3105.pdf%27%5D_1489488815180

³⁹ IWW (2005), Berufsrecht: Das Bilanzrechtsreformgesetz, das Bilanzkontrollgesetz und das Abschlussprüferaufsichtsgesetz sollen das Vertrauen in die Abschlussprüfung wieder herstellen, <http://www.iww.de/astw/archiv/-berufsrecht-das-bilanzrechtsreformgesetz-das-bilanzkontrollgesetz-und-das-abschlussprueferaufsichtsgesetz-sollen-das-f52940>

⁴⁰ FATF, Anti-Money Laundering and Combating the Financing of Terrorism <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Germany%20full.pdf>

⁴¹ Gesetz zur Optimierung der Geldwäscheprävention of 29.12.2011, <http://dipbt.bundestag.de/extrakt/ba/WP17/361/36164.html>

OVERVIEW OF THE PROFESSIONS INCLUDED

German **public accountants** and statutory **auditors** exercise a liberal profession and have to be members of the *Wirtschaftsprüferkammer* (WPK), the statutory organisation, which is a corporation under public law. The appointment as *Wirtschaftsprüfer* (auditor) requires the successful completion of an examination. They are also required to take a professional oath⁴²: Auditors are allowed to provide tax advice to their clients and in line with the regulations.⁴³ At the beginning of 2017, the WPK had 21,248 members. The auditing profession is principally governed by the German Public Accountant Act (*Wirtschaftsprüferordnung – WPO*) and the Professional Statutes for Auditors/Statutory Accountants (*Berufssatzung für Wirtschaftsprüfer/vereidigte Buchprüfer – BS WP/vBP*).⁴⁴ Oversight of auditors in Germany is performed by the Audit Oversight Commission (AOC).⁴⁵

The Federal Chamber of **Lawyers** (Bundesrechtsanwaltskammer - BRAK) is the umbrella organization that represents the professional-policy interests of currently some 142,800 **lawyers**. This is a self-regulatory organization. The Federal Prosecutor's Office in Germany is committed to safeguarding legal freedom from state interference and for the independent position of the legal profession. The legal profession is regulated primarily by the Federal Lawyers' Office (BRAO). BRAO supervises application of the Professional Regulations of Lawyers (BORA) and the Professional Code of Professional Conduct (FAO).⁴⁶ Lawyers are allowed to provide tax advice according to §3 of the German Tax Consultancy Act (StBerG). Lawyers are also allowed to collaborate with tax consultants to jointly practise their professions (BRAO § 59a).⁴⁷

Tax advisors form a separate liberal profession in Germany⁴⁸. Only members of *Bundessteuerberaterkammer* (BStBk), the statutory organisation, who have passed the requisite exams and completed required experience can become tax advisors. The statutory organisation counted 95,007 members in 2015⁴⁹. The rights and obligations of the tax advisor are governed specifically by the StBerG, the Implementing Regulations of the German Tax Consultancy Act (DVStB) and the Professional Rules and Practice Guidelines of the Federal Chamber of Tax Advisors (BOSTB).⁵⁰

⁴² "Ich schwöre, daß ich die Pflichten eines Wirtschaftsprüfers verantwortungsbewußt und sorgfältig erfüllen, insbesondere Verschwiegenheit bewahren und Prüfungsberichte und Gutachten gewissenhaft und unparteiisch erstatten werde, so wahr mir Gott helfe". (§ 17 WPO)

⁴³ Ibid., §2.

⁴⁴ <http://www.wpk.de/pdf/wpo.pdf>, <http://www.wpk.de/pdf/bs-wpvbp.pdf>

⁴⁵ <http://www.apak-aoc.de/en/about-aoc/auditor-oversight-in-germany.html>

⁴⁶ <http://www.brak.de/fuer-anwaelte/berufsrecht/>

⁴⁷ http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao-stand-6-12-2011-mit-korr-191f-2014.pdf

⁴⁸ In Germany, the profession of tax advisors took shape at the end of the 19th century. The requirement for professionals to pass an exam to acquire a licence was put in place in 1933 and at the time could not be issued to Jews or communists. Organisational forms were widely varied after 1945 but was compiled into professional law in 1961 and the profession as we know it today was laid down in an act from 1972, see

<http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Ministerium/Geschaefsbereich/Bundesfinanzakademie/Steuermuseum/Museumsfuehrer/21-die-entwicklung-des-steuerberatenden-berufes.html>.

⁴⁹ BStBk, Berufsstatistik – Zahlen und Fakten aus den Kammern,

https://www.bstbk.de/export/sites/standard/de/ressourcen/Dokumente/01_bstbk/berufsstatistik/Jahresbericht_2015_Berufsstatistik.pdf.

⁵⁰ Section 2 of - An english translation of the information on Chambers of Tax Advisors and the profession of tax advisors - Federal Chamber of Tax Advisors (Bundessteuerberaterkammer)

https://www.bstbk.de/export/sites/standard/de/ressourcen/Dokumente/02_steuerberater/berufsrecht_steuerberater/2017-02-28_english_translation_fin.pdf

PROFESSIONAL OBLIGATIONS UNDER ANTI-MONEY LAUNDERING LEGISLATION

German AML regulations can be found in the German Money Laundering Act (Geldwäschegesetz – GwG) and the Banking Act (Gesetz über das Kreditwesen - KWG).⁵¹ The current German regulations implement the 3rd AML Directive to FATF standards. The GwG established Germany's financial intelligence unit (FIU) within the Federal Criminal Police Office (BKA), imposes customer due diligence obligations on a wide range of financial institutions, and requires these financial institutions to submit suspicious transaction reports to the competent authorities. The German AML regulations include human trafficking, drug trafficking, corruption, bribery and tax evasion as some of the predicate offences. Note that making tax evasion a predicate offense for money laundering goes beyond the express requirements of the 2003 version of the FATF recommendations and the 3rd AML Directive. All predicate offenses for money laundering under German law extend to conducts that occurred abroad, provided that dual criminality is met (FATF report, 2010).⁵²

The German AML/CFT obligations encompass a wide range of businesses and professions including accountants, auditors, lawyers and tax advisors. In some cases, the scope of coverage in Germany is broader than that called for in the FATF recommendations. The AML Act requires reporting entities to submit suspicious transaction reports to the relevant Land police or prosecutorial body with a copy to the FIU, which is the national centre for receiving suspicious transaction reports. AML is enforced in Germany by the respective supervisory bodies of the professions. Examples of such supervisory bodies capable of enforcing AML are Bar associations, the chamber of tax advisors and the chamber of public accountants. Lawyers, patent attorneys, notaries, auditors, accountants, and tax advisors are all subject to strict professional secrecy obligations. A court order is required for a law enforcement investigator to obtain customer due diligence information from a member of the relevant professions. Also, the relevant professions are not permitted to give testimony in a legal proceeding about any client information that is subject to professional secrecy provisions, including customer due diligence information. However, under AML the obligation to report suspicious activity comes into effect if they know that their client is deliberately using their legal advice for the purpose of money laundering or terrorist financing (FATF report, 2010).

For the period from 2004 to 2008, Germany received a total of 42,783 suspicious transaction reports of which 1,636 cases resulted in convictions. During the same period, Germany confiscated property worth € 1,144,598,368 (FATF report, 2010). On 22 February 2017, the bill for the revised German Money Laundering Act (AMLA) implementing the 4th AML Directive was adopted and will come into effect on 26 June 2017.

BINDING AND NON-BINDING RULES OF INDEPENDENCE AND RESPONSIBILITY

Auditors and Accountants

Independence for auditors means personal and economic independence and refusing commissions or benefits of any type, similar to the situation of tax advisors

⁵¹ https://www.gesetze-im-internet.de/bundesrecht/gwg_2008/gesamt.pdf, <https://www.gesetze-im-internet.de/kredwg/>

⁵² <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Germany%20full.pdf> (FATF report, 2010)

(§55a WPO). Lastly, they cannot act in cases of conflict of interest (§55 WPO). Auditors must refuse services that would violate their duties as auditors or if there is a risk of the auditor being biased (§49 WPO). They also have the obligation to act impartially in the production of auditor reports, and are required to keep an independent critical attitude while exercising their profession and uphold the reputation of the profession pursuant to §43 WPO. **Responsibility** means auditors have to carry out their duties independently, conscientiously and confidentially. This is also laid down in §43 WPO.

Lawyers

Independence for lawyers means that a lawyer may not enter into any ties that pose a threat to their professional judgement. It also requires a lawyer to refuse to accept cases involving a conflict of interest. A lawyer is also prohibited from accepting cases that he was previously concerned with in the role of a judge, an arbitrator, a public prosecutor, a member of the public service, a notary or as the administrator of a notary's office.⁵³ Confidentiality is one of the pillars of the legal profession and cannot be broken and applies without exception unless it is necessary for defence against claims of self or the client. However, confidentiality can in certain circumstances be overridden under AML legislation. Under AML legislation, the professional secrecy obligations of lawyers take precedence unless the lawyers are aware that the contracting parties are deliberately involved/have used the knowledge gained in money laundering or terrorist activities. The intermediaries are required to report suspicious activities to the Federal Criminal Police Office.

Tax Advisors

Tax advisors must comply with the statutory requirements of the professional conduct rules, including the rules on responsibility, independence and confidentiality. The requirement to follow the AML legislation is binding on all the intermediaries. Confidentiality can exceptionally be waived under AML legislation (Geldwäschegesetz §11).

Independence for tax advisors takes the form of personal and economic independence, in particular, it is suggested that they do not accept commissions or benefits of any type. **Responsibility** for tax advisors requires that they follow the rules of independence and accept the duties of a professional tax advisor. Tax advisors are also required to avoid conflict of interest arising from representing several contracting parties in the same matter. Tax advisors need to protect the confidentiality of their clients' affairs against third parties, the authorities and the courts.

ENFORCEMENT

The Federal Ministry of Finance supervises the *Bundessteuerberaterkammer* (federal tax advisory board) according to (§88 StBerG) The members can be subject to various actions such as fines up to 50,000 EUR, prohibition and exclusion from profession. The members can also be subject to court action if necessary. There is no requirement to make enforcement cases public.

The WPK, whose members are chartered accountants, is supervised by the Federal Ministry of Economic Affairs and Energy. Possible disciplinary measures are

⁵³ http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brak-stand-6-12-2011-mit-korr-191f-2014.pdf

reprimands, fines up to 500,000 EUR, temporary prohibition from certain types of professional activities, or final exclusion from the profession. Breaches of professional duties related to statutory audits of public interest entities are within the responsibility of the Auditor Oversight Body. Cases of enforcement shall be made public but exclude personal details (§ 69 WPO). Currently two cases relating to tax advice are listed. Both date from 2006 and the sentences were reprimands with fines. In the first case an auditor who previously worked as lawyer was reprimanded and fined 5,000 EUR for assisting in tax evasion (*Landgericht Berlin, Urteil vom 25.2.2006*). In the second case, a tax advisor was reprimanded and fined 15,000 EUR for tax evasion and assisting in tax evasion (*Kammer für Steuerberater- und Steuerbevollmächtigten Urteile vom 24.11.2006*). In both cases the professionals had been previously convicted by a German court and therefore relatively mild professional sanctions were seen as sufficient.

The legal profession is self-regulating in Germany. According to a 2004 study commissioned by the German Ministry of Justice, lawyers are particularly at risk for involvement in money laundering. It surveyed over 4,000 professionals and analysed 163 cases of investigation into money laundering. The findings were that in three quarters of the cases, investigations are carried out against lawyers. In 85% of the cases analysed the suspects acted intentionally as opposed to thoughtlessly or being passively involved which seems to indicate a criminal involvement motivated by personal gain. This concerns predominantly cases of "white collar" crime such as investment fraud and rarely drug crime.

According to the 2015 annual report of the Financial Intelligence Unit of Germany, a total of 29,108 cases of suspicion of money laundering were notified. This is the highest number yet and the notifications have constantly risen since 2009. The financial sector is responsible for 99% of those notifications, a total of 238 notifications were made by the non-financial sector, including lawyers.

6. LUXEMBOURG

KEY FINDINGS

- Luxembourg based intermediaries obtained most offshore entities from Mossack Fonseca in the European Union
- Accountants (comptable) are regulated in Luxembourg as a liberal profession. Accountants may be penalised by a court for misconduct.
- Legal profession in Luxembourg is a self-regulated profession. The joint disciplinary and administrative council of the Luxembourg and Diekirch Bar Associations supervise it. The bar association does not mention that any decision and sanctions have been imposed.
- Tax advising is not a separate profession
- The relatively strong independence and responsibility requirements for lawyers are primarily ensuring that the professionals work in the interests of the clients
- All intermediaries need to follow the AML/CTF requirements
- Although the bank secrecy has *de facto* been eliminated, Luxembourg still tries to protect secrecy in other areas. An example of this prosecuting whistleblowers

RELEVANCE TO THE CURRENT STUDY

Luxembourg is one of the largest tax havens and financial centres in the EU. It has, in particular, a strong position in the private wealth and fund businesses. In fact, it is the largest distributor of funds cross-border and second largest investment fund centre in the world (PWC, 2016⁵⁴). In the field of taxation the country is known for its tax rulings. These government-approved agreements provide a tax relief for the companies concerned. The existence of these secretive agreements was unveiled in 2014 with the publication of the Lux Leaks (ICIJ, 2014⁵⁵).

Luxembourg played an important role in the Panama Papers, as the EU member state with the largest number of offshore entities established for customers of intermediaries (De Groen, 2017). Luxembourg is one of the EU member states that had a bank secrecy regime in place, which it has been able to preserve till very recently. Lux Leaks and the economic problems in Cyprus made it untenable for Luxembourg and Austria to delay the adoption of the savings-tax directive⁵⁶ any further (WSJ, 2014⁵⁷). Although the bank secrecy has *de facto* been eliminated with the adoption of this directive, which provides for the automatic exchange of information on private savings income, Luxembourg still tries to protect its secrecy in other areas. As was, for instance, demonstrated by the treatment of the whistleblowers that unveiled the tax rulings.

The two former employees of the Big 4 accounting firm PricewaterhouseCoopers (PwC) and an investigative journalists involved in Lux Leaks were prosecuted and at

54 http://www.luxembourgforfinance.com/sites/luxembourgforfinance/files/luxembourg_financial_centre_infographics_august_2016.pdf

55 <https://www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database>

56 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0107>

57 <https://www.wsj.com/articles/SB10001424052702304256404579451681198945764>

first instance sentenced to time in prison and fines (*Luxemburger Wort*, 2016⁵⁸). On appeal, the sentences of the former PwC-employees were reduced and the journalist was acquitted (EUobserver, 2017⁵⁹).

⁵⁸ <http://www.wort.lu/en/business/luxembourg-court-result-of-luxleaks-whistleblowers-appeal-set-for-march-15-5874ac4953590682caf17906>

⁵⁹ <https://euobserver.com/justice/137256>

OVERVIEW OF PROFESSIONS INCLUDED

Accountants (*comptable*) are regulated in Luxembourg as a liberal profession.⁶⁰ The requirements to become accountant are primarily targeted at ensuring that the person or firm has sufficient knowledge about labour, social security, accounting and tax laws. Moreover, they need to be of good reputation and not have evaded tax or social security contributions in Luxembourg. The (judicial) police officers are responsible for investigating offenses.

Tax planning and compliance is at the core of the services that accountants provide. The accountants are often responsible for the preparation of the balances for the tax returns, tax planning, and representation to the tax authority according to the Luxembourg association for accountants and tax advisors (Alcomfi)⁶¹. The accountants and tax advisors that are member of this organisation need to adhere to the status of the organisation, prove that they are authorised as professional accountant and pay an annual membership fee.

Lawyers (*avocats*) are subject to specific legislation for their profession⁶². Only lawyers are allowed to represent parties before judicial bodies including courts in Luxembourg. In order to become a lawyer or practise law in Luxembourg, lawyers need to be registered with one of the two bar associations (i.e. *Barreau de Luxembourg* and *Barreau de Diekirch*) in the Grand Duchy. In total there are approximately 2,000 lawyers registered in Luxembourg, which has about 575,000 inhabitants. In order to be registered the lawyers need to present a guarantee of good character, demonstrate that they have had the required professional training, are EU nationals, and have sufficient knowledge of the local languages. A joint disciplinary and administrative council is responsible for the enforcement of the requirements (European e-Justice Portal, 2017⁶³).

Tax advisors are not considered as a separate profession in the Luxembourgish legislation. Although there is no specific legislation for tax advisors, many of the professionals that provide tax advice are already covered under the legislation for accountants (CFE-EUTAX, 2003⁶⁴).

PROFESSIONAL OBLIGATIONS UNDER ANTI-MONEY LAUNDERING LEGISLATION

Luxembourg has implemented the **AML/CFT** legislation as agreed for EU member states. The AML/CFT-law⁶⁵ and revisions apply to professions that are legislated in Luxembourg such as accounting, auditing, lawyers and notaries as well as unregulated professions such as providing tax advice on a professional basis. The law explicitly makes an exemption from the application of professional secrecy when

⁶⁰ Loi du 2 septembre 2011 réglementant l'accès aux professions d'artisan, de commerçant, d'industriel ainsi qu'à certaines professions libérales et - modifiant l'article 542-2 du Code du travail; - modifiant la loi modifiée du 16 juillet 1987 concernant le colportage, la vente ambulante, l'étalage de marchandises et la sollicitation de commandes; - modifiant la loi modifiée du 10 juin 1999 relative à la profession d'expert-comptable; - portant abrogation de la loi modifiée du 21 février 1976 ayant pour objet d'instaurer un jour de fermeture hebdomadaire dans les stations de vente de carburant et de lubrifiant pour véhicules automoteurs. <http://legilux.public.lu/eli/etat/leg/loi/2011/09/02/n1/jo>

⁶¹ <http://www.alcomfi.lu/profession.php>

⁶² Loi du 10 août 1991 sur la profession d'avocat

⁶³ https://e-justice.europa.eu/content_legal_notice-365-en.do

⁶⁴ <http://www.cfe-eutax.org/node/4732>

⁶⁵ Loi du 27 octobre 2010 relative à la mise en œuvre de résolutions du Conseil de Sécurité des Nations Unies et d'actes adoptés par l'Union européenne comportant des interdictions et mesures restrictives en matière financière à l'encontre de certaines personnes, entités et groupes dans le cadre de la lutte contre le financement du terrorisme.

it concerns persons, companies and groups suspected of terrorist financing or money laundering.

The Financial Intelligence Unit (FIU) of the State Prosecutor's office to the Luxembourg District Court receives and analyses the suspicious transactions reports (STRs). The number of STRs has risen sharply in the past few years, but the proportion of non-financial business or profession has remained relatively low (see Table 1 : Number of suspicious transaction reports filed in Luxembourg by type of advisor and intermediary). In fact, the proportion of non-financial parties STRs ranged between 1.4% in 2012 and 8.1% in 2005. Most of the STRs were filed by accountants and auditors, followed by lawyers. Scarcely any of the STRs were submitted by tax advisors or notaries.

When the AML/CFT requirements are not respected this may lead to imprisonment of up to five years or fines of a maximum of €250,000. The number of inspections, including on-site inspections, and prosecutions have, however, been relatively low in the past. Only in recent years the enforcement activities have been improved. Hence, the number of convictions has, for example, been gradually growing from only 8 convictions between 2003 and 2008 to 163 in 2013.

Table 1 : Number of suspicious transaction reports filed in Luxembourg by type of advisor and intermediary

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Financial sector	556	448	461	528	708	1266	4770	8136	10969	4303	6652	10830
Credit institutions	470	387	375	452	636	1166	4629	7929	10574	3681	3077	4062
Other professionals in the financial sector	86	61	86	76	72	100	141	207	395	622	3575	6768
Non-financial business or profession	22	43	25	24	44	66	96	170	169	189	214	193
Accountants	16	19	11	17	25	29	46	101	112	92	124	100
Auditors	3	13	6	4	8	12	10	30	23	36	36	39
Lawyers	0	3	1	0	2	6	13	16	18	25	36	32
Economic and tax advice	0	1	0	0	0	1	2	3	2	5	1	2
Notaries	3	4	4	0	1	2	4	1	4	1	0	0
Other non-financial	0	3	3	3	8	16	21	19	10	30	17	20
Total declarations	578	491	486	552	752	1332	4866	8306	11138	4492	6866	11023
Total advisors	22	40	22	21	36	50	75	151	159	159	197	173
<i>Share of total (%)</i>	<i>3.8%</i>	<i>8.1%</i>	<i>4.5%</i>	<i>3.8%</i>	<i>4.8%</i>	<i>3.8%</i>	<i>1.5%</i>	<i>1.8%</i>	<i>1.4%</i>	<i>3.5%</i>	<i>2.9%</i>	<i>1.6%</i>

Source: Authors' elaboration based on the annual activity reports of the Luxembourg FIU (2014-2016)

BINDING AND NON-BINDING RULES OF INDEPENDENCE AND RESPONSIBILITY

There are very few requirements regarding independence and responsibility of **accountants** in the law. They need to behave in good dignity with the profession. More specifically, they need ensure that they respect the professional integrity to also protect the partners and customers in the future. This requirement is not only applicable to the staff, but also to majority shareholders and persons that are able to exercise a significant influence on the management of the firm. The integrity is for example breached when a proxy is used for the management, documents or statements are falsified, legal publications as required for the company register or authorities are not kept, significant debts to public authorities or in distress and serious or repeated convictions related to the professional activities.

The members of the association of **tax advisors and accountants** (Alcomfi) need to subscribe to a charter,⁶⁶ undertaking to act in the best interest of the client. More specifically, they are expected to exercise their profession with diligence, delicacy and probity. They also need to ensure that they are following the rules on professional ethics and remain independent. They should not take on assignments that may impede their discretion and objectivity, limit their freedom of appreciation or impartiality, or and prevent them from following the rules of the profession. Moreover, the charter explicitly mentions that the members need to respect the obligation of professional secrecy with respect to the AML/CFT requirements.

Lawyers need to comply with the rules on ethics contained in the law and implementation measures of the bar association. The ethics rules prescribe that lawyers may not represent parties with conflicting interests or with interests that go against the lawyers' own, and that the fees charged for services must be reasonable. Moreover, lawyers must respect professional secrecy, which includes the privileged relation with the client and confidentiality of communication with other lawyers. In addition, the profession of lawyer may not be combined with most other activities, including notary and auditor functions as well as director or manager of commercial companies, or any other profession that may infringe on the independence or dignity of the profession.

Lawyers have further the responsibility not to take any case for which they do not have the right skills, unless they cooperate with other lawyers that have the necessary skills.

ENFORCEMENT

The court has several options to penalise **accountants** and accounting firms that breach the legal requirements. They can receive a fine of up to € 250,000, prison sentence of up to 3 years, an order to cease activities, or a ban on exercising their profession.

Lawyers may face criminal and disciplinary prosecution if professional secrecy is not respected. The joint disciplinary and administrative council of the Luxembourg and Diekirch Bar Associations is composed of five lawyers with at least five years of experience.

⁶⁶ <http://www.alcomfi.lu/charte.php>

The council has several penalties that it can impose, ranging from a warning and a reprimand to a fine of up to €250,000 (money laundering and terrorist financing) and temporary or permanent suspension. The bar association does not mention that any decision and sanctions have been imposed.

7. CYPRUS

KEY FINDINGS

- Cyprus is a small economy. The business services sector is one of the most dynamic and its activities have been supported by Cyprus' network of about 50 double tax treaties
- Accountants in Cyprus are member of Institute of Chartered Public Accountants of Cyprus (ICPAC). The enforcement of accountants is quite weak, only 3 disciplinary actions were issued in 2014. Statistics for other years is missing
- Legal profession in Cyprus is self-regulate through a disciplinary board. The lawyer's code of conduct puts considerable emphasis on independence
- Cyprus does not have a separate tax advisor profession
- The AML enforcement body, MOKAS is active, but has very few convictions
- Corporation tax is calculated based on audited financial statements

RELEVANCE TO THE CURRENT STUDY

Cyprus is a small country with an economy based on tourism, services, some light manufacturing and agriculture. The service sector includes an important business services sector. Cyprus has long been a centre for investment in the countries of the former Soviet Union, in part because of favourable tax treaties. It is now also used for a wider range of investments both from and into Europe. It is also a centre for retail foreign exchange, providing favourable access to the EU market. The ICIJ's Offshore Leaks Database finds 6,374 offshore entities that are linked to Cyprus.⁶⁷

OVERVIEW OF THE PROFESSIONS INCLUDED

The **legal** system in Cyprus is based on English common law. Lawyers are known as advocates and are registered with the Cyprus Bar Association (CBA) pursuant to the Advocates Law. Only advocates can perform services for preparing documents for company registration. Advocates are subject to the CBA Code of Conduct Regulations. To register as an advocate, one needs to pass the Legal Council's exam along with obtaining training for a year.⁶⁸

The professional body for **accountants** is the Institute of Chartered Public Accountants of Cyprus (ICPAC). The ICPAC currently has around 3,500 members. They are required to follow the professional rules of conduct of the association. This covers their work as accountants and auditors, including the provision of trust and company services to third parties.⁶⁹ The Cyprus Public Audit Oversight Board (CyPAOB) is an independent body that is responsible for the supervision of the audit profession in Cyprus.⁷⁰

There is no separate **tax advisor** profession in Cyprus, but a new law from 2012 regulates commercial providers of fiduciary services and administration or management services regarding trusts and companies. Providers of such services

⁶⁷ <https://offshoreleaks.icij.org/search?utf8=%E2%9C%93&q=&c=CYP&j=&e=&commit=Search>

⁶⁸ <http://www.cyprusbarassociation.org/v1/index.php/en/c-b-a/2013-03-25-18-38-37/history>,
<http://www.cypruslawdigest.com/topics/legal-profession-in-cyprus/item/177-the-legal-profession-in-cyprus>

⁶⁹ <http://www.icpac.org.cy/selk/en/default.aspx>

⁷⁰ <https://www.ifac.org/about-ifac/membership/country/cyprus>

other than lawyers and accountants must obtain a licence from the Cyprus Securities and Exchange Commission (CySEC). The intention is to eliminate rogue operators and to attract leading international trust service providers.⁷¹

PROFESSIONAL OBLIGATIONS UNDER ANTI-MONEY LAUNDERING LEGISLATION

The main AML/CTF legislation in Cyprus is The Prevention and Suppression of Money Laundering and Terrorist Financing Law of 2007 (Law No. 188(I)/2007), based on the relevant EU legislation. The Law transposes into Cypriot legislation the requirements of the Third Directive of the European Union (Directive 2005/60/EC), which is in line with the recommendations of the Financial Action Task Force.⁷² It is administered by the Unit for Combating Money Laundering (MOKAS). According to most recent Mutual Evaluation Report, Cyprus was deemed Compliant for 17 and Largely Compliant for 22 of the FATF 40 + 9 Recommendations. It was partially compliant or non-compliant for 2 of the 6 Core Recommendations.⁷³

All professional intermediaries including accountants, tax advisors and lawyers, are subject to this legislation. They must disclose any reasonable suspicion of money laundering or terrorist financing offences, even if comprising privileged communications between lawyer and client, and they must apply customer identification and due diligence in particular when establishing a business relationship and for occasional transactions for €15,000 or more.

Money laundering offences include both converting or transferring property to conceal its origin in a predicate offence, and acquiring or possessing such property. The predicate offences include any offence punishable by more than one year's imprisonment and yielding proceeds. This covers the offences of wilfully making any incorrect statement or return in respect of income, collaborating with, encouraging or assisting another person to make such a statement or return, both being punishable by a fine or up to five years' imprisonment.

BINDING AND NON-BINDING RULES OF INDEPENDENCE AND RESPONSIBILITY

Auditors and Accountants

The professional conduct of accountants is governed by Ethics Regulations for Certified Public Accountants⁷⁴. The Regulations require an accountant to 'safeguard his **independence** vis-à-vis his clients', to perform 'accounting or auditing work in a manner which is objective and independent from any influence of the client', and 'to keep an impartial attitude on conflicting views of clients or other interested parties, expressing without unnecessary characterisations the objective findings'. The accountant is required to avoid conflicts of interest and not to use confidential information for the benefit of the accountant or third parties. The **responsibility** of an accountant includes being objective, maintaining professional competence, and behaving professionally by complying with relevant laws and regulations. The ICPAC

⁷¹ <http://www.mondaq.com/x/235292/property+taxes/Recent+Changes+To+The+Cyprus+Tax+Legislation>

⁷² http://www.centralbank.gov.cy/nqcontent.cfm?a_id=13709&lang=en

⁷³ <http://www.knowyourcountry.com/cyprus1111.html>

⁷⁴ <https://www.icpac.org.cy/selk/en/ethicscode.aspx>,

<https://www.icpac.org.cy/selk/en/common/PreviewDocument.ashx?itemId=1214&refItemId=T470DOCUMENTS&refTabId=470&language=EN>

has a Disciplinary committee that handles issues of misconduct. The sanctions available range from reprimands and fines to removal from the register.

All tax returns of companies must be based on audited financial statements.⁷⁵

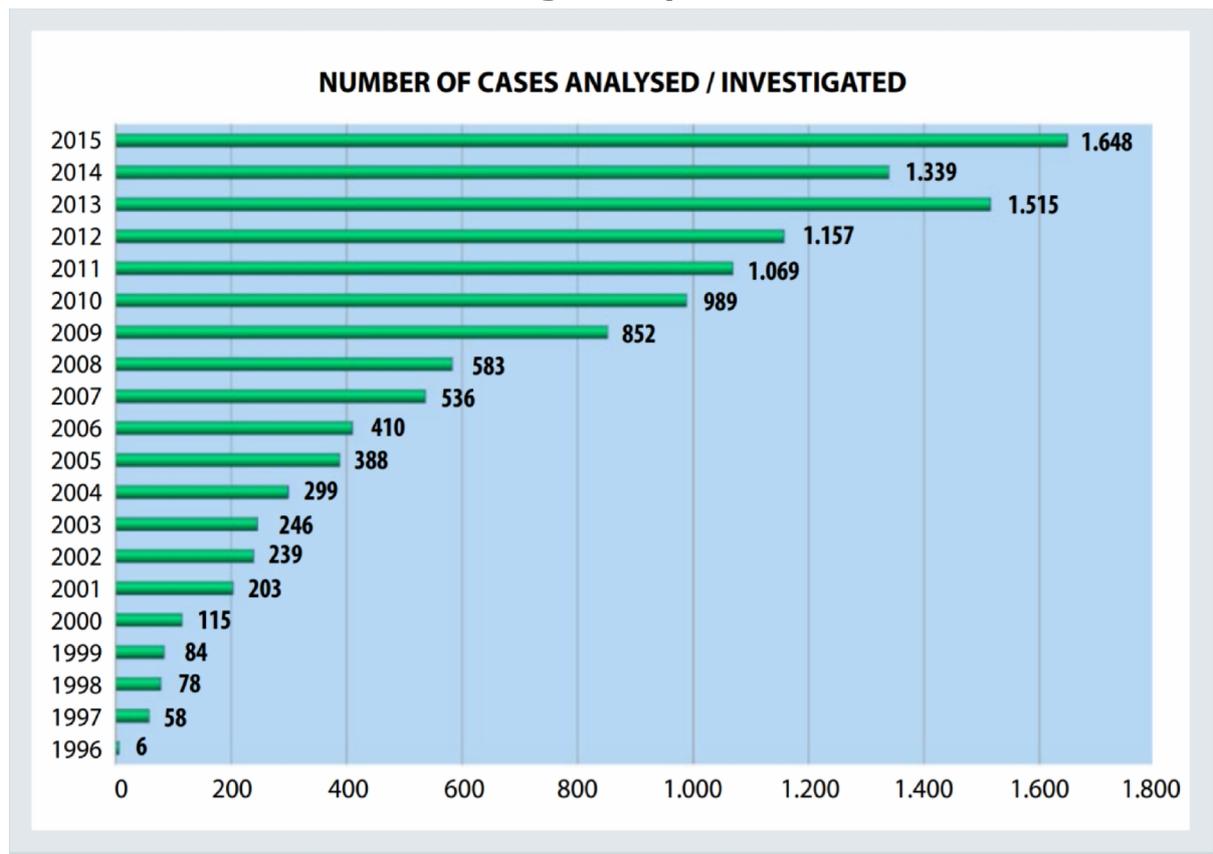
Lawyers

The CBA Code of Conduct⁷⁶, which is based on the CCBE Code of Conduct, places considerable emphasis on **independence**. 'Advocates must always act in absolute independence, free of all forms of dependence or pressure, and in particular as may arise from their own interests or external influence. ... Advocates ... should not give advice with the aim of pleasing their client or as a result of external pressure.' They are also required not to engage in being a part of any other business, and they must avoid conflicts of interest. They are required to maintain professional secrecy regarding confidential information. **Responsibility** of advocates requires that they always defend the client in the best manner possible, even with regard to their own personal interests.

ENFORCEMENT

The number of cases investigated by MOKAS from 1996 – 2015 can be seen below.

Table 2 : Number of cases investigated by MOKAS



Source: MOKAS Annual report, 2015⁷⁷

The number of cases reported to MOKAS has increased every year from 58 in 1997. This increase can be attributed to improvements in legal framework for combating

⁷⁵ <http://m.fbscopyprus.com/docs/income-tax-law.pdf>

⁷⁶ http://www.cyprusbarassociation.org/v1/files/disciplinary/New_code_of_counduct_eng.pdf

⁷⁷ [http://www.law.gov.cy/law/mokas/mokas.nsf/B6860BF4E952069AC2257BDD0042692F/\\$file/MOKAS%202015-ENG.pdf](http://www.law.gov.cy/law/mokas/mokas.nsf/B6860BF4E952069AC2257BDD0042692F/$file/MOKAS%202015-ENG.pdf)

ML and TF along enhanced supervision and increased awareness and training initiative undertaken by MOKAS

About 1,100 cases each year are currently reported by banks or result from requests from other countries. In 2014, 25 cases came from reports from accountants or lawyers. In 2013-14 there were 302 prosecutions and 13 convictions for money laundering offences. In a report by MONEYVAL, enforcement of AML/CFT law is considered to be one of the problem areas of Cyprus. This report mentions that the very low number of standalone ML convictions; incomplete statistics and lack of information on the predicate offences to which the ML provisions are being applied makes it difficult to determine that the ML provisions are applied in a fully effective manner.⁷⁸

For accountants the ICPAC has a Disciplinary committee that handles issues of misconduct. The sanctions available range from reprimands and fines to removal from the register. The website of ICPAC mentions that three were 3 cases of sanctions imposed in 2014. Information for disciplinary committee actions for 2013 and 2015 are missing from ICPAC's website.⁷⁹

Enforcement for the legal profession is under the Disciplinary Board. If an advocate is found guilty of disgraceful, fraudulent or unprofessional conduct, the Disciplinary Board may reprimand, fine or suspend the advocate or order the advocate struck off the roll.

⁷⁸ [http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/CYP4_MER_MONEYVAL\(2011\)2_en.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/CYP4_MER_MONEYVAL(2011)2_en.pdf)

⁷⁹ <https://www.icpac.org.cy/selk/en/decisionsDisciplinaryCommittee.aspx>

8. SWITZERLAND

KEY FINDINGS

- Switzerland is a global financial centre and tax haven
- The AML/CFT requirements only apply to financial intermediaries and cash handlers
- Tax advisors, lawyers and accountants are self-regulated, with the requirements primarily safeguarding the interests of clients
- Sanctions being imposed under AML/CFT regulation are considered insufficient to combat money laundering and terrorist financing

RELEVANCE TO THE CURRENT STUDY

Switzerland is both a tax haven as well as a global financial centre with a specialisation in wealth management. The institutional structure in the country supports the development of these activities. The country has a stable political climate and strong legal certainty as well as a secrecy regime to hide assets. The traditional strong secrecy regime will, however, be weakened in 2018, when Switzerland will start automatically exchanging financial information with tax authorities in other jurisdictions. This is, among others, the consequence of several leakages of 'secret' bank data. The leaked documents from HSBC, LGT and UBS (ICIJ, 2015⁸⁰; WSJ, 2008⁸¹) clearly showed that bank secrecy was abused to conduct illicit activities such as tax evasion.

Switzerland is after Hong Kong and the United Kingdom the jurisdiction where the greatest number of intermediaries involved in the Panama Papers are based. Some of these offshore entities have been created for EU citizens. These jurisdictions provide the base for the intermediaries such as tax advisors, lawyers, and accountants that form the main link between ultimate beneficiary owners and offshore entities.

OVERVIEW OF PROFESSIONS INCLUDED

Switzerland has a large financial services sector and is a multilingual federation of cantons. This is reflected in the regulation and organisation of the sector, which has a more granular categorisation than in most other countries as well as associations and supervisors that cover only part of the country.

Accountants (*Buchhalter*) as such are not a regulated profession in Switzerland. However, there are several protected job titles (*Fachausweis Buchhalter*, *Fachausweis Controller* and *Diplomierter Buchhalter/Controller*) for professional accountants who have completed the educational qualifications prescribed by the Swiss Ministry of Professional Education and Technology⁸². VEB,⁸³ with about 8,000 members, is the largest association of accountants and controllers in Switzerland.⁸⁴ The organisation has both active and passive members. The active members are graduate experts in accounting and control and the passive members are natural

⁸¹ <https://www.wsj.com/articles/SB121624391105859731>

⁸² <https://rabowereldwijd.nl/taxes-and-accounting/a/7692875>

⁸³ [Fachausweises in Finanz- und Rechnungswesen](#)

⁸⁴ https://veb.ch/verband/ziele_und_aufgaben.html

and legal persons connected to the association professionally and socially. Besides meeting the professional qualifications, they must behave professionally and pay their annual contribution. They are encouraged to regularly take further professional training⁸⁵.

The **lawyers** (*Anwälte*) in Switzerland are regulated under the *Anwaltsgesetz*,⁸⁶ which requires them to be registered with the Cantonal lawyers' register. To be recognised as lawyer they need to have a master's degree from a Swiss university or equivalent institution in another country as well as an internship of at least one year finishing with an examination of both theoretical and practical knowledge. Moreover, they must not have been convicted of any activities incompatible with the profession of lawyer. The enforcement is further arranged at cantonal level.

The Swiss Bar Association (SAV-FSA) is the professional organization for lawyers in Switzerland with over 10,000 members.⁸⁷ The members of the association must be independent lawyers or practising in an independent law firm. In addition there is a special division of the Swiss Bar Association and the Swiss Notaries Association dedicated to lawyers who are considered financial institutions for the purposes of the Swiss AML/CFT regulation. The members of this self-regulated body SRO SAV/SNV⁸⁸ can be independent lawyers and notaries that are predominantly active in Switzerland. The lawyers and notaries that are recognised as financial institutions are obliged to become members of SRO SAV/SNV, since it is also responsible for their supervision in the context of the AML/CFT regulation. These lawyers and notaries are also required follow several short courses (up to one day each) after they become members.⁸⁹

The profession of **tax advisors** (*Steuerexperten*) is not protected as a regulated profession in Switzerland. But there are certified tax advisors. They are, in particular, well placed for tax planning, dealing with complex taxation issues and representing clients before the tax authorities and the courts. Certified tax advisors obtain their certificate from a special institute that arranges the examination on behalf of five organisations. The examination covers tax law and also aspects related to business studies. The certificate is generally only obtained after two years training on the job. The organisations involved include the Swiss association of certified tax advisors (SVDS⁹⁰), the organisation of trust/fiduciary companies in Switzerland (Treuhand/Suisse), the Swiss tax conference (SSK⁹¹), the trust/fiduciary companies chamber (THK⁹²), and the Swiss bar association (SAV-FSA⁹³). Given the focus on accountants, auditors, lawyers and tax advisors the remainder of this chapter only considers SVDS and SAV-FSA and not the other involved organisations.

SVDS represents the professional and political interests of the about 600 members, who all hold the highest Swiss degree in the field of taxation. The degree is comparable to those of *Steuerberater* and *Wirtschaftsprüfer* in Germany. The independence and responsibility requirements are arranged through the two sub

⁸⁵ <https://veb.ch/verband/statuten.html>

⁸⁶ <https://www.admin.ch/opc/de/classified-compilation/19994700/index.html>

⁸⁷ <https://www.sav-fsa.ch/en/portrait/wer-wir-sind.html>

⁸⁸ Selbstregulierungsorganisation des Schweizerischen Anwaltsverbandes und des Schweizerischen Notarenverbandes (SRO SAV/SNV)

⁸⁹ <http://www.sro-sav-snv.ch/mitgliedschaft/beitritt>

⁹⁰ Schweizerische Vereinigung Diplomierter Steuerexperten (SVDS)

⁹¹ Schweizerische Steuerkonferenz (SSK)

⁹² Treuhand-Kammer (THK)

⁹³ Schweizerische Anwaltsverband (SAV)

associations ZVDS⁹⁴ and OREF,⁹⁵ which each cover different cantons. Active members of the association need to be certified tax advisors in Switzerland or have an equivalent certificate from another country. The members commit themselves to follow the rules of the association.

In addition, there is EXPERTsuisse, which provides training and support, and represents about 6,000 experts and 850 companies with certified auditors, tax and fiduciary experts.

PROFESSIONAL OBLIGATIONS UNDER ANTI-MONEY LAUNDERING LEGISLATION

The Swiss **AML/CFT** Act⁹⁶ applies to both financial intermediaries and dealers in commercial goods that accept cash. Tax advisors, accountants and legal advisors are not subject to these requirements as long as they are not considered financial intermediaries, that is, as long as they do not advise on investments, conduct trades and/or manage assets, which some of the intermediaries in the Panama Papers do. The AML/CFT legislation makes some reservations for lawyers and notaries in the compliance with the requirements. They do not need to report when professional secrecy requirements apply.

The supervision of **lawyers** and **notaries** regarding compliance with the AML/CFT standards is arranged through self-regulated organisations. These are responsible for the organisation of inspections by other lawyers and notaries who are independent from the inspected intermediaries. According to the latest Mutual Evaluation Report published in 2016 the self-regulatory bodies are inconsistent in their risk assessment. Moreover, the AML/CFT audits should be improved and the role of FINMA in these audits should be stepped-up (FAFT, 2016⁹⁷).

The number of suspicious transaction reports (STRs) has increased gradually in the past few years after awareness campaigns of the Swiss supervisors. But the number of STRs remains insufficient and they are mostly prepared in reaction to external information (FAFT, 2016⁹⁸). Though, the number of STRs filed by lawyers and notaries remain very low (see table 2).

Table 3 : Number of suspicious transaction reports filed in Switzerland by type of advisor and intermediary

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Credit institutions	359	492	573	603	822	1080	1050	1123	1495	2159
Lawyers and notaries	1	7	10	11	13	31	12	9	10	6
Total declarations	619	795	851	896	1159	1625	1585	1411	1753	2367
<i>Share of total (%)</i>	<i>0.2%</i>	<i>0.9%</i>	<i>1.2%</i>	<i>1.2%</i>	<i>1.1%</i>	<i>1.9%</i>	<i>0.8%</i>	<i>0.6%</i>	<i>0.6%</i>	<i>0.3%</i>

Source: Authors' elaboration based on the FAFT (2016⁹⁹).

⁹⁴ Zentralschweizerische Vereinigung diplomierter Steuerexperten

⁹⁵ Ordre Romand des Experts Fiscaux

⁹⁶ Bundesgesetz über die Bekämpfung der Geldwäscherei und der Terrorismusfinanzierung (Geldwäschereigesetz, GwG)

⁹⁷ <http://www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf>

⁹⁸ <http://www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf>

⁹⁹ <http://www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf>

Non-compliance with the requirements may lead to a fine of maximum CHF 500,000 (app. € 470,000). Since inspecting lawyers and notaries are also subject to professional secrecy, the secrecy requirements are not impeded. In Switzerland the Office of the Attorney General of Switzerland (*Ministère Public de la Confédération*) responsibility for AML/CTF prosecutions, along with the cantonal prosecution authorities, some of which have dedicated bodies to deal with complex cases. There have in total been 1,073 convictions in the five years between 2009 and 2013, of which the majority resulted from prosecutions by the law enforcement authorities in the cantons (96.6%). The sanctions that are currently being imposed are not considered proportionate and sufficiently deterrent to combat money laundering and terrorist financing (FAFT, 2016¹⁰⁰). Breaching the professional secrecy requirements may have severe consequences for the persons involved. They can receive a monetary penalty or a prison sentence of up to three years.

¹⁰⁰ <http://www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf>

BINDING AND NON-BINDING RULES OF INDEPENDENCE AND RESPONSIBILITY

Accountants

The active members of the Swiss association of accountants VEB are expected to have a professional attitude¹⁰¹. This requirement has been set forth in a code of ethics based on five principles (honesty, objectivity, confidentiality, fairness, and professional competence), of which objectivity and fairness refer to independence aspects and honesty, confidentiality, and professional competence to responsibility.¹⁰²

More specifically, on the **independence** aspects they are expected to disclose all facts important to conduct their activities objectively and refrain from activities and do not retain relations with parties that may impede the possibility to conduct an independent and fact based assessment or damage the interests of related parties (i.e. VEB, the accountant, or clients). They also should not accept gifts or privileges damaging their integrity. Moreover, conflicts of interests should be discussed with their clients and immediate supervisors.

Turning to the **responsibility** aspects, members of VEB are expected to work with care and to be aware of their responsibilities, respect laws and not to discredit their profession. They should also continue educating themselves. Moreover, they are supposed to promote legitimate and ethical goals for companies and clients. Confidential information should not be used for personal advantage and provided to third parties, unless there is a legal obligation or permission from the clients. In the case of conflicts they should be solved with discussions taking the interests and needs of all different actors involved and a fact-based approach should be used.

Lawyers

The independence and responsibility requirements for lawyers are embedded in the Swiss *Anwaltsgesetz*¹⁰³. Lawyers are primarily responsible for defending the interests of their clients, with a great emphasis on professional secrecy. More specifically, lawyers are expected to conduct their profession carefully, conscientiously, independently, in their own name and on their own responsibility. They should avoid conflicts of interests between the interests of the clients and those with whom they have business or private ties. They also need to take on cases without compensation to which they are assigned in the canton. Moreover, lawyers are expected to respect professional secrecy and ensure that their assistants also maintain it.

The rules for the members of the Swiss Bar Association (SAV-FSA) build on the legal requirements, but are often more detailed. The **independence** requirement has been specified as that there may not be any relation with third parties that may influence the professional judgement, except for other lawyers. They should not conduct any activities that are not compatible with their profession as lawyer. Moreover, lawyers cannot defend two or more clients in one case when there is even a threat of conflicts of interest. When they have already taken on a case and their independence or professional secrecy is threatened, or conflicts of interests arise, they should cease representing all the clients concerned. They should also not accept new clients were it might lead to infringements of the secrecy obligations to previous clients or of which the declarations could harm previous clients. In addition, they must treat clients who are not required to pay fees in the same way as paying clients.

¹⁰¹ <https://veb.ch/verband/statuten.html>

¹⁰² <https://veb.ch/verband/ethik.html>

¹⁰³ <https://www.admin.ch/opc/de/classified-compilation/19994700/index.html>

When lawyers work together in a law firm, the rules are applicable to the organisation as a whole. The association of lawyers who are considered to be financial institutions (SAV/SNV) has primarily rules for their members respecting AML/CFT requirements.

Turning to **tax advisors**, ZVDS would like to be promoting the independence and image of the profession and protecting the job title of qualified control experts. It provides, for example, information on changing tax laws.

The members of EXPERTsuisse (**tax, audit**, and fiduciary services) need to comply with the professional rules of the association. These requirements have as general principle that the activities that the members conduct should not harm the reputation of the profession. The members should, for instance, avoid conflicts of interest, ensure that they can operate independently, as well as preserve professional secrecy in the entire organisation.¹⁰⁴

ENFORCEMENT

In the case of the associations, the most severe sanctions are suspension or cancelation of the membership. The members of accountants association VEB who seriously breach the ethical guidelines may, for instance, see their membership revoked.

The supervision of lawyers is arranged at the cantonal level. The supervisory authorities can take several disciplinary measures ranging from a warning to a fine of up to CHF 20,000 or lifetime professional ban. The sanction is limited to the canton where the supervisor is based, whereas the supervisors of the other cantons must be notified and included for a limited period for five or ten years after the sentence. Moreover, the prosecution needs to take place within 12 months after the supervisor knew the incident, and no more than 10 years after the alleged incident took place. This period is only extended for incidents within the scope of the Swiss criminal law. The potential sanctions of the self-regulatory organisations such as SRO SAV/SNV are more severe than of the lawyer and tax expert associations. In addition to warnings, references, suspension or cancelation of the membership, they can also give fines, require enhanced reporting, and prohibit financial intermediary activities.

¹⁰⁴ <http://www.expertsuisse.ch/reglemente>

9. THE BRITISH VIRGIN ISLANDS

KEY FINDINGS

- BVI is one of the world's largest offshore corporate domicile – has about 500,000 active companies. It has a tax neutral environment. Companies need not file financial statements, nor have them audited
- BVI has no regulation for accounting or auditing profession. Proposed Professional Accountants Act (2015) yet to be made into a law.
- Legal profession in BVI is self-regulated. The disciplinary tribunal and the Virgin Islands general legal counsel, the two bodies expected to enforce the legal profession has not yet been established
- BVI does not have a separate tax advisors profession.
- All intermediaries need to follow the Anti Money laundering guidelines
- BVI has weak enforcement of AML – Mossack Fonseca's BVI operations was only fined \$440,000. Disciplinary Tribunal, the enforcer of legal profession not established yet

RELEVANCE TO THE CURRENT STUDY

The British Virgin Islands (BVI) is a tax haven with about 500,000 active companies domiciled here. In comparison the population is only about 32,000. The government of BVI collects about \$200 million in corporate fees every year.¹⁰⁵ The ICIJ's Offshore Leaks Database finds 151,588 offshore entities that are linked to BVI.¹⁰⁶ BVI was the most favoured tax haven chosen for incorporation as seen in Mossack Fonseca's files.¹⁰⁷ BVI has a no corporation tax, capital gains tax, or income tax. The process to open an offshore company is very straightforward and takes only about 2-3 days. The main intermediary in opening a company is a licenced agent of the BVI. Typically, an accountant or a lawyer who acts behalf of the company becomes the introducer to the licenced agent.¹⁰⁸ Following the revelations in Panama papers, the number of company incorporations in 2016 went down by 29 per cent as compared to 2015.¹⁰⁹

OVERVIEW OF PROFESSIONS INCLUDED

BVI does not have a regulated **accounting or auditing profession**. To comply with FATF requirements, BVI Professional Accountants Act, 2015 was proposed. Under this act, members of approved institute such as Association of Chartered Certified Accountants (ACCA) who have cleared all the qualification requirements can become a licensed member of British Virgin Islands Association of Professional Accountants provided he/she has one year of work experience. Currently, professional accountants in the BVI are usually members of Association of Chartered Certified Accountants (ACCA). They are required to follow the professional rules of conduct of the association.¹¹⁰

¹⁰⁵ <https://www.thestar.com/news/world/2016/04/04/british-virgin-islands-portrait-of-a-tax-haven.html>

¹⁰⁶ <https://offshoreleaks.icij.org/search?utf8=%E2%9C%93&q=&c=&j=BVI&e=&commit=Search>

¹⁰⁷ <https://panamapapers.icij.org/graphs/>

¹⁰⁸ <http://www.lexmundi.com/Document.asp?DocID=5639>, <http://www.bakertillyinternational.com/media/2126761/doing-business-in-british-virgin-islands.pdf>

¹⁰⁹ <http://www.bvifsc.vg/Portals/2/2016%20Statistical%20Bulletin%20Qtr%204.pdf>

¹¹⁰ http://bvineews.com/new/wp-content/uploads/2015/03/Proposed_Professional_Accountants_Act-2015_update.pdf

The **legal system** in BVI is based on English common law. The Legal Profession Act, 2015 is the act that provides for the admission of legal practitioners to practise law in BVI.¹¹¹ Members who have a certificate of legal education issued by the council for legal education are considered to have the appropriate education and training for admission to the legal profession. Qualified English solicitors and lawyers can apply to the High Court to be admitted to the BVI Bar.¹¹² The Disciplinary Tribunal is charged with the duty of upholding standards of professional conduct and enforcing the Code of Ethics.

BVI does not have a separate **tax advisors** profession.

PROFESSIONAL OBLIGATIONS UNDER ANTI-MONEY LAUNDERING LEGISLATION

All professional intermediaries including accountants, tax advisors and lawyers, are subject to the anti-money laundering (AML) legislation. This is based on the Proceeds of Criminal Conduct Act together with the Code of Practice / Money Laundering Regulations passed thereunder.¹¹³ BVI has also agreed to follow the Recommendations through the Caribbean FATF (CFATF). A Mutual Evaluation Report relating to the implementation of anti-money laundering and counter-terrorist financing standards in the British Virgin Islands was undertaken by the Financial Action Task Force (FATF) in 2008, and a follow-up report was provided by BVI in 2011. According to these reports, The British Virgin Islands was deemed Compliant for 14 of the 16 core and key recommendations of FATF. It was Partially Compliant for the remaining 2 core recommendations.¹¹⁴

The requirement to follow the Anti Money Laundering (AML) legislation is binding. Until very recently, it was very hard to trace the beneficial owner of a company established in BVI. Under the new AML rules, intermediaries should pass on the details of the "beneficial owner" to the licenced agent located in BVI. In addition, the intermediaries are required to hold detailed customer due diligence materials such as copy of passport etc. and make it available to the BVI authorities on request without fail.

Beyond AML legislations, BVI has agreed to follow US Foreign Accounts Tax Compliance Act (US FATCA), UK Crown Dependencies and Overseas Territories International Tax Compliance Regulations (UK CDOT), and UK Foreign Accounts Tax Compliance Act (UK FATCA). BVI also implemented Common Reporting Standard (CRS) by way of the Mutual Legal Assistance (Tax Matters) (Amendment) (No. 2) Act, 2015 (No. 17 of 2015) and the amendment took effect from January 1, 2016.¹¹⁵ BVI further signed an agreement to share beneficial ownership information with the UK authorities that came into effect on 8 April, 2016.¹¹⁶ Currently, BVI is deemed

¹¹¹ <http://www.chba.org.uk/for-members/library/practice-directions-court-notice/legal-profession-act-2015-bvi>

¹¹² <http://communities.lawsociety.org.uk/international/regions/americas-and-caribbean/caribbean/how-to-practise-in-the-caribbean/5044595.fullarticle>

¹¹³ [http://www.bvifsc.vg/Portals/2/Anti-money%20Laundering%20and%20Terrorist%20Financing%20\(Amendment\)%20Code%20of%20Practice,%202017.pdf](http://www.bvifsc.vg/Portals/2/Anti-money%20Laundering%20and%20Terrorist%20Financing%20(Amendment)%20Code%20of%20Practice,%202017.pdf) , <http://apollo-public.s3-website-eu-west-1.amazonaws.com//57026c8985d3a.pdf>

¹¹⁴ <https://www.cfatf-gafic.org/index.php/cfatf-documents/cfatf-follow-up-reports/virgin-islands/139-virgin-islands-3rd-follow-up-report/file>

¹¹⁵ <http://www.bvi.gov.vg/media-centre/bvi-financial-institutions-reminded-reporting-obligations>, <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-BVI-6-30-2014.pdf>

¹¹⁶ <https://www.gov.uk/government/publications/the-british-virgin-islands-sharing-beneficial-ownership-information>

"largely compliant" with the Organization Economic Co-operation and Development's tax transparency standards. In December, France finally took the BVI off its black list of tax havens.¹¹⁷

BINDING AND NON-BINDING RULES OF INDEPENDENCE AND RESPONSIBILITY

Auditors and Accountants

Currently, there is no regulation for accountants or auditors. However, professional accountants who are members of ACCA or other professional bodies such as Chartered Institute of Management Accountants (CIMA) or Association of International Accountants (AIA) are required to follow the rules of conduct of their respective professional body. **Independence** in the accounting profession mainly takes the form of financial independence and awareness of familiarity issues. Accountants and auditors are expected to be objective, and not allow conflict of interest to bias their professional judgement. Some of the threats to independence identified are: threat due to financial interest of the client, threat due to familiarity with client and threat due to intimidation. The ethics guidelines encourage the members to put in safeguards against such independence threats. **Responsibility** of an accountant involves providing professional services with professional competence, integrity, and maintaining confidentiality. However, the accountant also has a responsibility to act in the interest of the public. In situations, where there is evidence of fraud or misconduct, the member has a duty to report it after considering confidentiality requirements. In cases of money laundering, the accountant is mandatorily required to disclose this issue. Accountants must also consider the application of the AML and tax rules discussed above.

Lawyers

All the legal professions are regulated under the Legal Profession Act, 2015. **Independence** has limited meaning in the legal profession. Lawyers are required to act in their clients' interest. This means that they must not act for a client where there is a conflict between the interest of the client and that of another client (unless the clients give informed consent). Financial independence requires that a legal practitioner shall not acquire directly or indirectly by purchase, or otherwise, a financial or other interest in the subject matter of a case which he or she is conducting. To avoid conflicts in employment, a legal practitioner should not accept private employment in a matter upon which he or she previously acted in a judicial capacity or for which he or she had substantial responsibility while he or she was in public employment.

In the British Virgin Islands (BVI) the law on **attorney-client privilege** is based primarily on the common law principles, which in turn are derived from the English common law. Hence, any communication verbal or written passing between a party (including his predecessor-in-title) and his attorney or other legal professional advisor is privileged from disclosure. However, no privilege protections will apply if the communication was made for fraudulent or illegal purposes. When an attorney suspects that the funds he holds on behalf of a client are derived from criminal conduct, he is encouraged to become a whistle-blower under the Proceeds of Criminal Conduct Act. Lawyers will also have to comply with AML/CFT regulations.¹¹⁸

¹¹⁷ <https://www.thestar.com/news/world/2016/04/04/british-virgin-islands-portrait-of-a-tax-haven.html>

¹¹⁸ <http://www.lexmundi.com/Document.asp?DocID=1901>

ENFORCEMENT

The proposed Professional Accountants Act, 2015 intends to establish a disciplinary tribunal to enforce the professional code of conduct and ethics in the accounting profession. The ACCA has a Disciplinary committee that handles issues of misconduct. Similarly, other accounting professional bodies have their respective disciplinary committees to enforce actions for misconduct.¹¹⁹ The sanctions range from fines to revoking the licence to practice.

The disciplinary tribunal, a body established by the legal profession is in charge of handling any issues of misconduct or fraud. The sanctions range from fines to striking the name off the rolls of allowed practitioners. Despite the Legal Profession Act being passed in 2015, the disciplinary tribunal and the Virgin Islands general legal counsel, the two bodies expected to enforce the legal profession, have not yet been established.¹²⁰

The BVI Financial Services Commission (FSC) is the main regulator of the financial services sector in BVI. The FSC is in charge of ensuring AML is followed. It has the authority to impose financial and administrative penalties. The maximum penalty for most offences now ranges between \$250,000 and \$500,000. It has issued several penalties against companies in the recent past – the most recent one being a financial penalty of 440,000 \$against Mossack Fonseca’s BVI operations for breaches of BVI’s AML and TF codes and its regulatory codes. Although the FSC issued this fine to Mossack Fonseca, the fact that the amount is quite small compared to the scale of revelations in Panama papers made it just a token gesture and brought into question FSC’s ability as a regulator.¹²¹

Table 4 : Enforcement actions by FSC by year

	No. of enforcement actions	Maximum penalty issued in the year
2016	13	Administrative Penalty of \$440,000.00
2015	58	Administrative Penalty of \$97,000.00
2014	47	Administrative Penalty of \$335,000.00
2013	97	Administrative Penalty of \$205,500.00

Source: Authors’ elaboration based on the enforcement activity reports of 2013-2016 (<http://www.bvifsc.vg/en-us/publications/enforcementaction.aspx>)

¹¹⁹ <http://www.accaglobal.com/us/en/member/standards/ethics/acca-code-of-ethics-and-conduct.html>

¹²⁰ <http://bvinews.com/new/still-no-body-to-vet-punish-lawyers-a-year-later/>

¹²¹ <https://panamapapers.icij.org/20161116-bvi-mossack-fonseca-penalty.html>

10. UNITED STATES OF AMERICA

KEY FINDINGS

- US regulates all professional representing taxpayers before the IRS, including requirements as to independence and responsibility
- US imposes disclosure rules on promoters of tax avoidance schemes similar to the UK DOTAS rules, but also has also had conduct requirements for professionals giving written opinions on certain tax shelter schemes

RELEVANCE TO THE CURRENT STUDY

The United States has a special importance as the world's largest economy, even though it appears relatively little as a direct participant in the Panama Papers. However, the US tax system includes a number of provisions that offer interesting possible alternative approaches to the regulation of professionals acting as tax intermediaries. A full review of the rules of independence and responsibility in the US is, nevertheless, beyond the scope of this study.

OVERVIEW OF PROFESSIONS INCLUDED

Although there is no separate tax profession in the United States there are a number of provisions of US federal tax law regarding the conduct of those who represent taxpayers, whatever their professional accreditation. These include general provisions relating to the conduct of tax advisor and tax return preparers, as well as provisions regarding tax shelters, similar to the UK DOTAS and POTAS provisions.

BINDING AND NON-BINDING RULES OF INDEPENDENCE AND RESPONSIBILITY

Treasury Department Circular No. 230 regulates practice before the Internal Revenue Service (IRS), which covers representing taxpayers before the IRS but not preparing and filing tax returns. Lawyers and public accountants can automatically practise before the IRS, as can others who pass an exam prescribed by the IRS in order to become an "enrolled agent". The IRS requires any person who assists a taxpayer in preparing a return to have a preparer tax identification number (PTIN). This includes lawyers and accountants (Bittker & Lokken 2017: ¶ 110.2).

The rules in Circular 230 apply in addition to professional standards applicable to lawyers and accountants. In terms of **independence** the Circular requires practitioners to avoid conflicts of interest between clients. In addition, former IRS employees may not represent a person in a matter that the employee was personally involved with, or more generally within two years after leaving the Service where the former official was responsible for the matter. Employees of the Treasury Department who participate in the development of a tax rule may not make representations regarding the rule within one year after leaving the Department (Bittker & Lokken 2017: ¶¶ 110.2.4, 110.2.9).

Regarding **responsibility**, a practitioner may not sign off on a return or claim for refund that the practitioner knows or should know contains an "unreasonable" position, a willful attempt to understate tax or a reckless or intentional disregard of rules or regulations. Practitioners may not give advice relying on the possibility that a matter will not be audited by the IRS (Bittker & Lokken 2017: ¶ 110.2.6).

From 2004 to 2014 the Circular contained special rules regarding “covered” opinions, that is a range of written opinions on tax shelters in a number of categories involving a high risk of avoidance or evasion. The rules were removed because they were seen as too complicated and as tending to result in some practitioners’ seeking to give advice on the shelters in other forms. In giving a covered opinion a practitioner had to reasonably seek to identify the correct relevant facts, to relate the applicable law to the facts, to evaluate all significant federal tax issues, and to give an overall conclusion as to the likelihood of favourable federal tax treatment, or as to why such a conclusion was not possible. The covered opinion also had to disclose the practitioner’s compensation arrangement with any promoter of the scheme, and for certain schemes could only be issued when the practitioner thought it more likely than not that the scheme would be successful (Bittker & Lokken 2017: ¶ 110.2.7).

The US equivalent of the DOTAS rules is the requirement in the Internal Revenue Code is that a taxpayer must disclose with their return any “reportable transaction” during the year. This requirement has been in place since 2000. There are five categories of reportable transactions, including confidential transactions and loss transactions. A person who gives advice on a reportable transaction that has been implemented by a taxpayer, and receives fees above a certain limit is a “material advisor”, and must file a return describing the transaction and its benefits within 30 days. The material advisor must also maintain a list of clients who have been advised about the scheme (Bittker & Lokken 2017: ¶ 111.3).

There are also rules on the promotion of abusive tax shelters. Under § 6700 of the Internal Revenue Code, a person who is involved in organising or selling an entity, an investment plan or any other arrangement is subject to a penalty if the person makes a false statement about the arrangement or “propagates a gross valuation overstatement” (more than 200 per cent of the value) about the arrangement. There is also a related offence under § 6701 for assisting with the preparation of a tax return or other document knowing that it will result in an understatement of tax (Bittker & Lokken 2017: ¶ 114A.8).

ENFORCEMENT

Circular 230 is enforced by the Office of Professional Responsibility within the Treasury Department. It has the power to reprimand a practitioner or to suspend or disqualify a practitioner from participating in proceedings before the Treasury or the IRS, and also has the power to censure a practitioner publicly to reprimand the practitioner privately (Bittker & Lokken 2017: ¶ 110.2.11).

The penalty for a material advisor failing to file the required return is generally \$50,000, but it can in certain cases be increased to the greater of \$200,000 or 75% of the material advisor’s income from the transaction before filing (Bittker & Lokken 2017: ¶ 111.3.2). The penalty on a tax shelter promoter under § 6700 is the lesser of 100 per cent of the promoter’s fee or \$1,000 for each entity created or investor sold to. The penalty for abetting an understatement under § 6701 is similar, but in this case the maximum penalty is increased to \$10,000 if the taxpayer is a corporation (Bittker & Lokken 2017: ¶ 114A.8).

There are cases in the US where taxpayers have successfully sued for negligence or malpractice lawyers and accountants who have promoted or given an opinion on a tax shelter that was later overruled by the IRS or the courts (Bittker & Lokken 2017: ¶ 110.2.1).

11. RECOMMENDATIONS:

IMPROVING THE INCENTIVES OF TAX PROFESSIONALS THROUGH RULES ON INDEPENDENCE AND RESPONSIBILITY

KEY RECOMMENDATIONS

- Development of an EU framework for compulsory common ethical standards for tax advisors in each country
- An independently self-regulated tax advisor profession can balance the public interest with the need for independence from the tax authority
- Common standards for the disclosure of tax avoidance schemes
- Penalties for promoters failing to disclose schemes as required at a proportionate level to encourage compliance
- An offence for professionals assisting in tax evasion, also at the level of professional firms
- Encourage the improvement of professional standards and standards for exchange of information in tax havens
- Encourage the improvement of enforcement and its deterrent effect, particularly through improved public statistics on enforcement measure regarding professionals advising on tax
- Ensure that full advantage is taken of the inclusion of tax crimes as predicate offences under the 4th AML Directive

This analysis has shown that, although all the countries in the study have rules of independence and responsibility for their professions, and the basic elements of those rules are broadly similar, there are also significant differences of detail, even between professions within one country. With tax planning being co-ordinated by large, often multi-functional professional firms, and often involving a range of professionals in different countries taking very different roles in developing and implementing multi-national commercial and investment structures, it is important that there should be a common core of standards against which tax advisors work.

A number of countries in the analysis have tax advisor professions, often with some overlap with the accounting and legal professions. However, in some cases they appear to have less well-developed codes of conduct than the other two professions. The analysis shows that this is not necessary.

One possible approach is that of Circular 230 in the US, which applies to all those advising taxpayers regardless of their other professional affiliations. This provides rules of conduct for all tax professionals. The problem is that, while these rules have the advantage of being compulsory, the potential conflict of interest of the tax authority limits the credibility of these rules, and puts the independence of the tax professionals at risk. Germany has a separate regulated profession. This preserves independence, but at the risk of not including all professionals advising on tax. The UK has a code of conduct for all tax advisors, including those who are also lawyers and accountants, but it is voluntary.

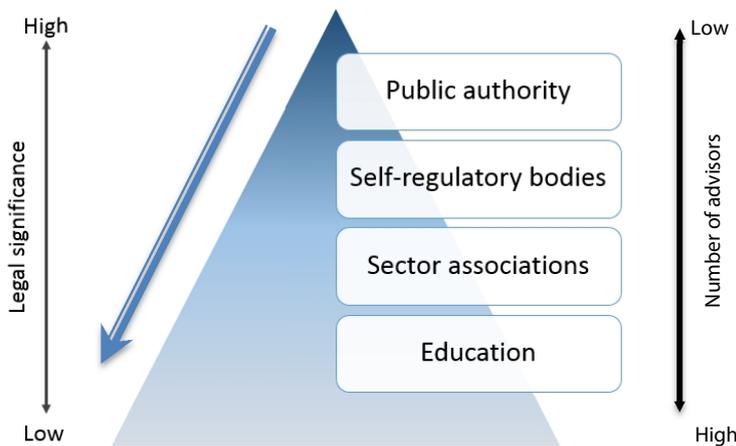
One advantage of the US approach is that the special needs of tax and the public interest are clearly recognised in rules considering conflicts arising to professionals

who spend time working both for the tax authority and as advisors, and rules requiring that advisors not take unreasonably aggressive positions in giving tax advice. However, the recent changes to the UK PCRT requiring advisors not to promote tax plans that are highly aggressive or contrary to the clear intent of Parliament, show that independent regulators based in the profession can develop rules of conduct that seek to balance the public interest with the interests of advisors and their clients.

At the EU level, a framework similar to Circular 230 or the PCRT could be set out as a recommendation for the implementation of best practice standards. Their scope could include the conduct of professionals giving advice on or helping to implement tax structures that can be identified as potentially abusive on the basis of criteria such as those used in the tax disclosure regimes or the former US 'covered opinion' rules. The use of a separate independent self-regulator for lawyers, rather than the lawyers' representative body, as in the UK, Cyprus and other jurisdictions offers a way to further strengthen the credibility of the rules and of enforcement. Differences in Member State professional structures and tax procedures are probably sufficiently different to make it difficult to legislate in this area at the Union level, but a best-practice framework could offer valuable guidance.

Some of the trade-offs that need to be balanced are shown in Figure 1. While lower level, less legally demanding approaches have advantages, they achieve a better response from advisors who are already compliant. More legally stringent approaches can exert more pressure to encourage non-compliant advisors to adopt a more compliant stance and move down the pyramid. This pattern is reminiscent of the famous tax compliance pyramid of Braithwaite (2007: 5).

Figure 1 : Levels at which independence and responsibility of advisors is addressed and effect on compliance



Source: Authors

A requirement for tax returns to be based on audited financial statements, as in Cyprus, could provide a basis for extending auditors' responsibility with regard to tax affairs. This would take advantage of the special position of independence with respect to their clients that applies to auditors.

The other relevant mechanism that has proven to be valuable for increasing the responsibility of tax professionals for their advice has been the tax plan disclosure rules in the UK and the US. The OECD (2011) has commented on their effectiveness. More can be done to ensure that tax professionals bear responsibility for their part

in disclosing schemes, and perhaps for schemes that ultimately fail on challenge, if it can be shown that the advisor gave an opinion that did not reasonably assess the chance of success, along the lines suggested by Ventry (2008).

It is also crucial to ensure that the penalties for failing to disclose schemes, especially when there is a cross-border element (*a fortiori* with the involvement of tax haven entities), are sufficient to incentivize compliance. Sikka (2013: 24) recounts an example of some concern reported by the US Senate Permanent Subcommittee on Investigations of a large accounting firm reasoning that disclosure of schemes would be inadvisable given the low fines that could be imposed and its understanding of the behaviour of other firms. The problems of the fine against Mossack Fonseca in the BVI shows both that proportionate penalties are important, and challenging to achieve. The use of public shaming under the UK's POTAS regime for professionals and others who do not comply with their responsibilities under DOTAS is an approach that could be encouraged. The new power introduced in the UK in 2016 for HMRC to charge civil penalties on tax professionals (and others) who enable tax avoidance, with non-trivial fines of up to 100% of the tax that the intermediaries helped evade, as well as the new offence of corporate failure to prevent the facilitation of tax evasion in the Criminal Finances Bill, are also approaches that could usefully be considered by other countries.

Additional measures could also be considered for transactions with a cross-border element, especially in case of the involvement of a tax haven. Core elements of the standards for regulation of tax professionals could be included in the new version of the EU tax good governance criteria being developed (European Commission, 2013), and could thus become a factor taken into account in considering countries, such as tax havens, for listing as countries that refuse to respect tax good governance standards. Efforts should also be made to ensure that all tax havens are signed up to automatic exchange of information, where due diligence was done by the intermediary (following the BVI example), preferably using the CRS under the OECD / Council of Europe Convention on Mutual Assistance in Tax Matters.

This analysis has not been able to include very much detailed information about the experience of the countries in the case studies in enforcing these rules of independence and responsibility, because it is simply not readily available. However, the information that is available suggests that enforcement of these rules, particularly with regard to tax matters, could be significantly strengthened in all of the countries considered. While low levels of convictions and of serious penalties could be construed, as indicating that the rules are working well, a key role of any penalties is to have a deterrent effect. The lack of readily available statistics with sufficient detail suggests that the penalties may well often lack the public visibility needed for them to operate with the intended level of deterrence.

One valuable tool for strengthening the standards of tax advising is the AML rules. The 2012 FATF Recommendations and the 4th AML Directive, due to be implemented in June of this year make it explicit that (serious) tax evasion is to be treated as an AML predicate offence. This brings the prospect that AML can become much more important in controlling tax evasion. One problem, however, is that legal professionals are only within the scope of the legislation if they are involved in implementing the operational side of a tax plan. Merely advising on a plan with potential elements of evasion would not trigger obligations on legal professionals under even the 4th AML Directive. This is perhaps another argument for a tax advisors profession that includes tax advisors who are also qualified as lawyers or accountants.

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