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Introduction

As regards the scope of its work, while the laundering of drugs money will remain a principal focus for the FATF, its work will continue to cover money laundering of the proceeds of serious crime and/or offences which generate significant funds. However, as in the past, the FATF will not deal with tax issues. (FATF, 1994, 6)

The list of predicate offences for money laundering has been expanded to include serious tax crimes. This will bring the proceeds of tax crimes within the scope of the powers and authorities used to investigate money laundering. (FATF, 2012a, 2)

As a dependent offense, money laundering has the particularity of presupposing that a prior – or, as the saying goes, “predicate” – crime has been committed, the profits of which are being concealed or at least “recycled” as dirty money. The illegalism punished as money laundering is constructed relative to another illegalism corresponding to the source of the assets laundered (Cassani, 2009, 17). In other words, money laundering necessarily results from other transgressive behaviors. In my view, the requirement that a predicate offense
be committed aligns money laundering with a type of financial and economic illegalism that may be described as “secondary” – not, certainly, in view of the actors’ ultimate aim, which generally remains profit, but in a chronological sense as occurring later. From an analytical point of view, then, the definition of the primary illegalisms on the basis of which a financial policing apparatus is implemented merits our attention (Amicelle, 2011; Amicelle, Favarel-Garrigues, 2012).

2 Drawing upon the concept of illegalisms invented by Michel Foucault (1975), I seek to account for the (economic and financial) practices for gaming the existing rules as well as the manner in which these practices are tolerated/disqualified, differentiated and managed (ibid.; Lascoumes, 1996; Gros, 2010). The fight against money laundering that began in the late 1980s and early 1990s in this regard presented itself as an effort to “differentially manage illegalisms” from the outset. This expression helps make explicit the differential manner in which irregular capital flows are treated depending on the type of situation and actors with whom the capital in question is associated. Officially, the earliest international norms issued by the Financial Action Task Force (FATF, 1990) and the first anti-money laundering directive of the European Union (European Union, 1991) only applied to “drug money”, indicating selective targeting rather than an intention to monitor all profit-generating illegalisms with the same intensity. Limiting its operations to a single category of actors (drug traffickers), this system of counter-measures targeted activities that sought to disguise the origin of capital originating in a particular form of illegalism (drug-trafficking). While the existence of other illegalisms was hardly passed over in total silence (Godefroy, Lascoumes, 2004), regulations and resources were nevertheless employed in a differential manner. The latter, in particular, were unprecedented in the framework of the fight against “drug money”. This single-minded preoccupation with the financial proceeds of drug trafficking, however, was not to last.

3 Decoupled from its exclusive focus on “drug revenue”, the proto-international mobilization of the late 1980s has today been enlarged to other predicate targets (“serious offenses”), sometimes even including targets adjacent to the incrimination of money laundering (e.g., the financing of terrorism and nuclear proliferation; FATF, 2012b). Far from being static, the definition of “dirty money” has continuously evolved since the creation of the FATF in the late 1980s, when it was exclusively focused on the profits of drug trafficking (ibid.). Like delinquency, the notion of “dirty money” is misleadingly obvious (Chamboredon, 1971; Lascoumes, 1986). Since “dirty money” does not exist in itself, what we have here is above all a matter of definition; as such, it is inseparable from a process of social construction (Amicelle, 2014). The field of application of anti-money laundering efforts and the contours of the “problem of ‘dirty money'” have thus been constant matters of debate.

4 In what follows, I will consider the near permanent renegotiation of the perimeter of the fight against “dirty money” in order to clarify the dynamics of differentiated disqualification of economic and financial illegalisms. To this end, I will examine how both the FATF and the European Union have repeatedly sought to come to grips with a particular type of illegalism. In particular, by studying their treatment of “tax illegalisms”, I hope to account for the shifting framework of the anti-money laundering effort. Although tax illegalisms have been clearly excluded from the purview of the FATF (first excerpt quoted above), the inclusion of such practices among the predicate offenses to money laundering is more than ever on the agenda (second excerpt quoted above). A nagging question is at the origin of this article: how has this inclusion transformed the
By adapting a Foucault-inspired analysis to my object of investigation, I seek first of all to show how the anti-money laundering system has become detached from the simple duty of preventing/repressing illegalisms. This analysis sheds light on a genuine system of management of economic and financial illegalisms—that is, a way of categorizing them, differentiating them, establishing a kind of hierarchy among them, of laying down the limits of tolerance, of giving free reign to some, of putting pressure on others, of excluding a particular section, of making another useful, of neutralizing certain individuals and of profiting from others (Foucault, 1975, 277; see also Foucault, 2009). In extending recent efforts to reappropriate the notion forged by Michel Foucault (Fischer, Spire, 2009; Chantraine, Salle, 2009), I also aim to displace the traditionally legal manner in which the management of illegalisms has been examined, insisting instead on the social uses of norms of reference. This approach is in keeping with a sociological literature that has amply demonstrated that operative norms differ from the formal norm (Lascoumes, Le Bouhris, 1996, 63; Ocqueteau, Soubiran-Paillet, 1996; Hibou, 2011) as well as a philosophical literature that has underscored that norms have no reality beyond the concrete action through which they are performed (Macherey, 2009, 137). Moreover, this stance partly overlaps with Foucault’s discussion of the Ancien Regime in France and in particular his claim that its social order was based less on an unambiguous application of the law than on perpetual negotiation between legality and illegality (Foucault, 2001, 1584). In particular, he insists on the non-respect of certain laws and customs via the practical constitution of margins of illegalisms that were either voluntarily tolerated by way of concession (silent consent) or involuntarily tolerated as a result of impotence (practical impossibility of enforcing the law and punishing offenders) (Foucault, 1975, 302).

By broadly tracing the evolving place held by tax questions in the anti-money laundering framework, my aim is not so much to enter into the details of surveillance practices as to attend to the often unwritten “secondary norms” (Lascoumes, 1990) that are constructed in the interaction among the “foot soldiers” of financial surveillance and which constitute so many schemes of interpretation of the norms of reference. While the first part of what follows mainly considers the formation of international norms of reference, the focus later shifts to the European and, above all, French cases in order to illustrate my problematic and reexamine the international mobilization against “dirty money”. The present article is based on research conducted on the issues confronting financial surveillance in the European Union and the uses that are made of it.
I – Dirty Money and Tax Illegalisms: A Negotiated Frontier

1. The FATF and White Collar Crime

At the start of the 1990s, the first reports of the FATF resulted in a definition of “dirty money” that echoed Foucault’s distinction between “illegalisms of rights” (purely economic and financial forms of transgression) and “illegalisms of goods” (theft, damage to property and violent trafficking). In this period, “dirty money” uniquely referred to the profits of the second type of illegalisms. The members of the FATF had in fact considered extending the area of intervention of anti-money laundering efforts to include illegalisms of goods beyond drug-trafficking (e.g., human-trafficking, armed robbery) but never to such illegalisms of rights as tax evasion and fraud. The crucial process of selecting the predicate illegalisms of money laundering thus resulted in a clear-cut distinction between illegalisms of goods, construed as illegalisms to be suppressed (i.e., “serious crimes”), and illegalisms of rights, which enjoyed a wider margin of tolerance.

What’s more, the tension between crimes (dramatized illegalisms) and illegalisms (minimized) meant that the practice of gaming tax rules, which benefited from additional uncertainty as to its legal status, tended to differentiate itself from the former (Lascoumes, 1986; Barilari, 2000). Apart from the difficulties relating to their detection, tax transgressions can oscillate between several descriptions due to the inherent lacunae of tax legislation and/or the sophisticated strategies employed by those engaging in such practices to take advantage of the frontiers of legality. Christian Chavagneux, Richard Murphy and Ronen Palan remind us that, while the distinction between legal (tax optimization) and illegal (tax fraud) strategies for avoiding taxes is on the face of it clearly established in law, the reality is more complicated (Chavagneux et al., 2010). In particular, they insist on the complexity of tax measures, which entail constant games of interpretation. This is all the more so given that such games of interpretation are liable to increase in the case of cross-border transactions, allowing for the possibility of creating conflicts between the tax rules of the relevant states. These three scholars thus remain skeptical as to the possibility of drawing, in a general way, a clear boundary between these various tax avoidance strategies. In contrast to a positive vision of the law formally distinguishing between these practices, Alexis Spire also asks that we contemplate the existence of a continuum between the optimization tolerated by the texts and that practiced in breaking the rules (Spire, 2011, 59). As a consequence, “tax issues” alone refer to many different ways of gaming the rules, some of which take place in gaps in the law – gaps that were foreseen by its silences or opened up by de facto tolerance (Foucault, 1975, 103). Moreover, some authors have drawn away from the crude opposition of law and illegality (Deleuze, 2004, 37) in order to substitute a subtle correlation made between illegalisms and laws (Ibid.), precisely drawing upon the concept of illegalisms and applying it to the tax field (Favarel-Garrigues, 2007; Favarel-Garrigues et al., 2009; Lascoumes, 1986, 1997; Spire, 2009).

In the course of the first years of the FATF’s existence, a frontier was nevertheless negotiated and drawn between what was potentially a matter of “dirty money” – and thus, in the absence of further details, fell under the purview of anti-money laundering – and what was not, including “tax issues”. More than simply bracketing a form of transgression, many academics saw this as evidence of selective tolerance for acts of
white collar crime. The initial focus of the mobilization against “dirty money” tended to
grant the unprecedented powers to investigate and lift bank secrecy on some forms of
illegalisms associated with “(transnational) organized crime” while leaving other
business illegalisms – generally associated with socially more legitimate actors –
untouched (Strange, 1998; Favarel-Garrigues, 2005). Starting in 1992, the FATF supported
moves to enlarge money-laundering beyond the profits of drug-trafficking. The aim of
doing so, it must be noted, was to intensify the fight against already targeted groups, not
to include additional categories of socio-economic actors in this fight. For example, the
authors of the FATF’s third annual report specified that the methods of money laundering in
non-drug cases are virtually identical to the methods employed in drug money laundering cases
and often involve the same criminal organizations. Moreover, drug trafficking organizations also
often pursue other criminal activities the profits of which must be laundered (FATF, 1992, 35).
Still in its infancy, the decoupling of laundering from drug money is above all presented
as necessary in order to intensify efforts to dismantle criminal organizations in which
narco-trafficking is just one of many activities. The possible enlargement of the scope of
anti-money laundering efforts was understood according to considerations specific to a
single, vast and heterogenous category of actors associated more with major violent
trafficking than with tax illegalisms.

This negotiated frontier was of course the product of contemporaneous struggles, the
result of compromise among a constellation of interests. The announcement of a partial
de-compartmentalization of anti-money laundering, with tax illegalisms formally
bracketed, must be placed in the context of the forces that led to the emergence of
international norms in 1990. It is intuitively appealing to interpret the FATF’s in principle
exclusion of tax issues in terms of the staunch opposition of certain member states which
saw inclusion as contrary to their national interest. In 2009, moreover, delegates from the
British Treasury remarked that the recommendations of the FATF did not include tax
offenses as predicate crimes for money laundering because certain jurisdictions were
hostile to such an approach (House of Lords, 2009, 43). All eyes thus turned to the usual
suspects, such as Luxembourg and Switzerland, which privileged their interests as major financial
centers (Brayer, 2007, 25).

This interpretation merits being taken seriously, at the very least by putting it back into
the institutional context that surrounded the creation of the FATF. In search of allies and
legitimacy, the leaders of the national delegations promoting this body hoped to include
states representing important financial centers. In this particular context, the
representatives of Switzerland and Luxembourg were clearly able to place conditions on
their entry into this nascent inter-governmental organization. While not irrelevant, this
explanation oversimplifies matters: in fact, reservations regarding the FATF were not
confined to one or two countries and cannot be reduced in all their complexity to a
supposedly unified national position. Indeed, the creation of a proto-international
compromise regarding anti-money laundering was more a matter of joining – and
sometimes ambivalently juxtaposing – the respective tasks and representations of two
groups of professionals: “security professionals” (ministries of the interior and police)
and “finance professionals” (ministries of finance, financial supervision authorities and
banking institutions) (Amicelle, 2011b). This conjunction of professional interests
clarifies the decision to bracket tax issues. Each group possessed its own vision of the
fight against money laundering. In order to move beyond a level of analysis that seems to
suppose the unity of state actors, one must therefore examine the place assigned tax
illegalisms in these alternative rationalities and the bureaucratic stances to which they correspond.

2. Finance Professionals and the Hunt for Undesirables

If most finance professionals have joined the fight against money laundering, this has above all been in the interests of protecting the financial system and its actors from illegitimate transactions and illegitimate operators capable of harming their integrity and reputation. This corporatist rationale notwithstanding, however, there is no consensus among finance actors regarding tax illegalisms, the proceeds of which are not seen as having the same illegitimacy or destabilizing capacity as those of major trafficking operations (of drugs, for example).

On the question of legitimacy, Erik Helleiner has insisted on the influence of the “liberal ideology”, which he presents as extremely widespread beginning in the 1980s among financial actors and, more generally, political decision-makers (Helleiner, 1999). While there was agreement in liberal circles as to the need for anti-money laundering initiatives to reduce what were considered undesirable activities, much less agreement was to be found as to international tax illegalisms. For many, these cross-border flows were less improper uses of the financial system than a rational reaction of individuals and corporations to the fact of excessive taxation. Regulation was thus not necessarily seen as indispensable. Indeed, from this point of view, certain types of evasion and tax fraud can even have positive effects, serving to discipline states that pursue “inappropriate” policies. Some have even regarded this as the expression of an ideological defense of tax fraud (Garabiol, Gravet, 2001, 25), understood as an act of resistance against the abuses of states with what were taken to be excessively high tax rates.

Let’s be clear: I do not wish to claim that this stance on tax illegalisms was unanimously shared or thereby assert a term for term inversion of points of view between reprehensible “dirty money” and desirable tax offenses. Taken alone, the remarks made several years later by the managing director of the International Monetary Fund (IMF) in the framework of a plenary meeting of the FATF suffice to discredit any attempt to excessively generalize a supposed common position among finance professionals. Michel Camdessus’ speech is interesting in more than one respect. In it, he reiterated the official position of the Fund regarding the work of the FATF, to which the IMF had lent official support starting in 1996, by denouncing money laundering as one of the most serious issues facing the international financial community (FATF, 1998, 37). He thus endorsed the utility of anti-money laundering for the “proper functioning of financial markets”. Yet, while he indicated support for international counter-measures targeting money laundering, Mr. Camdessus expressed a much less consensual stance on tax fraud, one at odds with the differentiation established by the FATF. Although some members’ anti-money laundering legislation does not apply to the proceeds of tax evasion, there are inevitably close linkages between the two. Money that has evaded taxes must be disguised, and laundered money must be kept hidden from the tax authorities (Ibid., 40). The idea underlying the stance of the Fund’s director on this issue consists in supposing that the effectiveness of increased repression of fiscal illegalities might in return encourage a reduction in the taxes on businesses (for the IMF text expressing this idea, see Quirk, 1996; see also Favarel-Garrigues, 2005).

Without going into more detail, I will simply note that, while there was no unambiguous position vis-à-vis tax illegalisms, a consensus can be discerned among finance professionals regarding anti-money laundering efforts targeting actors and activities overwhelmingly recognized as illegitimate. In addition to the statements of supervisory
authorities, who presented the laundering of drug money as a threat to financial stability (Basel Committee, 1988), agreement as to the social illegitimacy of this practice was all the more widespread since it overlapped with the concerns of banking actors whose reputation and economic interests could potentially be harmed by drug laundering. Not so in regards to the tax illegalisms associated with white collar criminality, where such fears were less widely shared or forcefully expressed.

As a result, while all proposals for monitoring capital flows had to confront the hostility of groups of actors favoring the process of financial liberalization (for a historical perspective, see Farquet 2009; Helleiner 1994), their hostility was less pronounced in regards to the profits of “organized crime”. In this connection, Helleiner notes that the opportunities for lobbying available to perpetrators of illegalisms are of course unequally distributed. Not all of them possess the capital (in the Bourdieusian sense) necessary to directly or indirectly influence the regulatory leanings of political decision-makers. Groups indulging in drug money laundering generally must keep a low profile due to their recognized illegitimacy and the possibility of legal proceedings relating to their primary illegalisms (drug-trafficking). By contrast, some social groups affiliated with international fiscal illegalisms are said to have a much better chance of winning an attentive hearing from authorities tempted to repress their transgressive behaviors (Helleiner, 1999). Robin T. Naylor provocatively expresses more or less the same idea by underscoring that it is moreover interesting to note that it is the people responsible for this tax evasion who have the power to deregulate (Naylor, 1999, 30). In the same vein, Chavagneux, Murphy and Palan insist on the presence and role played by large accounting firms, legal advisors and banking and tax experts in all major legislative innovations concerning tax havens conceived to escape from regulation and taxes. In this perspective, the (more or less obligatory) support of financial circles for the cause of anti-money laundering, understood as a “hunt for undesirables”, must also be understood in the light of the intransigent refusal of these same financial circles to countenance equivalent measures against fiscal illegalisms and the profits of white collar criminality.

In the 1990s, finance professionals could no longer allow themselves to assert that the preservation of bank secrecy took priority over the fight against major traffickers (Levi, Reuter, 2006). They could, however, maintain this in regards to tax illegalisms. This did not mean that the latter were always exempt from national legislation against money laundering. The meaning of “serious offenses” had not been clarified by the FATF’s recommendations (1996); following the example of Australia’s representatives, some members of this body thus quickly came to see tax fraud as a predicate offense of money laundering. Nor did it mean that business or even political circles were fully outside of the scope of anti-money laundering measures. Judges were able to take advantage of the available arsenal for fighting drug traffickers and “transnational organized crime” to tackle cases of white collar criminality (Sheptycki, 2000; Favarel-Garrigues, 2003). Nevertheless, this type of initiative was limited to a handful of national interpretations and the sporadic efforts of individual judges. Financial professionals were either divided over (financial authorities) or extremely unfavorable (banking actors) to the prospect of an international harmonization of positions on tax issues. All the more so given that any such harmonization continued to be perceived as potentially prejudicial to “legitimate” capitalist actors in search of optimal tax advantage. Over time, the differential manner in which the FATF treated illegalisms of goods and illegalisms of rights nevertheless became
blurred without for all that resulting in the adoption of a new stance on business illegalisms.

3. Tax Havens, Organized Crime and Security Professionals

The tax issue received new impetus at the end of the 1990s. Taking into consideration a point raised by the practitioners of anti-money laundering and reiterated in the course of a 1998 G7 summit, the members of the FATF decided to publish an “interpretive note” to orient the declarative obligations then impinging on banking actors. This note stipulated that **suspicious transactions should be reported by financial institutions regardless of whether they are also thought to involve tax matters** (FATF, 1999, 33). Although it was only an interpretive note and not a formal recommendation, bankers were for the first time encouraged to report suspicious activity to the anti-money laundering authorities concerning transactions that could be linked to tax matters.

This change of attitude is worth considering. Yet it would be mistaken to see it as a turning point or even a sign, however minor, of a coming enlargement of the FATF’s targets to include white collar criminality. By their decision, the representatives of the FATF’s member delegations recognized the untenable nature of any strict distinction between criminal-origin funds and tax illegalisms. It is a simple fact that recourse to international tax illegalisms is not reserved to a single category of actors. The pragmatic intention here was thus not to go after illegalisms in business circles but rather to close the loopholes used by “undesirables” to evade detection. Indeed, noting that the perpetrators of dramatized illegalisms react to the tools of supervision, the members of the FATF were obliged to admit that they needed to close the loophole whereby criminals **can avoid suspicious transactions reporting requirements by stating that their affairs relate only to tax matters** (the so-called “fiscal excuse”) (Ibid., 33).

In other words, the search for optimal tax advantage might serve to screen the money laundering operations of major violent trafficking. Since most countries had disconnected tax illegalisms from the offense of laundering in keeping with the policy established by the FATF, rules of confidentiality and other ethical banking principles tended to favor non-denunciation of tax transgressions in general. All species of traffickers were said to use the “fiscal excuse” to avoid justifying the provenance of their money and thus dissuade banks from issuing a report of suspicion, presenting their transactions as tax matters falling outside of the purview of anti-money laundering. The members of the FATF acknowledged that they would have to abandon the in principle refusal to handle tax issues if they wished to keep the pressure on the criminal organizations they were targeting. The contrast between illegalisms of goods and illegalisms of rights thus became less structuring or, in any case, less absolute since the members of the FATF officially recognized that the latter were no longer reserved to more legitimate social groups.

The possibility that “organized crime” could game the current rules was taken all the more seriously given that the FATF’s efforts were at this time focused on offshore financial centers, often referred to as “tax havens” for convenience (for an overview of issues relating to tax havens, see Chavagneux, Palan, 2012). In this connection, the FATF’s 1998-1999 activity report underscored that **the oft-stated reason for creating an offshore financial centre has been to provide certain fiscal advantages to natural or legal persons that use its services.** Since tax evasion schemes and money laundering operations often appear to use...
similar techniques, many money laundering experts believe that the quest for optimal “fiscal advantages” is frequently used as a cover for moving to or through such locations what are in reality criminally derived moneys (FATF, 1999, 12). Once again, the intention was pragmatic: it was a matter of sealing the breaches in the financial system and making it more difficult for “undesirables” to use offshore opportunities to conceal the origin of their assets and escape legal action (Blum et al., 1998). Just as banks failed to denounce laundering operations that were disguised as “fiscal optimization”, offshore financial centers ignored requests for cooperation when the offense could be described as tax fraud (Garabiol, Gravet, 2001, 44). Strict observance of bank secrecy in regards to tax issues allowed all investigations of this type to be blocked.

23 The whole point of the FATF negotiations was to reaffirm the continued exclusion of tax illegalisms from the perimeter of anti-money laundering while preventing this situation from hampering investigations conducted within that perimeter even when tax issues were involved. This stated intention was part of a balancing act and in no way reflected a desire to tackle business illegalisms or globally reform the practices of offshore financial centers. In regards to the emergence of offshore banking as a theme within the FATF in the late 1990s, Thierry Godefroy and Pierre Lascoumes observe that it was a question of making sure that these centers were not used by transnational criminal organizations to launder the profits of crime in the international financial system. But the use of these resources by legitimate international actors (multinationals, banks) was not for all that generally called into question, even when what was involved was the transfer of sums issued from corruption or large scale tax fraud (Godefroy, Lascoumes, 2004, 168). Given that financial barriers already significantly limited access to the opportunities and opacity of tax havens to a minority of wealthy individuals and large companies, the emphasis was thus placed, not on eliminating spaces for gaming the rules, but rather on reserving access to them to certain parties while forbidding it to others (Chavagneux et al., 2010).

24 This is revealing in a nearly photographic sense of the form taken by the economy of illegalisms at the outset of the era of financial capitalism. In contrast to the advent of industrial capitalism described by Michel Foucault (1975) and its specific economy of illegalisms, profits now depend less on the worker’s hand to hand fight with the merchandise (Gros, 2010, 14) than on the smooth circulation of capital flows, particularly in accordance with fiscal opportunities. For the vast majority of multinational firms, practices aiming to “optimize taxes” (i.e., reduce them as far as possible) and, to that end, recourse to the services of tax havens have become an integral part of the process of wealth creation. While illegalisms of rights in general are no longer the exclusive privilege of the elites, business circles have nevertheless retained specific leeway for tolerated illegalisms. “Undesirables” are excluded from this without calling the very existence of these spaces of tolerance into question. What we have here is a twofold effort to selectively weigh and differentially (dis)qualify social practices for gaming the tax rules.

25 As a result, the FATF’s first reversal, if one can use that term here, was in response to supposed trends in the manner in which “(transnational) organized crime” laundered money. This is not evidence of a profound transformation in the manner in which the anti-money laundering effort approached tax illegalisms. Nor can it be interpreted as reflecting the sudden emergence of a consensus among finance professionals or movement among security professionals in this direction.

26 Indeed, reluctance to describe tax illegalisms as predicate infractions of money laundering was not confined to financial circles. For other reasons, it was also to be found
in law enforcement circles. Support among security professionals for anti-money laundering measures was based on the idea that attacking the “portfolio” is an effective strategy for damaging the entities and phenomena that fall under the expression “(transnational) organized crime”. This stance on anti-money laundering as an instrument in the fight against organized crime reflected a restrictive vision of the field of application of financial surveillance measures. The priority given the relationship between money laundering and organized crime did not sit well with the idea of expanding the perimeter of the anti-money laundering effort, with security professionals divided over the appropriateness of incorporating tax illegalisms as such. For its critics, the broader conception of anti-money laundering only appeared to be a good idea and could, in the worst case scenario, undermine the effectiveness of the resources available to the financial strategy.

In a 1999 report sponsored by the French Minister of the Interior, Jean-Pierre Chevènement, Bernard Gravet, Inspector General of the National Police, and Dominique Garabiol, head of the financial markets auditing board, insisted on this issue. It is nonsense to claim to combat money laundering independently of the fight against organized crime. In the same way, it is strategically ill-conceived to uniformly fight all forms of illicit financial channeling. Faced with the scale of the task they have been assigned, the resources mobilized become dispersed and lose their focus. The confusion between tax fraud and the fight against the money of organized crime is particularly detrimental (Garabiol, Gravet, 2001, 53). When, several years later, Bernard Gravet reexamined the heavy resistance put up by some countries and professions to the FATF’s handling of tax illegalisms, he once again defended the “pragmatic advantages” of a restrictive approach. As a matter of experience, when one includes tax crimes under the purview of the fight against money laundering, the representatives of civil society are more reluctant to cooperate. By ‘civil society’, I mean the professionals who are supposed to transmit reports of suspicious transactions (bankers, notaries, lawyers) and are subject to ethical rules in the area of confidentiality. This is one reason why I have from the outset been hostile to including tax crime in the structure of anti-money laundering. While no one can justify not participating in the fight against organized crime, the tax issue remains too controversial to yield a satisfying level of cooperation (Gravet, Favarel-Garrigues, 2003, 150). As in the case of finance professionals, the point here is not to claim that this opinion was unanimously shared among security professionals but rather to note the patent absence of consensus regarding the inclusion of tax issues in the FATF.

In the first years of this century, no agreement took shape as to whether states should be obliged to include tax illegalisms among the predicate offenses of money laundering (Levi, 2002). This issue continues to provoke controversy; it is certainly not the tidy and relatively fluid (and changing, depending on the national jurisdiction) frontier separating tax fraud, evasion and optimization that will calm the debate over possible inclusion. What’s more, by virtue of their essentially economic character, tax illegalisms represent a significant challenge for supporters of the fight against money laundering. Generally speaking, they cover all mechanisms serving to dissimulate either the existence (by keeping it in cash) or nature (by attempting to make it appear in a category or place where it will be subject to little or no taxation) of a legally obtained revenue (Blum et al., 1998). In both cases, the tax avoidance maneuver has often the effect, in the event of proven tax fraud, of changing legal money into illegal money. As it has been historically defined in reference to “drug money”, however, capital laundering corresponds to a different process. In this case, the maneuver consists in conferring the appearance of
legitimacy upon illegally obtained revenue. Including tax illegalisms within the purview of the anti-money laundering effort amounts to extending it to cover originally legal revenue rendered illegal via fiscal transgression. For opponents of the broad approach, the tendency to no longer limit oneself to examining the origin of funds but to also inspect their destination constitutes an undesirable denaturation of the anti-money laundering apparatus (Garabiol, Gravet, 2001). Although it still appeared to have a firm foothold in the FATF in 2001, this restriction nevertheless suddenly gave way late that same year – not because of the tax issue but rather as a result of the discontinuity introduced in the aftermath of the 11 September 2001 attacks in the United States.

II – From 11 September 2001 to the International Financial Crisis: Towards a Differentiated Treatment of Illegalisms “from Below”

1. The Reconfiguration of the Anti-money laundering Perimeter in Europe

Starting in late 2001, the restriction on tracing the destination of proceeds, formerly a necessary condition if tax illegalisms were to be addressed, took a back seat to a new issue: terrorist financing. It is true that financing for what are designated “terrorist” organizations is not limited to the collection of criminal-origin funds; such movements may also benefit from donations (indirect or otherwise) as well as legal economic activities. From this point of view, the emphasis placed on the issue of “terrorist finances” has tended to reconfigure the field of anti-money laundering since the notion of “dirty money” no longer only refers to criminal-origin capital but also encompasses legitimately earned capital that is potentially illicit in its destination and use. In this respect, foregrounding this issue also constituted a watershed moment for the manner in which tax issues were addressed.

I think that not being able to look at the destination of proceeds long blocked us. But while we never addressed the subject before, I do not think this was due to terrorist financing. It’s the problem of the tax aspect because tax crimes usually concern exactly that: it’s legitimate-source money that is intended to be laundered, evaded or something of the kind. However, because we had this impediment, this obstacle due to the impossibility of looking at everything relating to tax crimes, everything regarding the destination of proceeds – which can also be interesting for understanding laundering – was off limits to us. Once it was decided that, in the case of terrorist financing, one can and must look at the destination of proceeds, we crossed a potentially important threshold for looking at tax crimes. But not now, doing so is not at all possible at the moment. (Interview with a representative of the FATF’s Secretariat General, Paris, March 2006)

In this 2006 interview, the FATF expert clearly indicates that there is something important here but that one cannot infer from this that tax illegalisms will immediately be taken into account. And, indeed, they were not, at least not in the first years following the events of September 11th. While the recommendations of the FATF, revised in 2003, contain a list of “designated categories of [predicate] offenses”, now accompanied by a “fraud” section, the word “tax” is entirely absent (FATF, 2003). Nevertheless, as a result of the new focus on “terrorism”, the field of intervention of the anti-money laundering effort was sufficiently expanded to once again allow the issue of tax illegalisms to be
raised, particularly in the European Union in the aftermath of the 2001 attacks on American soil and, even more so, those perpetrated in Madrid in 2004 and London in 2005.

31 In preparing their third anti-money laundering directive, which was adopted in 2005 (European Union, 2005), European actors drew upon the revised FATF recommendations and in particular embraced the so-called “threshold method”. In concrete terms, this meant that, in addition to providing a list of principal offenses (primary illegalisms), the 2005 directive covered all offenses punishable by a sentence of more than one year in prison (the threshold for classification as a serious offense), inevitably (if indirectly) reviving the debate over tax illegalisms. This legal instrument implicitly raised the tax issue. The fact is, for a certain number of European Union member states, starting with France, the crime of tax fraud fully or partly corresponded to the new definitional criteria of “serious offense”. In these cases, such an offense theoretically fell within the range of predicate offenses and could thus be approached and investigated in the same way as the other first illegalisms of laundering. For professionals subject to anti-money laundering regulation, the direct consequence of this inclusion was on the face of it straightforward: in the case of suspected tax fraud, they were to discharge their declarative obligations under threat of sanction. In other words, the distinction between what was and was not a matter of capital laundering was redrawn, with tax illegalisms tending to fall under the category of “dirty money”.

32 The adoption of this threshold method – the implications of which are not insignificant – did not take place without raising some eyebrows and objections, in particular among banking associations. Representing the main European banking federations,11 the members of the European Banking Industry Committee (EBIC) expressed their concerns regarding the tendency to increase the scope of anti-money laundering measures. EBIC’s first official position regarding the draft of the third directive thus singled out a “particular problem” that would face banks in some countries as a result of enlarging the scope to include fiscal illegalisms (EBIC, 2004). A few years later, Séverine Anciberro, a legal advisor to the European Banking Federation, itself a member of EBIC, reiterated word for word this common position: In what concerns tax fraud, I do not believe that banks can be held as guarantors of the fiscal loyalty of their clients. Finally, I believe that a non-targeted fight against laundering can only lead to the dispersion of resources, whether private or public (Anciberro, 2007, 132).

33 Using arguments that reflected misgivings identified in the ranks of finance and security professionals alike, this position could also be found in European institutions. It was expressed with particular force at meetings of the ECOFIN Council (the economic and financial body of the Council of the European Union) and those of the working group on financial services with which it is associated. As shown by a 12 November 2004 internal document from the Council, the representatives of the French Ministry of Finances were very reluctant to expand the notion of serious offense on a compulsory basis and some adamantly opposed doing so (European Union, 2004). The confrontation was short-lived, however, as French positions on this issue were not supported. At first glance, this situation may seem surprising, even highly paradoxical, but it can easily be understood by reflecting on the manner in which the terms of debate were set. In this framework, the proposal to significantly expand the range of predicate laundering offenses above all aimed to accommodate FATF and European Union observations regarding the diversified character of activities relating to “organized criminality” and “terrorism”. The principal
aim of extending the declarative field was thus to facilitate suspicious transaction reporting and thereby ensure that all of the revenue-generating activities of targeted organizations could be pursued. At no moment did the possibility of explicitly addressing the treatment of tax illegalisms ever arise in the directive.

34 In this context, the concerns expressed by the Council’s French delegation regarding the threshold method – pegged at one year of imprisonment for the definition of “serious offenses” – could not necessarily be applied to the situation facing other member states. While in France it represented a crucial issue of the new European text, the Union’s various members were not uniformly affected by the implicit inclusion of tax fraud in the perimeter of “dirty money”.

It’s true that it is defined in a somewhat obscure manner because the directive says there is a precise list of crimes to define the serious offense – corruption, the activities of criminal organizations, etc. – and then let’s say there is a more open indication for all offenses punished by a sentence of more than one year. With a little luck, this should include tax crimes throughout the European Union. But there are situations where certain tax crimes are not penal offenses but rather administrative in nature or are simply irrelevant because they do not exist as offenses... ("as in Luxembourg?")... exactly, and that’s a problem, but it’s the best that the directive could do at this time. (Interview with a representative of the Internal Market Directorate General, European Commission, June 2006)

35 Of course, the case of Luxembourg is not typical. Yet only a few national jurisdictions included all tax fraud in anti-money laundering legislation. In contrast to France, many countries already distinguished between several types of tax fraud according to their seriousness, with some types (“the most serious”) covered by the established threshold while others were not. Finally, other countries (Spain, for example) chose to include tax fraud in the declarative requirements of banks before the third directive. Once again, however, the impact of this legislation proved to be particularly brutal for states such as France, where tax issues had been completely excluded from the anti-money laundering system, something reiterated by the country’s representatives when they spoke of the “Great Wall of China” separating anti-money laundering services from the fiscal administration (Favarel-Garrigues et al., 2009, 269).

36 The issue of tax fraud did not uniformly provoke an outcry because the questions that it raised were not comparable from one state to another and were often not presented in quite such a direct manner as in France. All of the individuals I have met who in some way participated in European negotiations concerning the third directive agree in saying that the subject remained marginal and amounted to a purely French debate. Moreover, this subject was no longer bitterly defended by European banking associations. The issue is well stated in EBIC’s first written position but does not appear in those that followed, having preceded the official vote of the regulatory text and this despite stiff opposition from the committee’s French and, to a lesser degree, Austrian members.12 Not that there was suddenly a change of opinion within EBIC – the writings of Séverine Anciberro (2004) demonstrate its continuity – but the working group on money laundering agreed that this debate should play out at the national level.13

37 The abandonment of this theme did not lead members to rally behind the treatment of tax illegalisms. Rather, it promoted awareness of the fact that, due to the national disparities mentioned above, this theme should be dealt with not in Brussels but rather upon implementation of the text by each member state. In this, European negotiations relating to the third directive did not constitute a decisive moment once and for all.
determining the manner in which tax issues were to be dealt with. This held for France as well, where ministerial representatives were well aware of the fact.

As you say, many discussions took place on this tax issue because there was a significant change with the third directive and that presented some major problems. In France, we find ourselves rather isolated in Council negotiations concerning opposition to the adoption of serious offenses and the question of “1 year of prison”, which means that we address tax fraud. That is going to play out at the level of implementation. Tax fraud remains a taboo subject and it will be one of the major points of friction in the directive’s adaptation. (Interview with an official from France’s Ministry of the Economy, Finance and Industry, June 2006)

The process of adapting this community legislation at the national level cannot therefore be understood as a formality in which an already negotiated European legal norm is imposed upon its recipients, who are have no choice but to adopt a passive attitude. In this respect, there is absolutely nothing unusual about the present object of investigation. As sociological studies of European policies have clearly shown, this type of community text tends to represent more a general framework than a precise and unavoidable roadmap (Smith, 2004, 68) for national interventions. Formal analysis of the relevant European norms can in no case serve to predict the concrete operation of a policy.

2. Lack of Differentiation from Above, Differentiation from Below: The French Case

In France, the application of the third directive set in motion a number of interacting forces, with intense negotiations taking place on the tax theme. The representatives of the institutions covered by the European text – and, in particular, banking establishments – condemned the prospect of indiscriminately including tax fraud in the fight against money laundering. The representatives of the banking industry expressed their disagreement vis-à-vis what they interpreted as a specificity of the French framework which caused, in contrast to the majority of European Union countries, all tax fraud to be brought under the purview of anti-money laundering measures. On this point, the spokesperson of the French Banking Federation (FBF) criticized a difference of criminal policy that was capable of leading to competitive distortion between member states (FBF, 2005, 31). Implicit in this was a fear on the part of the French banking establishment that it would no longer appeal to “legitimate” clients (whether individuals or companies) seeking tax optimization strategies.

Refusing to play the role of advance guard for the tax administration, the actors concerned by the European directive more generally denounced what they saw as excessive – and, indeed, potentially ineffective – regulation. In addition to what they considered a disproportionate burden of responsibility, banking actors argued that the undifferentiated inclusion of tax illegalisms would give rise to massive suspicious transaction reporting. Such an eventuality, they claimed, would harm the anti-money laundering fight by “drowning” the authorities. In the three years that passed between the adoption of the directive and its formulation in French law, the members of the French Banking Federation warned of bottlenecks in the service that collects and handles the information transmitted by banks – to wit, Tracfin, the French financial intelligence unit (FBF, 2007). These warnings were to be found in FBF activity reports that in passing drew upon arguments denouncing expanded surveillance of the population. In contrast to most European countries, in France that [the reporting field of the third directive] will apply
to all economic and financial crimes and in particular to all tax fraud, at least if the national legislation is not adapted. Failing to distinguish between organized criminality and a form of fiscal incivility, this measure threatens to paralyze Tracfin due to the large number of suspicious transaction reports that will likely flow from it. What's more, there is a risk that this will result in the creation of files for thousands of people. The FBF asks the authorities for a pragmatic solution so that banks can continue to effectively fight laundering in a clarified legal framework (FBF, 2007, 39). According to this thinly veiled attempt to euphemize matters, all tax fraud is merely a form of incivility, that is, a simple error in contrast with the misdeeds associated with the dramatized notion of organized criminality.

The Ministry of Finance officials responsible for coordinating the dossier nevertheless continued to take the same stance, reiterating that the aim of Tracfin was certainly not to be monopolized by tax issues.

It’s true that this taboo subject has to be addressed but one must be clear: on the subject of tax fraud in general, everyone cheats and it is not Tracfin's job to deal with that, this service is not made for that. (Interview with an official from the French Ministry of the Economy, Finance and Industry, June 2006)

"Rescue plans" were thus drawn up and discussions were in full swing during the consultations held under the aegis of the Ministry of Finance concerning the draft ordinance transposing the directive into French law. Among the handful of initiatives considered, serious discussion was given to an approach that would have resulted in splitting up the existing definition of tax fraud. In particular, the possibility was considered of moving towards a solution that distinguished between “aggravated tax fraud” and “simple tax fraud”, with the phenomena covered by the latter expression being located outside of the scope of the anti-money laundering directive. This option could count on support from the sectors covered by the directive. The spokesperson of the FBF, in particular, had called for modifying the general tax code in order to redefine tax fraud and thereby alter the effective scope of the European text. The proposal that was put forward thus consisted in reworking a pre-existing legal category: the introduction of a new degree of differentiation, it was hoped, would help hone the qualification / disqualification of certain fiscal illegalisms.

Signed by the President of the Republic on 30 January 2009 and ratified by Parliament on 12 May 2009, the ordinance ultimately did not opt for revision of the crime of tax fraud, which continued to be punishable by a sentence of up to several years of prison. What’s more, by allowing Tracfin agents to communicate information to their counterparts in the fiscal administration under certain conditions, this ordinance opened a breach in the famous “Great Wall of China” (President of the French Republic, 2009). Yet, while the executive authorities could clearly not run the risk of trivializing a portion of tax fraud by having it pass under the critical threshold of “one year of prison”, the text was not for all that silent on the subject and this without changing a line of the general tax code.

In contrast to all predicate money-laundering offenses, suspicion of tax fraud, however well-substantiated, is not sufficient grounds for transmitting a report to Tracfin. In concrete terms, in addition to “knowing, suspecting or having good reasons to suspect” that a sum or transaction is the result of tax fraud, the latter must also meet at least one of the criteria of tax fraud laundering. Mentioned but not specified in the ordinance, this set of criteria was the object of a specific decree under the aegis of the Prime Minister sixth months after the ordinance’s publication (Prime Minister of the French Republic, 2009a). The decree enumerated a series of 16 criteria (see appendix to present article),
with any declaration of tax fraud laundering required to meet at least one of them. In their report to the President of the Republic and in annex to the ordinance, the teams of Prime Minister François Fillon and Finance Minister Christine Lagarde justified the introduction of these criteria by reference to the complexity of tax fraud (Prime Minister of the French Republic, 2009b). Given this complexity, the measure sought to supply professionals with indicators that could help steer their efforts to identify cases of fraud.

However praiseworthy it may be, this justification does nothing to conceal the principal effect of this regulatory act, which was to compensate for the impossibility of formally excluding tax fraud from the perimeter of anti-money laundering. Among other things, it limited the volume of information transmitted to Tracfin concerning tax fraud to operations that met at least one of the specified criteria. In so doing, transactions that did not positively correspond to one of these indicators were automatically excluded from the declarative field. In an advisory opinion that was never acted upon, the members of the Council of State held that such an exceptional reporting system was incompatible with the third directive’s conditions of transposition (Council of State, 2010).

Ultimately, the manner in which this transposition took place was fully consistent with differentiation between two types of tax illegalisms in terms of seriousness. While it remained implicit with the 16 criteria, this differentiation was in practice made explicit. A source of ambiguity and uncertainty, this list of criteria was the object of interpretation by the parties involved in implementation. This was a matter of clarifying the fuzzy limit between, on the one hand, the tax illegalisms that were to be reported by banks and, on the other, those that fell outside of the scope of the anti-money laundering surveillance system. This process of interpretation focused on the notion of “serious and organized tax fraud” to give meaning to the ordinance. This notion appeared neither in the decree nor in other official documents and had no legal value in France. It nevertheless established itself as an “unwritten norm” (Lascoumes, 1990) and shared point of reference relative to which a given tax situation could be described and a decision taken as to whether it should be denounced. This shared point of reference has been adopted, not only by the vast majority of banking actors, but also by the agents of Tracfin, who endlessly repeat that in regards to the present issue of the notion of tax fraud encountered by professionals, Tracfin insists on the notion of “serious and organized” tax fraud. A general scheme for interpreting the norms of reference thus emerged and the relations that developed between the various actors responsible for overseeing financial flows gave rise to expectations. This reflected the fact that these anti-money laundering “foot soldiers” were neither fully free agents nor mere passive executors. While the notion of serious and organized tax fraud was not incorporated into the legislation, it was nevertheless applied in the social uses of the legal norm.

In France, all tax fraud is theoretically covered by anti-money laundering legislation and associated sanctions. In practical terms, however, a portion of it is protected by selective oversight in accordance with official regulations and the manner in which they are interpreted. The third European directive steered (but did not determine) the new French legislation, with which anti-money laundering actors for their part remain actively engaged. This differential treatment is now structured around the notion of “serious and organized tax fraud” that resulted from the appropriation of the law by the actors involved in implementation. Where abstract and vertical legality (legislated law) is embodied by a complex list of 16 criteria, horizontal legality (mobilized law) reveals the actors’ successful efforts to pursue their issues in conformity with the written norm.
By practically establishing a new explicit differentiation – one that was no longer diffuse, as in the written norm – Tracfin and its “informers” gave official status to the fact that “ordinary” tax fraud is not covered by the application of the anti-money laundering directive. The conservation of a space of tolerance for these “ordinary” and/or non-organized tax illegalisms reassured banking actors eager to limit anti-money laundering obligations: while tax fraud had not in principle been excluded from the purview of anti-money laundering, it had at least been practically bracketed. In addition to the organizational routines and representations that have led anti-money laundering to be associated with the repression of “organized (transnational) criminality”, this margin of tolerated illegalisms also reflects the situation of Tracfin, which must give pragmatic imperatives priority over legalism. Concern that the service would be submerged by an influx of impossible to handle reports played a decisive role, as did the desire to remain focused on organized crime (understood as the pursuit of major trafficking) and avoid compromising the relations of trust that had been established with financial circles.

From the point of view of this new variation on the notion of tax illegalisms, precisely where “ordinary” and/or non organized tax fraud stops and “serious and organized” tax fraud begins remained to be seen. A priori, the response to this question was to be had by consulting the 16 criteria enumerated in the ordinance (see appendix). Nevertheless, these only represent a collection of distinctive signs; they reduce but do not eliminate the imprecision that characterizes the notion of “serious and organized” tax fraud. The product of a negotiated adjustment, the use of this notion did not for all that make it a defined legal category in French law, a fact that somewhat reinforced the margin of maneuver of the actors responsible for categorizing the operations they encountered. Adding to the difficulties of detection that characterize most acts of money laundering, in general, and tax fraud laundering, in particular, the use of this category of imprecise status and content reveals the relativity of the new anti-money laundering norm applied to tax illegalisms. To know the extent to which business illegalisms and therefore white collar criminality are now affected by suspicious transaction reporting and the possibility of legal action would require a systematic analysis of practices and perhaps even an ethnographic study of Tracfin and regulated actors.

The French case underscores the end of a taboo as well as the persistent sensitivity of the tax issue. But above all it illustrates the ongoing transformation of the fight against money laundering as a system for managing illegalisms. Following the lead of the FATF’s recommendations, earlier European Union directives supplied the grounds for differentially handling tax illegalisms from above, immediately and rather clearly ruling out “tax issues”. In France, at least, the third draft of the European text changed this state of affairs in two respects. First, the relative absence of differentiation from above in practice led French actors to substitute differential treatment of tax illegalisms from below. Second, this differential treatment no longer only applied to other transgressive practices but also to practices for gaming the tax rules, making it more complex by enlarging the discretionary power of the “foot soldiers of public action”. In other words, the third directive did not mean an end to anti-money laundering as differential management of economic and financial illegalisms but rather brought about a change as well as a shift of tension between crime and illegalisms. The central norms had a priori included tax transgressions in the category of “dirty money”. In practice, however, this inclusion remained piecemeal and depended upon expected behaviors among groups of frontline actors in the fight against laundering. This shift from a differential management
of illegalisms from above (in the reference norms) to a differential management from below (in the practical norms) today extends beyond the somewhat particular framework of France.

51 Indeed, far from a specific elaboration solely responding to a purely French issue, we are here confronted with a major trend. What had remained implicit and non-harmonized in the third directive – that is, an end to the exclusion of tax illegalisms from the official framework of anti-money laundering – asserted itself at the level of the FATF. Increasingly, the example of France can be seen as representing and/or heralding a more general transformation affecting the fight against “dirty money”. In parallel with European developments, a new event was to once again raise the question of the explicit inclusion of tax issues in the framework of the FATF’s recommendations.

3. The International Financial Crisis: An Accelerated Transformation

52 The onset of the international financial crisis in 2007-2008 indirectly favored new debates to the tax theme. In parallel with the initiatives taken within the G20 and the Council of the European Union, FATF discussions regarding tax illegalisms officially resumed in February 2009 – that is, a few days after publication of the French ordinance launching the transposition of the third European directive. The reopening of these discussions reflected the possibility that national positions on this question were changing. This was particularly true of the United States where, in this period of economic slowdown and tax revenue loss and with a new administration in office, a modification to the statutes of federal anti-money laundering law to include tax fraud was being considered. These discussions were thus part of a more general process of consultation regarding a new revision of the FATF recommendations following those of 2003. After more than a year of ultimately indecisive discussions, these efforts at revision resulted in a set of proposals unveiled following the plenary meeting of the FATF, which took place in Paris in October 2010. Among the decisions that were taken, one in particular merits our attention: the decision to re-categorize tax illegalisms as predicate offenses of laundering. By including tax issues in the perimeter of the international mobilization against “dirty money”, they were theoretically subject, like any other type of first illegalisms, to a lifting of bank secrecy, with all that that implies in terms of reporting requirements, the transmission of information and sanctions for bankers complicit in laundering tax fraud.

53 Announced in October 2010 (FATF, 2010) and confirmed in February 2012 (FATF, 2012a), this decision harmonized at the scale of the FATF what the third European directive had already given a glimpse of – that is, a relative end to the differential treatment of tax illegalisms from above. In this respect, there was nothing atypical about the situation encountered in France during the transposition of the community legislation; it even became ideal typical of a process of ongoing transformation. Given the initiatives adopted by their country in the framework of the transposition and in contrast to the European negotiations of 2004-05, the French delegation was not particularly hostile to this project (quite the contrary). For all that, the discussions were not without tension, with Swiss and, to a lesser degree, Japanese representatives reluctant to directly include tax offenses in the fight against capital laundering.

54 The members of the Swiss delegation bitterly resisted this proposal but were ultimately obliged to accept the new compromise. It was in Switzerland, moreover, that the negotiations were followed with the greatest attention. The Swiss press emphasized that,
starting in June 2010, this decision – which might be reached in the coming days – would have major consequences for the Swiss financial market. According to the estimates most often heard within banks, between 60 and 80% of the foreign funds deposited in Switzerland have not been declared to the tax authorities of their country of origin. [...] Bankers suspecting a client of not being on good terms with the taxman would thus be obliged to report that client to the competent body – in Switzerland, the Money Laundering Reporting Office, or MROS. Receiving these funds (by opening and managing an account, creating offshore businesses to hold them, etc.) would become a criminal offense punishable by prison. Another disagreeable effect: the suspicious transaction reports issued by banks and the names of the clients concerned would be transmitted abroad without additional formalities via the international network of communication offices established under the aegis of the FATF (Besson, 2010, 1). The spokespersons of the Swiss banking industry lost no time in reacting to the announcement of this possible re-categorization, arguing that not declaring revenue to the tax authorities does not de facto transform this revenue into illicit money tied to organized crime. Bankers are not agents in the service of foreign tax administrations (Boder, 2010, 1). They denounced an error that would further remove the fight against money laundering from its initial objective, the combat against organized crime (Swiss Banking, 2010, 1). As can be seen, these criticisms did not differ from those somewhat earlier expressed in France. Indeed, the similarities with French case did not end with the vehement statements of banking actors.

And for very good reason: this international re-categorization of tax issues went far beyond the adjustments that had been agreed to by the FATF since the late 1990s. In this respect, it constitutes a turning point in the recent history of the fight against "dirty money". Yet it is one thing to observe that international norms tend to no longer arbitrarily segregate tax issues from other illegalisms, quite another to conclude from this that activities of (dis)qualification and differentiated oversight have come to an end. Creeping differentiation from below tends to be the response to processes of dedifferentiation from above. As in the French case, power struggles took place over continued application of differentiated treatment to tax illegalisms, even if it meant introducing a new distinction in terms of seriousness. The Swiss Banking Association has already made it known that this notion [tax crime] must absolutely be reserved for extremely serious offenses like accounting falsifications or embezzlement. The amount involved is not a relevant criterion (Swiss Banking, 2010, 1). Moreover, the head of the Swiss delegation to the FATF, Alexander Karrer (Federal Department of Finance), hastened to reassure the country's structurally powerful banking and financial institutions, announcing that the definition of “tax crime” will remain a matter for the competence of each country (Boder, 2010, 2). Without doubting the sincerity of these statements, one may question the definitional capacity of a country that was recently obliged, under pressure from the OECD, to abandon its very specific internal legal distinction between fraud and evasion. It nevertheless remains the case that the re-categorization of tax issues leads to a negotiation of practical adjustments and non-written norms that merits empirical study. In this connection, there is nothing astonishing about the fact that representatives of a European Union member state such as France should show themselves open to debate and even encourage this evolution within the FATF. For it in no way changes the French situation as it has stood since implementation of the European directive; rather, it extends that situation to France’s partners.

In this respect, the responses addressed to the FATF following a consultation among financial circles in regards to a proposed revision of reference norms were extremely
interesting (FATF, 2011). The representatives of the French Banking Federation thus devoted only three lines to tax issues, contenting themselves with reiterating that they are covered by national legislation against money laundering while at the same time recommending that action and suspicious transaction reporting be restricted to serious tax offenses. The reactions of other banking associations, such as the European Banking Federation (EBF), the European Committee of the Banking Industry (EBIC) and the Swiss Bankers Association, were much more detailed and emphatic. They were clear in their opposition to designating tax issues as predicate illegalisms of laundering. While European interest groups pushed for limiting these to “serious” fiscal crimes, the Swiss federation insisted that the definition of the term “tax crime” remain a matter of national competence, claiming that anti-money laundering norms are not designed to guarantee the fiscal conformity of citizens.

**Conclusion**

From the perspective of international political sociology, two general conclusions can be drawn from this analysis of the current dynamics of conflict surrounding the treatment of tax illegalisms in anti-money laundering. The first concerns the Weberian state and the end of its historical monopoly over the definition of fraud and tax evasion as well as the manner in which they are to be dealt with. What is shown by my analysis of debates over tax issues? After the fashion of France and Switzerland, no state now seems capable of having the last word in determining and pursuing a strictly national normative approach to taxation and tax illegalisms. The enlargement of circuits of legitimation via the transnational hybridization of state bureaucracies and the development of professional dynamics by way of participation in supranational organizations mean that states are losing their monopoly over defining the tax system. Enmeshed in spheres of interdependence within the European Union, the representatives of the French state had no choice but to include tax issues within the perimeter of the fight against “dirty money”. In the same way, while the Swiss delegation was able to impose its views in the institutional context of the FATF’s creation, the ties of interdependence that have since developed and now constrain the state meant that its representatives were unable to lastingly oppose proposals to re-categorize tax issues.

Yet it would be an error to suppose that the dynamic at work on the tax system, though undeniably real, is in practice synonymous with unstoppable standardization of the now undifferentiated fight against irregular financial flows. This is my second conclusion. The inclusion of tax issues in the FATF’s recommendations does not automatically presuppose their full and complete integration into the shared norms of the actors responsible for fighting against “dirty money” on a daily basis. As the French experience with the European directive illustrates, an examination of the relations among groups of actors obliged to apply supranational reference norms spares us from drawing hasty teleological conclusions. By attending to these practical adjustments, one may avoid taking the categories produced by supranational authorities at face value and thereby steer clear of any too hasty assumption of identity between formal and operative norms. While the reports of the FATF constantly draw upon the notion of anti-money laundering “norms” to describe the organization’s recommendations, it would be naïve to suppose, in the absence of further analysis, that these central norms fully determine the norms that make up the social rules governing the action and interaction of the “foot soldiers” of
anti-money laundering. In France, the social uses of legal norms underscore the unchanging face of anti-money laundering – an effort to differentially manage illegalisms that therefore resists defining tax illegalisms, taken as a whole, as “dirty money”. While it is entirely conceivable that this state of affairs will evolve in the direction of increased pressure on tax issues, it is just as likely that the status quo à la française will be maintained. Prophetic analytical models are of no help here; only a study of tomorrow’s practices will enlighten us on this score, especially with the upcoming fourth EU anti-money laundering directive that explicitly includes tax issues.

From the creation of the FATF to the present day, the trajectory of “tax issues” thus reveals a transformation of the anti-money laundering fight. This transformation, however, is not necessarily identical to that mentioned in the organization’s official statements, which suggest that an undifferentiated approach to all economic and financial illegalisms will succeed the earlier exclusion of economic illegalisms. The treatment differential has not disappeared; it has changed. It is now to be found in the social uses of reference norms. There is still tension surrounding tax issues and their association with “dirty money” remains very ambivalent. The FATF’s calmer relationship with tax illegalisms must not be allowed to obscure the fact that they – even more than business illegalisms and white collar criminality – have never constituted a priority within this body nor been a driving force in the evolution of its mandate. Moreover, if they can now be addressed, this has more to do with the impact of 11 September 2001 and the priority given the fight against terrorism financing than with the economic and financial crisis.

I would like to now extend this clarification of anti-money laundering norms by relating an analysis of national and transnational uses of “suspicious transaction reporting” to an examination of forms of social domination and the inequalities that may result from them. The information that banking actors transmit to national financial intelligence units in the event of suspicion of money laundering are generally held for a period of ten years. As its name indicates, suspicious transaction reporting concerns financial operations suspected of money laundering or terrorist financing. Inevitably, these reports identify suspects and supply a great deal of personal data. Their centralization in large national databases is one of the main results of the cooperation that was instituted between banking actors and financial intelligence units over the course of the past twenty years. In 2011, the British equivalent of Tracfin possessed a database of more than 1,900,000 entries. (House of Lords, 2011). Between January and October 2010, this database was consulted 329,229 times by various authorized law enforcement agencies (ibid.). Far from the initial purposes of European legislation against “dirty money”, certain local authorities have used it in the framework of investigations bearing upon social benefit fraud (housing) (ibid.). As in this example, use of these databases and struggles for access to them are worth studying. Setting aside official justifications centered on the money of “transnational organized crime” and “terrorism”, to what degree do the existence and uses of these databases also contribute to increasing the visibility of popular and business illegalisms?
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NOTES

1. While it can seem far removed from the rigor attributed to legal language, the notion of dirty money nevertheless explicitly appears in official texts and statements (see, for example, EU, 2005). Over the course of the past twenty years, a collection of documents and declarations have conferred some consistency on this poorly delimited notion.

2. Although the Foucauldian concept of ‘illégalismes’ has been frequently translated as ‘illegaliities’, I prefer the term ‘illegalisms’ as it retains the key distinction in French between ‘illégalisme’ and ‘illégalité’ (both of which are translated as "illegality").

3. Founded in 1989 during a G7 summit in Paris, the Financial Action Task Force (FATF) is today the leading intergovernmental organization responsible for conceiving and promoting anti-capital laundering and terrorism financing policies at both the national and international levels. This is reflected in the publication of the FATF 40 recommendations. These international norms have on several occasions been revised since 1990. The FATF today includes 36 members, including two regional institutions (the European Commission and the Gulf Cooperation Council) for 34 countries and territories. Eight FATF “satellite” bodies have been added to this first circle and each brings together between a half dozen and thirty member states. Finally, around twenty organizations more or less directly concerned by the theme of “dirty money” hold the status of observer within the FATF. These include the World Bank, the International Monetary Fund, Interpol, Europol, the
counter-terrorism committee of the United Nations Security Council and the Basel Committee on Banking Supervision. In all, more than 180 national jurisdictions are formally involved in the fight against capital laundering and the financing of terrorism to the degree that their representatives are involved in applying the recommendations issued by the Financial Action Task Force.

4. Starting with the priority given the fight against the financing of “terrorism” since 11 September 2001, I endeavored to analyze the general process of securing the financial system and to describe the mechanisms of prevention and suspicion as well as the resulting mode of governmentality. In order to do this, I first of all attempted to put the socio-historical construction of the notion of “dirty money” into perspective. I then examined the development of European lists of “terrorists” subject to financial sanctions, the now transatlantic program of the “hunt for terrorist financing” and the routine use of surveillance technologies to detect “suspicious” clients and transactions in the framework of the relations of cooperation that have been established between finance and security professionals. My work draws among others on around sixty interviews covering the large variety of actors involved in the fight against “dirty money”. Whether explicitly cited or not, these interviews have contributed to the present article, which also reflects as systematic a study as possible of the many official documents relating to my object of research.

5. In my view, actors from the world of justice have had less of an influence on this process.

6. This is a speech by M. Michel Camdessus, General Director of the IMF, to the plenary meeting of the Financial Action Task Force concerning capital laundering, Paris, 10 February 1998 (see FATF, 1998, 39-45).

7. The European Union’s first anti-laundering directive was even officially justified in the name of protecting financial liberalization and the free circulation of capital!

8. They [the commercial firms] advised and coaxed the politicians to provide the legislation they needed to pursue their trade, and on occasions they drafted that legislation for the states in which they had located themselves. The professionals have also been present in each and every redrafting of the laws of offshore and they are the ones who actually set up the offshore facilities that such legislation enables. They also innovate new technologies of evasion and avoidance, which they sell to clients; lobby against changes in the laws against tax havens; and argue that tax havens are an entirely legitimate form of business (Chavagneux et al., 2010, 12).

9. In this connection, it is worth noting that the overwhelming majority of state delegations to the FATF are headed by finance ministries. Among the first fifteen member states in the early 1990s, only Australia, Belgium and Japan did not choose a ministry or “financial” department as the main authority represented within the FATF delegation.

10. Large international banks are major users of tax havens. They draw upon them for themselves, for tax purposes or for risk-taking, and in order to offer services to companies and wealthy clients in order to recuperate a portion of the commissions resulting from the production of opacity. All of the major corporate business scandals of recent years have involved the largest international banks: Citigroup with Enron, UBS with Madoff, etc. Multinationals make use of tax havens in order to establish subsidiaries that invest elsewhere or concentrate the proceeds of intellectual property rights: lightly taxed by definition, it is these subsidiaries that register the profits while their more heavily taxed counterparts in the countries of final destination make little. They also use them to hide their debts in order to present potential investors with a balance sheet that appears healthier than it really is or simply use them to falsify their accounts (Chavagneux, 2009, 9). In 2009, all French CAC 40 corporations had a presence in offshore financial centers (Chavagneux, Rinuy, 2009).

11. The European Banking Federation (EBF); the European Savings Bank Group (ESBG); the European Association of Cooperative Banks (EACB); the European Association of Public Banks (EAPB); the European Mortgage Federation (EMF); the European Federation of Building Societies (EFBS).
12. Interview with an EBIC legal advisor, June 2008.
14. France was put on formal notice by the European Commission for its delay in transposing the third directive, originally anticipated for late 2007.
15. By contrast, this notion exists for example in Belgian law and I suspect that it was imported rather than simply invented in the French framework.
17. Having stopped my field work in 2009-2010, I do not have the critical distance necessary to assess this still recent issue concerning the practices of anti-laundering actors. This empirical work must still be carried out.

ABSTRACTS

While tax issues have been historically disconnected from the mobilization against money laundering, there is now an ongoing reconfiguration of this “border” in France and at the international level. Our contribution aims to analyze the inclusion process of tax issues within anti-money laundering policy in order to understand the current transformation of the fight against “dirty money”. To what extent is there a new impulse regarding the practices of differentiation, hierarchization and management of economic and financial illegalisms?

Alors que la problématique fiscale a longtemps été tenue à l’écart de la mobilisation contre le blanchiment de capitaux, cette frontière historiquement négociée est aujourd’hui en cours de recomposition, en France comme à l’international. En analysant les modalités d’intégration des questions fiscales au cœur de l’anti-blanchiment, il s’agit de rendre compte des transformations travaillant actuellement la lutte contre l’« argent sale ». Dans quelle mesure assiste-t-on à un renouvellement normatif dans les activités de différenciation, de hiérarchisation et de gestion des illégalismes économiques et financiers ?

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Geographical index: France, Europe, International
Keywords: (transnational) organized crime, Dirty money, money laundering, norms, tax illegalisms, terrorism, white collar crime
Mots-clés: argent sale, blanchiment de capitaux, crime organisé (transnational), criminalité en col blanc, illégalismes fiscaux, normes, terrorisme
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