

ARTICLE
ANTI-MONEY LAUNDERING AND LAWYER
REGULATION:
THE RESPONSE OF THE PROFESSIONS

*Delphine Nougayrède**

ABSTRACT

The extension of anti-money laundering (AML) controls to lawyers has been an object of controversy since the early 2000s. Facing these measures, the legal profession has adopted different strategies of response, three examples of which are examined and contrasted in this Article. In the United States, the legal profession vocally objected to the measures and has been able to deflect any legislative action. In the United Kingdom, the profession actively engaged with ambitious new rules, while in France, the legal profession made maximum use of the levers of self-regulation allowed by the European directives. This Article presents AML lawyer-regulation as an example of the versatility of global regulatory norms which do not necessarily evict national traditions. It also presents the European Union as the bedrock of AML regulatory diffusion and critiques US professional resistance to these norms.

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* Lecturer-in-Law, Columbia Law School; Research Fellow, Center for Global Legal Transformation; avocat at the Paris Bar and solicitor of England & Wales. The author gratefully acknowledges comments by Laurel Terry on an earlier version of this article. All errors are her own.

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I. INTRODUCTION

International standards of anti-money laundering (“AML”) regulation involve placing control mechanisms at different access points into the international financial system.¹ The inclusion of the legal profession into this regulatory regime in the early 2000s led to the imposition in various countries of obligations on lawyers that were modelled on those of financial institutions. Because they collided with traditional models of lawyer regulation and professional conduct, these obligations provoked a decades-long confrontation between lawmakers, courts, and legal professionals that played out in many countries. National legal professions implemented different strategies to deal with the new AML standards, leading to outcomes marked by the circumstances of each country and extent of domestic influence wielded by its legal profession.

This Article will not analyze the substance of the AML standards in detail, or their theoretical justification, as they have amply been described elsewhere. Rather, the objective here is to compare and contrast the strategies that were adopted in specific countries by national legal professions, the diversity of resulting outcomes, and the empirical response that can be identified in countries where hard-law rules were introduced. In other words, this is an account of the resistance strategies deployed by lawyers and their professional organizations against obligations initially perceived by them to be excessive, imposed from the outside, or contrary to traditional standards of professional conduct and culture.

1. GILMORE, *DIRTY MONEY: THE EVOLUTION OF INTERNATIONAL MEASURES TO COUNTER MONEY LAUNDERING AND THE FINANCING OF TERRORISM* 95-97 (2010) (citing a FATF report of February 1990 emphasizing the need for detection at entry points); Peter Alldrige, *Money Laundering and Globalization*, 35 *J. L. & SOC'Y* 437, 442 (2008) (explaining that in addition to prohibition (i.e. criminalization), AML involves preventative measures such as “regulation of markets and imposition of reporting obligations”).

This Article proceeds by way of case studies selected to highlight salient differences. The first case study is that of the United States. In the United States, AML lawyer-related standards are referred to as the “Gatekeeper Initiative,” a designation which is not neutral and reflects the profession’s continuing opposition to these measures.² The US legal profession has to this day successfully deflected any mandatory introduction of AML standards, putting forward instead diluted voluntary measures under the control of its self-governance bodies, rather than external regulators.³ The US strategy has been successful mainly because of the significant resources, organization, influence wielded by lawyers in American society in general, and influence by the American Bar Association (“ABA”) in particular. At the other end of the spectrum are two case studies drawn from the European Union, where prospects of hard-law AML standards materialized early on. The European legal profession was collectively unable to counter the legislative tide; after unsuccessful court challenges by some of the national professions, binding measures were eventually imposed on all.⁴ These professions have dealt since then with their AML obligations through differentiated strategies, which reveal a divide between the British profession, which has very actively engaged in AML procedures including suspicious transaction reporting, and Continental countries where suspicious transaction reporting is scarcer.⁵ The United Kingdom will accordingly be used as a second case study, followed by France as an example of a Continental response.⁶ The last section of this Article will attempt to draw out wider lessons from these differentiated strategies.

A final word of introduction is to mention the particular case of Canada. In contrast to the United States, but similar to the European

2. See *infra* Part III.

3. See *infra* Part III.

4. See *infra* Part V.

5. See *infra* Parts IV and V.

6. For a comparative study by economists of the responses in the UK and Sweden, see Karin Svedberg Helgesson & Ulrika Mörth, *Involuntary Public Policy-making by For-Profit Professionals: European Lawyers on Anti-Money Laundering and Terrorism Financing*, 54 J. COMMON MKT. STUD. 1216 (2016). See also Nathaniel Tilahun Ali, *States’ Varied Compliance with International Money Laundering Standards for Legal Professionals*, 88 NORDIC J. INT’L L. 280, 280 (2019) (concluding that the varied national responses to the AML duties of lawyers reflect not national commitment to the rule of law but differences “in the philosophical inclinations of judiciaries over how the legal profession serves the public interest” and “a turf war over the administration of the legal profession”).

Union, Canadian legislators were at the forefront of AML regulation and able to push through legislation imposing AML obligations onto Canadian lawyers in 2001.⁷ The mandatory reporting obligation was, however, countermanded by the courts as contrary to Canadian constitutional principles.⁸ Therefore, it seems that the Canadian legal profession was unable to block legislation, but successful in achieving protection by the courts against suspicious transaction reporting,⁹ something the European profession was not able to achieve. Canada would be an interesting fourth case study for this Article, but will be set aside in the interest of brevity.

II. A BRIEF HISTORY OF THE AML LAWYER-RELATED REGULATORY REGIME

While this Article does not analyze the substance of the AML lawyer-related regime, it is necessary nevertheless to say a few introductory words to place it in historical perspective. As is well-known, the body in charge of producing global AML norms since 1989 has been the Financial Action Task Force, (“FATF”), an intergovernmental body headquartered in Paris and lodged by the Organization for Economic Cooperation and Development (“OECD”). The initial objective of the global AML regimes produced in the 1980s and 1990s was to combat the laundering of proceeds of drug trafficking by measures primarily applicable to the banking sector.¹⁰ It soon became apparent, however, that criminal organizations were turning to

7. See MICHELLE M. GALLANT, *LAWYERS AND MONEY LAUNDERING REGULATION: TESTING THE LIMITS OF THE SECRECY IN CANADA* 1 (2013); Ronald J. MacDonald, *Money Laundering Regulation – What Can be Learned from the Canadian Experience*, 2010 J. PROF. LAW. 143, 144 (2010).

8. *Canada (A.G.) v. Federation of Law Societies*, [2015] 1 S.C.R. 401 (Can.).

9. On the debates that occurred at the time, see generally GALLANT, *supra* note 7; MacDonald, *supra* note 7.

10. *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FIN. ACTION TASK FORCE [FATF] (June 2019), www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf [<https://perma.cc/CAX9-RADJ>] [hereinafter FATF 2012 Recommendations]. The original recommendations produced by the FATF in 1990 were entitled the “Forty Recommendations.” *The Forty Recommendations of the Financial Action Task Force On Money Laundering*, FATF (1990), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf> [<https://perma.cc/V69W-3AL3>].

more sophisticated methods to launder gains, and that these methods involved the creation of legal entities and new categories of external service providers, such as lawyers and accountants.¹¹ The idea of including these professions into the AML regulatory regime was first mooted at the political level by a G8 summit held in 1999 in Moscow.¹² At that meeting, the heads of government decided collectively to “consider requiring or enhancing suspicious transaction reporting by the ‘gatekeepers’ to the international financial system, including company formation agents, accountants, auditors and lawyers, as well as making the intentional failure to file the reports a punishable offense, as appropriate.”¹³ This was the first clear signal that lawyers were on the political radar screen. They were being bundled together with other services categories, a fact that would cause lawyer consternation,¹⁴ but in 1999 the G8 was merely committing to *consider* the measures. It used the expression “gatekeepers,” which was later somewhat discarded in actual AML regulatory production, except in the United States where it took on a powerful symbolic dimension, as will be argued in this Article. In July 2000, a G7 Meeting of Finance Ministers specifically tasked the FATF to revise its recommendations to include the gatekeepers.¹⁵

The next and most dramatic milestone were the September 11 attacks and EU adoption of the Second Directive on December 4,

11. GILMORE, *supra* note 1, at 45-46; Patricia Shaughnessy, *The New EU Anti-Money Laundering Directive: Lawyers as Gatekeepers and Whistle-Blowers*, 34 L. & POL’Y INT’L BUS. 25, 26-27 (2002).

12. *Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime - Communique*, FED. AM. SCIENTISTS ¶ 32 (Oct. 20, 1999), <https://fas.org/irp/news/1999/10/991020-crime-rus.htm> [<https://perma.cc/RS9B-DA77>].

13. *Id.*

14. *See, e.g.*, Int’l Bar Ass’n et al., *A Lawyer’s Guide to Detecting and Preventing Money Laundering*, AM. BAR ASS’N 5 (Oct. 2014), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf [<https://perma.cc/6SK9-L328>].

15. The G7 report states as follows:

We take note that, as a follow-up to the October 1999 Moscow Ministerial Conference on Combating Transnational Organized Crime, an experts group was convened to study the issues related to the involvement of professionals such as lawyers and accountants (“gatekeepers” to the international financial system) in money laundering. We express our support for the continuation of this work.

Report from G7 Finance Ministers to the Heads of State and Government, Actions Against Abuse of the Global Financial System, G7 INFO. CTR. ¶ B.5(a) (July 21, 2000), <http://www.g8.utoronto.ca/summit/2000okinawa/abuse.htm> [<https://perma.cc/4LP5-N8Q8>]; *see* GILMORE, *supra* note 1, at 106 (2010).

2001.¹⁶ The directive had been under discussion for several years, yet one of the areas of disagreement was precisely the inclusion of the legal professions.¹⁷ Commentators report that the European Commission was heavily influenced by the FATF,¹⁸ and that the Commission wanted to include the legal profession into the regime but the European Parliament was in favor of broader exemptions.¹⁹ Ultimately the Commission's position prevailed and the Second Directive became the first fully documented and legally binding expression of the new regulatory standards that would become applicable to lawyers.²⁰ It has since been followed by the Third,²¹ Fourth,²² Fifth, and Sixth Directives,²³ all including identical or quasi-identical language regarding lawyers. It can therefore be argued that contrary to frequent commentary, the European directives are the real regulatory benchmark against which the standards issued by the FATF or in other national regimes should be compared. The Second Directive lawyer

16. Shaughnessy, *supra* note 11, at 30-32.

17. GILMORE, *supra* note 1, at 230-31.

18. *Id.*

19. GILMORE, *supra* note 1, at 230 (*citing* VALSAMIS MITSILEGAS, MONEY LAUNDERING COUNTER-MEASURES IN THE EUROPEAN UNION (Kluwer Law Int'l ed., 2013)). The Council was apparently aligned more with the Commission than the Parliament. See also the Opinion of the European Court of Justice Advocate General Miguel Poiares Maduro of 14 December 2006 on Case C-305/05, *Ordre des Barreaux Francophones et Germanophone v. Conseil des Ministres*, E.C.R. I-5308, ¶¶ 10-16, available at <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:62005CC0305&from=CS> [<https://perma.cc/N5V4-4H7G>] [hereinafter Opinion of Miguel Poiares Maduro]. See also Shaughnessy, *supra* note 11, at 30-32.

20. See Directive 2001/97, 2001 O.J. (L 344) 76 (EU) [hereinafter Second Directive]. The language extending the AML regime to lawyers is at Article 2 introducing a new Article 2(a)5 into the historical First Directive 91/308/EEC of 1991.

21. Directive 2005/60, 2005 O.J. (L 309) 15. On the preventive use of the financial system for the purpose of money laundering and terrorist financing, see *id.* at 3 (entirely replacing the First and Second Directives) [hereinafter Third Directive]. Its main effects were to widen the definition of predicate offenses for money laundering, implement the principle of "risk-based" CDD and introduce the prohibition against tipping-off in connection with suspicious transaction reporting.

22. Directive 2015/849, 2015 O.J. (L 141) 73 (entirely replacing the Third Directive and entering into force on 26 June 2017) [hereinafter Fourth Directive]. Amongst its novelties was the enhancement of CDD obligations, in particularly in connection with PEPs, and introduction of mandatory beneficial ownership registers of EU companies.

23. See Directive 2018/843, 2018 O.J. (L 156) (amending the Fourth Directive and due to be implemented by 10 January 2020) [hereinafter Fifth Directive]. See also Directive 2018/1673, 2018 O.J. (L 284) 22, (adopted a few months after the Fifth Directive in order to expand and unify criminal law and tax evasion) [hereinafter Sixth Directive]. Generally, no major changes have been made to the lawyer-related provisions since the Second and Third Directives.

provisions actually pre-dated the corresponding FATF recommendations that were produced in 2003, with the revision of their historical “Forty Recommendations,”²⁴ including Recommendation 12 mandating inclusion of lawyers into the AML customer due diligence and record keeping regimes for certain types of activities and Recommendation 16 requiring lawyers to report suspicious transactions.²⁵ The FATF is undoubtedly an influential body that has widened the geographical diffusion of AML standards and maintains its influence through a recurring peer review process. However, when one is dealing in regulatory regimes and examining the conduct of real-life legal professions, reality is defined more by hard-law provisions that are legally binding than by proposed recommendations, and this is why EU law seems like the more relevant benchmark.

As will be briefly set out in the following paragraphs, the provisions affecting lawyers in the European Union and FATF regimes comprise three main limbs. The first limb is the typology of covered activities that fall under AML obligations in the first place, when conducted by lawyers. The second limb regards the obligation to properly identify clients of covered activities and maintain records: this is often referred to as “client due diligence” (“CDD”), or “Know your Client” (“KYC”). The third limb is the mandatory reporting of suspicious transactions, subject to the respect of traditional rules regarding professional secrecy and legal privilege. This is usually referred to as “suspicious transaction reporting” (“STRs”) or

24. The original Forty Recommendations of 1990 (*supra* note 10) and a first set of revisions adopted in 1996 did not extend AML procedures to lawyers (for a copy of these documents, see GILMORE, *supra* note 1, at 269-84). The 1996 revisions recommended only that appropriate national authorities “consider applying Recommendations 10 to 21 and 23 to the conduct of financial activities as a commercial undertaking by businesses or professions which are not financial institutions.” (¶ 9). In its 2000-2001 Annual Report, FATF then wrote that “one solution offered by the experts this year is to encourage including [the legal] professions under the same anti-money laundering obligations as financial intermediaries when they perform similar functions” (¶ 80), and that its “working group will carefully analyse whether the FATF Forty Recommendations should be extended to cover certain categories of nonfinancial businesses and professions, and other financial intermediaries” (¶ 86(c)). Evidently this language was still tentative and not definitive. See *Annual Report 2000-2001*, FATF (June 22, 2001), <https://www.fatf-gafi.org/media/fatf/documents/reports/2000%202001%20ENG.pdf> [<https://perma.cc/M8H6-9MTT>].

25. The two Recommendations are now renumbered in the FATF 2012 Recommendations as Recommendations 22 and 23. The inclusion of these Recommendations in 2003 was facilitated by the Second Directive equivalents which had been adopted a few months earlier. See GILMORE, *supra* note 1, at 112).

“suspicious activity reporting” (“SARs”).²⁶ Of these three limbs, the third has been the most controversial.²⁷

The current European language regarding the first limb of lawyer AML obligations is found in the Fourth Directive.²⁸ According to its provisions, lawyers (or more precisely, “notaries and other independent legal professionals”) are “obliged entities” placed under AML obligations similar to banks or other financial institutions

where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the:

- (i) Buy and selling of real property or business entities;
- (ii) managing of client money, securities or other assets;
- (iii) opening or management of bank, savings or securities accounts;
- (iv) organization of contributions necessary for the creation, operation or management of companies;
- (v) creation, operation or management of trusts, companies, foundations, or similar structures; [. . .].²⁹

In the FATF regime, this broadly corresponds to Recommendation 12 of the 2003 Recommendations and Recommendation 22(d) of the currently applicable 2012 Recommendations as last updated in June 2019.

The second limb of the AML lawyer regime is the obligation for lawyers conducting these covered activities to properly identify their clients and maintain adequate documentation (CDD or KYC).³⁰ This limb has given rise to much less controversy. In many countries, it has been seen as promoting good practices even outside of AML considerations.³¹ The third and final limb, the most controversial of the

26. One should also add its corollary, the prohibition against tipping-off, which was added to the European system by the Third Directive.

27. See *infra* Part III regarding the United States and Part V regarding the French reaction.

28. This language is almost identical to the original definition introduced by the Second Directive in 2001.

29. See Fourth Directive, *supra* note 22, art. 2(1)(3)(b) (originally in Article 2 of the Second Directive, *supra* note 20).

30. Fourth Directive, *supra* note 22, ch. II; FATF 2012 Recommendations, *supra* note 10, Recommendations 10, 11, 17, 18 and 19.

31. Most professional conduct rules requiring that lawyers properly identify their client as a necessary pre-condition to providing adequate representation.

three, is the obligation to report suspicious transactions and the prohibition on informing the client that a report has been made, a rule known as “no tipping off.” The reporting obligation is set out in the following terms in the Fourth Directive (in terms almost identical to the original 2001 language of the Second Directive):

Member States shall require obliged entities, and, where applicable, their directors and employees, to cooperate fully by promptly:

- (a) informing the FIU, including by filing a report, on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing, and by promptly responding to requests by the FIU for additional information in such cases; and
- (b) providing the FIU, directly or indirectly, at its request, with all necessary information, in accordance with the procedures established by the applicable law.

All suspicious transactions, including attempted transactions, shall be reported.³²

Recognition is given, however, to the specific circumstances of the legal profession.³³ This is done through two mechanisms: first, reporting can be conducted not directly, but through national bar authorities, and second, reporting is never required for certain types of activity:

By way of derogation [. . .], Member States may, in the case of [notaries and other independent legal professionals], designate an

32. Fourth Directive, *supra* note 22, art. 33(1). The equivalent is at Recommendation 23(a) of the FATF 2012 Recommendations: “Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22.” Reporting persons are then prohibited from disclosing the fact of that report to their client or any third person, a rule known as “no tipping off” (Article 39 of the Fourth Directive and Recommendation 21 of the FATF 2012 Recommendations applicable to lawyers as a consequence of Recommendation 23).

33. *Id.* See also the Interpretative Note to Recommendation 23 of the FATF 2012 Recommendations, at 85 (“Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege”).

appropriate self-regulatory body of the profession concerned as the authority to receive the information [. . .]. [. . .] [T]he designated self-regulatory body shall [. . .] forward the information to the FIU promptly and unfiltered;³⁴

and

Member States shall not apply the [reporting] obligations [. . .] to notaries [or] other independent legal professionals, [. . .] to the strict extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.³⁵

The intention of EU lawmakers was clearly to exempt traditional lawyering activities from the reporting obligation. This is consistent with the fact that court and contentious activities are not included in “covered activities,” i.e. lawyers engaged in that kind of work are not “obliged entities” subject to AML obligations in the first place. Instead of referring back to domestic legislation or law, EU lawmakers preferred to craft their own vocabulary to describe these exemptions. For instance, they refer not to “legal advice,” but to “ascertaining the legal position of clients.” In the national instruments transposing the directives into each of the member states, however, the language tends to circle back to pre-existing and better-defined legal concepts such as “legal advice,”³⁶ legal “privilege,”³⁷ or “professional secrecy.”³⁸

These legal categories in the European Directives closely reflect the soft-law standards of the FATF. As has already been stated, there has been substantial alignment throughout the years between the normative AML production of the European Union and the

34. Fourth Directive, *supra* note 22, art. 34(1).

35. Fourth Directive, *supra* note 22, art. 34(2) (*emphasis added*).

36. See, e.g., the expression “legal advice” (*consultation juridique*) used in the French statutory transposition of the Directives at Article L 561.3 of the Monetary and Financial Code (CMF). C. MON. ET FIN. [MONETARY AND FINANCIAL CODE] art. L 561.3 (Fr.).

37. See, e.g., the expression “privileged circumstances” used at Section 330 of the British Proceeds of Crime Act (*infra* note 94).

38. See, e.g. the concept of “professional secrecy” (*secret professionnel*) repeatedly used in the successive AML-related professional regulations produced by the French Conseil National des Barreaux (*infra* notes 157 and 166).

recommendations of the FATF. The key difference being, however, that norms produced by the European Union are not “soft-law,” but legally binding on the member states.

III. THE UNITED STATES: KEEPING FEDERAL LAWMAKERS OUT

The US legal profession is organized into 50 separate state bars and represented at the national level by the American Bar Association (“ABA”), a voluntary association of lawyers across the country.³⁹ Whether the profession is “self-regulated” or regulated principally by the judiciary has been the object of debate and is not directly relevant for this Article.⁴⁰ What is more important is the national role that is played by the ABA, particularly in the production of benchmark standards of professional conduct for the profession,⁴¹ the exclusion of federal or state lawmakers from primary responsibility for the regulatory oversight of lawyers or production of rules of conduct, and the profession’s desire to protect this traditional division of tasks. Instances of federal involvement in lawyer regulation do exist, however. One example is in connection with the work of securities lawyers.⁴² In the wake of the Enron and WorldCom scandals in the

39. See *The American Bar Association*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/about_the_aba/ [<https://perma.cc/TKZ4-5RD2>] (last visited Nov. 30, 2019). According to the ABA website, the ABA was founded in 1878. Its mission is “to serve [its] members,” “advocate for the profession,” “eliminate bias and enhance diversity” and “advance the rule of law.”

40. See, e.g., MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 10 (AM. BAR ASS’N 1983) (stating that “[t]he legal profession is largely self-governing”); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1148-49 (2009) (pointing out that “courts, commentators, and legal ethics regulators continue to conceptualize law as a “self-regulated profession”); Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717, 721 (2016) (indicating that “the state supreme courts typically have the overarching responsibility for lawyer regulation . . .”).

41. Those currently in place are the 1983 Model Rules of Professional Conduct, which were transposed, with variations, in the 50 fifty individual states via the state judiciaries MODEL RULES OF PROF’L CONDUCT, *supra* note 40, pmbl. ¶ 10.

42. The practices of US tax lawyers are also subject to certain regulations by the IRS. See William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 950 (2005). Other areas of lawyer activity where lawmakers or regulators have introduced rules that affect their conduct are banking, bankruptcy, class actions, criminal defense, debt collection, or insurance defense. On this “fragmentation” of lawyer regulation and rules of conduct, see John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 961 (2009).

early 2000s, federal lawmakers instructed the Securities Exchange Commission (“SEC”) to issue guidelines on lawyer conduct when clients commit material violations of the securities laws.⁴³ These rules, which were reflected in Section 307 of the Sarbanes-Oxley Act and Part 205 Rules of the SEC, were fiercely resisted by the profession at the time.⁴⁴ It so happens that the debate on Section 307 and Part 205 raged exactly at the same time the FATF was preparing to roll out its 2003 Recommendations including the duties of lawyers. This Article will return to the possible effects of this coincidental timing later.

At present, US lawyers are in the fairly unique position of not facing any mandatory regulatory requirements in connection with AML policy. This was made possible by the ABA’s active resistance from the very inception of what they immediately named the “Gatekeeper Initiative,” channeled through a specially formed “Task Force on Gatekeeper Regulation and the Profession.”⁴⁵ The only measure that has been accepted by the US legal profession to date are “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing” that were issued by the ABA in 2010.⁴⁶ These measures replicate to a certain extent the detailed “risk-based” client due diligence measures recommended by the FATF and introduced in the EU by the Third Directive,⁴⁷ but they are only voluntary. The ABA’s “Voluntary Good Practices” document pointedly indicates that

[i]t is not intended to be, nor should it be construed as, a statement of the standard of care governing the activities of lawyers in implementing a risk-based approach to combat money laundering and terrorist financing. Rather, given the vast differences in practices, firms, and lawyers throughout the United States, [it]

43. Leubsdorf, *supra* note 42, at 1017-18; JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 217 (2006).

44. *Id.*

45. *Task Force On Gatekeeper Regulation and the Profession*, AM. BAR ASS’N, https://www.americanbar.org/groups/criminal_justice/gatekeeper/ [https://perma.cc/NZ3J-GRMM] (last visited Nov. 12, 2019).

46. ABA, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, AM. BAR ASS’N (Apr. 23, 2010), https://www.americanbar.org/content/dam/aba/directories/policy/2010_am_116.pdf [hereinafter ABA Voluntary Good Practices]; ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 463 (2013) (endorsing the Voluntary Good Practices).

47. Directive 2005/60, *supra* note 21, at 15-16.

seeks only to serve as a resource that lawyers can use in developing their own voluntary risk-based approaches.⁴⁸

Because of the absence of any binding legal obligation on lawyers (and other service professions), the United States has been rated “non-compliant” in the relevant sections of the “Mutual Evaluations” conducted in 2006⁴⁹ and 2016⁵⁰ under the auspices of the FATF. According to the latest 2016 Mutual Evaluation report, the United States “regulatory framework has some significant gaps, including minimal coverage of certain institutions and businesses (investment advisers (IAs), lawyers, accountants, real estate agents, trust and company service providers (other than trust companies).”⁵¹ To this it adds that “. . . the vulnerability of these minimally covered [. . .] sectors is significant, considering the many examples identified by the national risk assessment process.”⁵²

This is not to say, however, that the United States is not doing anything at all, or that the international critique of the US framework has been entirely without effect. A few high-profile scandals likely helped to push some US governmental action. For example, the Panama Papers data leak and a *60 Minutes* television program, which filmed several New York attorneys discussing techniques to conceal ultimate ownership of real estate before an NGO representative who was posing as the lawyer of a foreign official.⁵³ Following these

48. ABA Voluntary Good Practices, *supra* note 46, at 3.

49. *Summary of the Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism, United States of America*, FATF-GAFI 13-14 (June 23, 2006), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20ES.pdf> [<https://perma.cc/8APJ-VY79>].

50. FATF on Money Laundering & Asian/Pacific Group on Money Laundering, *United States Mutual Evaluation Report*, AM. BAR ASS'N 3-4 (Dec. 2016), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/fatf_mutual_evaluation_report.pdf [<https://perma.cc/95PW-PBSU>].

51. *Id.*

52. *Id.*

53. *The Panama Papers*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Aug. 21, 2019), https://www.icij.org/investigations/panama-papers/panama-papers-faq-all-you-need-to-know-about-the-2016-investigation/?gclid=EAIaIQobChMImK_f_rXq5QIVF5SzCh0zwmwFIEAAYASAAEgJXM_D_BwE [<https://perma.cc/9FE6-QRLM>]; *Undercover Investigation of American Lawyers Reveals Role of Overseas Territories, in Moving Suspect Money into the United States*, GLOBAL WITNESS (Feb. 12, 2016), <https://www.globalwitness.org/en/press-releases/undercover-investigation-american-lawyers-reveals-role-overseas-territories-moving-suspect-money-united-states/> [<https://perma.cc/MP26-M4ES>].

scandals, the US FIU Financial Crimes Enforcement Network (“FinCEN”) implemented territorial “targeting orders” imposing that specialized intermediaries known as real estate “title insurance companies,” which intervene in real estate acquisitions alongside banks and lawyers, identify the ultimate beneficial owners in certain types of transactions.⁵⁴ US banks have also come under additional AML obligations introduced by FinCEN in recent years.⁵⁵ It is notable, however, that these new AML obligations were placed not on lawyers, but on other intermediaries or banks. Lawyers have, until now at least, remained immune.

To understand why this is so, it is necessary to return to the complex matrix of US lawyer regulation, which is often bewildering to outsiders because it involves multiple layers of tension and balancing. The traditional principle of US lawyer self-regulation (or regulation by the judiciary) must be balanced against the perceived risk of legislative or executive intervention, the powers of the fifty state bars must be balanced against the influence of the central organization (the ABA), and the powers of the states must be balanced against those of the federal branch. It seems that one of the ABA’s main objectives, when faced with the FATF standards, was to keep out the federal lawmakers and executive agencies: these were the points of contact through which the FATF and other foreign governments or organizations were perceived to be attempting to exercise influence on US regulatory design. This fear of federal interference as a result of foreign influence is very clear from the language of the 2010 “Voluntary Good Practices” document: it points out that the “government is under pressure from the FATF and others (including development agencies, the Organization for Economic Cooperation and Development, the International Monetary Fund, the World Bank, and the United Nations) to adopt legislation implementing some or all of the provisions of the [FATF] Recommendations relating to the legal profession.”⁵⁶ In this context, its overarching purpose was to promote voluntary standards that would

54. See, e.g., US Treasury Department, *FinCEN Expands Reach of “Geographical Territorial Orders” Beyond Manhattan and Miami*, FINCEN (July 27, 2016), <https://www.fincen.gov/news/news-releases/fincen-expands-reach-real-estate-geographic-targeting-orders-beyond-manhattan> [https://perma.cc/MAD6-VE8E].

55. See, e.g., US Treasury Department, *Customer Due Diligence Requirements for Financial Institutions*, FINCEN (May 11, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-05-11/pdf/2016-10567.pdf> [https://perma.cc/JEH4-5DTX].

56. ABA Voluntary Good Practices, *supra* note 46, at 3.

be sufficiently widely implemented to “negate the need for federal regulation.”⁵⁷ In other words, the ABA saw as its main mission not active participation in global regulatory design, including through the crafting and dissemination of standards that might be accepted as mandatory, but to avoid giving the federal government an excuse to intervene.⁵⁸

The US legal profession appears to have been fairly unified in its objection to the introduction of mandatory AML standards. Scholarly publications discussing the subject are generally critical of the measures, albeit in varying degrees.⁵⁹ The critique is not surprising,

57. *Id.*

58. This ABA position is also reflected in its long-standing opposition to mandatory registration of beneficial ownership of US corporations, a policy which it views as indirectly introducing AML duties on lawyers. In this connection the ABA writes in 2018 that:

“it opposes legislation and regulations that would impose burdensome and intrusive gatekeeper requirements on lawyers, including bills that would subject the legal profession to key anti-money laundering compliance provisions of the Bank Secrecy Act. If adopted, these measures would undermine the attorney-client privilege, the confidential lawyer-client relationship, and traditional state court regulation of the legal profession, while also imposing excessive new federal regulations on lawyers engaged in the practice of law.”

Gatekeepers Regulations on Attorneys, AM. BAR ASS’N, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ [https://perma.cc/H5UE-DRMP] (last visited Nov. 30, 2019).

59. Bruce Zagaris, *The Gatekeepers Initiative: An Emerging Challenge for Professional Advisors Of International Business And Tax Matters*, AM. BAR ASS’N, 18 (2002), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_articles_gatekeeper2.pdf [https://perma.cc/6RUF-7Y54]; Bruce Zagaris, *Gatekeepers Initiative – Lawyers and the Bar Ignore it at their Peril*, 23 CRIM. JUST. 28, 32 (2008) [hereinafter Zagaris (2008)]; Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers*, 43 REAL PROP. TR. & EST. L. J. 607, 612 (2009); Laurel S. Terry, *An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance*, 2010 JOUR. PROF. L. 3, 9 (2010) (this was a special issue of the ABA’s Journal of the Professional Lawyer containing other articles on the topic of FATF lawyer measures) [hereinafter Terry (2010)]; Laurel Terry, *U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing*, 59 N.Y.L. SCH. L. REV. 487, 514 (2015) (commending the U.S. government and the U.S. legal profession for taking the “long view” in their approach to implementing FATF’s recommendations); Duncan E. Osborne, *The Financial Action Task Force and the Legal Profession*, 59 N.Y.L. SCH. REV. 422, 423 (criticizing the role of the FATF); Laurel S. Terry & José Carlos Llerena Robles, *The Relevance of FATF’s Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession*, 42 FORDHAM INT’L L. J. 627, 729 (2018) (critical of FATF’s lack of engagement with the legal profession but supportive of more AML involvement by lawyers, in particular KYC/CDD). *But see* Rebecca Gregory, *The Lawyer’s Role: Will Uncle Sam Want You in the Fight Against Money Laundering and Terrorism?* 72 UMKC L. REV. 23, 50 (2003) (noting that US professional rules

admittedly, when expressed by authors who were members of the ABA Task Force lobbying against the reforms. One member described the “Gatekeeper Initiative” as “astonishingly broad”⁶⁰ and creating “unprecedented challenges to the sanctity of the attorney-client privilege, the duty of client confidentiality and the delivery of services generally in the American legal system.”⁶¹ In contrast, the work of the ABA Task Force, presumably the “Guardians at the Gate” of the article’s title, has been described as “an admirable battle against FATF and its member states in order to curb the excesses of the Gatekeeper Initiative.”

To be fair, a portion of the US critique shares commonalities with some of the critique that initially emanated from the European professions. For example, it points to the unclear language used by FATF in its various definitions, the challenge posed by STR/SAR reporting obligations to traditional lawyer duties of confidentiality, and the absence of hard empirical data linking voluntary lawyer participation to money-laundering activity.⁶² However, where the US critique seems to stand out is its skepticism vis-à-vis what is presented as legal transplants from a non-legitimate, non-democratically elected organization (i.e. FATF). This is most clearly expressed in a 2008 article by another member of an ABA working group:

The FATF process of promulgating and then trying to implement AML standards for gatekeepers suffers from: (1) exclusion of major stakeholders from the decision-making process except for

are likely to change). In line with its position on lawyer-related AML in the US, US scholarship is critical of the European directives regarding lawyers. Shaughnessy, *supra* note 11, at 44; Danielle Jasmin Kirby, *The European Union’s Gatekeeper Initiative: The European Union Enlists Lawyers in the Fight against Money Laundering and Terrorist Finance*, 37 *HOFSTRA L. REV.* 261, 261 (2008).

60. Shepherd, *supra* note 59, at 670.

61. *Id.* at 612.

62. Zagaris (2008), *supra* note 59, at 29, 32. This argument has also been made by the European organizations. See Letter from John Fish, CCBE President to FATF Secretariat (September 9, 2002) at 3 (responding to the 30 May 2002 consultation) [hereinafter Letter from John Fish]. There is at least one US scholarly attempt to conduct empirical analysis. See Lawton P. Cummings & Paul T. Stepnowsky, *My Brother’s Keeper: An Empirical Study of Attorney Facilitation of Money-Laundering Through Commercial Transactions*, 2011 *J. PROF. LAW.* 1, 36-38 (2011). The authors analyzed 40 Second Circuit cases and concluded that in 15% of these cases, there had been unwilling participation by a lawyer. Despite this finding, they recommended only that US attorneys be asked to certify that they voluntarily apply the Good Practices procedure. The FATF now comprises thirty-nine members (thirty-seven states and two regional organizations).

the 34 countries that are FATF members, (2) lack of adequate participation in policy making and implementation by the private sector, (3) lack of transparency in the decision-making process (the FATF's deliberations on the recommendations occurred behind closed doors, without a record and without participation of elected officials or the private sector), (4) the use of economic sanctions and coercion in the way of blacklists as part of FATF's initiative against noncooperative territories and jurisdictions without binding hard law, (5) differential and favorable treatment of its own members whose inadequacies have not resulted in blacklisting (e.g., noncompliance by the United States with the 2003 gatekeeper initiatives), (6) the apparent efforts to usurp critical policy from democratically elected governments without their participation; and (7) questionable substantive policy design, such as the absence of any cost-effective measurements of the recommendations.⁶³

Similar thoughts are expressed by another author for whom "the FATF has been given an unsupervised and unmonitored license to address AML and CFT [Counter-Financing of Terrorism] problems," and "has done so without thoughtfully considering the merits of its arguments and pronouncements, without any consideration whatsoever to costs, without meaningful engagement of the private sector, and with a willful obliviousness to both the reality and practical consequences of its work."⁶⁴

This critique of the FATF is not isolated and has appeared in a number of other scholarly works on the general design of global AML law.⁶⁵ However, it ignores the important fact that by the time the FATF had formally issued its 2003 Recommendations, a number of other democracies had already decided to introduce binding AML standards onto their own lawyers (in particular, as already noted, the European Union and Canada). There is also a tendency in US commentary to overstate the substantive content of what is actually required by the

63. Zagaris (2008), *supra* note 59, at 31-32.

64. Osborne, *supra* note 59, at 431.

65. *See, e.g.*, HEBA SHAMS, LEGAL GLOBALIZATION: MONEY LAUNDERING LAW AND OTHER CASES 228 (2004) ("the FATF is procedurally illegitimate on all scores"); Alldridge, *supra* note 1, at 443, 463 ("FATF is (deliberately) an unrepresentative agency attempting to enforce its standards worldwide"; "FATF must show much greater transparency and accountability than hitherto . . .").

FATF standards.⁶⁶ Even authors sympathetic to AML objectives consider that the FATF's overall approach (addressing lawyers together with other professions) is too "one-size-fits-all" and therefore seen by the profession as "fundamentally at odds with lawyers' historic and globally-accepted values."⁶⁷

Several comments can be made here. First, US scholars seem to be reading a lot into the mission and influence of FATF, a consultative body whose role is to produce soft-law standards, and which is entirely dependent on the actions of governments for the introduction and enforcement of these norms (and, it might be added, for its own existence and funding). At some point the concern was even expressed that the United States might risk expulsion from the FATF, a risk that was probably never very high.⁶⁸ In reality, it is the EU that should be viewed as the powerful actor standing behind the FATF-designed AML norms. As will be argued below, the European experience is that these transnational regulatory norms can, in fact, be rolled out in different guises with varying outcomes that reflect national circumstances and professional cultures. In contrast, there seems to be an underestimation in the United States of the degrees of flexibility that must inevitably accompany such global regimes. It is not impossible to imagine that the same level of culturally-determined "idiosyncratic" implementation and enforcement of these norms could occur in the United States as it has in Europe.

The second impression given by the US response to AML lawyer regulation is the emphasis that is placed on the idea of "lawyer exceptionalism."⁶⁹ Lawyers are presented not only as zealous advocates and protectors of clients against the state, but also as guardians of democracy and the rule of law. This self-image is not

66. For example, Zagaris incorrectly states that the FATF initiative "threatens professionals with criminal penalties for failing to adhere to emerging standards of anti-money laundering . . . due diligence." Zagaris (2008), *supra* note 59, at 29. This is not so: the FATF standards do not require criminalization, although some countries did choose to criminalize certain breaches, as will be explained below for the United Kingdom. *See infra* Part III.

67. Terry & Robles, *supra* note 59, at 721. For full clarity, Laurel Terry views some of the AML norms favorably (more precisely the KYC/CDD obligation), but she suggests that FATF's lack of constructive engagement with the legal profession may have slowed down effective lawyer participation in AML.

68. *See* Terry (2010), *supra* note 59, at 9. The present author's comment, admittedly, has the enormous benefit of hindsight.

69. *See* Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73 nn.8, 10 (2010).

unique to the US profession, but it appears to have been more successfully promoted within its domestic system than in other countries.⁷⁰ The continuous references to “gatekeeper” regulation and the idea that this regulation is antithetical to the role of lawyers also tied the AML discussion together with other battles waged by the legal profession in the 2000s, particularly, against the SEC. This in turn raises the question of the contrast between the failure of foreign-driven AML gatekeeper measures, which were successfully deflected by the US profession, and the Sarbanes Oxley-related gatekeeper measures, which were partially imposed by the US Congress.⁷¹

Indeed, although the coincidental timing may be serendipitous, it is difficult not to observe these two initiatives in a comparative light. Section 307 of the Sarbanes Oxley Act and Part 205 of the SEC Rules were adopted in the aftermath of the Enron and WorldCom scandals, in which massive securities fraud was committed by the two companies leading to their collapse and severe financial loss by employees and shareholders.⁷² The crisis led to the loss of self-regulation by the accounting profession,⁷³ and indictment (followed by collapse) of Arthur Andersen, one of the then Big Five accounting firms.⁷⁴ The question many were asking at the time was “where were the lawyers?”⁷⁵ Section 307 was the consequence: it gave express authority to the SEC to “prescribe minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any

70. See, e.g., the judicial challenges by the European professions described at Part V below.

71. See the following paragraphs of this Part.

72. Rex Nutting, *Enron Workers Lost Everything*, MARKET WATCH (Dec. 18, 2001), <https://www.marketwatch.com/story/enron-workers-lost-everything-in-collapse-they-say> [<https://perma.cc/M9LM-LH2Y>].

73. *Fast Answers: Public Company Accounting Oversight Board (PCAOB)*, US SEC. & EXCHANGE COMM’N, <https://www.sec.gov/fast-answers/answerspcaobhtm.html> [<https://perma.cc/T9X6-HSQG>] (the PCAOB “is a private-sector, nonprofit corporation created by the Sarbanes-Oxley Act of 2002 to oversee accounting professionals who provide independent audit reports for publicly traded companies” and “[w]hen Congress created the PCAOB, it gave the SEC the authority to oversee the PCAOB’s operations, to appoint or remove members, to approve the PCAOB’s budget and rules, and to entertain appeals of PCAOB inspection reports and disciplinary actions”).

74. Scott Horsley, *Enron and the Fall of Arthur Andersen*, NPR (May 26, 2006), <https://www.npr.org/templates/story/story.php?storyId=5435092> [<https://perma.cc/MN47-6JN6>].

75. Bernard S. Carrey, *Enron-Where were the lawyers?* 27 VT. L. REV. 871 (2002-2003).

way in the representation of issuers.”⁷⁶ The standards had to “include a rule requiring an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer”⁷⁷ Section 307 was a bipartisan proposal by US senators that “sailed through the Senate,”⁷⁸ in July 2002, and was said to have caught the ABA “flat-footed.”⁷⁹ In November 2002, the SEC went on to publish its proposed rules for public comment:⁸⁰ they included not only “up-the-ladder” reporting (e.g. internal reporting within clients) but also, in certain circumstances, mandatory disclosure to the SEC that a lawyer was terminating his services or withdrawing his opinions (a procedure known as “noisy withdrawal”).⁸¹ At that point the ABA and state bars sprang back into action. They fiercely resisted mandatory noisy withdrawal, which ended up being removed from the final text of Part 205 in February 2003.⁸² After its initial passivity, the profession’s response to Sarbanes Oxley had become organized and effective. It had been too late to block the initial legislative action in July 2002 but it was able to mitigate the aftershock by reducing the scope of lawyer obligations in the months that followed. In March 2003, one of the ABA Task Forces on corporate responsibility explained that “lawyers for [a] corporation—whether employed by the corporation or specially retained—are not ‘gatekeepers’ of corporate responsibility in the same fashion as public accounting firms. . . . Lawyers are first and foremost counselors to their clients”⁸³ Drawing on the traditional representation of lawyers as advocates and defenders, considerable effort was invested to differentiate lawyers from accountants or other gatekeeper professions.

76. SEC Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205 (2003), available at <https://www.sec.gov/rules/final/33-8185.htm> [<https://perma.cc/M8LA-NVFE>].

77. *Id.*

78. COFFEE, *supra* note 43, at 217.

79. *Id.*

80. Kim, *supra* note 69, at 89.

81. *Id.* at 90 n.116.

82. Part 205 did, however, retain the rule of *permissive* external reporting, i.e. the *right* (as opposed to the *obligation*) to report certain violations to the SEC. Kim, *supra* note 69, at 91 n.128. The difficulty is that it was not exactly replicated in the ABA Model Rules nor in the conduct rules of many of the 50 states. See Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. REG. 491 (2016).

83. *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 156 (2003).

These events coincided with FATF's preparatory work on AML standards that could also affect lawyers. A July 2001 meeting of G7 finance ministers in Rome had asked that its process of revising its recommendations be "open, transparent and consultative."⁸⁴ A consultation paper in preparation for what would become the 2003 Recommendations was therefore published on 30 May 2002.⁸⁵ According to the account of participants in the ABA's Gatekeeper Task Force, the ABA provided its response to that consultation in May 2003, in other words very soon after its successful efforts to reduce the impact of Part 205.⁸⁶ The shock of Section 307 was presumably still fresh in memories, and concerns as to future regulatory direction were likely high. Did this context color the organization's response to the FATF consultation? It is not impossible to think so. Yet at the same time, the ABA's consistent opposition to any AML regulation since 2003 can be seen as an indication that their response would have been the same even without the Sarbanes Oxley alert.

What is equally intriguing is that full-scope Sarbanes Oxley measures (including mandatory noisy withdrawal) had found widespread support within the US legal academia. Scholarly voices pointed out that the ABA's Model Rules had themselves included noisy withdrawal,⁸⁷ and others disagreed with the idea that corporate lawyers could never act as gatekeepers.⁸⁸ To date, the same has not been true, for AML lawyer regulation. At this point, US academia seems not to have attempted a full throated defense of AML control measures as they are practiced elsewhere. The soundness of the CDD/ KYC limb is acknowledged by some,⁸⁹ but professional resistance to its explicit

84. GILMORE, *supra* note 1, at 107.

85. Shepherd, *supra* note 59, at 622.

86. *Id.* The European CCBE provided its response in September 2002. *See* Letter from John Fish, *supra* note 62.

87. Kim, *supra* note 69, at 91.

88. *See* COFFEE, *supra* note 43, at 193. *See also id.* at 192 ("presenting the attorney as primarily an advocate profoundly misrepresents the functional activity of the corporate lawyer"). His proposal is mandatory review or certification of corporate disclosures by independent lawyers, presenting this "as a response to both the problem of fragmentation [of legal services leading to insufficient understanding of client activities] and the need to empower the lawyer as a gatekeeper"). *Id.* at 232 (emphasis added).

89. *See* Jack Sahl, *Lawyer Ethics and the Financial Action Task Force: A Call to Action*, 59 N.Y.L. SCH. L. REV. 457, 483 (2015) ("the [US] bar needs to recognize [...] that [...] resistance is unwarranted with respect to the FATF's CDD principles, which promote both lawyers' and the public's interests."); Terry & Robles, *supra* note 59, at 691-92 (arguing that KYC/CDD obligations are already implied in the Model Rules, and seeming to advocate making

expression as a mandatory obligation has not yet been overcome.⁹⁰ Nor has any defense of the STR/SAR measure been, to date, offered, even with the associated professional privilege exemption. It is as if the critique of FATF and its processes had overtaken the domestic question of how to more effectively enlist US lawyers in AML policy.⁹¹

To summarize, the US picture is one of a profession very well organized for the domestic defense of its interests, which has focused its efforts on criticizing the FATF as an institution and individual AML measures on their merits, and has in parallel promoted partial measures to pre-empt any attempts at federal intervention. However, on the whole, however, compared to other professions in advanced democracies, its steadfast refusal to participate in any mandatory AML measures for almost twenty years places it in the position of an outlier.

IV. LAWYERS IN THE UNITED KINGDOM: COMPLYING WITH AMBITIOUS LEGISLATION

Judging by its headcount, the size of its market, and the number of global UK-headquartered law firms,⁹² the British legal profession

this more explicit); Kevin Shepherd, *ABA Needs a New Model Legal Ethics Rule*, LAW360 (Apr. 6, 2017), <https://www.law360.com/articles/910316/aba-needs-a-new-model-legal-ethics-rule> [<https://perma.cc/C92U-96VR>] (arguing, contrary to some of his previous positions, that “the ABA should seriously consider developing and adopting a new model legal ethics rule to ensure that lawyers conduct the reasonable client due diligence needed to avoid facilitating money laundering”).

90. Stephanie Brooker & Joel Cohen, *Overview of Recent AML Gatekeeper International and U.S. Developments*, in *INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: ANTI-MONEY LAUNDERING 2018* 1, 7 (Global Legal Group ed., 2018) (referring to the ABA’s continued opposition but also to “some movement [...] within the ABA to adopt a model rule that would obligate attorneys to perform risk-based due diligence on prospective clients or matters” and that “significantly, such a rule would subject non-compliant attorneys to discipline by the state bar rather than by the government”).

91. An additional factor is that the US conversation on lawyers’ AML role has become intertwined with the ABA’s equally long-standing resistance to corporate transparency reform, also an AML global norm. See Terry & Robles, *supra* note 59, at 637-38 n.39. Scholarly positions critical of the ABA do seem to be appearing in regard to this last policy regarding corporate transparency. See, e.g., Matthew Stephenson, *Why does the American Bar Association Oppose Beneficial Ownership Transparency Reform?*, THE FACT COALITION (Feb. 26, 2018), https://thefactcoalition.org/american-bar-association-aba-oppose-beneficial-ownership-transparency-reform?utm_medium=blog [<https://perma.cc/6TMA-JZYL>].

92. The number of practicing solicitors and barristers is approximately 167,000 in 2019. See, for solicitors, *Population of solicitors in England and Wales*, SOLICITORS REG. AUTH., https://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics/data/population_solicitors/ [<https://perma.cc/F63L-99X6>] (last visited Nov. 30, 2019).

might be viewed as the second most influential after the US profession, certainly in the commercial sector.⁹³ Its attitude towards AML regulation, however, has been the polar opposite of the American attitude. In no small part, this may be explained by the British government's early embrace of AML regulation, and its willingness to thrust the full force of these rules onto its lawyers from the very outset.

In contrast to other countries, AML awareness seems to have appeared in the United Kingdom comparatively early. By October 2001 the UK lawmakers had already presented their bill for the future Proceeds of Crime Act ("POCA"), an ambitious instrument creating new tools against money-laundering, in other words they had acted in this area before the September 11 attacks and the Second Directive.⁹⁴ In 2002, the English Law Society issued what was already a revised professional guidance note on the subject.⁹⁵ In 2003, POCA was then

For barristers, see *Statistics on practising barristers*, BAR STANDARDS BD., <https://www.barstandardsboard.org.uk/news-publications/research-and-statistics/statistics-about-the-bar/practising-barristers.html> [<https://perma.cc/2FPV-VAR8>] (last visited Nov. 30, 2019). In addition there are a large number of unregulated legal practitioners in the UK practising in what is known as the "alternative" (i.e. unregulated) legal services market. The sector is considered to be the largest in Europe and a significant contributor to the British economy. See, also, the figures drawn from the US Trade Representative presented by Laurel Terry at an ABA US-UK Roundtable in November 2018, available at https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Laurel_Terry_US_UK_US_TR_email_2-slide_format.pdf [<https://perma.cc/824H-4XWT>] (last visited Nov. 30, 2019).

93. The relative domination of the US and UK professions has been commented on elsewhere and from many different angles. For French efforts to better understand the economic benefits of having a globally influential legal system and profession, see PASCAL DURAND-BARTHEZ & FRANCOIS LENGART, *CHOISIR SON DROIT: CONSÉQUENCES ÉCONOMIQUES DU CHOIX DU DROIT APPLICABLE DANS LES CONTRATS INTERNATIONAUX* (2012). For a critique of US/UK dominance, see KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 135 (2019) (commenting on "the remarkable dominance of English and New York law for the coding of global capital").

94. See generally Proceeds of Crime Bill, 2001 (Bill 31/330) (Gr. Brit.), available at <https://publications.parliament.uk/pa/cm200102/cmbills/031/2002031.pdf> [<https://perma.cc/MB7R-N6CZ>]. The bill received Royal assent in July 2002. Proceeds of Crime Act 2002, c. 29 (U.K.) [hereinafter POCA], available at http://www.legislation.gov.uk/ukxi/2017/692/pdfs/ukxi_20170692_en.pdf [<https://perma.cc/7JTA-4FVM>]. The "failure to disclose: regulated sector" offence was already at Section 324 of the bill and became Section 330 of the act once adopted. In its original (2002) expression the provision applied to solicitors conducting investment or financial activities in addition to their principal activity.

95. *Money Laundering Legislation: Guidance for Solicitors*, THE LAW SOCIETY (Aug. 14, 2002), <https://www.lawsociety.org.uk/support-services/advice/practice-notes/aml/documents/Money-laundering-legislation-guidance-for-solicitors/>

amended to incorporate new elements from the Second Directive.⁹⁶ What is remarkable with POCA generally is that it went well beyond the requirements of the Second Directive (or FATF standards), by actually criminalizing AML duties and in particular the obligation to report suspicions.⁹⁷ This was achieved by way of a specific offense for “failure to report” that became applicable to all professional legal advisers in the “regulated sector,”⁹⁸ i.e., lawyers performing the designated transactional or financial activities.⁹⁹ Following POCA and attendant 2003 Money Laundering Regulations,¹⁰⁰ the English Law Society produced a pilot Anti-Money Laundering Guidance in 2004,¹⁰¹ and a flow of suspicious transaction reporting by solicitors followed quickly thereafter, reaching very high numbers in the early years (e.g., 11,300 reports in the year 2006/2007).¹⁰² The reporting flow has since significantly abated, but it is still higher than in other European countries. There can be little doubt that this significant flow of reporting activity by the British legal profession is explained, first and foremost, by the seriousness of the potential risk of criminal sanctions.¹⁰³

[<https://perma.cc/BA4N-9HUC>] (explaining that the 1993 Money Laundering Regulations applied to solicitors conducting investment or financial activities, see at 7).

96. POCA, *supra* note 94.

97. Colin Tyre, *Anti-Money Laundering Legislation: Implementation of the FATF Forty Recommendations in the European Union*, 2010 J. PROF. LAW. 69, 77 (2010) (“... the UK went further in the 2002 Act than it was required to do by the terms of the First and Second Directives”).

98. POCA, *supra* note 94, § 330.

99. *Id.* The list of these activities is set out at Schedule 9 of POCA. It is similar to the language of the FATF Recommendations and Second Directive and includes: the buying and selling of real estate or business entities; managing of client money, securities or other assets; opening or management of bank, savings or securities accounts; organisation of contributions necessary for the creation, operation or management of companies; creation, operation or management of trusts, companies or similar structures. *Id.*

100. Money laundering regulations were issued in 1993, 2003 and 2007. Those currently in force are The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, available at http://www.legislation.gov.uk/ukxi/2017/692/pdfs/ukxi_20170692_en.pdf [<https://perma.cc/ZFL7-YYT2>].

101. *Money Laundering: Guidance for Solicitors*, THE LAW SOCIETY (Jan. 2004), <https://www.lawsociety.org.uk/support-services/advice/practice-notes/archive/aml/money-laundering-guidance-2004/> [<https://perma.cc/JTS5-SPFK>].

102. SERIOUS ORGANISED CRIME AGENCY, SUSPICIOUS ACTIVITY REPORTS REGIME, ANNUAL REPORT 2008 41 (2008).

103. The criminal risk is not an empty threat and solicitors have been imprisoned for failure to report. See, e.g., *Regina v. Philip Griffiths*, [2006] EWCA Crim 2155 (U.K.).

Chart 1: Number of “suspicious activity reports” (SARs) filed by British legal professionals.¹⁰⁴

2006/ 07	2007/ 08	2008/ 09	2009/ 10	2010/ 11	2011/ 12	2012/ 13	2013/ 14	2014/ 15	2015/ 17	2017/ 18	2018/ 19
11,515	6,581	4,869	4,764	4255	4015	3935	3610	3827	4878	2660	2774

Annual reports by the British FIUs (first the Serious Organized Crime Agency, now the National Crime Agency) have provided various details over the years on the typology of these reports. At present, they mostly emanate from three areas of particular risk: company and trust formation, conveyancing (i.e. real estate transactions), and the holding of money in client trust accounts. According to recent statistics, approximately half of the SARs are said to relate to property transactions,¹⁰⁵ which does not seem surprising. Typically, the reports are filed before completion of transactions in relation to which a suspicion has arisen, or before accepting or transferring money in client accounts. The majority of reports are so-called “defense against money laundering” reports (“DAML”) (in 2017/18, they represented 1,857 out of 2,592).¹⁰⁶ These used to be

104. NATIONAL CRIME AGENCY, UK FINANCIAL INTELLIGENCE UNIT: SUSPICIOUS ACTIVITY REPORTS, ANNUAL REPORT 2019 8 [hereinafter SAR 2019]; NATIONAL CRIME AGENCY, SUSPICIOUS ACTIVITY REPORTS (SARs), ANNUAL REPORT 2018 6 [hereinafter SAR 2018]; NATIONAL CRIME AGENCY, SUSPICIOUS ACTIVITY REPORTS (SARs), ANNUAL REPORT 2017 12 [hereinafter SAR 2017]; NATIONAL CRIME AGENCY, SUSPICIOUS ACTIVITY REPORTS (SARs), ANNUAL REPORT 2015 11 [hereinafter SAR 2015]; NATIONAL CRIME AGENCY, SUSPICIOUS ACTIVITY REPORTS (SARs), ANNUAL REPORT 2014 12 [hereinafter SAR 2014]; SERIOUS ORGANISED CRIME AGENCY, SUSPICIOUS ACTIVITY REPORTS REGIME, ANNUAL REPORT 2010 53-54; SERIOUS ORGANISED CRIME AGENCY, SUSPICIOUS ACTIVITY REPORTS REGIME, ANNUAL REPORT 2009 45 (2009); SERIOUS ORGANISED CRIME AGENCY, SUSPICIOUS ACTIVITY REPORTS REGIME, ANNUAL REPORT 2008 41 (2008). The numbers for 2007-2010 include SARs filed by barristers, solicitors, and “legal other.” The numbers for 2011-2013 include SARs filed by solicitors. The numbers for 2014-2019 include SARs filed by “independent legal professionals.” All of the annual reports cover a twelve-month calendar period straddling the designated reporting years except for the 2017 report which covered eighteen months (October 2015 to March 2017).

105. *SRA Risk Assessment*, SOLICITORS REG. AUTH. (Mar. 2, 2018), www.sra.org.uk/sra/how-we-work/reports/aml-risk-assessment.page [https://perma.cc/GN2G-4A38].

106. SAR 2018, *supra* note 104, at 15-18. The numbers include SARs filed by barristers, solicitors and “legal other.” *Id.*

called “consent reports,” involve a latency period of seven working days and provide the reporting lawyers with a future defense against a principal money-laundering offense, thereby enabling them to mitigate their personal risk. Importantly however, these reports do not automatically require that lawyers withdraw from representation and can be filed by any persons, i.e. are not limited by POCA to the “regulated sector.”¹⁰⁷ Situations can therefore arise where both a lawyer and her client file DAML reports with regard to the same object or transaction of a third party. This may be one explanation why British lawyers have not systematically interpreted the POCA reporting obligation as placing them in an excessively adversarial or disloyal position towards their clients.¹⁰⁸ The objections that have been expressed by the profession are not so much that the duties are contrary to traditional rules of ethics or professional conduct, but that the regime is overly onerous in terms of compliance costs and personal risk management (see more on this below).

The English regime is, in truth, very complex. It has been addressed in regularly updated guidance notes produced by the professional organizations (initially the Law Society for solicitors, now a combined group called the “Legal Sector Affinity Group,” which deals with AML for the combined professions and unregulated practitioners).¹⁰⁹ The latest guidance note, dated 2018, is more than 150 pages long.¹¹⁰ It sets out in elaborate detail the extent of mandatory CDD procedures and, importantly, the rules regarding reporting to the FIU. The main objective is to balance the tension between the criminal risk incurred by individual lawyers who fail to report, and their

107. See POCA, *supra* note 94, §§ 337, 338 (which relieve persons from obligations of confidentiality that may otherwise exist including outside of the regulated sector).

108. See Hilary Hurd, *Applying Anti-Money Laundering Reporting Obligations on Lawyers: the UK Experience*, GLOBAL ANTICORRUPTION BLOG (June 2, 2018), <https://globalanticorruptionblog.com/2018/06/08/applying-anti-money-laundering-reporting-obligations-on-lawyers-the-uk-experience/> [<https://perma.cc/5XKR-YK8U>].

109. The British legal profession was liberalised by the Legal Services Act 2007 and comprises a number of independent practitioners who do not need to belong to one of the regulated professions (the latter including solicitors and barristers, but also legal executives, licensed conveyancers, notaries, costs lawyers, patent attorneys or trademark attorneys).

110. See generally Legal Sector Affinity Group, *Anti-Money Laundering Guidance for the Legal Sector*, THE LAW SOCIETY (Mar. 2018), <https://www.lawsociety.org.uk/policy-campaigns/articles/anti-money-laundering-guidance/> [<https://perma.cc/V2CD-QL39>]. As follows from the previous footnote it is addressed to all “independent legal professionals” and applies “across the entire legal sector” regardless of membership in one of the regulated professions. *Id.* at 11.

obligation to protect information that is covered either by “privileged circumstances,” a new legal category introduced by POCA and described as a transposition of the EU Directives,¹¹¹ or by the traditional English common law “legal professional privilege” (itself comprising “legal advice privilege” and “litigation privilege”).¹¹² These categories are not identical, respond to different definitions, and both operate to exclude reporting. Their interpretation in each individual case requires careful factual and legal analysis before a report can be filed. It is generally considered that in the early years at least, the complexity of the regime may have led to strategies of precautionary or defensive over-reporting, particularly in the absence of a minimal threshold.¹¹³ The fact that the number of reports has steadily declined over the years of annual SARs statistics production is therefore worthy of note. It may indicate that the profession has improved its grasp of the regime and no longer feels the need for defensive over-reporting. It is also possible that improved upstream CDD/KYC procedures have reduced the intake of AML-exposed clients and matters.

An interesting question is why UK lawmakers decided to criminalize reporting duties in the first place. Full criminalization of anti-money laundering duties was not required by the FATF or Second Directive, or indeed under the Fifth Directive currently being rolled

111. *Id.*, at 95 (“receipt of information in privileged circumstances is not the same as legal professional privilege. It is a creation of POCA designed to comply with the reporting exemptions set out in the European directives”).

112. *Id.* at 100-02. For an analysis of the articulation between the failure to disclose offense and English rules on legal privilege, see John A. Terrill II & Michael A. Breslow, *The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach*, 59 N.Y.L. SCH. L. REV. 433 (2015), concluding that “the U.K. approach of addressing matters of legal professional privilege through POCA is both complicated and worthy of the skepticism of the American Bar.” *Id.* at 454.

113. “Defensive over-reporting” is when reporting agents are overly cautious and prefer to send a larger number of reports to FIUs than might be warranted by the specific facts in individual cases. The phenomenon is known in financial crime research and has been particularly examined in the UK banking sector. See, e.g., Amandine Scherrer, *Fighting Tax Crimes – Cooperation between Financial Intelligence Units: Ex-Post Impact Assessment*, EUR. PARLIAMENT 45-46 (Mar. 2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/598603/EPRS_STU\(2017\)598603_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/598603/EPRS_STU(2017)598603_EN.pdf) [<https://perma.cc/35K9-C4CD>]. In the context of English solicitors, see Tyre, *supra* note 97, at 78; Terrill II & Breslow, *supra* note 112, at 445.

out.¹¹⁴ As mentioned above, the UK Proceeds of Crime bill creating the failure to report offense was introduced prior to the final adoption of the Second Directive.¹¹⁵ What were the reasons? One explanation would seem to lie in the general criminal justice agenda that was pushed in those years by Tony Blair and his Labour Party and, according to commentators, a combination of “moral imperative”¹¹⁶ and desire to solidify the government’s “law and order” credentials.¹¹⁷ To some extent, AML concerns in Britain are also traditionally exacerbated by the extent of financial ties with offshore financial centers located in its overseas territories or crown dependencies.¹¹⁸ Many provisions of POCA were novel at the time. For example, they were amongst the first to extend money laundering beyond traditional predicate offenses, like drug trafficking, to all crimes, remove minimal thresholds, and punish violations not only by criminal sanctions and confiscation, but also by civil recovery measures and the levying of tax on the related benefits.¹¹⁹ These were significant changes compared to previous practices. At a time when lawmakers in other countries seemed far less enthusiastic, the United Kingdom was positioning itself

114. The Sixth Directive (Oct. 2018) seems to have changed the situation by expanding and unifying the criminal law treatment of money laundering. It is unclear whether and how this will apply to the obligation to report suspicious activities. See Peter Burrell & Michael Thorne, *The Sixth EU Anti-Money Laundering Directive: What will change?*, WILLKIE FARR & GALLAGHER (Feb. 12, 2019), https://www.willkie.com/~media/Files/Publications/2019/02/The_Sixth_EU_Anti_Money_Laundering_Directive_What_Will_Change.pdf [<https://perma.cc/KFU3-HKAT>].

115. See the discussion on the UK Proceeds of Crime bill above and *supra* note 94.

116. Peter Alldrige & Ann Mumford, *Tax Evasion and the Proceeds of Crime Act 2002*, 25 *LEGAL STUD.* 353, 353 n.2 (2005) (citing Tony Blair declaring in a speech that “[I]t simply is not right in Modern Britain that millions of law-abiding people work hard to earn a living, whilst a few live handsomely off the profits of crime. The undeserved trappings of success enjoyed by criminals are an affront to the hard-working majority”).

117. Alldrige, *supra* note 1, 440; PETER ALLDRIDGE, *WHAT WENT WRONG WITH MONEY LAUNDERING LAW?* 76 (2016) (“Tony Blair did very well out of profits of crime, and now David Cameron is appropriating it to his own ends”).

118. See, e.g., HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, *MOSCOW’S GOLD: RUSSIAN CORRUPTION IN THE UK* 28 (2018), *available at* <https://publications.parliament.uk/pa/cm201719/cmselect/cmfaaff/932/932.pdf> [<https://perma.cc/K2K7-R7FW>].

(“While the Government should continue to respect the autonomy and constitutional integrity of the Overseas Territories and Crown Dependencies on devolved matters, money laundering is now a matter of national security, and therefore constitutionally under the jurisdiction of the UK. The Overseas Territories and Crown Dependencies are important routes through which dirty money enters the UK. This cannot continue”).

119. Alldrige & Mumford, *supra* note 116, at 358-59.

as a front-runner in the fight against financial crime and *gold-plating* its domestic measures.¹²⁰ In this general political context, the inclusion of criminally-sanctioned lawyer reporting was presumably considered a minor feature of the overall agenda. The legal profession did express its opposition, arguing that the bill was too broadly drafted and would lead to a flow of “useless reports related to trivial breaches.”¹²¹ The debate on regime effectiveness continues to this day, although a recent consultation regarding the continuance of the regime did not lead to any significant change.¹²²

The British AML regime for lawyers raises a number of additional questions (which this Article does not claim to answer). It could be an example of legislative overkill in light of the balance between costs generated and the regime’s overall effectiveness in achieving successful criminal prosecutions of primary offenders. The comparatively meager headcount of regulator staff also seems to be a concern. For instance, it was recently alleged that only twenty five persons at the NCA were tasked with processing the total number of SARs, including those filed by the entire British banking sector.¹²³ In contrast, a survey conducted by the Law Society in 2008 indicated that law firms spent an average of four hours per week analyzing suspicions and making disclosures.¹²⁴ Even with the drop in number of reports, voices within the profession claim that the regime is “cumbersome,

120. See Tyre, *supra* note 97, at 77.

121. *Proceeds of Crime Act 2002*, THE GUARDIAN (Jan. 19, 2009), <https://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/proceeds-crime-act> [<https://perma.cc/U3W6-458U>].

122. *The Law Commission’s report on reforming the SAR regime – guidance over change?*, DENTONS (July 8, 2019), <https://www.dentons.com/en/insights/alerts/2019/july/8/the-law-commissions-report-on-reforming-the-sar-regime> [<https://perma.cc/876H-7HUH>] (concluding that “little has been done to address the real concerns expressed about the operation of the regime”).

123. LAW COMM’N, *Anti-Money Laundering: the SARs Regime* 3, par. 1.25 (Consultation Paper No. 236, 20 July 20, 2018), available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/07/Anti-Money-Laundering-the-SARs-Regime-Consultation-paper.pdf> [<https://perma.cc/V6W7-CDBP>]. Banks filed 371,522 SARs in the annual period 2017/2018, representing approximately 80% of the total of 463,938). SAR 2018, *supra* note 104, at 15-16.

124. *Id.* at ¶ 1.22. See, e.g., *Britain’s War on Dirty Money Lacks Oomph*, THE ECONOMIST (Oct. 11, 2018), <https://www.economist.com/finance-and-economics/2018/10/11/britains-war-on-dirty-money-lacks-oomph> [<https://perma.cc/5KK4-LPJV>].

inefficient, and most importantly ineffective.”¹²⁵ Their position seems supported by British scholars who pinpoint the absence of empirical research on overall effectiveness.¹²⁶ For some of these scholars, administrative or professional control by self-regulating bodies might be more effective than criminal prosecution, particularly in light of the difficulty in successfully prosecuting facilitators who merely harbor a suspicion rather than principal offenders. They write that “regulatory action such as closing down a law firm or controlling how a lawyer may practice provides more direct public protection and indeed disruption, at less social cost, than does prosecution.”¹²⁷

A further question relates to the profession itself and its inability to have its views heard by the government over the years. Here, the division of the profession may be one explanation. As is well known, English (and Welsh) lawyers are divided between barristers and solicitors (with similar categories in Scotland and Northern Ireland). This division is not only functional but also relevant, at least to some extent, to traditional roles in society, with barristers forming a kind of aristocracy of the profession. It is mainly solicitors who are subject to AML obligations, as they (with conveyancing agents) are those most involved in the kind of transactional activities that give rise to the AML obligations.¹²⁸ In contrast, barristers tend to specialize in contentious work that does not by nature fall within AML regulation. This division of labor may have affected the ability of solicitors to have their views fully heard at the political level. The presence since the Legal Services Act 2007 of a contingent of unregulated and therefore unrepresented practitioners may also be a factor.¹²⁹ Finally, the attitude of existing representative organizations is also of interest. Contrary to the ABA in the United States, the English Law Society does not appear to view its

125. Richard McGarry & Stephenson Harwood, *SARs: A Need for Change but in which Direction? – The Law Commission Consults*, STEPHENSON HARWOOD (Aug. 20, 2018), <https://www.shlegal.com/news/sars-a-need-for-change-but-in-which-direction---the-law-commission-consults> [https://perma.cc/6KJ6-XRHL].

126. David Middleton & Michael Levi, *Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services*, 55 BRIT. J. CRIMINOL. 647, 649 n.1 (2015) (“The UK legal profession is by far the most likely in the world to report suspicions of money laundering by their clients, though there are no serious studies rigorously analysing either outputs or outcomes from these reports . . .”). See ALLDRIDGE, *supra* note 117, 77-78.

127. Middleton & Levi, *supra* note 126, at 649-50.

128. See SAR 2018, *supra* note 104, at 15-16 (reflecting the significantly lower number of SARs filed every year by barristers e.g. 4 in 2018/2019, compared with 2,437 by solicitors).

129. See *supra* note 109.

role as that of vocal advocate defending solicitors against AML obligations imposed onto them from the outside. Their position seems rather the contrary. On its website the Law Society declares its commitment “to making the UK a hostile environment for illicit finances by helping solicitors in England and Wales act as gatekeepers to the UK financial system.”¹³⁰ In their commentary on the 2017/2018 reporting statistics, they wrote that “the legal sector still isn’t submitting enough SARs. We do not believe that there is a right number of SARs and instead urge solicitors to make a quality SAR when they spot suspicious activity.”¹³¹ This is a very different tone from that adopted by the ABA when confronting attempts to introduce AML obligations on US attorneys.

In summary, the full scope of AML measures have for fifteen years been implemented by the British legal profession.¹³² The profession has complied with legislation and engaged with FIU reporting more than in other countries. Although this seems to have generated financial costs for the profession and the overall empirical effectiveness of the regime remains under question, the profession has been fairly understated in its challenge of the regime and has not, in particular, attempted to use the courts to do so. This is despite the fact that British AML regulation was significantly more ambitious from the outset than what international standards prescribed.

V. FRANCE: COURT CHALLENGES AND ENLISTING THE BAR AUTHORITIES

Similar to the United Kingdom, the French legal profession is divided. The largest group are the advocates (*avocats*), who have a full monopoly on court representation and outside legal advice and are

130. *Anti-Money Laundering*, THE LAW SOCIETY, <https://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/> [https://perma.cc/LE62-3XXG] (last visited Nov. 19, 2019).

131. *National Crime Agency SARs report: Implications for the legal sector*, THE LAW SOCIETY (Feb. 6, 2019), <https://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/nca-sars-report-2018/> [https://perma.cc/XRJ6-NUVV].

132. In its latest Mutual Evaluation (2018), FATF reported the United Kingdom as “largely compliant” with regard to Recommendations 22 and 23 of the 2012 Recommendations. FATF, *Anti-money Laundering and Counter-terrorist Financing Measures United Kingdom: Mutual Evaluation Report*, FATF 209 (Dec. 2018), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> [https://perma.cc/K64B-AGYL].

placed under the professional authority of regional bar associations, followed by the notaries (*notaires*), whose main activity is to handle property and estate transactions.¹³³ Both groups are regulated separately under the auspices of dedicated laws.¹³⁴ In-house lawyers do not belong to the regulated professions and do not benefit from any professional privilege (referred to as “professional secrecy,” *secret professionnel*).¹³⁵

One of the early peculiarities of the French regime is that notaries have been required to report suspicious transactions as far back as 1998, well before the Second Directive.¹³⁶ This is explained by the fact that they have historically had a legal monopoly on all property transactions, in which they act not so much as legal advisers to the parties, but as public officers (“*officier ministériel*”), in other words representatives of the state who are also tasked with the collection of transfer taxes.¹³⁷ The status and traditions of advocates are very different. When AML regulation was first mooted for them by the Second Directive, their response was closer to the American position of outright defiance than to the British acceptance. Legislation to implement the Second Directive was first introduced in 2004,¹³⁸

133. There are approximately 69,000 advocates and 14,500 notaries. See *Les chiffres clés de la profession d’avocat [Key figures of the legal profession]*, CONSEIL NATIONAL DES BARREAUX [NATIONAL BAR COUNCIL] <https://www.cnb.avocat.fr/fr/les-chiffres-cles-de-la-profession-davocat> [<https://perma.cc/KPK4-9DZX>] (last visited Nov. 30, 2019); *Rapport Annuel du Notariat [Annual Report of the Notary]*, NOTAIRES DE FRANCE [NOTAIRE OF FRANCE] (Sept. 30, 2019), <https://www.notaires.fr/fr/profession-notaire/rapport-annuel-du-notariat/le-notariat-en-chiffres> [<https://perma.cc/HX5L-DUJR>]. The number of regulated professionals is therefore less than half of the British number, for population and GDP that are similar.

134. Compare Law Nr. 71-113 of 31 December 1971 (amended by Law Nr. 90-1259 of 31 December 1990) (regarding *avocats*) with Ordinance Nr. 45-2590 of 2 November 1945 (regarding *notaires*); Ordinance Nr. 58-1270 of 22 December 1958 (regarding judges and magistrates).

135. See, e.g., *L’avocat, le juriste d’entreprise et le secret [The advocate, the in-house lawyer, and secrecy]*, CHRISTIAN CHARRIERE-BOURNAZEL (Oct. 28, 2013), <http://www.charriere-bournazel.com/l%E2%80%99avocat-le-juriste-d%E2%80%99entreprise-et-le-secret/> [<https://perma.cc/5ZN2-NADK>].

136. Law Nr. 98-546 of 2 July 1998 codified at Article L-561.2.13 of the Monetary and Financial Code (CMF). C. MON. ET FIN. [MONETARY AND FINANCIAL CODE] art. L 561.3 (Fr.).

137. *The Role of the French Notaire*, NOTAIRES DE FRANCE [NOTAIRE OF FRANCE] (Nov. 23, 2017), <https://www.notaires.fr/en/notaire/role-notaire-and-his-principal-activities/role-notaire> [<https://perma.cc/DXX9-WNFH>].

138. Law Nr. 2004-130 of 11 February 2004. Loi 2004-130 du 11 février 2004 réformant le statut de certaines professions judiciaires ou juridiques, des experts judiciaires, des conseils en propriété industrielle et des experts en ventes aux enchères publiques (1) [Law 2004-130 of

followed by implementing decrees in 2006.¹³⁹ Both the law and the decree were immediately challenged by the bar organizations (led by the National Bar Council, a federation of the regional bars) before the Conseil d'Etat, France's highest administrative court, leading to the removal of some of the decree provisions on direct communication channels between advocates and the French FIU.¹⁴⁰ When further implementing legislation and decrees followed in the footsteps of the Third Directive, in 2009,¹⁴¹ they too were challenged by the bar organizations before the Conseil d'Etat, this time unsuccessfully.¹⁴² The French bar had refrained from taking their case against the Second Directive and implementing provisions to the European Court of Justice, as a petition by the Belgian bar to their Constitutional Court had already made its way to Luxembourg for a preliminary ruling on the compatibility with Article 6 of the European Convention of Human Rights (concerning rights to a fair trial). It was bad fortune for all the European professions, therefore, when in 2007 the ECJ upheld the

11 February 2004 on Reforming the Status of Certain Legal Professions, Judicial Experts, and Intellectual Property Advisers, and Auction Experts], C. MON. ET FIN. [MONETARY AND FINANCIAL CODE] art. L-561.1 (Fr.).

139. Décret 2006-736 du 26 juin 2006 relatif à la lutte contre le blanchiment de capitaux et modifiant le code monétaire et financier (partie réglementaire) [Decree 2006-736 of June 26, 2006 on the Fight Against Money Laundering and Modifying the Monetary and Financial Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 27, 2006, at 9625.

140. CE Sect., April 10, 2008, Rec. Lebon 296845, available at <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000018624326> [<https://perma.cc/GY3Y-H5U5>].

141. JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 31, 2009, p. 1819. Ord. n° 2009-104 du 30 janvier 2009 relative à la prévention de l'utilisation du système financier aux fins de blanchiment de capitaux et de financement du terrorisme [Ordonnance 2009-104 of 30 January 2009 on the prevention of the use of the financial system to launder money and finance terrorism]. The CNB's sweeping critique of its provisions was expressed in a report presented to its general assembly of 13 and 14 February 2009. *Rapport sur L'ordonnance de transposition de la 3ème directive anti-blanchiment [Report on the transposition order of the third anti-money laundering directive]*, CONSEIL NATIONAL DES BARREAUX [NATIONAL BAR COUNCIL] (Feb. 13 and 14, 2009), [https://encyclopedie.avocats.fr/GED_BWZ/192175791035/CNB-RP2009-02-13_TXT_Blanchiment-ordonnance_Sacaze\(P\).pdf](https://encyclopedie.avocats.fr/GED_BWZ/192175791035/CNB-RP2009-02-13_TXT_Blanchiment-ordonnance_Sacaze(P).pdf) [<https://perma.cc/W2NU-MFTU>].

142. CE, Oct. 14, 2011, Rec. Lebon 332126, available at <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000024669907&fastReqId=959932372&fastPos=1> [<https://perma.cc/H2VF-EJ8W>].

Second Directive's AML provisions on lawyers, on reasoning that will be presented below.¹⁴³

The French bar's judicial challenges were not at an end, however. One of the members of the Paris Bar Council, Patrick Michaud, had brought an individual case before the Conseil d'Etat against the National Bar Council's own AML implementation regulations adopted in 2007,¹⁴⁴ arguing that they were contrary to Articles 7 (legal certainty) and 8 (right to privacy) of the ECHR.¹⁴⁵ In 2010, that petition was rejected by the Conseil d'Etat.¹⁴⁶ Mr. Michaud's next move was to file a case against France, before the European Court of Human Rights in Strasbourg, under Articles 6 (right to a fair trial), 7 (legal certainty), and 8 (right to privacy) of the ECHR. The only claim seriously entertained by the Strasbourg Court was the one under Article 8,¹⁴⁷ but it too was ultimately rejected. This final defeat marked the end of eight years of continuous judicial action by the French (and Belgian) bars against the Second Directive and ensuing national implementation measures. Contrary to the Canadian profession (which convinced its Supreme Court to strike down their AML reporting obligations), the European professions were ultimately unsuccessful in their two highest courts of Luxembourg and Strasbourg.

The arguments that were presented in all of these proceedings were very similar to the ones still being made by the US bar. It was argued that the principles of professional secrecy and independence of

143. Case C-305/05, *Ordre des Barreaux Francophones et Germanophone v. Conseil des Ministres*, 2007 E.C.R. I-5335 [hereinafter *Ordre des Barreaux*].

144. See Conseil national des barreaux [CNB] [National Bar Council] decision No. 2007-002, July 12, 2007, J.O. 13331 (Fr.) ("Décision à caractère normatif n° 2007-002 portant adoption d'un règlement relatif aux procédures internes destinées à mettre en oeuvre les obligations de lutte contre le blanchiment des capitaux et le financement du terrorisme & Dispositif de contrôle interne destiné à assurer le respect des procédures").

145. *Michaud v. France*, App. No. 12323/11, Eur. Ct. H.R. (2012), ¶ 15 [hereinafter *Michaud*].

146. CE, July 23, 2010, Rec. Lebon 309993, available at <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000022512920> [<https://perma.cc/7DNL-VH4U>] (last visited Nov. 30, 2019).

147. *Michaud*, *supra* note 145. The Strasbourg Court ruled that Mr. Michaud did not have standing to bring a claim under Article 6 (right to a fair trial) or Article 7 (legal certainty), because he himself had not suffered any proceedings and the rights of which he was alleging breach were not his own but those of others (i.e., clients). *Michaud*, ¶¶ 133-34.

lawyers are essential to democracy and European society,¹⁴⁸ that these principles are protected under the ECHR,¹⁴⁹ that lawyers have a duty of loyalty,¹⁵⁰ that clients must be able to maintain trust and confide in them,¹⁵¹ and that such principles are eroded by the Second Directive's AML reporting obligation in a manner that is neither necessary, consistent with justice or proportionate to the public interest at hand.¹⁵² The arguments were presented by the plaintiffs, Mr. Michaud and the Belgian French-speaking and German-speaking Bar, but also by the CCBE, an organization representing the European bars and law societies, which was authorized to appear as intervening third party. There appear to be three main reasons why they were unsuccessful. First, the Luxembourg and Strasbourg Courts found that AML rules only applied in the context of *transactional* or *financial* activities that are different from the traditional role of lawyers as legal counselors and advocates, and that it is the latter that form the basis of their professional right to secrecy.¹⁵³ Under the Second Directive, AML procedures do not apply when a lawyer is engaged in the provision of legal advice, or once she is called upon for assistance in defending a client in contentious proceedings. At those points, the lawyer is exempt of any reporting obligations regardless of when information was received or obtained.¹⁵⁴ Second, the Strasbourg Court found persuasive the fact that the Second Directive allows a filter between individual lawyers and financial intelligence units, in the form of the right given to each member state to organize communications only through national bar authorities.¹⁵⁵ This, indeed, is the mechanism that has been implemented in France (see more on this below). Finally, both Courts were of the opinion that money-laundering constitutes a serious threat

148. Opinion of Miguel Poiares Maduro, *supra* note 19, ¶ 36 (referring to arguments by plaintiffs presenting lawyers' secrecy as a principle found in all democracies and with roots in the "very foundations of European society"); *Michaud*, *supra* note 145, ¶ 60.

149. Opinion of Miguel Poiares Maduro, *supra* note 19, ¶ 24.

150. *Id.* ¶ 29 (the French version of the Opinion uses the expression "devoir de loyauté"); *Michaud*, *supra* note 145, ¶ 67.

151. Opinion of Miguel Poiares Maduro, *supra* note 19, ¶¶ 37, 54; *Ordre des Barreaux*, *supra* note 143, ¶¶ 13-14; *Michaud*, *supra* note 145, ¶ 63.

152. Opinion of Miguel Poiares Maduro, *supra* note 19, ¶ 79; *Michaud*, *supra* note 145, ¶¶ 63-64.

153. *Ordre des Barreaux*, *supra* note 143, ¶¶ 33-35; *Michaud*, *supra* note 145, ¶¶ 27, 127-28.

154. *Id.*

155. *Michaud* *supra* note 145, ¶¶ 129-30.

to society and democracy, and that AML interference in the professional rights of advocates for the activities listed by the Directive was therefore justified and not disproportionate.¹⁵⁶

The French bar was disappointed by these outcomes, but it regrouped and issued its next generation of AML professional guidelines.¹⁵⁷ Much of the focus is placed on the CDD measures, with detailed forms being provided on the type of verifications that must be performed before clients can be engaged or matters accepted (including beneficial owner identification).¹⁵⁸ The STR obligation, for its part, is organized in such a manner that all communications must be sent to the head of the regional bar (bâtonnier), who is the only person authorized to enter into direct contact with the FIU.¹⁵⁹ No direct communications between the FIU and individual advocates are permitted.¹⁶⁰ Transmission to the FIU of suspicious transaction reports received by the bâtonnier is not automatic,¹⁶¹ the bâtonnier's role being to "assist colleagues, verify reports and ensure that no rules on professional secrecy are infringed."¹⁶² A "confidential dialogue" may take place between the reporting advocate and the bâtonnier, which is not to be disclosed to the FIU.¹⁶³ Most importantly, regardless of whether a suspicious transaction report is transmitted by the bâtonnier and regardless of the FIU's response, the reporting lawyer must

156. *Ordre des Barreaux*, *supra* note 143, ¶ 36; *Michaud*, *supra* note 145, ¶ 131.

157. CONSEIL NATIONAL DES BARREAUX [NATIONAL BAR COUNCIL], GUIDE PRATIQUE: LUTTE CONTRE LE BLANCHIMENT ET LE FINANCEMENT DU TERRORISME [PRACTICAL GUIDE : FIGHTING BLEACHING AND TERRORIST FINANCING] (2017) [hereinafter *CNB Guide Pratique*].

158. *Id.* at 16-21.

159. *Id.* at 28.

160. *Id.* at 26 ("aucune relation directe entre Tracfin et un avocat n'est . . . permise" ["No direct relationship between Tracfin and a lawyer is . . . permitted"]).

161. *Id.* at 28 ("le bâtonnier ne retransmet pas de manière automatique à Tracfin les déclarations de soupçon qui lui sont adressées par les avocats. Son rôle consiste d'abord à assister ses confrères et à contrôler les déclarations reçues pour s'assurer de l'absence de tout manquement aux règles du secret professionnel" ["The bâtonnier does not automatically transmit to Tracfin the suspicious activity report sent to him by the advocate. His role is first to assist his colleagues and to control the reports received to ensure the absence of any breach of the rules of professional secrecy"]).

162. *Id.*

163. *Id.* ("Un dialogue, dont la nature confidentielle peut être opposée à Tracfin, peut ainsi s'établir entre le bâtonnier et l'avocat déclarant" ["A dialogue, the confidential nature of which can be opposed to Tracfin, can thus be established between the president and the reporting advocate"]).

immediately terminate his retainer or representation.¹⁶⁴ The implication here is that for the French bar authorities, the very expression by a lawyer of her suspicions in writing means that she is no longer able to carry out her duties objectively and independently, and must therefore cease to act. One sees that the essence of these guidelines is very different from the British approach to suspicious transaction reporting. It may not be surprising, in this context, that the number of suspicious transaction reports received by the French FIU from the bar has remained very low since 2007.

Chart 2: Number of STR reports received from the French bar (source: Tracfin annual reports)¹⁶⁵

Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
STRs	1	3	2	0	1	4	6	1	0	4	0	1

There are several possible interpretations for these low figures. An uncharitable view would be that the French bar is openly defying its legal obligations, or that the French regime is not sufficiently dissuasive (failure to report not being sanctioned criminally, as in the United Kingdom). Such behavior would seem self-defeating, however, for a profession that sets great store in its public reputation. More constructive explanations can be found which are more persuasive. The

164. *Id.* at 31 (“Dès lors que l’avocat a exprimé un soupçon, il a le devoir de se déporter immédiatement, il cesse toute participation, peu importe le retour de Tracfin” [“Once the reporting advocate has expressed a suspicion, he has the duty to withdraw immediately and cease any participation, regardless of the response by Tracfin”]).

165. *Rapport d’activité 2008* [Activity report 2008], TRACFIN 11, https://www.economie.gouv.fr/files/files/directions_services/tracfin/Publications/rapports_activite/2008_rapport_FR.pdf [https://perma.cc/5EZW-QRYV] (last visited Nov. 30, 2019); *Rapport d’activité 2010* [Activity report 2010], TRACFIN 42, https://www.economie.gouv.fr/files/files/directions_services/tracfin/Publications/rapports_activite/2010_rapport_FR.pdf [https://perma.cc/4EHD-G4NU] (last visited Nov. 30, 2019); *Rapport annuel d’analyse et d’activité 2012* [Annual analysis and activity report 2012], TRACFIN 52, 69, https://www.economie.gouv.fr/files/files/directions_services/tracfin/Publications/RAAA_2012_TRACFIN.pdf [https://perma.cc/5JRA-LL7K] (last visited Nov. 30, 2019); *Rapport annuel d’activité TRACFIN 2017* [Annual activity report TRACFIN 2017], TRACFIN 10, <https://www.economie.gouv.fr/files/ra-2017-tracfin.pdf> [https://perma.cc/HGL6-B4J6] (last visited Nov. 30, 2019); *Rapport annuel d’activité TRACFIN 2018* [Annual activity report TRACFIN 2018], TRACFIN 11, https://www.economie.gouv.fr/files/web_RAA_tracfin-2018.pdf [https://perma.cc/CH4P-CL9U] (last visited Nov. 30, 2019).

main one is that French lawyers are focusing their efforts on upstream prophylactic measures, i.e. early identification and understanding of clients and transactions in order to minimize the risk that down the road they will be faced with a decision of whether or not to report. This is consistent with the structure of the current professional guidelines and was quite clearly explained in prior versions, under titles such as “dissuasion rather than denunciation.”¹⁶⁶ It is explained that “the advocate’s true duty . . . is to *know* a client before acting for it.”¹⁶⁷ “By identifying clients, understanding the nature of transactions, convincing clients not to proceed and withdrawing services if they fail to convince, advocates are satisfying their [legal] obligations”¹⁶⁸ A lawyer’s duty is to monitor client activities and, should suspicions arise as to a future transaction, to dissuade them from proceeding. If a lawyer fails to convince his client not to proceed, then he must terminate the retainer or representation.¹⁶⁹ This is a strategy that places the emphasis on due diligence and risk-prevention at the moment of client engagement and matter acceptance. Failure to achieve full clarity with respect to both is sanctioned by the immediate duty to terminate services. The downside is likely loss of economic opportunity, but it can be argued that this kind of arbitrage is generally consistent with French cultural preferences.¹⁷⁰ A second, more technical explanation to the low number of reports received by the FIU is the traditionally wide definition under French law of information that is protected by *advocate secrecy*, a concept that is both wide and absolute. For example, it cannot be released by clients. This is where the bâtonnier filter may play its most critical role.

The regime of client monies is also of interest, as it is a large source of SARs in the British system.¹⁷¹ In the French system, client monies held by advocates are placed under the control of regional

166. See generally *Dissuader pour ne pas dénoncer: Conseils de vigilance & de procédures internes destinés à prévenir l’utilisation de la profession d’avocat aux fins de blanchiment des capitaux d’origine illicite et de financement du terrorisme* [Dissuading not to denounce: Guidance on vigilance & internal procedures to prevent the use of the profession of advocate for the purpose of money laundering and financing of terrorism], CONSEIL NATIONAL DES BARREAUX [NATIONAL BAR COUNCIL] (Jan. 2012), <http://www.etudes-fiscales-internationales.com/media/02/00/3729884604.pdf> [<https://perma.cc/7RSL-2HHS>].

167. *Id.* at 8.

168. *Id.* at 8.

169. CNB *Guide Pratique*, *supra* note 157, at 24.

170. This is the view of the author as a French advocate and national.

171. See Part IV.

organizations, called the CARPAs, which are supervised by the bar councils.¹⁷² AML control over these funds is performed by the CARPAs themselves which can communicate freely with advocates, in which case the communications are covered by professional secrecy and cannot be disclosed to the FIU.¹⁷³ The FIU is authorized to send enquiries to the CARPAs, but the CARPAs cannot respond directly and must send their responses to the bâtonniers, who may then communicate them to the FIU.¹⁷⁴ The CARPAs are not under any independent reporting obligation and are not required by law to spontaneously report suspicions.¹⁷⁵ Here too, the profession has internalized its AML procedures and placed it under the central control of the bar authorities and bâtonniers.

The views of the head of the French FIU, surely a competent observer in such matters, seem to align with the more constructive interpretations regarding the low number of reports. In a recent interview he commented, somewhat wryly, that “at the end of the day, the scope of suspicious transaction reporting is so narrow that it is normal that there are so few—although there might possibly be more.”¹⁷⁶ Overall, if one compares with the British reporting figures, there is indeed a discrepancy, which must therefore reflect the differences between the regimes. In the particular area of real estate transactions, however, French notary reporting activity has been steadily increasing and is now not unlike the SAR numbers that are reported in the field of UK conveyancing (see above).

Chart 3: Number of STR reports received from French notaries (source: Tracfin annual reports)¹⁷⁷

172. *Règlement Intérieur National de la Profession d'Avocat (RIN) 2019* [National Rules of Procedure of the Advocate Profession (RIN) 2019], CONSEIL NATIONAL DES BARREAUX [NATIONAL BAR COUNCIL] art. 6.2 (Sept. 12, 2019), https://www.cnb.avocat.fr/sites/default/files/rin_2019-09-12_consolide.pdf [https://perma.cc/H7WL-89LK].

173. CNB *Guide Pratique*, *supra* note 157, at 38.

174. *Id.* at 39-40.

175. *Id.*

176. *Entretien avec Bruno Dalles, directeur de Tracfin* [Interview of Bruno Dalles, Director of the French FIU Tracfin], TENDANCE DROIT (Jan. 2018), <http://www.tendancedroit.fr/wp-content/uploads/2018/01/dpn1801entretien.pdf> [https://perma.cc/8Q2B-A8L3].

177. *See supra* note 165.

Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Notaries	313	347	370	674	1069	995	970	1040	996	1044	1401	1474

In summary, after almost a decade of largely unsuccessful litigation in the country's highest courts, the French profession is now placed under full AML regime.¹⁷⁸ The system of compliance that has evolved is a centralized one with a significant element of self-regulation. The bar authorities (*bâtonniers*) serve as central filters overseeing the articulation of AML obligations with traditional rules of confidentiality and conduct. The reporting obligation, for its part, is managed by way of emphasis on upstream prophylactic measures *before* client and matter acceptance. The system is geared toward the protection of traditional standards of conduct, and the profession is implicitly accepting to pay the potential price in the form of reduced activity or loss of economic opportunity.

VI. CONCLUSION

Without seeking to read too much into the comparisons that have been drawn, it seems possible to formulate certain wider lessons, findings, or interrogations.

First, the introduction of AML controls over lawyers and legal professionals is primarily a function of the political will of lawmakers. This may sound self-evident, but POCA in the United Kingdom and the Second Directive in the European Union were forceful measures underpinned by strong political convictions regarding the need to reform the financial system. Where that political conviction does not exist, mandatory AML measures on lawyers seem unlikely. This seems relevant in the US context.

Second, the US legal profession remains an outlier that has been successful not only in blocking AML reform directly affecting it, but also other related policies, such as corporate transparency. Through the

178. The FATF's latest Mutual Evaluation Report of France is quite old (2011). In this report, FATF rated France as "partially compliant" with regard to the 2003 Recommendations on lawyer-related CDD, record keeping and suspicious transaction reporting. *Id.* at 24-26. See generally *Rapport d'évaluation mutuelle de la France: Lutte contre le blanchiment de capitaux et le financement du terrorisme* [Mutual Evaluation Report of France: Fight against money laundering and the financing of terrorism], FATF (Feb. 25, 2011), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20France%20ful.pdf> [<https://perma.cc/V2QJ-RPL9>].

semantical use of the expression *gatekeeper*, the battle against international AML standards has been joined with other professional battles against the SEC and other domestic agencies. The US critique has specifically targeted the FATF as an institution and questioned its legitimacy. Generally, the US legal profession's success is indicative of its deep integration in the US political economy and its powerful voice in domestic affairs.

Third, the European Union is clearly a frontrunner in AML regulation. Its lawyer-related measures in the Second Directive reflected the 2003 recommendations before they were even published by the FATF and, it is argued, facilitated their diffusion. This has not been the main topic of this Article, but it seems that the tight cooperation between the FATF and EU institutions is a crucial component of global AML norm design and implementation.¹⁷⁹

Fourth, the European system shows that there are different ways of rolling out transnational regulatory standards. The AML lawyer-related provisions of the European Directives apply to all the member states, but they allow a measure of national discretion and can be rolled out through national implementing statutes that are closer to country tradition. A central lever of discretion is the ability to involve professional bar authorities in the operation of the national regimes, an option that was exercised to maximum effect in France, but not in the United Kingdom. This may have allowed the French profession to retain greater control over AML regime implementation. This versatility of national regimes and professional responses runs counter to the US critique centering on the one-size-fits-all dimension of the FATF standards.

Yet another comment pertains to the voice of the European professions in the European institutional system. The French profession, and other continental professions like in Belgium, deployed significant effort to obtain judicial relief from some of the AML measures in its national courts and in the two highest European courts of Luxembourg and Strasbourg. Looking beyond the legal arguments, it is interesting to ask oneself why these attempts were unsuccessful. Is it possible that the European professions and the judges in Luxembourg

179. See generally Valsamis Mitsilegas & Niovi Vavoula, *The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law*, 23 MAASTRICHT J. EUR. & COMP. L. 261 (2016); Leonardo Borlini & Francesco Montanaro, *The Evolution of the EU Law Against Criminal Finance: The "Hardening" of FATF Standard Within the EU*, 48 GEO. J. INT'L L. 1009 (2017).

or Strasbourg are too distant from one another to form a common cultural community? At the very least, one can say that the European legal professions have less voice in the EU institutional system than the US legal profession in its own system.

A final comment is regarding the effectiveness of these AML regimes. It seems entirely normal that the commercial bar should participate in AML policy implementation and not hide behind claims of “lawyer exceptionalism” or roles as “guardians” of the rule of law. The lack of empirical research on the positive effects of lawyer-related AML measures remains problematic, however, and should if possible be remedied. It must also be acknowledged that effective AML monitoring by lawyers can be difficult. Risk identification can be impeded by high levels of intermediation of cross-border financial flows and the long length of cross-border service supply chains, which generate information asymmetries.¹⁸⁰ In such circumstances, law firms sometimes have limited visibility on the full activities of their overseas clients. If not accompanied by wider structural measures such as transnational corporate transparency reform or general increase in government resources devoted to financial monitoring, the risk is that delegation of AML functions to lawyers in the private sector may bear little fruit.

180. On information asymmetry created by the use of offshore companies, see generally Delphine Nougayrède, *The Use of Offshore Companies in Emerging Market Economies: A Case Study*, 23 *COLUM. J. EUR. LAW.* 401 (2017); Delphine Nougayrède, *After the Panama Papers: A Private Law Critique of Shell Companies*, 51 *THE INT’L L.* (2019).