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Germany VII: Illicit Financial Flows

Compiled and ordered notes from interviews including cross-checks with publicly accessible material, prepared for future use. Language check and German quotes translated into English thanks to Dr. Sue Berning.

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1 Context

1.1 What are we talking about?

The term “Illicit Financial Flows” is rather unknown in Germany, while it is a concept of growing importance in Africa (High Level Panel, 2015a) and international development NGOs such as Global Financial Integrity.

As has been discussed in I/IV/6.1, Illicit Financial Flows are an important consequence of global financial integration, providing private, corporate and criminal holder

of illicit and illegal wealth with channels to transfer their funds out of the country without the respective state noticing or being able to control this haemorrhage – Offshore Financial Centres and Shell Companies only being the most well-known features. Because the structures of financial integration can be used for all sorts of illicit financial flows examining the respective background and context is important as well to establish the overall damage for the community and the common good and here especially for the poor.

It has been established that the following areas are of importance in particular for this research project:

- Corruption/bribery, as far as it is interfering with good governance (incl. Tax administration) or important market mechanisms (e.g. in the case of bidding procedures which then would endanger sound businesses and quality jobs),
- Money laundering,
- Trade mispricing and trade misinvoicing,
- Tax evasion and aggressive tax avoidance,
- Tax fraud, e.g. Turnover Tax Fraud,
- Monetary flows within the shadow economy.
- In literature, two more topics are linked to this debate, namely "mere" capital flight or the funding of terrorism. The first is of importance since this capital would be needed for local investment for jobs and infrastructure, the latter is growing in importance because it preoccupies authorities increasingly, while at the same time neglecting other areas of importance.[1]

1.2 Cross-flows, direct and indirect damage

IFFs are very suitable to illustrate the global interconnection of financial markets as result of financial globalization and integration (see I/IV/5.3). It is no longer a major problem to transfer money out of a country and hide it elsewhere, thus depriving and damaging the common good. IFFs consist in financial flows of a considerable, but unknown magnitude. Raymond Bakers famous quote sets the proportion as follows:

> Much attention has been focused on corruption in recent years, that is, the proceeds of bribery and theft by government officials. In the cross-border flow of illicit money, we find that funds generated by this means are about 3 percent of the global total. Criminal proceeds generated through drug trafficking, racketeering, counterfeiting and more are about 30 to 35 percent of the total. The proceeds of commercial tax evasion, mainly through trade mispricing, are by far the largest component, at some 60 to 65 percent of the global total. (Global Financial Integrity, 2009, p. 1)

IFFs are not only problematic because they are depriving a state directly of revenue. They also are indirectly damaging: For example, the money going out could be invested in ones own country or it could be spent on consumer good. Or: Because of those illicit or illegal practices market competition is distorted, thus damaging businesses sticking to rules, providing bad services and creating non-sustainable structures.

Commonly it is thought that IFFs are following a one-way direction: Leaving poor countries and going to developed countries and tax havens and are either hidden their in deposits or invested in developed countries to generate even larger profits. This, however, is

[1] Regarding the entire complex of IFFs see e.g. (Altvater & Mahnkopf, 2002), (Blickman, 2009), (Unger, 2007), (African Development Bank; Global Financial Integrity, 2013), (Financial Action Task Force, 2010), (OECD, 2013c), publications by Global Financial Integrity or the Financial Transparency Coalition….

not the entire truth: Money is also leaving developed countries, either because of commercial transactions or because illicit or criminal profits are “laundered” via institutions in poor countries.

IFFs are difficult to combat for various reasons: First, they would need to be detected at all, second, it is difficult to distinguish that which is still legal from that which is already illicit, illegal or criminal, third, there has to be an interest in combating them in the first place. The former is difficult since it is operating out of view and under the screen of supervisory authorities. This is why insight in this criminal field is more limited than in others and this is why the dark field (Dunkelfeld) is larger than in other crime areas. for the second, it needs highly competent specialists to shed light into the dark. The third second is hampered because too many people in high places are interested to keep the system working in their favour, which is why they obstruct the assignment of adequate personnel or their adequate equipment.

Here, conversation partner among the police force admit, that German law enforcement is at best scratching the tip of an iceberg.

1.3 A broad picture, a broad solution

Given the broad spectrum of offences one wonders, whether one single approach might be possible at all. There is, if one considers and treats those phenomena as symptoms of one underlying cause: financial integration and its inherent opportunities for IFFs. It is here where one original and creative proposal addresses the problem:

Because it is so difficult to separate the origin and nature of different IFFs from each other in a clear and analytical way so that a legal investigation and prosecution can make sense, Brigitte Unger proposed in 2007 a very simple solution to it: To subject all sorts of financial flows to a Tobin Tax. This, she admits, would neither resolve the problem nor make investigation and prosecution redundant. It would be a start, however, to make the transfer of criminal proceeds as well as financial speculation equally unattractive (Unger, 2007).

This is an interesting point, because it would fit into the ongoing attempts of some European states to establish a Financial Transaction Tax, a more comprehensive model than the previous Tobin Tax, into place. And there is clearly a point to Mrs. Ungers observation, even eight years after the proposal has been made, for example:

In 2002 already, Elmar Altvater illustrated with a detailed example how money-laundering works nicely by trading in derivatives, one of the core elements of global financial integration (Altvater & Mahnkopf, 2002, p. 235f.), and even in the present negotiations aiming for a Financial Transaction Tax, there are areas of overlapping interest for both combating financial speculation and IFFs. And a conversation partner from NGOs with expertise in finance matters explained it as follows:

> In particular, instruments which close down the loopholes of tax avoidance as planned in the commission draft could have this effect. It begins with the counterpart-principle. By being obliged to pay taxes the second party which is involved in a transaction is being registered. This is a risk for IFFs even if it does not automatically mean that it will be controlled from where the money comes. But one is in the tax agency’s or central bank’s computer at all. Also, the issue-principle could have this effect as the origin of a derivate is determined, at least the country of origin. If the IFF is raised with the help of the clearing house or the trade register as suggested in MIFID (which needs technical clarifying yet) a registration takes place at all. But there are unsolved legal questions, that is whether the clearing houses are allowed to be used for tax collection. But in all cases, no automatic detection of IFFs follows though it has a

dissuasive effect and in case of an initial suspicion, the transactions can be traced back easily. This is all also a topic for Big Data – this time perhaps even a positive one. [2]

Indeed: The entire point of money laundering is to bring hidden assets into the legal circulation of finance, and as much as underground and shadow banking, cyber money, hawala and hundi services enable criminal assets to circulate and move around the globe, at one stage they have to cross entry points into the formal financial system if they want to be legalized. Here, the Financial Transaction Tax is certainly not the best, but also not the worst option to capture at least some of this criminal money, supporting the dictum of a former German finance secretary in another context: it is better to capture a little from something than much of nothing.[3]

When submitting this proposal to contact persons in the Bavarian Police Force, they agreed that such a Financial Transaction Tax is a possibility and would most likely achieve the intended goals. The only caution they added was that they would not advocate that the introduction of a Financial Transaction Tax could be used as a justification to scale down resources of police to investigate and prosecute Transnational Organized Crime with their established means and instruments – which, of course, makes sense since both measures would have to complement, not replace each other.

There are further publications and views supporting this view, e.g. Dorothea Schäfer of the DIW in September 2015.[4]

Accordingly, the present efforts to implement a Financial Transaction Tax should receive a new boost by adding those arguments on the negotiation table, supporting those who want a comprehensive tax without any loopholes.

1.4 The link to core tax issues

Why the interest to treat these issues also in regard to criminal activities in a research project on tax justice? For two reasons:

First of all, there is a strong overlap between the phenomena normally discussed under the heading of IFFs and issues of tax malpractice. This is the case because those phenomena drive on the same structures of global formal and informal financial integration: Opaque

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[2] Original wording: ‚Vor allem die Instrumente, Schlupflöcher für Steuerumgehung zu schließen, wie sie der Kommissionsentwurf vorsieht, könnten diese Wirkung haben. Das fängt mit dem Counterpart-Principle an. Indem die zweite an einer Transaktion beteiligte Partei auch die Steuer bezahlen muss wird sie registriert. Das ist ein Risiko für IFFs, auch wenn es noch nicht automatisch bedeutet, dass dann gleich nachgeprüft wird, woher das Geld kommt. Aber man ist dann erst mal im Computer der Steuerbehörde oder der Zentralbank drin. Auch das Ausgabeprinzip könnte diese Wirkung haben, da damit die Herkunft eines Derivats ermittelt wird, zumindest das Herkunftsland. Falls die Erhebung der FTT mit Hilfe der in MIFID vorgesehen Clearingstellen oder des Handelsregisters vorgenommen ist (was technisch noch nicht geklärt ist) findet ebenfalls eine Erfassung statt. Allerdings gibt es da noch ungeklärte juristische Fragen, nämlich ob die Clearingstellen für Steuererhebung genutzt werden dürfen. In allen Fällen aber ergibt sich daraus keine automatische Entdeckung von IFFs, sondern es wirkt erst mal abschreckend und im Fall eines Anfangsverdachts lassen sich die Transaktionen natürlich leicht zurückverfolgen. Also alles auch ein Thema für Big Data - in dem Fall vielleicht mal positiv.‘

[3] Peer Steinbrück "Besser 25 Prozent von X, als 42 Prozent von nix." See: Hulverscheid, Cl. (2010, May 21) 25 Prozent von X. In: Süddeutsche Zeitung. Retrieved 29 May 2015 from http://www.sueddeutsche.de/geld/reizwort-abgeltungssteuer-prozent-von-x-1.880295

[4] Schäfer, D. (2015, September 23). Hoffnung Finanztransaktionssteuer. In: DIW Wochenbericht Nr. 39. Retrieved from http://www.diw.de/documents/publikationen/73/diw_01.c.514180.de/15-39-3.pdf Schäfer argues that the state would have received at least something from the criminal Cum-Ex Trade if a FTT had existed at each step of trading.

structures disguising beneficial ownership and informal ways to transfer funds are being used by legal and illict tax avoiders as well as criminal tax evaders, those hiding income from corruption and bribery and those committing other crimes like fraud or money laundering. This is largely known and seen even outside a closer circle of experts: For example in May 2015 when the EU Parliament finally approved the 4th directive against money laundering, many newspapers titled "EU geht schärfer gegen Geldwäsche und Steuerhinterziehung vor."[5] And indeed: Tax evaders largely profit from structures also used by criminals laundering proceeds from organized crime: 'It can be easier to hide tax evaded income because, unlike other criminal proceeds, the money generally comes from a legitimate source initially.' It becomes, however, illegal in the process (Marriage, 2013, p. 6). Accordingly and consequently, also the Bavarian government established a continually strengthened and new specialist group "Sonderkommission schwerer Steuerbetrug", which emerged from the previous existing group on Money Laundering and Organized Crime (see GER/VI/4.3.6).[6]

Next and for those very reasons, tax administration employees are well placed to detect not only tax avoidance and tax evasion, but also indication for more serious crimes as those under discussion here. If there is, for example, a complex structure of businesses involving tax havens there might not just be a case of tax evasion, but also money laundering. If there is a case of underreported earnings this might not just be cheating on the tax bill, but also the attempt to hide income from bribery and corruption.

The link between tax administration and crime is known at the latest since Al Capone has been caught and imprisoned because of tax issues: Even though he was known to have committed all sorts of crimes, it was only here that enough evidence could be gathered, strong enough to live up at court.[7] There are other cases as well, for example Russian Criminal Mogilevic, who finally was caught and sentenced on tax fraud issues.[8]

Tax administration, therefore, is much more than just a revenue collecting agency. It could also be a place of assisting proper authorities with the investigation and prosecution of serious, organized and international crime.

1.5 The link to research areas

An article of (Schneider, Raczkowski, & Mroz, 2015) illustrates the shifting shades of grey within the entirety of economical activities when it comes to tax avoidance and tax evasion:

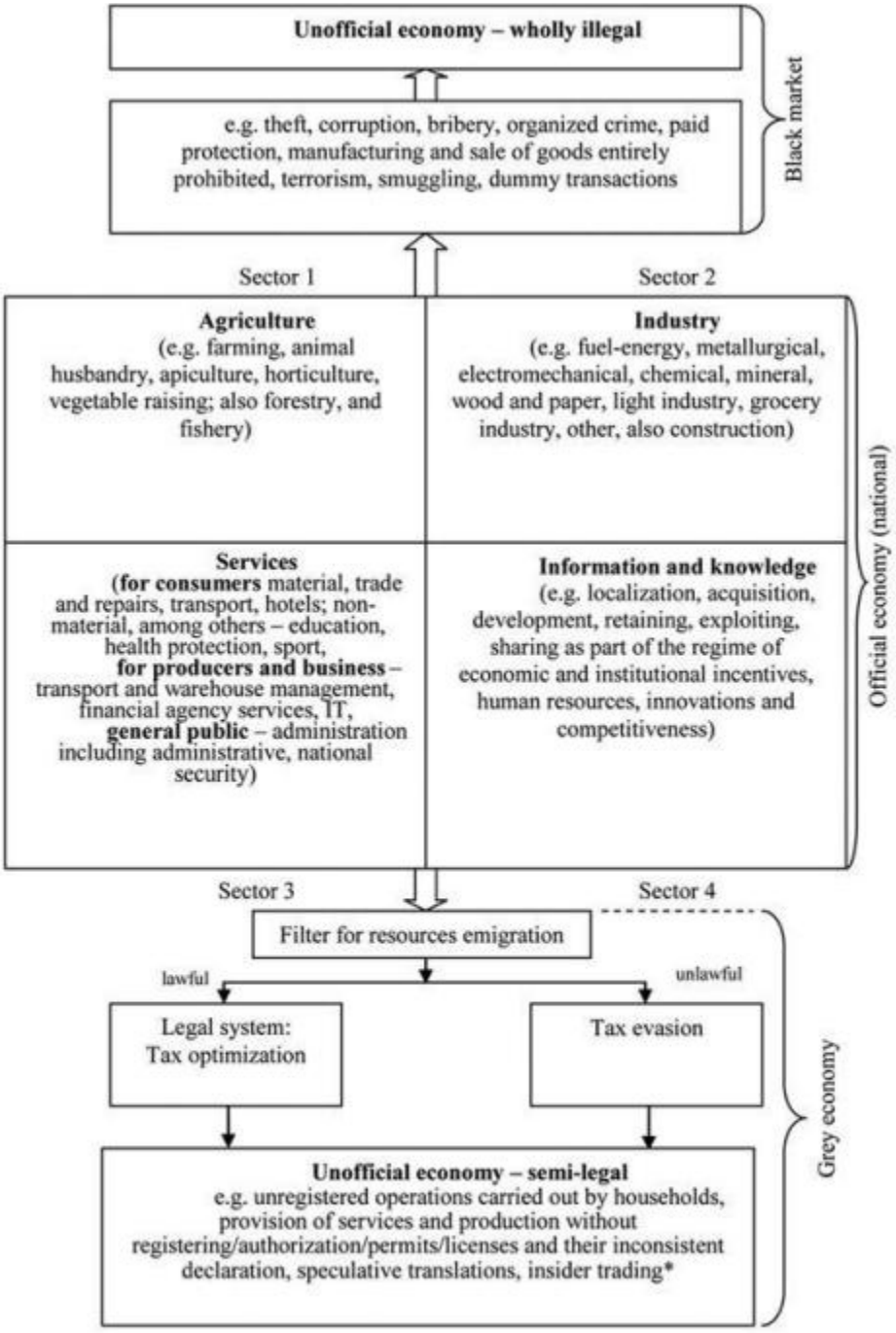
[5] Süddeutsche Zeitung (2015, May 20) Retrieved from http://www.sueddeutsche.de/news/politik/eu-eu-geht-schaerfer-gegen-geldwaesche-und-steuerhinterziehung-vor-dpa.urn-newsml-dpa-com-20090101-150520-99-06509 Equally the literature quoted above in footnote 1.

[6] By now the group has more than 100 members, some of whom are also employed for combating terrorist financing. Finanzbeamte sollen Terrorismus bekämpfen (2015, April 27). In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/bayern/steuerfahndung-finanzbeamte-sollen-terroristen-bekaempfen-1.2455601

[7] Clark, J. Why was tax evasion the only thing pinned on Al Capone? Retrieved 28 July 2015 from http://history.howstuffworks.com/history-vs-myth/capone-tax-evasion.htm

[8] 'The fact that Mogilevic, after years of living so undisturbed that he even agreed to be interviewed by the BBC, was arrested in 2008 for tax fraud perpetrated through a chain of beauty supply shops, almost seems like a joke.' (Saviano, 2015, p. 284).

Graphic 1 Different "legalities" within the unofficial economy



Note: *Insider trading – use of non-public information in transactions relating to securities of their own companies by persons employed in the given company (insiders), or persons having privileged access to it (brokers, auditors)
Source: Raczkowski (2013)

Source 1 (Schneider, Raczkowski, & Mroz, 2015, p. 36)

The previous model takes the classic subdivision of economic activities (primary, secondary, tertiary sector) and adds a fourth one, namely information and knowledge. 'From the shadow economy perspective, it is this fourth sector which is of fundamental significance and which is decisive for the opportunity to create value by minimizing the information gap in decisions undertaken.' (Schneider, Raczkowski, & Mroz, 2015, p. 35) The authors identify 17 research relevant areas for investigating the relationship between the shadow economy and tax evasion, each of them not being isolated "close-system" research, but due to the open system character

of economic activities reciprocal supplementing each other (pp. 37ff.). For example, research into:

- Tax morality
- Measurement of the shadow economy
- Comparative analysis of shadow economy
- Asymmetry of information in the financial sector
- Collaboration of the state and organized crime in providing public goods
- Differing approaches to tax fraud, economic deterrence, fiscal psychology models
- Etc.

While economic and business activities are excluded from the resaerch focus right from the beginning, two links and overlappings to research related areas are pointed out: The ethical dimension, e.g. tax morality and the question of conceptual clarification and distinction and the area of the informal economy/shadow economy which is one of the focus areas of this research.

1.6 Distinguishing the legal, illegal and illicit

In I/IV/6.1. has been explained that it is easy to identify and define illegal financial practices and that the original problem at hand is to distinguish legal tax avoidance from aggressive or illicit tax avoidance practices. It has been concluded 'The research team holds the opinion that tax avoidance is acceptably legal only if it is demonstrably in accordance with both the letter of the law and the intention of the lawgiver. It may (!) be legitimate, if it clearly serves a higher good, e.g. creating and preserving quality jobs. It is judged to be illicit, if it perhaps not offends against the letter, but only the spirit of the law. If this is the case, it is called "tax poaching", "aggressive tax avoidance" or "aggressive tax planning".[9]'

A German conversation partner who sifted through the Offshore Leaks DVDs stated that the area of corporate tax avoidance is largely not illegal, but certainly unethical since it profits usually only individuals or small groups but damages the wider common good: When dividing the material into the categories "legal-legitimate", "legal-immoral" and "illegal", by far the largest amount of cases had to be grouped among the second category, thus supporting basically the view of Raymond Baker quoted in 1.1.

Additionally conversation partners from the tax administration explain that the problem is made complicated in a country and taxation law system like the German one, that there is no simple distinction between "legal" and "illegal" anymore, especially when it comes to national and international business practices, the latter involving legal regulations and practices from other countries. It is a spectrum from white to black with plenty of grey in between. In principle, the law has a provision which cares for this kind of behaviour: §42 of the Fiscal Code argues:

> (1) It shall not be possible to circumvent tax legislation by abusing legal options for tax planning schemes... (2) An abuse shall be deemed to exist where an inappropriate legal option is selected which, in comparison with an appropriate option, leads to tax advantages unintended by law for the taxpayer or a third party.

[9] An expression used by the OECD, e.g. in its Aggressive Tax Planning Directory or (OECD, 2013a). the expression "tax poaching" is even older and stems from (OECD, 1998)

Similarly, the Federal Constitutional Court states in its judgement regarding the Inheritance Tax in guideline 5:[10]

> A taxation law is unconstitutional if it allows arrangements with which tax reliefs can be achieved that are not intended and against the background of equality before the law are not justifiable.

The problem, of course, is to define and apply the Fiscal Codes term "appropriate". However, in Germany, the intention of the lawgiver is always included in the documentation going alongside the passage of a law. Parliamentary documents (*Drucksache*) on the federal and state level do not just contain the text of the newly passed laws, but also extensive descriptions (*Begründung*) which illustrate the intention of the lawgiver for passing this law and provide a guideline when authorities have to establish a distinction between that which is legal and legitimate and that which is illegal and illicit.

Some efforts to proceed here are underway, but leaves a lot lacking and wanting: In its most recent "International Standards on Combating Money Laundering and Financing of Terrorism and Proliferation" this Task Force in 2012 updated its 40 recommendations for international cooperation (Financial Action Task Force, 2013), which are today endorsed by over 180 countries (OECD, 2013c, p. 17). These recommendations are, normally, adopted into EU law and therefore binding for EU member states.[11] However, 'some weaknesses still remain' which is why 'major Western banks and non-financial institutions can still receive, transfer and manage illicit funds from the developing world, *knowingly or unknowingly*.' [Emphasis added] (OECD, 2013c, p. 23).

1.7 Legal options turning illict

First of all, there are national ambiguities because the national legislator perhaps intentionally leaves them open in the effort to do justice to individual situations of persons or businesses. Here, of course, a person or business is on safe ground when trying to "optimize" its tax bill by using those options provided by the own legislator.

There are also national options offered specifically to international elites among individuals and businesses which then, of course, can be used legally. They may, however, create profit for some to the disadvantage of others which then makes the morally questionable and, accordingly, illicit.

Further problems arise because residence, headquarters, production chains, intellectual properties must no longer be strictly localized in a specific territorial spot, making the assignment of tax duties complex and avoidance options easy, e.g. via hybrid entities. Here, illicit applications are possible because national legislation is unable to keep step with international business and IT development.

Another problem arises when international actors use taxation gaps between states or available or accessible options opening up by combining different legal national options

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[10] 'Ein Steuergesetz ist verfassungswidrig, wenn es Gestaltungen zulässt, mit denen Steuerentlastungen erzielt werden können, die es nicht bezweckt und die gleichheitsrechtlich nicht zu rechtfertigen sind.'. From: Press release of 17 December 2014 http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2014/bvg14-116.html .The full text http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/12/ls20141217_1bvl002112.html;jsessionid=42F4790A23EF6DCF055DB0C0643D95BD.2_cid393

[11] More information: http://ec.europa.eu/internal_market/company/financial-crime/index_en.htm

provided by different national contexts into a larger international tax saving scheme. It may then still be based on legal national options, but transforms into something different. Here this research holds the view that such a combination to the disadvantage of the national or international common good is illicit because a person or business combines options which possibly have not been provided by the respective national legislator for this purpose.

Differences in national legal provisions can also result into protection of illicit practices: Given the international dimension of this shifting-around of assets, the situation is made more complicated by the fact that one tax related office might consist a crime in one state, but not in another – which is why one state investigates, the other does not and does even not agree that there is a need to investigate in the first place. This results in uncertainty what exactly requires, e.g. a notification of authorities or it does delay any assistance by authorities if asked for it. A major issues had been the conflict between Germany and Switzerland: Whereas in Germany tax evasion is a crime following § 370 AO, in Switzerland only the heightened form, tax fraud, is illegal and it always frustrated German tax administrations when asking their Swiss colleagues for assistance.

1.8 Knowingly bending the law

In the following are some examples illustrating, where the ignorance of the spirit is pretty obvious:

1.8.1 Cum-Ex and Cum-Cum trade

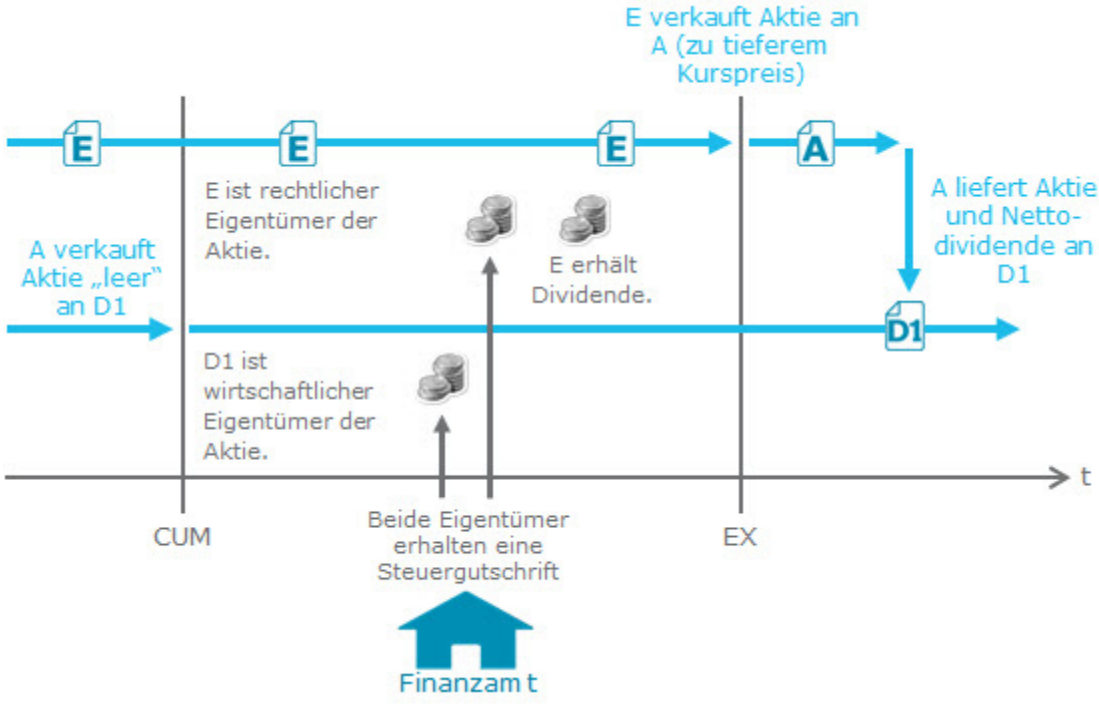
A very good example is the widespread fraud with "Cum-Ex" trading of shares ("dividend stripping"), which banks did by both offering it to clients and on request from clients. By that, trading occurred so fast and at short term notice that it was possible to pay capital gains tax (*Kapitalertragssteuer*) once but have it refunded several times. This was due to a gap in legislation which the legislator closed only in 2012, in spite of several warnings by the bankers' federation. One variation is as follows:

> Due to differing treatment between domestic and foreign shareholders, one can profit from dividend stripping. The name comes from the attempt to 'strip' the dividend from the share, like that: the foreign shareholder sells its German shares ("cum", i.e. with dividend rights) shortly before the annual dividend distribution takes place to a domestic firm or bank. This gets the dividend including the tax credit which it will be get disbursed by the fiscal authorities. The German firm or bank sells afterwards the shares to the original owner abroad. He gets them cheaper than he prior sold them because the dividend is excluded ("ex") which is mirrored in a lower share price. The foreign shareholder makes a profit with this deal which is normally almost as high as the dividend including tax credit would have been. The German firm or bank does not make any loss, and is getting well-paid services. It is a deal where both sides profit – and where the taxpayer loses. [12]

[12] Aus der unterschiedlichen Behandlung von inländischen und Ausländischen Aktionären kann man durch das Dividenden Stripping Kapital schlagen. Der Name kommt daher, dass man versucht, die Dividende von der Aktie abzustreifen (to strip), und zwar so: Kurz vor der alljährlichen Gewinnausschüttung verkauft der ausländische Aktionär seine deutschen Aktien („cum", also mit Dividendenberechtigung) an eine Firma oder Bank im Inland. Diese kassiert die Dividende mitsamt dem Steuerguthaben, das sie sich vom Finanzamt auszahlenlässt. Anschließend verkauft die deutsche Firma oder Bank die Aktien an den ursprünglichen Besitzer im Ausland. Der bekommt sie billiger, als er sie zuvor verkauft hat, weil ja die Dividende schon weg („ex") ist und sich das in einem niedrigeren Kurs der Aktie niederschlägt. Der ausländische Aktionär macht bei dem Deal einen Handelsgewinn, der in der Regel fast ebenso hoch ist, wie es die Dividende samt Steuergutschrift gewesen wäre. Die deutsche Fima oder Bank macht bei dem Aktiengeschäft keinen Verlust, und sie lässt sich ihre Dienste

Another variation is the following:[13]

Graphic 2 Cum-Ex trade, example



The previous trick, leading to billions of Euros of tax evasion, was only possible due to the instrument of Short Sales (Leerverkauf), one of the elements of global finance where the question is justified who, on earth, is in need of this product at all?

This delay between recognizing the gap and finally closing it was used by banks, funds and lawyers with the excuse that, after all, the state had de-facto legalized this option. The deal was offered by private, but also state owned banks even though banks, tax lawyers and even clients were pretty much aware that it is not only unethical (to pay tax once, but

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mit Provisionen gut bezahlen. Es ist ein Deal, bei dem beide Seiten profitieren – und bei dem die Steuerzahler verlieren. Jungbluth, R. (2015, Dezember 3) Selbstbedienung beim Finanzamt. In: Die Zeit. S. 27.

[13] ‚Bei den vor allem in Deutschland in Verruf geratenen Cum-Ex-Geschäften geht es nicht nur um die Vermeidung von Quellensteuern oder Ertragssteuer, sondern um die mehrfache Rückforderung von nur einmal bezahlter Quellensteuer. Dies wurde erst durch die mehrfache Ausstellung von Quellensteuerbescheinigungen im Zusammenhang mit Leer(Short)-Geschäften möglich. Das läuft so ab:

1. Ein Ausländer (A) verkauft leer Aktien cum an einen deutschen Kunden (D1).
2. Am Ex-Tag verkauft ein „echter" Eigentümer (E) die Aktien an A und erhält eine Bescheinigung über gezahlte Quellensteuer.
3. Am Ex-Tag erhält auch Kunde D1 eine Quellensteuerbescheinigung von seiner Depotbank (er ist dann ja Eigentümer der von A leer verkauften Aktien).
4. A liefert nun seine von E ex gekauften Aktien an D1 bzw. dessen Bank und bezahlt die Nettodividende (aus der Differenz zwischen Verkaufspreis cum und Kaufpreis ex) auf die D1 Anspruch hat.

Die Quellensteuer wurde zwar nur einmal an den Fiskus abgeliefert, die Zahlung wurde aber an zwei verschiedene Aktieneigentümer bestätigt. Das Geschäft dürfte in der Praxis etwas umfangreicher abgewickelt werden, etwa als Karussell und mit Optionsabsicherung; das ist aber für die Steuerbehörde irrelevant. So wurden die Aktien ex wiederum von D1 an E zurückverkauft, da E und D1 gar nie die Absicht hatten, die Aktien zu verkaufen bzw. zu halten.‘

Grafik und Text von: Eichinger, M. (2014, July 28) Graue Geschäfte rund um die Dividende. In: Blog “Banking & Finance.CH” Retrieved from http://www.bankingundfinance.ch/produkte/graue-geschaefte-rund-um-die-dividende-teil-33/

have it refunded several times), but probably even illegal perhaps not to the letter, but the spirit of tax law.

Interesting enough, it was known since 2002[14] that there is a gap in legislation which can be exploited and it was even the German Federation of Banks which pointed out this gap to the then-Finance Minister Steinbrück. As it seems, the Federation of Bank even proposed how to close this gap for trading within Germany, but what was (intentionally or not) overlooked was the persisting opportunity to exploit legal gaps by going across borders within the EU, especially involving the City of London. As journalists uncovered: Textblocks from the statement provided to the Ministry by the Federation of Banks found entry into the legislation prepared by the Ministry one by one, which indicates that here is a particularly clever proceeding of lobbying. Until that gap was closed it lasted three Finance Ministers and did not happen before 2012 until this practice was clearly illegal. This delay prompts now all those participating in that deal to argue that they have presupposed that their acting is legal since the law, tax consultants and banks were recommending and acting like that. This is contradicted by the state who, simply, states 'Every child knows that you do not get twice for performing once.'[15]

That way, up to 10 billion Euro of tax were evaded which lead to major investigation against prominent German and non-German banks. The damage created by the Canadian Maple Bank in aiding and abetting tax evasion was set at EUR 450 million alone. In 2013, estimates regarding the damage created in the state of Hessen via tax evasion were estimated to be EUR 997 million and in the state of Bavaria EUR 372 million, and altogether probably something between EUR 2 and 10 billion. As time went by, the total estimate was set at around EUR 10 billion.[16] As first German bank, the Hypovereinsbank agreed to pay EUR 30 million to the state in the attempt to settle further investigation and prosecution. Only EUR 10 million of that is linked to the damage arisen from Cum-Ex Deals – a very considerate settlement for the bank, considering the damage done.[17]

A similar model is the Cum-Cum Trade, which started flourishing after the Cum-Ex-Loophole was closed and with which banks assisted customers to evade EUR 5 billion in taxes.

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[14] http://www.handelsblatt.com/unternehmen/banken-versicherungen/cum-ex/vom-renditeturbo-zum-karrierekiller-cum-ex-deals-die-chronik/13033390.html

[15] Es sei jedem Kind bekannt, dass man nicht für eine Leistung zwei Mal etwas bekommen könne. Zitat BMF https://programm.ard.de/TV/Untertitel/Nach-Rubriken/Dokus--Reportagen/Alle-Dokus/?sendung=2810818516871636 . Copy & Paste from Banking Federation into the law: Video at Minute 13 http://www.daserste.de/information/reportage-dokumentation/dokus/videos/die-story-im-ersten-milliarden-fuer-millionaere-106.html

[16] Ott, Kl. (2013, November 6) Dokumente belasten Banken schwer. In: Süddeutsche Zeitung. Retrieved from http://sz.de/1.1811471. And: Ott, Kl. (2014, April 5) "Bitte Vorsicht mit der Wortwahl". In: Süddeutsche Zeitung. Retrieved from http://sz.de/1.1930332. Ott, Kl. (2014, April 5) Dutzende Ermittlungsverfahren gegen Banken und Fonds. In: Süddeutsche Zeitung. Retrieved from http://sz.de/1.1930304. Ott, Kl./ Schreiber, M. (2015, June 9) Nächster Fall, nächste Razzia. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/deutsche-bank-naechster-fall-naechste-razzia-1.2512738, Schäfer, D. (2015, September 23). Hoffnung Finanztransaktionssteuer. In: DIW Wochenbericht Nr. 39. Retrieved from http://www.diw.de/documents/publikationen/73/diw_01.c.514180.de/15-39-3.pdf; Ott, Kl. (2015, September 24) Die Bank, die Hunderte Millionen Euro abgezockt haben soll. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/cum-ex-geschaefte-aktiendeals-unterm-ahornblatt-1.2662894

[17] Ott, Kl. (2015, December 3) Hypovereinsbank muss 30 Millionen Euro Strafe zahlen. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/hypovereinsbank-muss-millionen-euro-strafe-zahlen-1.2766099

> The decisive factor of taxation of dividend payment is the place of residence of the company of shareholder: In contrast to domestic shareholders, foreign shareholders cannot get refund of the 15 % of income tax. Therefore they trick: Shortly before the date of dividend distribution, they lend their shares to a German bank. The bank quasi earns the dividend tax free and then gives back the shares to the foreign investor. The saved tax is divided – an advantage for both parties. Cum-Cum deals are different from so-called Cum-Ex deals where banks and investors through usage of short sales get refund of the never paid tax. To achieve this, shares with (cum) and without (ex) right of dividend were shifted. The consequence is income tax bills are issued several times even though just paid once. Cum-Ex are forbidden since 2012 and lead to investigations against several banks.[18]
>
> The tricks are so popular that the volume of lent shares of German companies around the last three weeks of the dividend due date increase up to 800%, as reported by Handelsblatt. Between 2013 and 2015, these support services could be found at Commerzbank 250 times. Commerzbank said that with daily over 100.000 deals they "inevitably" have to do Cum-Cum situations. But with "extensive internal systems and controls is secured that all deals are according to current laws". But experts doubt that this method is tolerable in principle. "In case of no other economic reasons than tax avoidance" once can name this misuse said the tax expert of the University of Mannheim, Christoph Spengel to Bayerischer Rundfunk.[19]

This practice was uncovered in 2016 and it involved, among others, the Commerzbank, a bank which was rescued during the World Financial and Economic Crisis from collapse with taxpayers money. And as it turns out, this "business model" was applied even afterwards and the data leaks unveiled numerous examples for the years between 2013 and 2015.

At its session of 8 June 2016, the Chamber of States accepted legislation which should prohibit Cum-Cum trade in future, e.g. the owner of shares is obliged to hold on to them for at least 45 days in order to bear at least a minimum risk during that time.[20]

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[18] ‚Bei der Besteuerung von Dividendenzahlungen deutscher Unternehmen ist der Wohnort bzw. der Sitz der Aktionäre entscheidend: Im Gegensatz zu Inländern können sich ausländische Aktionäre die fällige Kapitalertragsteuer von 15 Prozent nicht erstatten lassen. Deshalb greifen sie zu einem Trick: Kurz vor dem Ausschüttungstermin verleihen sie ihre Anteilscheine an eine deutschen Bank. Diese kassiert quasi steuerfrei die Dividende und gibt dann die Aktien wieder zurück an den ausländischen Investor. Die gesparte Steuer wird geteilt - ein Vorteil also für beide Parteien. Cum-Cum-Deals sind nicht zu verwechseln mit sogenannten Cum-Ex-Geschäften, bei denen Banken und Anlegern unter Nutzung von Leerverkäufen zuvor gar nicht gezahlte Steuern erstattet wurden. Um dies zu erreichen wurden rund um den Dividendenstichtag eines Unternehmens Aktien mit (cum) und ohne (ex) Ausschüttungsanspruch rasch zwischen mehreren Beteiligten hin- und hergeschoben. Die Folge: Bescheinigungen über Kapitalertragsteuer wurden mehrfach ausgestellt, obwohl die Steuer nur einmal gezahlt wurde. Die Steuergestaltung Cum-Ex ist seit 2012 verboten und hat zu Ermittlungen gegen mehrere Banken geführt.‘ http://www.finanzen.net/nachricht/aktien/Commerzbank-im-Visier-Wie-funktioniert-das-Steuerschlupfloch-Cum-Cum-4866725

[19] ‚Die Tricks seien so beliebt, dass das Volumen verliehener Aktien deutscher Unternehmen in den letzten drei Wochen vor einem Dividendenstichtag um bis zu 800 Prozent anwachse, berichtet das *Handelsblatt*. Zwischen 2013 und 2015 ließen sich derartige Hilfsdienste demnach allein bei der Commerzbank 250 Mal nachweisen. Die Commerzbank erklärte auf Anfrage, man agiere bei täglich über 100.000 Handelsgeschäften "zwangsläufig" in sogenannten Cum-Cum-Situationen. Allerdings stelle man "durch umfangreiche interne Systeme und Kontrollen sicher, dass alle Handelsgeschäfte im Einklang mit dem geltenden Recht stehen". Experten aber bezweifeln, dass die Praxis grundsätzlich zulässig ist. Lägen "keine anderen wirtschaftlichen Gründe außer Steuervermeidung" vor, lasse sich durchaus von Missbrauch sprechen, sagte der Steuerexperte der Universität Mannheim, Christoph Spengel, dem Bayerischen Rundfunk.‘ Banken bringen deutschen Staat um 5 Milliarden Euro. (2016, May s). In: Die Zeit. Retrieved from http://www.zeit.de/wirtschaft/2016-05/steuertrick-fiskus-banken-investoren-commerzbank

[20] https://www.datev.de/web/de/aktuelles/nachrichten-steuern-und-recht/steuern/reform-der-investmentbesteuerung-kommt/

1.8.2 CO_2 Certificates

Another example is the dealing with CO2 certificates which also was organized as a Turnovertax-Carrousel Fraud, causing EUR 220 million in Germany and EUR 850 million altogether (see below 5.5). Here, too, some people benefitting from it now argue that they were not aware that things were illegal, while others knew it right from the beginning, admitting in private chat and mail messages that they do it for greed and the mere availability of opportunity.[21] But what about those responsible within the Deutsche Bank to supervise those trader? When the legal proceedings against those behind this "organized system of tax evasion" started it was commented right in the beginning that they were aware of its illegal character. In a TV commentary of the ZDF newscast Heute Journal of 15 February 2016 an internationally renowned tax expert, Professor Richard Ainsworth of Boston, argued that supervisors of those 7 accused main suspects should have realized immediately that something is wrong since they paid for the CO2 certificates 3% less than market value. Since nowhere in market economy such presents are made, this should have alarmed the supervisors of illegal character. This is also the courts view which had to deal with the case. The judges stated in their verdict:

> 'The businesses were so apparently be identified as tax fraud that even an undiscerning outsider could immediately have discovered the injustice of this tax carousel… A special hit was given to Deutsche Bank from the leading judge. The security systems of Deutsche Bank had completely failed. Even though, everyone could see at first sight that the bank crossed the legal lines brutally with the deals, they simply ignored this. The court expressed complete incomprehension for this missing awareness of legal loyalty'.[22]

And indeed: The prosecutor argues that this Turnover Tax Carrousel was used for money laundering purposes as well and that groups were at the beginning of that Carrousel who got those certificates either from theft or organized fraud. The alternative is, of course, that they have realized that illegal nature and silently backed it because they realized the profitability of the deal, hoping that nobody would discover it.[23]

In the end, however, it is not known what happened to the supervisors. Of those caught in the act, one was sentenced to three years imprisonment, five others to prison on probation. The Bank itself could not be punished since there is no penal law for businesses and corporations in Germany.[24]

1.8.3 Further examples

Another example is the following:

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[21] See http://www.businessinsider.de/deutsche-bank-mitarbeiter-in-frankfurt-wegen-steuerhinterziehung-vor-gericht-weil-wir-gierig-sind-2016-2

[22] 'Die Geschäfte seien so offensichtlich als Steuerbetrug zu identifizieren gewesen, dass selbst ein unbedarfter Außenstehender das Unrecht diese Steuerkarussells sofort hätte erkennen können…. Eine Sonderklatsche erteilte der Vorsitzende Richter der Deutschen Bank. Die Sicherheitssysteme der deutschen Bank hätten komplett versagt. Obwohl für jeden auf den ersten Blick erkennbar gewesen sei, dass mit dem Handel der Bank rechtliche Grenzen brutal überschritten wurden, habe man einfach weggesehen. Das Gericht äußerte völliges Unverständnis für dieses mangelnde Bewusstsein für Rechtstreue. (LG Frankfurt, Urteil v. 13.6.2016, 11 WI 7510 Js 209624)' See: https://www.haufe.de/compliance/recht-politik/schwerer-bandenmaessige-steuerhinterziehung-bei-der-deutschen-bank_230132_363432.html

[23] http://www.zdf.de/ZDFmediathek/beitrag/video/2670694/Deutsche-Bank-Prozess-um-CO2-Rechte-#/beitrag/video/2670694/Deutsche-Bank-Prozess-um-CO2-Rechte-

[24] Sechs Ex-Mitarbeiter von Deutscher Bank verurteilt (2016, June 13. In: Die Zeit. Retrieved from http://www.zeit.de/wirtschaft/unternehmen/2016-06/steuerbetrug-deutsche-bank-umsatzsteuer-landgericht-frankfurt

> To date, foreign investors can transfer their shares directly before the dividend due date to a German investment fund which collects the dividends tax free. In contrast, foreign investors have to pay 25% withholding tax on income from capital plus solidarity tax. Immediately after the dividend payment, the shares are given back to the original owner. The government will take action against this practice.[25]

There is also evidence elsewhere, that (representatives of seemingly) respectable banks are knowingly involved in illegal and illicit business, see also findings of US Senate investigation against Credit Suisse which indicates that banker involved knew that their customers prime interest was tax evasion.[26]

Another good example is the tax cheating of Curt Engelhorn who, by doing it, dodged knowingly taxes on a EUR 19 billion transfer (see, e.g., GERVI/4.3.8.2).

1.8.4 Conclusion

Nevertheless it is obvious that many areas of corporate tax avoidance are "more legal" than illegal, especially in the area of company taxation. This will continue as long as states are neither able nor willing to close legal loopholes for tax saving models. Still, there are aggressive tax avoidance models which try even to over-exploit those loopholes.

On that background it is obvious, that corporate IFFs, evens though they make up a considerable share of global IFFs, need to be judged differently from criminal IFFs, because they make use of legal options arising from differences in national tax systems, the absence of regulations between states and/or existing tax loopholes – even though they might stretch those options so that the arising practice becomes illicit.

2 Agents enabling IFFs

2.1 Owner, shareholder and CEOs of TNCs

As in ordinary legal proceedings it is always worthwhile to ask "Cui bono?", i.e. "Who is profiting from a given practice? According to the assessment of tax experts and tax lawyers among conversation partners, 98% of what TNCs, but also "HNWIs" are doing in the field of tax optimization or tax avoidance is legal and has all chances to remain legal.

First of all, TNCs, their CEOs, Boards and Shareholder in the attempt to increase profits and dividends for capital owner. Given the status of financial integration, they have (too) many options for moving assets around and put enormous pressure upon states, regions and municipalities to accord concessions to them in return for remaining on the spot, continuing the employment of people. Given this enormous leverage explains why TNCs more than any other groups are able and willing to do intensive, even aggressive, Lobby Work with politicians in any country in order to get most preferential treatment (see also GER/Va & lobbyism).

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[25] Bislang können die ausländischen Anleger ihre Aktienanteile unmittelbar vor dem Dividendenstichtag auf einen deutschen Investmentfonds übertragen, der die Dividenden steuerfrei kassiert. Ausländische Anleger müssen dagegen 25 Prozent Kapitalertragsteuer plus Solidaritätszuschlag zahlen. Unmittelbar nach der Dividendenzahlung gehen die Aktien an den eigentlichen Besitzer zurück. Gegen diese Praxis will die Regierung vorgehen. Goldschmidt, M. (2015, April 19) Schäuble will Schlupfloch bei Dividenden-Besteuerung schließen. In: Finanzen.Net. Retrieved from http://www.finanzen.net/nachricht/aktien/Schaeuble-will-Schlupfloch-bei-Dividendenbesteuerung-schliessen-Kreise-4294974

[26] See: REPORT: Offshore Tax Evasion:The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts (February 26, 2014)

But since TNCs and corporate tax avoidance and evasion is not the focus of this research, not (much) more shall be said about this particular field.

2.2 Tax advisors & tax lawyers

Second, an entire industry of highly paid financial and banking experts, tax experts, consultants and lawyers and many others, who are extremely efficiently organized in lobby-groups, profit from this "legal industry"; Conversation partners from the group of tax consultants, who are sophisticated experts in looking for and applying legal loopholes, argued that they advise their customers to the limit of the law, but not beyond (see GER/Va/4.1). Even worse: That they are obliged by law to offer this kind of advice. To draw this line is very difficult and clearly some professionals try to stretch letter and spirit to the maximum so that courts have to come in to judge "licitness" of an activity.

Revelations, e.g. by Luxemburg Leaks indicate, however, that this limit is overstepped all too often in the hope of not being discovered, a likelihood which is considerable given the way tax administration is staffed and working:

2.3 "The Big 4" and other auditing companies

An exponential increase in option occurs when the "Big 4" among the chartered accountant companies enter the picture, namely KPMG, Deloitte, Ernest & Young and Price-Waterhouse-Cooper, who are the world's best experts in exploiting legal tax loopholes. More recently, Price-Waterhouse-Coopers role in the game of tax avoidance schemes was made published when the Luxemburg-Leaks blew in November 2014 (Süddeutsche Zeitung, 2014).

One has to be aware of the dimensions of the business: PwC has an annual turnover of USD 34 billion, out of which USD 8.8 billion are generated in the department specialized upon tax advice. In Luxemburg, PwC is sixth largest employer. However: Even though "victim" of Luxemburg Leaks, PwC is not the only culprit in this game. The more documents of Luxemburg-Leaks were assessed, the more light was shed into the doings of the other "Big 4" companies, namely Ernst & Young, Deloitte or KPMG. By then, even Jean-Claude Juncker, formerly Prime Minister of Luxemburg and current President of the European Commission, grudgingly admitted 'that the system was "not always in line with fiscal fairness" and may have breached "ethical and moral standards".'[27]

Instructive are documents arising from a questioning of the Heads of Tax Departments of the "Big 4" at the British Parliament in 2012: Even though they emphasized that they no longer sell aggressive tax avoidance models as in past years the admitted that their tax saving models presently are considered to be legit even if there is only a 50:50 chance that the proposed construction is legal when challenged at court. Doing that, they are well aware that resources of tax administration are such that they are forced to avoid protracted legal proceedings wherever possible. This is easy to calculate: While the British tax administration has 65 experts on transfer pricing, those "Big 4" employ 250 of them. Even better: If their proposed scheme does not live up to judicial review, 'there are no consequences for the firms.' (Committee on Public Accounts, 2013, p. 9).

[27] Luxembourg tax deals for Disney, Koch brothers empires revealed - Latest "Lux Leaks" files obtained by ICIJ disclose secret tax structures sought by "Big 4" accounting giants for brand name international companies (2014, December 10). Retrieved from http://www.publicintegrity.org/2014/12/09/16382/luxembourg-tax-deals-disney-koch-brothers-empires-revealed

It was obvious that they go beyond legal tax planning into the area of (aggressive) tax avoidance by counselling clients on tax saving models gaining them advantages in a way the legislator never intended when passing those laws. A problem is that those companies are part of lawmaking procedures so that they know early on loopholes on which they then can advise their clients. The parliamentarians state: 'we have seen what looks like cases of poacher, turned gamekeeper, turned poacher again, whereby individuals who advise government go back to their firms and advise their clients on how they can use those laws to reduce the amount of tax they pay.' (Committee on Public Accounts, 2013, p. 4). Not surprisingly, the MPs are not convinced that the "Big 4" refrain from misusing their insider knowledge: 'We are nonetheless very concerned by the way that the four firms appear to use their insider knowledge of legislation to sell clients advice on how to use those rules to pay less tax....KPMG denied that it was advising its clients on how to use those laws in ways that Parliament did not intend, but we are not convinced by its insistence that all the advice it offers to clients seeks to fulfil the purpose of the legislation. (p. 10)

Ironically, those four companies are both tax consultants and auditing companies whose task is to certify a company that they are acting in accordance to existing law, i.e. they know best how to hide assets since they are also paid for discovering them at times for the same client – in spite of all voluntary and self-binding ethics and code of conduct guidelines.

2.4 The Offshore Industry

While there is at least some transparency on part of the "Big 4" since they want to conduct international business in the world's capitals and therefore are not interested in drawing too much attention to themselves, this is yet again with companies registered at Offshore and Secrecy Jurisdictions. They, too, are involved in international law and legal practice, skilfully mixing the legal, illicit and criminal. Given the intransparency of their place of residence, however, their doings are much more shrouded in secrecy that that of other companies residing in non-secrecy-jurisdictions.

2.4.1 Exploiting legally grey areas for criminal purposes

The PanamaPapers revealed how options available within the international financial system were knowingly and intentionally used for tax evasion, also by explicitly mis-using the fine grey areas between (still) legal and (already) illegal practice (Süddeutsche Zeitung, 2016a).

At its center is Mossack-Fonseca, a small business, whose co-founder Jürgen Mossack is a German national originating from Fürth.[28] They administrated 214,488 shell companies on the British Virgin Islands, Panama, the Bahamas or Seychelles by (mis-)using fake directors fronting for all sorts of owners who were interested to keep their identity secret: Heads of States, drug bosses, people looked for with international warrants, football-stars, terror suspects and others. While issues relating to tax evasion via Panama were already part of the conversation with, e.g., wealth asset managers or tax lawyers long before the Panama Paper leaks (see GW#), it is additional confirmation for the involvement of German and other regular Banks as well as professional tax advisors in this dirty business and begs the question how long politics will refuse to act energetically towards banks and the responsibility of supervisory structures when it comes to the aiding and abetting of tax evasion and money laundering.

[28] Obermaier F. et al. (2016, April 4). Der Deutsche. In: SZ, p. 3

A letter leaked by the founding director of MossFon contained an explanation how a shell company could front the Red Cross as beneficiary, but at the same time the Stiftungsrat had the powers to replace the beneficiary in a subsequent meeting, replacing the Red Cross by a person who in the end is setting up the entire structure. Jürgen Mossack explained: the owner of such a shell company 'has the advantage to be able to negate questions about holder, economic eligibility and warrants of attorney truthfully towards the German tax agencies.'[29] Likewise, Offshore Companies were used for the laundering of drug money and other crime, for hiding weapon deals with governments under boycott and sanctions, business was conducted with people on international watchlists and sentenced criminals, e.g. pedophiles.[30] Regarding developing countries, Offshore Constructs are welcome to drain entire countries of revenue because exploitation licenses are sold against bribes, revenues are channeled away on accounts of ruling elites, mercenaries are hired and paid in order to defend private interests against the community.[31]

2.4.2 Common excuses, e.g. by Mossack & Fonseca

When MossFon was asked what they think of what they are doing, they rejected any suggestion that they are doing anything wrong, but that what they are doing is perfectly legal or at least not contradicting legal regulations and "widely accepted behavior":

> '…These types of services are always supported by the existence of legally recognized vehicles utilized for such purposes by all service providers in this industry…Even though we do provide shareholdership services through the legal structures already explained, we do not provide beneficiary services to deceive banks….Moreover, it is legal and common for companies to establish commercial entities in different jurisdictions for a variety of legitimate reasons, including conducting cross-border mergers and acquisitions, bankruptcies, estate planning, personal safety, and restructurings and pooling of investment capital from investors residing in different jurisdictions who want a neutral legal and tax regime that does not benefit or disadvantage any one investor. …Our firm has never been accused or charged in connection with criminal wrongdoing. However, we are legally and practically limited in our ability to regulate the use of companies we incorporate or to which we provide other services. … (A) client can use the structures provided by us for tax optimization of his/her estate, such as taking advantage of provisions in treaties for avoiding international double taxation. Such behavior is perfectly legal. … Company Secretarial Services are provided by many firms to professional clients and investors all over the world. The same director or company secretary can act on behalf of many different companies in different jurisdictions. That is widely accepted and perfectly legal, especially in cases where the purpose of a company is to be a holding company or own immovable or movable property. … These types of services are always supported by the existence of legally recognized vehicles utilized for such purposes by all service providers in this industry. Even though we do provide shareholdership services

[29] ‚hat den Vorteil, gegenüber den deutschen Steuerbehörden wahrheitsgemäß die…Fragen zur Kontoinhaberschaft, zur wirtschaftlichen Berechtigung und zu den Vollmachten verneinen zu können.' ‚Wir hätten da gerne ein paar Briefkastenfirmen…' (2016, April 5) In: Süddeutsche Zeitung, p. 12

[30] Fitzgibbon/Richter (2016, April 12) Agenten nutzen Panama-Firmen für CIA. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/politik/panama-papers-agenten-nutzten-panama-firmen-fuer-cia-1.2945241 Obermaier/Obermayer (2016, April 12) Mossack Fonseca behielt pädophilen Sexualverbrecher als Kunden. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/panorama/panama-papers-mossack-fonseca-behielt-paedophilen-sexverbrecher-als-kunden-1.2945238

[31] Zick/Tilouine (2016, April 13) Unter Kleptokraten. In: SZ. Retrieved from http://www.sueddeutsche.de/politik/kongo-brazzaville-unter-kleptokraten-1.2947471 . Pfaff/Zick (2016, April 13) Krieg und Öl: Wie Söldner Briefkastenfirmen nützen. In: SZ. Retrieved from http://www.sueddeutsche.de/politik/panama-papers-krieg-und-oel-wie-soeldner-briefkastenfirmen-nutzen-1.2947473 Pfaff/Zick (2016, April 13) 24 000 000 000 000 Dollar in der Erde. In: SZ. Retrieved from http://www.sueddeutsche.de/politik/rohstoffhandel-dollar-in-der-erde-1.2947475

> through the legal structures already explained, we do not provide beneficiary services to deceive banks… Such practice is common in our industry and its aim is not to cover up or hide unlawful acts.[32]

Regarding the development of criminal careers, i.e. that a client starts honest and turns criminal later, MossFon states that they renew their knowledge about clients regularly in order to secure 'that regarding the person and the company entrusted to him no negative statement was appointed to.'[33] This, however, seems to be disproven by PanamaPapers.

2.4.3 Legal-legitimate reasons for offshore companies?

For Catholic Social Teaching, however, the justification of use of those entities is very narrow

> "Entrepreneurs and investors loyal to the law in constitutional democracies do not need shell corporations in tax havens." Wiemeyer emphasized that according to Catholic Social Teaching property may only be acquired legally and that the usage that property is subject social responsibility and tax liability. But the state also has to protect acquired property correctly. If like with the Jews in Germany after 1933, a state or powerful criminal group wants to appropriate legitimate property, a dislocation abroad could be a justifiable resort. But these constellations do hardly exist in today`s democracies in which currently the major part of the worldwide rich is located. [34] (Wiemeyer, 2016b)

Commonly, however, many justifications for Offshore Companies are given. For example:[35]

- Protecting business secrets or interests. If, for example, the stock exchange would learn that something is going on, the share value might drop or rise and that way distort value or pose limits to the financial capacity of owner or investor
- Avoiding of Double Taxation
- Choosing lower tax rates (Ausflaggen von Schiffen)
- Legal tax optimization, provided, the asset distribution is transparent to tax authorities. For example: Buying a house in Mallorca which is owned by an offshore company in Panama. This offshore company can be transferred to

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[32] Statement Regarding recent Media Coverage. Retrieved 5 April 2016 from http://www.mossfon.com/media/wp-content/uploads/2016/04/Statement-Regarding-Recent-Media-Coverage_4-1-2016.pdf

[33] ‚dass sich hinsichtlich der Person und der von ihr anvertrauten Gesellschaft kein Negativbefund eingestellt hat.' Aus Obermaier/Obermayer (2016, April 12) Mossack Fonseca behielt pädophilen Sexualverbrecher als Kunden. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/panorama/panama-papers-mossack-fonseca-behielt-paedophilen-sexverbrecher-als-kunden-1.2945238

[34] Rechtstreue Unternehmer und Kapitalanleger in demokratischen Rechtsstaaten benötigen keine Briefkastenfirmen in Finanzoasen". Wiemeyer betonte, dass nach christlicher Sozialethik Eigentum nur legal erworben werden darf und die Verwendung von Eigentum einer Sozialpflichtigkeit wie der Steuerpflicht unterliegt. Der Staat habe aber auch korrekt erworbenes Eigentum zu schützen. Wenn wie bei den Juden in Deutschland nach 1933 sich ein Staat oder eine mächtige kriminelle Gruppe legitimes Eigentum aneignen wolle, könne eine Verlagerung ins Ausland ein gerechtfertigter Ausweg sein. Solche Konstellationen lägen aber in demokratischen Rechtsstaaten heute, in denen gegenwärtig der größte Teil des weltweiten Reichtums liege, nicht vor.'

[35] See: http://www.handelsblatt.com/finanzen/steuern-recht/steuern/panama-papers-das-sind-die-guten-gruende-fuer-briefkastenfirmen/13404516.html

See also: http://www.tagesanzeiger.ch/wirtschaft/panama-papers/vier-legale-gruende-fuer-eine-briefkastenfirma/story/25809172

Spain which still has the benefit that no Real Property Transfer Tax is required: This is the case if the house is directly purchased but no taxes are needed if shares are obtained in a company owning this housed.[36]

- Estate planning, i.e. protecting assets from legacy hunter (Erbschleicher). This is legal as long as the money is properly taxed in the country of residence. Or: If ownership of a villa/yacht/plane… is registered in an offshore haven, heirs do not have to pay as much estate tax as in the case of registration in the country of residence.
- Marriage/Separation planning, hiding assets from partner in case of divorce
- Protecting assets in order to lower risk of kidnapping or jealousy (e.g. in case of buying pieces of art)
- Limiting of liability: If ownership in real estate is "mediated" by an offshore company, liability in case of bankruptcy is against the company, not against the owner of the company.

Of those, on a moral thinking background, there are hardly any sensible and good reasons (perhaps apart from the first) because all the others protect the interests of the few who can affords those constructions and damage the common good. For tax experts, especially tax fraud investors, there are very few acceptable reasons for these constructs and in most cases they were misused for hiding assets.[37] This leads to the first conclusion: those constructions may be legally permitted, but their use is mostly illicit, illegal or criminal.

2.4.4 Defeating state-regulation and democratic control

The Whistleblower of the Panama Paper data leak holds the opinion that the Offshore System illustrates a defeat for state regulation and democratic control. In his manifesto, explaining the reasons for acting the way he did, he pointed to the increasing wealth gap in the world and the states interest to fight that. Instead, they are hindered by legal border, lobbyists and corporate intrigue.[38]

> Income inequality is one of the defining issues of our time. It affects all of us, the world over. The debate over its sudden acceleration has raged for years, with politicians, academics and activists alike helpless to stop its steady growth despite countless speeches, statistical analyses, a few meagre protests, and the occasional documentary. Still, questions remain: why? And why now? The Panama Papers provide a compelling answer to these questions: massive, pervasive corruption. And it's not a coincidence that the answer comes from a law firm. More than just a cog in the machine of "wealth management," Mossack Fonseca used its influence to write and bend laws worldwide to favour the interests of criminals over a period of decades.

He has the opinion that the capitalist system, as it is now, is corrupt and no longer fulfills its purpose, i.e. creating jobs and redistribution wealth. It is perverted into serving the interests of the some individuals and groups. While Pope Francis argues "This economy kills", John Doe characterizes it as "economic slavery"

> The collective impact of these failures has been a complete erosion of ethical standards, ultimately leading to a novel system we still call Capitalism, but which is tantamount to economic slavery. In this system—our system—the slaves are unaware both of their status and of their masters, who exist in a world apart where the intangible shackles are carefully hidden

[36] Leyendecker, H. (2016, April 7) Von den Reichen sparen lernen. In: Süddeutsche Zeitung, p. 2

[37] http://www.morgenpost.de/wirtschaft/article207384313/Experte-Wehrheim-Mir-fallen-sehr-wenige-legale-Gruende-ein.html

[38] John Does Manifesto. (2016, May 6). From: Süddeutsche Zeitung. Retrieved 20 May 2016 from http://panamapapers.sueddeutsche.de/articles/572c897a5632a39742ed34ef/

> amongst reams of unreachable legalese. The horrific magnitude of detriment to the world should shock us all awake. But when it takes a whistleblower to sound the alarm, it is cause for even greater concern. It signals that democracy's checks and balances have all failed, that the breakdown is systemic, and that severe instability could be just around the corner.

2.4.5 The Sharman Study

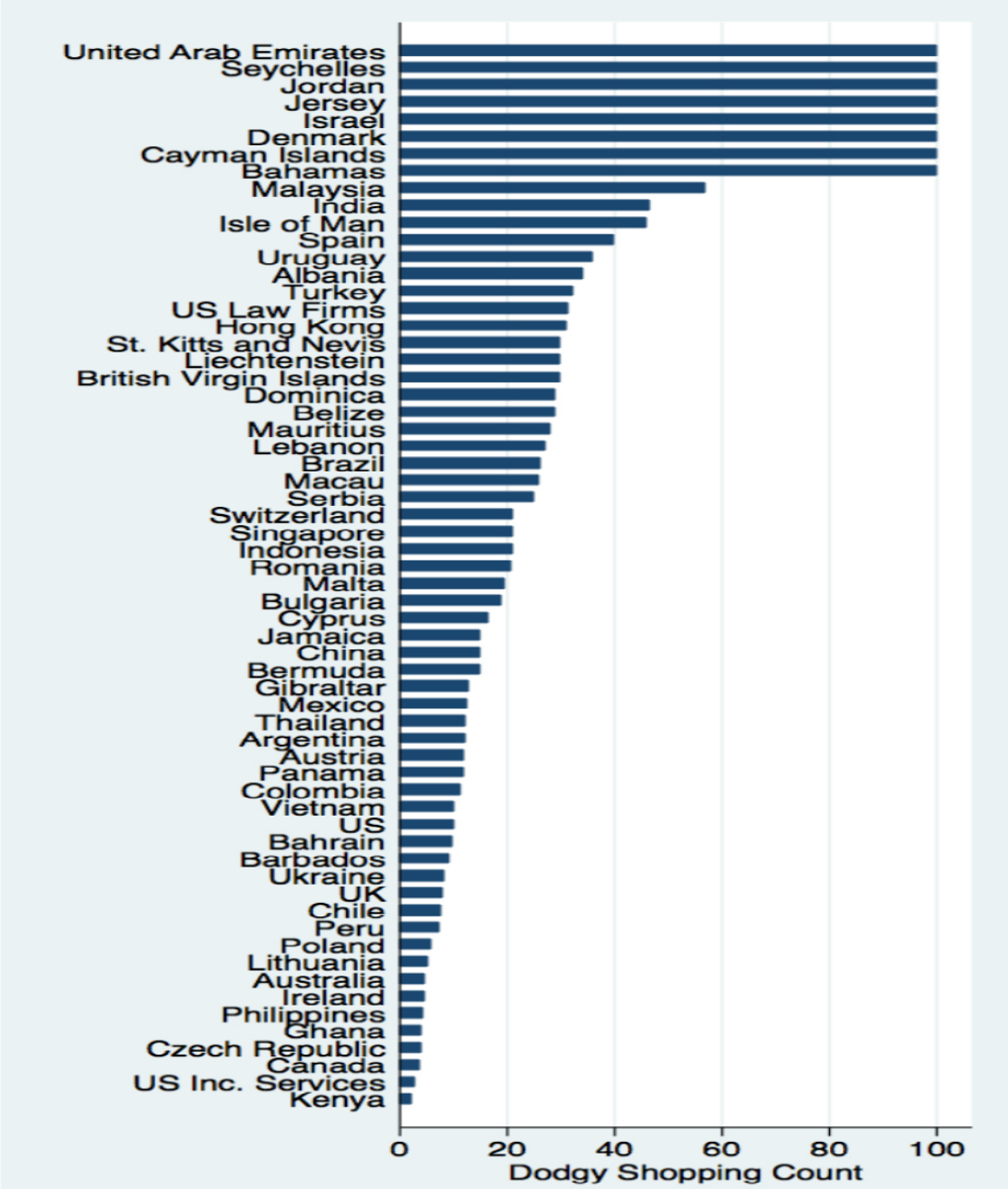
The Sharman Study is the most comprehensive and thorough attempt undertaken to establish any insight into ways and means to obtain non-traceable shell companies in order to secure financing of terrorism, launder money from corruption or hiding other illegal financial proceeds. [39]

> Academic study into the availability of Offshore Companies by Jason Sharman of Griffith University: 'Our research team impersonated a variety of low- and high-risk customers, including would-be money launderers, corrupt officials, and terrorist financiers when requesting the anonymous companies. Evidence is drawn from more than 7,400 email solicitations to more than 3,700 Corporate Service Providers that make and sell shell companies in 182 countries. The experiment allows us to test whether international rules are actually effective when they mandate that those selling shell companies must collect identity documents from their customers. Shell companies that cannot be traced back to their real owners are one of the most common means for laundering money, giving and receiving bribes, busting sanctions, evading taxes, and financing terrorism.
>
> Key findings include:
>
> 1. Overall, international rules that those forming shell companies must collect proof of customers' identity are ineffective. Nearly half (48 percent) of all replies received did not ask for proper identification, and 22 percent did not ask for any identity documents at all to form a shell company.
> 2. Against the conventional policy wisdom, those selling shell companies from tax havens were significantly more likely to comply with the rules than providers in OECD countries like the United States and Britain. Another surprise was that providers in poorer, developing countries were also more compliant with global standards than those in rich, developed nations.

Germany, too, is among those criticized by Sharman and his colleagues. The fact that developing countries are better than developed countries in applying rules indicates 'that the relatively lackluster performance in rich countries reflects a simple unwillingness to enforce the rules, rather than any incapacity' (p. 22). The following list indicates how good tax havens and how bad main economies are when it comes to shopping for offshore companies (p. 24):

[39] Sharman, J. (2012) Global Shell Games: Testing Money Launderers' and Terrorist Financiers' Access to Shell Companies. https://www.griffith.edu.au/business-government/centre-governance-public-policy/research-publications/?a=454625

Graphic 3 The „Dodgy Shopping Count" Ranking[40]



2.4.6 Conclusion

Of course, the tax haven industry can also cause problems – sometimes things are so secret that even its owner gets lost. The Panama Paper Leaks contains the example of an unnamed billionaire with the pseudonym Joachim zu Baldernach who lost or misplaced his bearer share (Inhaberaktie), i.e. the document which is proof that he is the owner of an offshore entity. He almost lost his possession, but, of course, the MossFon company found a way out of his trouble: He had to sign a "letter of indemnity", assuring that he did not do anything wrong with his bearer share and that he excuses MossFon from all damage which might result from an oblivious behavior on his part.[41]

[40] 'The "Dodgy Shopping Count" measures the average number of provides a particular type of customer would have to approach to receive a non-compliant response', i.e. to get the shell company sold (p. 19). The higher the count, the more difficult it is.'

[41] Verloren im Paradies. (2016, April 5) In: Süddeutsche Zeitung p. 11

By now it is obvious that also the Panama Papers reveal a number of tax evasion by German citizens as well as numerous criminal activities.

The big problem is, and automatic data exchange will not change it per se, that a number of Offshore options on offer by Panama, Malta, the Channel Islands and other Tax havens are perfectly legal in accordance with existing law. This means that states also have to change the law in order to ban its use. And even then they might be, at first sight, seem to be perfectly legal or legitimate and would require careful background investigation. Automatical Data exchange alone will not improve the situation.

2.5 States

The following builds upon and continues that which has been introduced in GER/Va regarding the power of businesses and their owner in relationship to states and democracies:

2.5.1 International competition

There are big and smaller states who profit from the international situation as it is, e.g. by attracting companies and millionaires to settle within their reach. Here we are not talking about exotic states such as the British Virgin Islands or Mauritius, but about OECD member states such as the US, Switzerland, Luxemburg or Ireland (OECD, 2013a). A lot of international legislation is trying to respond to global business activities such as Global Value Chains, R&D or intellectual properties, but as it seems, legislation both leaves open lots of areas where corporations can apply aggressive tax planning and/or bargain with national states tax privileges.

A very clear statement here was that of Luxemburg acting Prime Minister on the day when the Luxemburg Leak files were published. 'I cannot raise taxes merely because it would then benefit my indebted neighbours,' Mr. Bettel justified Luxemburg tax policies,[42] ignoring the fact that the costs of production such as strain upon infrastructure, pollution etc. were borne by other states and municipalities.

2.5.2 National responses

As long as there is no coordinated approach in place, national responses and policies to these international developments is rather competition than cooperation. The existence of capital mobility, investment, accounting and tax payment options force states to either lower their taxation for TNCs to a level which makes it unattractive for companies to shift their profits around the world. TNCs and wealthy individuals, especially owner of businesses, have an incredibly strong position towards governments: By their sheer command of employment, investment and jobs they can twist states into tax concessions, e.g. vial tax rulings or infrequent and superficial controls. Between 2000-2011, 31 OECD countries lowered their tax rates, only two (Hungary, Chile) raised them. If this is done, low tax rates might profit some states, such as in the case of Ireland with its tax rate of 12.5%, because the low tax rate is balanced by the amount of companies moving to that place in order to profit from this rate. As is increasingly evident, however, this practice is damaging for most of the other countries who want to stick to higher corporation rates but who are, in reaction, forced to lower their own corporation tax in the desperate attempt to compete for the registration of TNCs within their own jurisdiction. Alternatively states try to offer other forms of preferential treatment, e.g. tax exemptions, tax reductions for certain investments or tax holidays for certain economic

[42] Luxemburg – ein Land im Zwielicht (2014, November 6) In: (Süddeutsche Zeitung, 2014).

sectors or even preferential treatment of individual companies which negotiate their taxation with the relevant tax authority (Henn, 2013, p. 3f.).

2.5.3 Germany's competitive offers

The website www.investgermany.com counts among its 10 reasons why investors should choose Germany in no. 5: '**Tax Benefits -** Invest in Germany and you can enjoy some significant tax benefits offered to overseas investors as well as to local ones.'[43] Equally, the website Germany Trade & Invest has a separate chapter on tax incentives, explaining to the reader 'Germany offers numerous incentives for foreign investors. There is a variety of programs available, designed to fit the needs of economic activities at different stages of the investment process. Support ranges from cash incentives to labor-related and R&D incentives. Find out how your investment project can benefit from public funding.'[44]

Next the website explains tax deduction options, e.g. Loss Carry-backs and Loss Carry-forwards, the deductibility of interest payments, straight line depreciation and the pooling of losses and profits at the level of controlling parent companies.[45]

Finally, there are investor friendly labour-related incentives. The website explains options of permanent, temporary, fixed-term and low-pay employment options (which have, of course, tax revenue related repercussions) and offers support paid by the taxpayer for, e.g. training and further qualification of employees or downright cash subsidies in case the employment decides to offer a contract to people with disabilities or longtime-unemployed.

2.5.4 Competition instead of cooperation

Here a shift in taxation priorities can be seen: Was it in earlier times the attempt of states to collect as much taxes as possible from a business it is now the attempt to attract businesses into ones country by offering tax holidays, rebates and other privileges in the hope to collect taxes from those being employed or otherwise profiting from that investment. This competition can even be observed within states, e.g. in the US with the secrecy jurisdiction Delaware or in Germany in deduction from the tax administration policies of Bavaria and Baden-Wuerttemberg (see GER/VI/3.2).

Right now, it cannot be seen that states are willing to share the pie with others as long as they can secure the largest bit for themselves – in spite of the belligerent rhetoric after Offshore Leaks and tax scandals of global player such as Amazon, Starbucks, Google and others.[46] As is increasingly obvious, this "game" is going to the disadvantage of states, societies, democracies and the common good: First, because options are exploited ruthlessly by corporate and private interest groups, second, as Paul Kirchhof said, because in the end the state will win which offers Zero Rates, which would kill him being state with the ambition to set the rules (see GER VIII/4.7.5).

[43] Retrieved 23 October 2014 from http://www.investgermany.com/reasons-invest-germany.asp

[44] Retrieved 23 October 2014 from http://www.gtai.de/GTAI/Navigation/EN/Invest/Investment-guide/incentive-programs.html

[45] Retrieved 23 October 2014 from http://www.gtai.de/GTAI/Navigation/EN/Invest/Investment-guide/The-tax-system/tax-deductions.html#7008

[46] See, for example, Schön, W. (2013, April 14) Das große internationale Steuer-Spiel. In: *Frankfurter Allgemeine Zeitung*. Retrieved from: http://www.faz.net/aktuell/wirtschaft/globale-steuergerechtigkeit-das-grosse-internationale-steuer-spiel-12145394.html

2.6 Financial institutions and other service provider

Finally banks and other financial service provider are actively involved in IFFs and in tricks and deals of aggressive tax avoidance.

3 International and German banking

3.1 The context

It certainly would be unfair and unrealistic to start this chapter about Germany and German banks without illustrating the context within which they have to work and compete, i.e. "established, accepted and acknowledged" procedures of international banking of which they are so inextricably part of that it does not really make sense to separate "international" and "German" banking when it comes to aggressive tax avoidance, tax evasion or other illicit, illegal or criminal practices.

As has been indicated already in I/IV/5.3, the formal international banking system is the channel through which the financial heart blood of global economy flows. Some of the largest and most prominent banking institutions are also of interest for illicit and illegal deals since their network of branches all over the world, including tax havens. Fortunately, major data leaks shed some light into this environment, most importantly Offshore Leaks, Luxemburg Leaks and Swissleaks. While Offshore Leaks shed light into creative efforts to conceal wealth in Offshore Havens, Luxemburg Leaks illustrated the role of the Big 4 in tax planning and (aggressive) tax avoidance, which is most of all of interest to understand illicit financial flows in the context of TNCs. Swissleaks highlighted the role of large financial institutions in the lucrative business not only of illicit, but illegal and criminal deals by revealing information from the Geneva branch of one of the world's largest banks, the HSBC.[47] PanamaPapers finally sheds light on the role of intermediating legal agents, in this case the Panama based law office of Mossack-Fonseca.

3.2 Profit shifting revealed by CBCR

A 2015 study by Richard Murphy provides indications that German banks are involved in Profit shifting (Murphy, 2015)

> The study examines how high the profits of 26 banks of the European Union in the single countries should be if they would be distributed according to the real activities there. This means a profit assignment which is aligned with turnover, number of employees or assets: This procedure called "Unitary Taxation" has been applied for decades in the US and discussed in the European Union. Applying this standard shows that the profits in countries like Belgium, Luxembourg, Ireland or Singapore are disproportionately high. In Luxembourg, the analyzed banks would actually only be expected to have made profits of 485 million Euro. But according to the unitary taxation concept they made 2.7 billion Euro. In contrast, in Germany the profit was 1.1 billion Euro below the calculated profit in accordance with this concept. The fact that also in the USA disproportionately high profits can be found, may be surprising at first sight. But the US-State of Delaware is also reckoned as tax haven.[48]

[47] (Süddeutsche Zeitung, 2015a) and http://www.icij.org/project/swiss-leaks

[48] Die Studie untersucht, wie hoch die Gewinne von 26 Banken der Europäischen Union in den einzelnen Ländern ausfallen müssten, wenn man sie gemäß den realen Aktivitäten, die dort stattfinden, verteilen würde. Damit gemeint ist eine Gewinnzuweisung, die sich an Umsatz, Mitarbeiterzahl oder Vermögenswerten orientiert. Dieses Verfahren, „Unitary Taxation" genannt, wird seit Jahrzehnten innerhalb der USA angewandt und in der Europäischen Union diskutiert. Legt man diesen Maßstab an, dann zeigt sich, dass die Gewinne in Ländern wie Belgien, Luxemburg, Irland oder Singapur überproportional hoch ausfallen. In Luxemburg hätten die untersuchten Banken nach dem „Unitary-Tax-Konzept" eigentlich nur 485 Millionen Euro Gewinn machen dürfen – tatsächlich waren es aber 2,7 Milliarden Euro. Im Gegensatz dazu lag der Gewinn in Deutschland 1,1

On top is the Royal Bank of Scotland, followed by the Deutsche Bank. The Deutsche Bank, of course, argues that the interpretation of data is inaccurate: Of course is there more profit where profitable Investment Banking dominates, whereas in Germany, business with private banking does not generated adequate profit margins. However, according to the Handelsblatt, also other institutions such as the ZEW admit that country-to-country reporting provides tax administrations with hints and clues where to look more carefully. The Handelsblatt also admits that the Deutsche Banks excuse might explain the high turnover in Delaware. 'But what makes Belgium, Luxembourg and Ireland such big profit machines is therewith not clarified. Thus, the study's author Murphy argues that banks should explain more precisely during their country-specific reporting how such diverging profit and tax allocations arise.'[49]

A Eurodad study also contains a reference and example in case concerning Kenya, a partner country to this research:

> Back in 2012 Barclays published its accounts on a consolidated basis thus making it impossible to know much about its operations in developing countries. Nowadays, the accounts that the bank publishes allows readers to determine that, in 2014 – as two random examples – 30 employees generated a turnover of €744.36 million in Luxembourg, where the company paid €4.9 million in taxes, whereas in Kenya 2,853 employees generated a turnover of almost £200 million, and the company paid only €37 million in taxes. (Eurodad, 2015a, p. 17)

3.3 Tax evading & Money laundering services

As the PanamaPapers Leaks revealed, there are no big international banks not being part of the tax evading and money laundering service, most notably the by now familiar HBSC (purchasing 2300 Offshore companies from Mossfon), but also the UBS and Credit Suisse (purchasing 1100 each).

Regarding Germany, not only German Private Banks operate all over the world, tax havens included. Findings of a 2012 study by attac, confirmed other authors,[50] demonstrate that almost all large banks and banking federations have share property (*Anteilsbesitz*) in tax havens and are therefore well placed to participate in the "Offshore-Game":

Table 1 German Banks and their involvement in Tax Havens 2009/2010[51]

	Commerz-bank	Deka Bank	Deutsche Bank	DZ Bank	Hypo Vereinsbank
Activities in Tax Havens 2009	398	35	1.064	88	83

Milliarden Euro unter dem nach diesem Konzept errechneten Gewinn. Dass auch in den USA überproportional hohe Gewinne anfallen, mag auf den ersten Blick überraschen. Der US-Bundesstaat Delaware gilt allerdings ebenfalls als Steuerparadies.' In: Osman, Y. (2015, August 6). Banken verdienen in Steueroasen verdächtig viel. In: Handelsblatt. Retrieved from http://www.handelsblatt.com/unternehmen/banken-versicherungen/luxemburg-irland-singapur-banken-verdienen-in-steueroasen-verdaechtig-viel/12154508.html

[49] 'Was aus Belgien, Luxemburg und Irland so große Gewinnmaschinen macht, ist damit aber noch nicht erklärt. Studienautor Murphy ist daher dafür, dass die Banken bei ihrer länderspezifischen Berichterstattung genauer erklären, wie es zu den so unterschiedlichen Gewinn- und Steuerverteilungen kommt.'

[50] Attac study "Deutsche Großbanken weiterhin massiv in Steueroasen tätig", published 27 February 2012. Whereas three banks listed are Private Banks, the DZ Bank is the top institute of the German Cooperative Banks and the DEKA Bank belongs to the Public Saving Banking sector.

[51] Not in the chart, but known to be active were banks owned by German states such as the WestLB, Bayern LB or HSB Nordbank. Nevertheless and clearly, private banks seem to dominate the game.

Activities in Tax Havens 2010	338	31	1.096	213	84
Activities in Tax Havens 2009-2010	**-60**	**-4**	**+32**	**+125**	**+1**
Corporate links 2009	1.519	131	2.072	1.137	418
Corporate links 2010	1.381	130	2.337	1.161	391
Corporate links 2009-2010	**-138**	**-1**	**+265**	**+24**	**-27**

The most prominent case where a major private bank assisted thousands of customers in tax evasion via Luxemburg blew in the Mid-1990s. It involved the ***Commerzbank*** and lead until 2003 to 1.24 Billion Euro in repayments and fines (Wehrheim & Gösele, 2011, p. 137ff.). At the same time, the case gained prominence because of the pressure which political circles exercised upon tax fraud investigators. But even then, it seems, the Commerzbank did not stop to aid and abet tax evasion. As new CD leaks reveal, the Commerzbank and their Luxemburg branch continued to assist tax evasion even when the bank was supported with taxpayers money during the World Financial and Economic Crisis and beyond. In principle, the banks CEOs prohibited this area of business, but it seems that some of their subsidiaries did not "receive" those orders and the Luxembourg branch, similar to the practice of the HSBCs Geneva branch, just continued business as usual. In this branch alone in 2008, half a billion Euro were transferred to and administrated in Panama. Notes by banking employees reveal that they were aware that that least part of this business is illegal. Even in 2015 the bank was busy cancelling accounts of some client, when legal proceedings were already initiated because of the banks role of aiding and abetting tax evasion of billions of Euro via Luxemburg in Panama. With a court settlement of the bank agreeing to pay EUR 17.1 million, a lengthy battle based in evidence and the likelihood of a sentence could be avoided. Of course the question is asked, why the banks punishment is relatively benign and a settlement is preferred to a court sentence. Two reasons are offered: Limits of resources in the offices of investigators and prosecutors, linked to the complexity of cases and the burden of proof arising from it. Once more the North Rhine-Westphalian Minister of Finance argued that in those cases the opportunity should be created to withdraw banks their licence for business. A third reason is that the judges conceded that the bank was cooperative in investigations and curtailed their involvement.[52] Still there is more to come for the Commerzbank: Investigation because of Cum-Ex are still ongoing, and one of those responsible at the Commerzbank for those deals was Reinhard Henkel, a former tax fraud investigator who changed sides and went to the very institute which he investigated in his earlier position at the Frankfurt tax office (Meinzer, 2015a, p. 236)

More frequently another bank is in the headlines: The ***Deutsche Bank***, Germany's largest private Bank. Until 2013, the Deutsche Bank was pretty open about their Offshore business segment, e.g. via services offered at the Internet Portal http://www.dboffshore.com/ (which has changed its name into http://www.db-ci.com/). When the Offshore Leaks data was made publicly accessible, several Offshore constructions, Officers and Master Client

[52] Leyendecker, H./ Obermayer, B. et. Al. (2015, March 31) Die Commerzbank und der Pinguin. In: Süddeutsche Zeitung. Retrieved from http://sz.de/1.2418039 Leyendecker, H./Ott, Kl. (2015, October 15) Deal mit der Commerzbank. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/steuer-cds-und-die-folgen-deal-mit-der-commerzbank-1.2692367 . Commerzbank muss 17 Millionen Euro Bußgeld zahlen (2016, January 16). In: dpa Meldung. Retrieved from http://www.handelsblatt.com/unternehmen/banken-versicherungen/beihilfe-zur-steuerhinterziehung-commerzbank-muss-17-millionen-euro-bussgeld-zahlen/12839844.html

addresses implicating the Deutsche Bank were revealed.[53] Taking the number of employees as criterion, the Deutsche Bank branch in Mauritius seems to be prospering: Its number multiplied within five years from 5 to 200.[54] At least in one case this DB branch is involved in legal proceedings of interest to this research: In Kenya, a former Finance Secretary and a manager of Kenya Power are standing trial in many cases of bribery and money laundering which has been facilitated with the help of these Deutsche Bank structures (see 5.4.4.2). The Deutsche Bank reached again headlines during the Luxemburg-Leaks Scandal, when it arranged, together with Price Waterhouse Cooper and assisted by welcoming civil servants, for lucrative tax-saving schemes of large corporations. All that inside the law, admittedly, but certainly beyond the limits of legitimacy and good taste, given the damage for the common good.[55] Also PanamaPaper Leaks revealed that even as shortly as 2014 employees of the Deutsche Bank refused to co-operate in operations trying to identify beneficiary owners of offshore constructs by referring to the obligation to treat the names of clients confidential.[56]

The Deutsche Bank comes increasingly under pressure due to investigation and prosecution by the authorities: In Germany, proceedings are initiated because of tax evasion and money laundering by using CO_2-Certificates, amounting to evaded turnover tax of EUR 220 million (see 5.5). Similarly, US authorities investigate because of tax evasion. All in all, the Deutsche Bank had to accumulate EUR 3 billion reserves in case of being found guilty and more might be needed since more investigations are under way.[57] And all this in addition to those billions which have been spent already in legal proceedings or court settlements. The Deutsche Bank has also problems due to a more recent acquisition: The former Privatbank Sal. Oppenheim & Cie: This bank arranged dubious deals for wealthy clients vial Millionärsfonds administered in Luxembourg. Those deals were so obviously shady that the Deutsche Bank, after obtaining results of an internal investigation, passed on names of clients to the public prosecutor due to the suspicion of money laundering and tax evasion.[58]

This brings up the question of how much German Banks were aiding and abetting tax avoidance and tax evasion. And here it is not only the private banking sector which was/is doing business. Tax specialists know that it was certainly up to the 1990s widely normal for German Banks to counsel and assist those who wanted to transfer money out of the reach of the revenue authorities.[59] Since then, experts feel, there has been a shift towards more caution (not necessarily insight in the immoral nature of the business) – especially since the debate about leaked Tax data CDs (see e.g. GER/VI/2.1.1.1 usw.) and Offshore Leaks sharpened the awareness for potential risks of discovery (Conradi & Ott, 2013).

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[53] Enter "Deutsche Bank" into the Offshore Leaks Database http://offshoreleaks.icij.org/search. See also: Süddeutsche Zeitung 4 April 2013 "Deutsche Bank half bei Offshore Geschäften", tagesschau 4 April 2013 "Half die Deutsche Bank Steuerbetrügern?"

[54] See https://www.db.com/mauritius/, retrieved 15 November 2013

[55] See Giesen, Chr./Ott, Kl. (2014, November 7) Trickreiche Manager. In: Süddeutsche Zeitung. Retrieved from http://sz.de/1.2208470

[56] ‚Wir hätten da gerne ein paar Briefkastenfirmen…' (2016, April 5) In: Süddeutsche Zeitung, p. 13

[56] ARD Plusminus 15 May 2013 Unversteuert – Steueroase Deutschland. Retrieved from

[57] Razzia bei der Deutschen Bank (2012, December 12). In: Die Zeit. Retrieved from http://www.zeit.de/wirtschaft/2012-12/emimissionshandel-co2-betrug-deutsch-bank-razzia. USA verklagen Deutsche Bank. (2014, December 8). In: Die Zeit. Retrieved from http://www.zeit.de/wirtschaft/unternehmen/2014-12/deutsche-bank-usa-steuerhinterziehung

[58] Votsmeier, V. (2015, August 23) Deutsche Bank zeigt reiche Kunden in. In: Handeslblatt. Retrieved from http://www.handelsblatt.com/unternehmen/banken-versicherungen/steuerhinterziehung-deutsche-bank-zeigt-reiche-kunden-an/12223110.html

[59] See and (Wehrheim & Gösele, 2011, p. 163ff.) on the involvement of Deutsche Bank, Commerzbank, and the *Landesbanken* of Bavaria, Schleswig Holstein/Hamburg or North Rhine-Westphalia in services involving tax avoidance and tax evasion.

3.4 Criminal highlights of Swiss-Leaks

The Swiss Leaks revelation covered accounts at the HSBC branch in Geneva up to 2007 of some 100,000 clients from 200 nations owning assets worth about USD 100 billion of Dollars, Euro and other currencies. All three countries are present in the leaks: Germany with 2,106 clients and USD 4.4 billion in assets, Kenya with 742 clients and USD 559.8 million in assets, Zambia with 69 clients and USD 48.3 million in assets.[60] It did not just contain the usual mix of "housewives" (women without own income, behind which heiresses, princesses and business women were hiding),[61] artists, sportsmen, political "advisors" and well-connected business men were hiding. Swiss Leaks also revealed the extent of criminals which succeeded to secure banking services even though the bank clerks documented their knowledge about their ongoing prosecution. For example, among customers were

- Drug dealer from Columbia, whose names were known due to US Senate investigations.[62]
- DRC arms dealer involved in the Burundian war, whose name was known in a 2001 UN Report[63]
- A Katex Mines Guinee account, which was known by a 2003 UN Report to front for trafficking arms into the Liberian war with its high amount of child soldiers[64]
- Emmanuel Shallop, a trader in blood diamonds of whom clerks knew that Belgian authorities were investigating him and who was later convicted[65]
- Names linked to the financing of Al Qaeda, when names of financiers of terror were made known already as early as 2003 by media[66],
- Persons known from the Most Wanted List of Interpol

The latter proves to be most ironic: Not only have persons of Most Wanted List accounts at the Geneva HSBC branch, but also of Lebanese citizen Elias Murr, president of Interpols Foundation for a Safer World Interpol's Foundation for a Safer World, an organization aimed at fighting terrorism and organized crime. 'A spokesman for Murr said his client's wealth and that of his family is public knowledge, and his family has held accounts in Switzerland since before he was born. The account was not connected to his political role. "It is not illegal and it is not suspicious that a Lebanese national opens and holds accounts anywhere".' [67]

3.5 Germany and Swiss Leaks

What emerges about German customers from the Swiss Leaks? From Germany, 2106 clients are part of the Swiss Leaks material and the notes filed by bank employees reveal that

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[60] See http://www.icij.org/project/swiss-leaks/explore-swiss-leaks-data

[61] http://www.icij.org/project/swiss-leaks/real-housewives-hsbc

[62] http://www.hsgac.senate.gov/subcommittees/investigations/hearings/us-vulnerabilities-to-money-laundering-drugs-and-terrorist-financing-hsbc-case-history

[63] http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202001%20357.pdf

[64] http://www.un.org/ga/search/view_doc.asp?symbol=S/2003/498

[65] The HSBC clerk notes: "We have opened a company account for him based in Dubai. … The client is very cautious currently because he is under pressure from the Belgian tax authorities, who are investigating his activities in the area of diamond fiscal fraud." As to his involvement in diamond trading http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cote%20d%27Ivoire%20S%202011%20271.pdf

[66] http://www.wsj.com/articles/SB10479456373457340O

[67] Banking Giant HSBC Sheltered Murky Cash Linked to Dictators and Arms Dealers. Retrieved from: http://www.icij.org/project/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers

many of them used their connection for tax evasion. For example, when it is noted that the clients do not wish to be contacted by the bank and that all information has to remain within the bank only. It was especially surrounding the time when the European Savings Directive was discussed that constructions with offshore companies were recommended and used. Here, 'the ESD pertained only to individuals, not to corporations. The files show HSBC Private Bank seized on this loophole to market products that transformed individuals into corporations for tax-reporting purposes.'[68] Bank employees counseled their customers actively to establish a shell company somewhere in the world which would hide the beneficiary owner of the proceeds.

There was never a problem if clients wanted no communication and insisted that all paperwork remains within the bank. There was never a problem to withdraw cash, even though it was as much or more than one million in whatever currency. All that, of course, was completely in tune with established legal and customary practices, and if something was unclear, it was not the banks task to seek clarity. The HSBC statement excuses itself by saying 'In the past, the Swiss private banking industry operated very differently to the way it does today. Private banks, including HSBC's Swiss private bank, assumed that responsibility for payment of taxes rested with individual clients, rather than the institutions that banked them.'[69] Nevertheless, the notes bank employees made after their talks with customers indicate that they were engaged in those activities even at a time when HSBC directors were declaring that bank leadership "prohibited" the assistance to tax evasion.

Different from France and Belgium, there are no major legal prosecution efforts. So far, government sources argue, up to 1000 names are missing and the Federal Central Office for Taxes has asked French authorities to share their information with Germany, before they can be assigned to the relevant authorities in charge of prosecution in the German Länder. Given the responsibility of the German Länder to deal with cases like that it might take some time until efforts are as organized as they are already in countries with a centralized tax administration.[70]

Regarding the identity of Germanys 2106 known clients, so far no names are known since the files are with tax fraud investigators. And: A lot of investigation needs to be done since one third of Germans involved had numbered accounts. But some information is nevertheless interesting: Those 2106 persons owned1992 accounts with 3616 sub-accounts; altogether assets amounting to EUR 3.3 billion, amounting to over EUR 1 million for each sub-account on average. In France, where 2846 accounts were involved, eventually only 0.2% of them were known to authorities, all others were hidden and served murky purposes. Among names showing up are members of the family of the late Emperor of Germany, CEOs of large corporations, old money, new money, and names known from the Yellow Press. Also in the case of German names, HSBC accepted customers even though they were known to the employees to be under legal prosecution and criminal investigation, among them even one, Florian Homm, from the FBIs most wanted list.[71] Apart from Florian Homm, the following Germans are known by name from the Swiss-Leaks Data:

- Photographer Helmut Newton

[68] See http://www.icij.org/project/swiss-leaks

[69] See http://www.icij.org/project/swiss-leaks/standards-were-significantly-lower-today-hsbcs-response

[70] Deutschland will fehlende HSBC Daten (2015, February 10). In: Süddeutsche Zeitung. Retrieved from http://sz.de/1.2345415

[71] Leyendecker, H; Obermaier, F.; Obermayer B. (2015, February 10) Rotlichtkönige, Adel und ein Fußballprofi. In: Süddeutsche Zeitung. Retrieved from http://sz.de/1.2343281

- Friedrich Christian Flick, great-great-grandson of Friedrich Karl Flick, the persons behind the big corruption scandal in 1981 known as Flick-scandal-

An interesting observation by the Süddeutsche Zeitungs team is that many of the known account holder belong to the former (older) Federal Republic of Germany, from a time when it was "chic" to own an anonymous/numbered Swiss bank account.[72] It points to the interlinking of tax law, law enforcement and social norms, which determine decisively decisions relating to tax evasion or tax honesty and which apparently is changing since more and more Leaks and scandals blow (see E/I).

3.6 Germany and Panama Papers

Regarding the PanamaPapers, Germany is first involved because Mr. Mossack is a German citizen from the town of Fürth close to Nuremberg. Regarding the leak data,[73] Germany is not among those top 10 countries, where most intermediaries established by MossFon are active. Fortunately, also German banks are not among the top-ten banks, whereas prominent Swiss Banks (Credit Suisse and UBS) and the infamous HSBC are present once more. On the whole, only 389 addresses are in the database, which is a rather small share of the leaked data set.

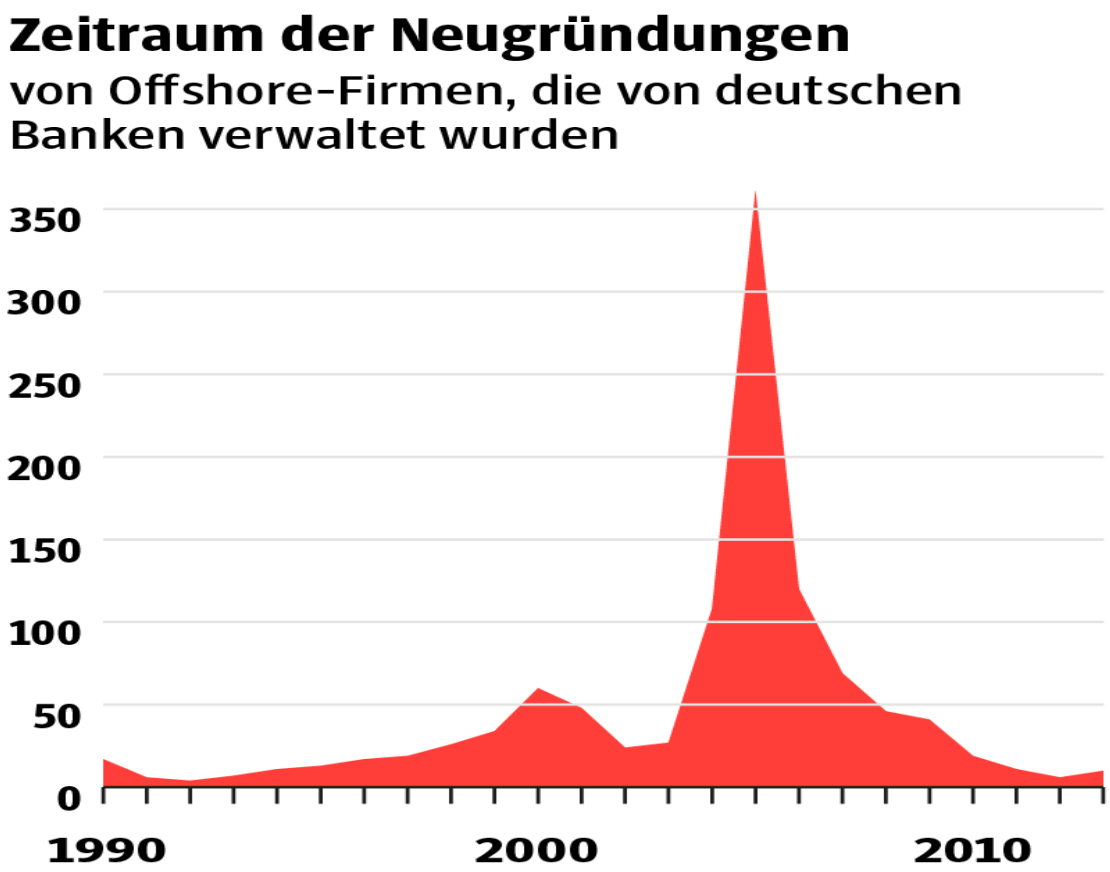
Also the PanamaPapers reveal that German banks increased their Offshore involvement dramatically around the time the European Savings Directive came into force, assisting also here a classic tax evasion manoeuvre.[74]

[72] Leyendecker, H; Obermaier, F.; Obermayer B. (2015, February 10) Rotlichtkönige, Adel und ein Fußballprofi. In: Süddeutsche Zeitung. Retrieved from http://sz.de/1.2343281

[73] https://panamapapers.icij.org/graphs/

[74] Eine Briefkastenfirma, bitte. (2016, April 5) in: Suddeutsche Zeitung. Retrieved from http://panamapapers.sueddeutsche.de/articles/56effb802f17ab0f205e6370/

Graphic 4 Development of Offshore Companies of German Banks, 1990-2010



And it was then that most German Banks got in touch with Mossack & Fonseca. Leading, once more, were the Deutsche Bank (purchasing 426 Offshore companies from MossFon), Dresdner Bank Latin America (333), Bayern LB (129), but also German Branches of Swiss Banks, such as the UBS Germany (138).

Regarding Germany, another bank emerges which so far has not been known to be involved in the Offshore Game: The Berenberg Bank, one of Germanys oldest private banks. From that bank, the Panama papers reveal several embarrassing cases: First the involvement with Ukrainian businesses who are said to be involved in weapon deals with Syria, Sudan and other areas of international conflict and tension. Other cases involve drug dealing and provisions emerging from re-import deals with medication. The most interesting detail is that employees of the banks compliance department warned of too many risky clients, deals and accounts. But instead of listening to them, they got sacked. The very president of the Berenberg Bank started office as president of the Federation of German Banks on Monday 11 April 2016. The bank is unavailable for comments.[75]

3.7 Customer, Bank Consultant & Bank Services

If one thing became very clear from Swiss Leaks and the Panama Papers, a lot of those business activities would not be possible without assistance from banks and their employees since customers normally do not have knowledge or contacts required for the setup of such

[75] Strozyk, J.L., Strunz, B., Hornung, P. (2016, April 12). Zwielichtige Kunden bei der Berenberg Bank. In: NDR. Retrieved from https://www.ndr.de/nachrichten/hamburg/Zwielichtige-Kunden-bei-Berenberg-Bank,berenberg130.html

structures. And the Customer Consultant has, indeed, a crucial role to play when it comes to customers trust and relations, as was explained to the research also by a conversation partner who worked for UBS and other banks exactly for that clientele.

He, and other conversation partners, detailed that banking practice is not as centralized and organized as one might expect. The key element of banking is the trusting relationship between customer and customer consultant of the bank. Without this trust, banking secrecy alone would not work either. For that reason, the customer consultant is the only person who knows all (best) about the financial interests and situation of the customer. What happens between consultant and customer is often confidential. It is not fixed in writing and rarely communicated to superiors. For that reason it may well be that such a consultant advises a customer not about regulating illict financial situations with the local tax office, but assists in bringing assets out of – say – Switzerland to another tax haven. If this is exposed and superiors assert that they never knew and that this consultant acted in violation of banking principles, this might even be the honest truth. But, of course, this practice is also in place exactly for this purpose: That middle and senior banking management can credibly deny to have instructed the customer consultant to act that way and/or that they feel cheated and betrayed in their trust of the honesty of this consultant.

The consultant is often more important than the bank. If the consultant changes a bank, he might take his customers and their assets with him. The relationship between customer consultant and customer is not just about financial matters, which is certainly the most important since the banking consultant often knows more about the financial situation of his client than the client himself. It is also about a human relationship, at times even a therapeutical. ‘At times’, one conversation partner said with a sigh, ‘I was to those people mother, spouse, psychiatrist, motivation trainer all in one person. Their trust was enormous and their dependence from what I said as well.’

Since evidence is emerging that the psychological state of many wealth holder is one of constant fear and anxiety, almost of schizophrenia and paranoia, a lot of these anxieties are linked with and to the financial situation (see GW#). Consequently, talks about who and where to place assets and who safe the profit might be is also about these anxieties and psychoses. One conversation partner working as assent manager put it ‘When I was working for the Family Office Department of that bank, “service” included many issues which I would have never dreamed of: It ranged from psychological counselling to book restaurants, to buy cough medicine to go Gassi with the dog while the client was dining.’

This in turn might overburden the person acting as customer consultant. When Offshore, Luxemburg and Swiss Leaks hit the headlines, the same conversation partner from asset management revealed that he did no longer go to social functions. As soon as he revealed his employer, people started to attack him and express their hatred about this wicked profession. At the same time, he felt that with what he did he was already in prison with more than one leg (see more in GW#)

3.8 Contrition and Punishment

The HSBC scandal is particularly painful since the then-chairman of HSBC international, Lord Green, a part time priest of the Anglican Church, who was counted among “ethical bankers” by saying publicly sentences such as "Values go beyond 'what you can get

away with'."[76] This apparent discrepancy between pledge and reality suggests two interpretations: Either the vows of the banking elite after the World Financial and Economic Crisis, that now more ethics is called for in banking practice, is a lie to placate the public (see I/IV/5.3.9). Or: that the declaration is made in honesty, but it is not possible to implement it.

Responding to the allegations when they were no longer to be oppressed (what they first attempted), HSBC management was contrite:

> "We acknowledge that the compliance culture and standards of due diligence in HSBC's Swiss private bank, as well as the industry in general, were significantly lower than they are today." … The written statement said the bank had "taken significant steps over the past several years to implement reforms and exit clients who did not meet strict new HSBC standards, including those where we had concerns in relation to tax compliance." The bank added that it had refocused this part of its business. "As a result of this repositioning, HSBC's Swiss private bank has reduced its client base by almost 70% since 2007." [77]

The most interesting bit is the last sentence: If the bank reduced its customers by 70% it certainly does not mean that those dismissed that way are now converted to be good boys. It rather suggests that they were looking for other banking institutions – something which HSBC banker honestly admit: "We simply pass them on to others, as others do with theirs by referring them to us", at the same time, others come back and open new accounts via intermediary persons at HSBC and not much will have changed.[78] If one finally considers the fact that the entire scandal concerns just one local Swiss branch of one major global bank one can imagine what the size of the entire tax evading-money laundering industry might be.

Meanwhile, in August 2015, the HSH Nordbank agreed with the prosecution to in a settlement to pay EUR 22 million for aiding and abetting tax evasion of private clients via shell constructions located in Panama with names such as "Minigolf Investments". Interesting enough, the Nordbank is not a private bank, but publicly owned…[79] Other banks attempt settlements, too: Also the CoBa (Commerzbank) and Hypo Vereinsbank, who advised their clients to move money to Luxemburg, are willing to settle legal proceedings with the payment of ca. EUR 20 million. Another major player is the Hypo-Vereinsbank, which is settling with the prosecution for EUR 30 million, split in EUR 10 million for assisting in Cum-Ex Deals and EUR 20 million for other suspicious dealings via Luxembourg.[80]

The question is, however, what other surprises will be revealed eventually. The issues also demonstrate, how important issues of transparency are in this area.

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[76] Lord Stephen Green is "Prebendary of St. Pauls Cathedral in London", which Wikipedia explains as follows 'A *prebendary* is a senior member of clergy, normally supported by the revenues from an estate or parish.' See the Editorial of The Guardian (2015, February 9), Retrieved at http://www.theguardian.com/commentisfree/2015/feb/09/guardian-view-hsbc-files-damning-dossier

[77] See http://www.icij.org/project/swiss-leaks and http://www.icij.org/project/swiss-leaks/standards-were-significantly-lower-today-hsbcs-response

[78] http://www.sueddeutsche.de/wirtschaft/swiss-leaks-das-schwarzgeld-ist-nicht-weg-nur-woanders-1.2342741

[79] HSH Nordbank zahlt 22 Millionen Euro Bußgeld. (2015, August 19), In: Tagesspiegel. Retrieved from http://www.tagesspiegel.de/wirtschaft/verfahren-wegen-beihilfe-zur-steuerhinterziehung-hsh-nordbank-zahlt-22-millionen-euro-bussgeld/12207058.html

[80] Ott, Kl. (2015, December 3) Hypovereinsbank muss 30 Millionen Euro Strafe zahlen. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/hypovereinsbank-muss-millionen-euro-strafe-zahlen-1.2766099

3.9 Discussion

As has been said in the methodological note above, the legal situation is so complicated that financial institutions can contribute to IFFs 'knowingly or unknowingly'. However, given findings of tax fraud inspectors or police investigating the role of German banks and other financial institutions when it comes to tax avoidance and evasion there are indications that those highly paid experts know better about that what they are involved into than they might admit when caught. (→ Cum-ex trade or Wehrheim).

If tax advisors and tax lawyers admit that they counsel their clients about all legal options available up to the very limits of the law there is some likelihood that in some cases the line is overstepped.

The involvement of the banking sector in the tax avoidance and evasion schemes is despicable for three reasons: First, as could be seen with the Commerzbank case above, they earn a lot by assisting individuals and corporations hiding money which would be needed for the community and the common good. Secondly, it was the banking sector which caused the big financial and economic crises 2007/2008 and was in need of stabilization by pouring out billions of taxpayer's Euro: The German financial sector received 644.11 Billion Euro in guarantees, of which 259.19 Billion Euro have been used and spent by the end of 2011.[81] Thirdly: After this crisis, the banking sector has no recognizable plan to pay back that money to the community. Moreover, it seems, they are still engaged in aiding and abetting wealthy people and corporations, hiding their money and, by doing that, continuing to earn a lot of money.

3.10 Conclusion: The game continues?

The German Financial and Banking sector attractive for these financial flows as well and the governments permits/contributes its share that this situation continues. Hard evidence is difficult to obtain, which is for critics from the NGO sector [82] of the German financial sector exactly the proof for the thesis employed:

- German Banks are universally present and accessible,
- They operate in and via Secrecy Jurisdiction,
- The German financial sector is large,
- There is a lack of adequate tax treaties with states where IIFs are likely to come from,
- Germany because its prosperity and social stability is very attractive for investments, and, most importantly:
- The German financial sector lacks adequate transparency.

It is also interesting that those banks having a foothold in offshore centres and profiting most by own dealings or assisting clients in shady deals are at the same time those paying least tax.

[81] See entry "Germany" in tables 28+29 of the EU Commission Staff Working Paper SEC(2012)443 final of 21 December 2012.
http://ec.europa.eu/competition/state_aid/studies_reports/2012_autumn_working_paper_en.pdf

[82] E.g. (Henn, Meinzer, & Mewes, 2013) or The Anti-Corruption Resource Centre „U4" in its Fact Sheet from 2012, May 23, retrieved from http://www.u4.no/publications/evidence-of-illicit-financial-flows-from-developing-countries-placed-in-germany/

So far, the automatic information exchange will make it more difficult for IFFs to move around, but it still will be worthwhile for those who can afford it, because new states will participate and new legalese schemes will be on offer:

In the good old days it was enough to hide money on a numbered bank account. To the extent that the banking secrecy is abolished now new instruments of hiding assets are deployed, most importantly shell companies and trusts. This has already been established by Gabriel Zucman when he examined Swiss bank deposit data: 'Zucman notes that this leads to the worrying phenomenon that more than 60 per cent of all foreign held deposits in Swiss banks belong to entities in the British Virgin Islands, Jersey and Panama, all renowned jurisdictions for setting up shell companies.' (Eurodad, 2015a, p. 26) These findings has been confirmed by Swiss Leaks Data. 'A World Bank review of more than 150 grand corruption scandals in developing countries found that anonymous companies were used in more than 70 per cent of the cases.' (ibid.).

As is indicated by conversation partners who have experience with wealth asset management, top wealth holder (or their Family Offices or wealth manager) tend to split responsibility for administrating assets among many banks, financial institutions and funds and emphasize that a trusted (team of) advisors is often more important than the name of the bank or financial institution. For that reason it can be assumed that also top German wealth holder and their manager will continue to look for advise and guidance not only among German banking institutions, but also continue to look for foreign advise which is still plentiful available. For example:

UBS

- Tax Planning
  http://www.ubs.com/ch/de/swissbank/wealth_management/planning/tax/services.html
- Exclusive Services
  http://www.ubs.com/ch/de/swissbank/wealth_management/exclusive_services.html
- Family Advisory
  http://www.ubs.com/ch/en/swissbank/wealth_management/familyadvisory.htm

Offshore Constructs

- http://www.offshorecompany.co.uk/banking/swissinstitutions/
- http://www.worldoffshorebanks.com/switzerlandoffshorebanks.php

http://www.swiss-banking-lawyers.com/

But for sure: The price for those constructions is going up, hence it is worthwhile only above a ceiling of several million Euro wealth assets (see below, 5.3.7)

4 Germany as a secrecy jurisdiction/tax haven

Conversation partners with police and NGO background agree that the following deduction is, in principle, correct: 1. Given Germanys economic strength, its political stability and its wealth it can be assumed that Germany is an attractive country of destination for money and investment. 2. Germanys banking and financial system is lacking transparency, beyond that, many other ways to transfer funds exist. 3. For those reasons it can also be assumed that IFFs of magnitudes flow into and out of Germany.

That which emerged from all the "leaks" since Offshore Leaks illustrates that this is correct: German attracts money, and German financial institutions, but also the Government, are happy to assist in this global game.

4.1 Criteria of a secrecy jurisdiction

There are good legal and institutional reasons and criteria to conclude that Germany, too, has features characterizing secrecy jurisdictions, also known as tax havens. Before entering into the discussion there is, of course, the need to clarify what exactly those features are. This is even more important since up to the present day there is no unanimously accepted definition of Tax Havens.

4.1.1 OECD criteria

Even though the OECD started in 1998 with a fairly comprehensive set of criteria defining tax havens,[83] subsequently only three key criteria were of remaining importance for OECD discussion and policies:[84]

1. No or nominal tax on the relevant income;
2. Lack of effective exchange of information;
3. Lack of transparency.

4.1.2 Financial Secrecy Index by TJN

The NGO Tax Justice Network (TJN), on the other hand, does not put major emphasis on secrecy alone, but rather a whole set of criteria, the so-called Key Financial Secrecy Indicators (Tax Justice Network, 2013, p. 5ff.):

1. Does the jurisdiction have a banking secrecy?
2. Is there a public register of Trusts and Foundations?
3. Does the relevant authority obtain and keep updated details of the beneficial ownership of companies?
4. Does the relevant authority make details of ownership of companies available on public record online for less than USD 10?
5. Does the relevant authority require that company accounts are made available for inspection by anyone for a fee of less than USD 10?
6. Are companies listed on a national stock exchange required to comply with country-by-country reporting?
7. Are resident paying agents required to report to the domestic tax administration information on payments to non-residents?
8. Does the tax administration use taxpayer identifiers for analysing information effectively, and is there a large taxpayer unit?
9. Does the jurisdiction grant unilateral tax credits for foreign tax payments?
10. Does the jurisdiction allow cell companies and trusts with flee clauses?
11. Does the jurisdiction comply with the FATF recommendations?
12. Does the jurisdiction participate fully in Automatic Information Exchange such as the European Savings Tax Directive?

[83] OECD (1998) Harmful Tax Competition – An Emerging Global Issue, chapter 1.

[84] See, e.g., Owens/St. Amans (2009) Countering Offshore Tax Evasion – Some Questions and Answers. Internet Resource http://www.oecd.org/tax/exchange-of-tax-information/42469606.pdf and (Merten, 2012, p. 57).

13. Does the jurisdiction have at least 60 bilateral treaties providing for broad information exchange, covering all tax matters, or is it part of the European Council/OECD convention?
14. Has the jurisdiction ratified the five most relevant international treaties relating to financial transparency?
15. Does the jurisdiction cooperate with other states on money laundering and other criminal issues?

4.2 Germany's "score"

4.2.1 TNJs Secrecy Index

These criteria are applied by TJN to each country and results are added to obtain a so called "secrecy score". This secrecy score is then combined with a scale weighting based on its share of the global market for offshore financial services. In the 2015 ranking (Tax Justice Network International, 2015a), Germany is seen to account for 6 % (up from 5% in 2013) of the global market for offshore financial services, which makes it still a relatively large player. If both criteria are applied and weighting is done, Germany also qualifies as a major Tax Haven because Germany scores 56 (down 1 from 57) out of 100 obtainable points. Accordingly, in TJNs Financial Secrecy Index 2013, Germany is listed as a Tax Haven/Secrecy Jurisdiction on rank 8 (unchanged to 2013), ahead the United Kingdom (rank 15) or British Virgin Island (rank 21, which became famous during "Offshore Leaks"), but behind Switzerland (rank 1, unchanged), the USA (rank 3, up from place 6), Hong Kong (rank 2, up one place) and the Cayman Islands (rank 5, down one place).[85]

The specific 2015 country report (Tax Justice Network International, 2015b) reiterates the importance of Germany to be an attractive goal for IFFs and the interest of the German government to keep it that way, as the following chapters suggest.

4.2.2 FATF

> 44. Economic conditions and infrastructure can provide a stable investment environment for money launderers intent on layering and integrating criminal proceeds. In Germany, real growth and real interest rates over the last three years have averaged 2 percent. The Global Competitiveness Report ranks Germany highly for its macroeconomic environment. It is relatively easy to carry out economic activities in Germany: Germany scores 70.5 out of 100 on the Heritage Foundation's Economic Freedom Index and is ranked 25th easiest country in the world to do business by the World Bank. Germany's high income levels and large economy also provide plenty of opportunities for large scale ML activity to be carried out unobtrusively.
> 45. Frankfurt is a major financial center, seat of the European Central Bank (ECB), and a global aviation hub. Thirty-seven of the world's 500 largest stock market listed companies measured by revenue are headquartered in Germany. The 10 biggest are Daimler, Volkswagen, Allianz, Siemens, Deutsche Bank, E.ON, Deutsche Post, Deutsche Telekom, Metro, and BASF.
>
> 46. Germany has a large, open, and sophisticated financial system. Total banking sector assets exceed EUR 8.1 trillion (USD 11.3 trillion). Deposits in German financial institutions exceed EUR 3.1 trillion (USD 4.7 trillion). Deposits by non-residents in German financial institutions exceed EUR 1.3 trillion (USD 1.8 trillion). Insurance and financial services provided to non-residents generated EUR 13 billion (USD 18 billion) in export earnings in 2007. Germany is heavily banked – with approximately 50 bank branches and between 63 and 64 automated

[85] http://www.financialsecrecyindex.com/introduction/fsi-2015-results and (Tax Justice Network International, 2015a)

> teller machines per 100 000 of population. German financial institutions send and receive the third largest volume of SWIFT messages in the world – approximately 616 million annually.
>
> 47. The Frankfurt stock exchange is the sixth largest in the world by turnover, with more than EUR 2.4 trillion (USD 3.4 trillion) traded annually. Market capitalization of listed companies exceeds EUR 1.5 trillion (USD 2.1 trillion). 10
> …
> 49. Germany has an open economy and plays a significant role in international trade and investment. Germany scores 2.323 on the Chinn-Ito financial openness variable, which measures a country‘s degree of capital account openness.11 The most open economy score is 2.6 and the least open score is -1.8. It is also ranked the 11th easiest country in the world for ease of trading across its borders. Its international trade equates to 86 percent of its GDP. Germany is the world‘s top exporter. France, the Netherlands, Italy, the United States, and the United Kingdom are Germany‘s major trading partners. Germany‘s ports handle the equivalent of nearly 17 million twenty-foot containers annually. Germany is a large investor overseas with a stock of more than EUR 2.4 trillion (USD 3.3 trillion) in portfolio and foreign direct investment. Foreigners have a stock of nearly EUR 3 trillion (USD 4 trillion) invested in Germany, EUR 657 billion (USD 915 billion) in FDI, and some EUR 2.2 trillion (USD 3 trillion) in potentially more volatile portfolio investment. (Financial Action Task Force, 2010)

FATF apparently wrote to the German government, warning that Germany might be publicly labeled to be a High Risk Country if the government does not improve the legal framework until June 2014.

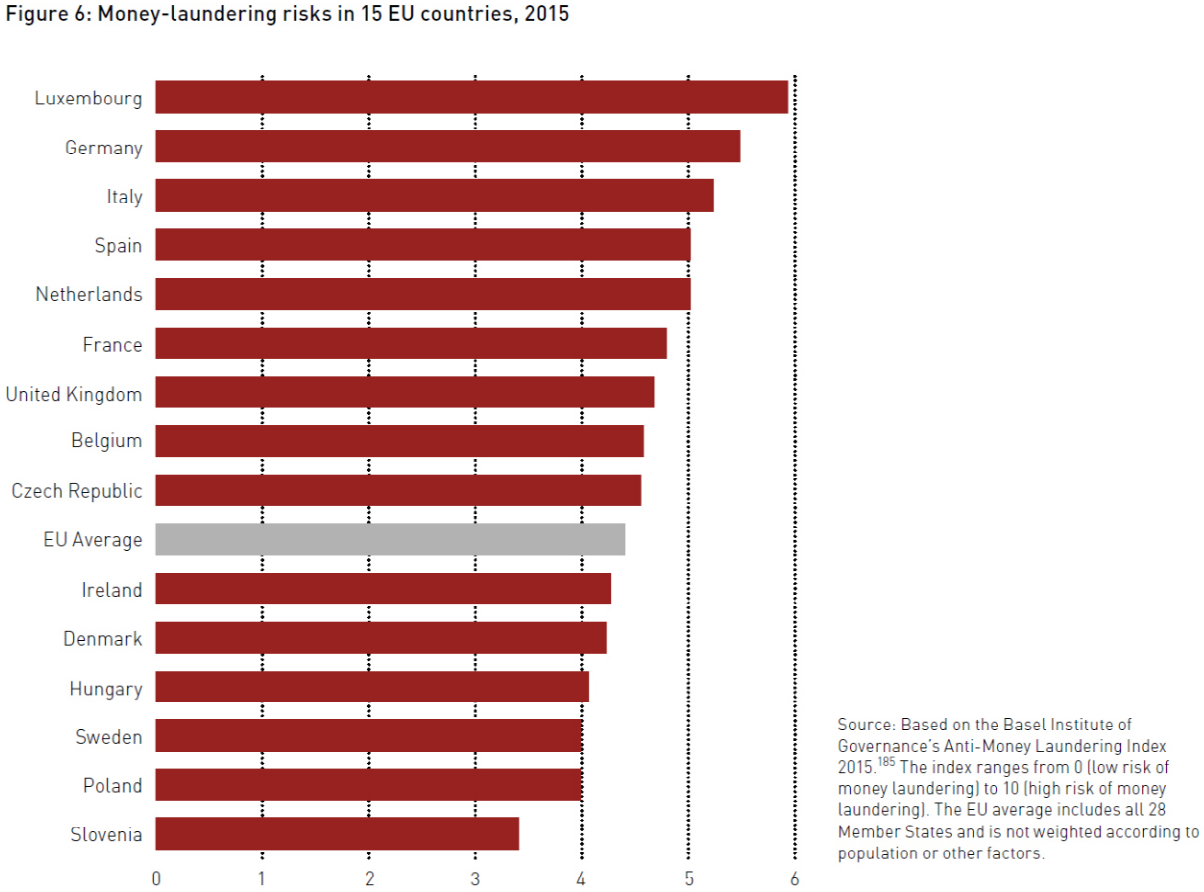
> As a result of a report, Germany does not proceed resolutely enough according to estimations of the OECD against money laundering, and hence also against international terrorism. The OECD criticizes that it it not accusable in Germany to launder its own black money. After an expert’s estimation, this regulation benefits in particular the Italian mafia. Additionally, according to OECD’s opinion the penalties for money laundering are too low in Germany. Someone who is convicted of money laundering mostly gets away with a prison sentence less than a year.[86]

4.2.3 Eurodad/Basel Institute of Governance

A Eurodad study confirms those suspicions: Based on data arising from the Basel Institute of Governance’s Anti-Money Laundering Index (0 indicates low risk, 10 high risk of money laundering), Eurodad concludes that Germany has the highest money-laundering risk in Europe, second only to Luxemburg:

[86] Deutschland geht einem Bericht zufolge nach Einschätzung der OECD nicht entschieden genug gegen Geldwäsche und damit auch internationalen Terrorismus vor… Auf Kritik bei der OECD stoße, dass es in Deutschland nicht strafbar sei, sein eigenes Schwarzgeld zu waschen. Diese Regelung nutze nach Einschätzung eines Experten insbesondere die italienische Mafia. Zudem seien nach Ansicht der OECD die Strafen für Geldwäsche in Deutschland zu niedrig. Wer der Geldwäsche überführt werde, komme meist mit einer Freiheitsstrafe von unter einem Jahr davon. Deutschland versagt laut OECD bei Geldwäsche. (2014, April 26). Retrieved from http://de.reuters.com/article/deutschland-oecd-geldw-sche-idDEKBN0DC0CC20140426

Graphic 5 Money-laundering risks in 15 EU countries



Source 2 (Eurodad, 2015a, p. 22)

4.2.4 Bussmann

A 2014 study into the Dunkelfeld of Money laundering in Germany commissioned by the Federal Ministry for Finance comes to the following conclusion, why Germany is and remains an attractive target for those wanting to launder proceeds of crime – criteria which are quite similar to FATF:

> In particular, there are at least three reasons why no decline in the volume of money laundering can be anticipated in the future:
> 1. A secure and prosperous industrial nation. Germany will retain its status as a financial centre and business location in Europe and its attractiveness can be expected only to increase.
> 2. Deficits in the non-financial sector. Germany's non-financial sector continues to reveal major loopholes in the implantation of the Money Laundering Act. Awareness and implementation of due diligence are generally insufficient.
> 3. Deficits in criminal prosecution. The broad lack of reports on suspicious cases in the nonfinancial sector relates closely to the low risks of criminal prosecution, and therefore extreme low detection rates. This indicates the need to increase what are currently still broadly inadequate personnel resources within the public prosecution authorities and justice system.
>
> Hence, the risks of being prosecuted for money laundering or for the offences that have led to it are very low in Germany, and this is the situation during a period of continued growth in the national economy. (Bussmann, 2015, p. 8)

4.3 Practices and instruments facilitating IFFs to Germany

There are quite a number of instrument facilitating IFFs to Germany, but, of course, they can be also used for perfectly legal purposes, which needs always be kept in mind.

4.3.1 Interbank loans, transitory & corresponding accounts

How is it being done, that money from foreign tax evader or other illicit financial flows can be invested in Germany? And how much is it? This is difficult to say because existing statistics is not unequivocal. There are, however, some known ways and methods used, many of them described by for example:

(Meinzer, 2015b): First of all the question of interbank loans, which are normally of no concern for legislator since it is thought that this is merely for the supply of liquidity between banks in land A to a subsidiary in land B. Since there are different laws in land B, one should pay closer attention. For example the increase of interbank loans with Luxemburg subsidiaries is skyrocketing because there are no comparable limits for handing out loans.

Next the problem of transitory accounts which a bank can offer to clients. They are prohibited following German law (KWG §25m), but not following FATF recommendations. This means that although German banks are not allowed to maintain such trust accounts respectively passage accounts themselves, the foreign subsidiaries and affiliated companies of German banks are not bound to the prohibition of § 25m KWG because this article does not count to the group-wide effective regulations of combating money laundering. [87]

And, according to FATF standards, banks are only requested to investigate the account ownership, not the ownership of assets. This recommendation is, however, one among the least well implemented of all FATF recommendations and that way money from tax havens can enter Germany.

Through corresponding accounts is it possible for a bank to get access to the German payment system and financial market without having an own subsidiary in Germany. As Germany / Frankfurt is central gateway to the Eurozone there exist a special interest in connections to German banks. It is known that this instrument is used for money laundry and tax evasion. In principle, since 2008 corresponding connections to banks outside the EU have to undergo a risk evaluation according to §25f KWG. However, BAFIN does not seem to be interested in checking whether this risk evaluation is done. Further, BAFIN excuses when subsidiaries within a banking group exist where the German standards cannot be comprehensively implemented. The corresponding banking system plays also a role for PanamaPaper Leaks. It illustrates a business model which shows that banks are really not capable of comprehending the source and target of money transmission chains which minimizes many regulations which should hinder money laundry. [88]

[87] D.h. Obwohl nun deutsche Banken solche Treuhandkonten bzw. Durchlaufkonten nicht selbst führen dürfen, so sind die ausländischen Niederlassungen und Töchter deutscher Banken nicht an das Verbot von KWG §25m gebunden, weil dieser Paragraph nicht zu den gruppenweit geltenden Geldwäschebekämpfungsregeln zählt (KWG §25l).

[88] Meinzer 2015b & Meinzer 2015a: 80ff. Korrespondenzkonten: Durch sie ist es möglich, Zugang zu deutschem Zahlungsverkehr und Finanzmarkt zu erhalten, ohne dass die Bank selbst eine Niederlassung in Deutschland hat. Da Deutschland/Frankfurt zentrales Tor zur Eurozone ist (S. 85), gibt es hier besonderes Interesse an Verbindungen zu deutschen Banken. Es ist bekannt, dass dieses Instrument zur Geldwäsche und Steuerhinterziehung genützt wird. Im Prinzip müssen Korrespondenzbeziehungen zu Banken außerhalb der EU seit 2008 aufgrund § 25f KWG einer Risikobewertung unterzogen werden. Die Bafin scheint aber nicht sehr interessiert zu sein, zu schauen, ob die Banken diese Risikobewertung machen. Ebenso entschuldigt die Bafin, wenn innerhalb einer Bankengruppe Filialen weiterhin existieren, wo die deutschen Standards nicht vollumfänglich umgesetzt werden können („Beispielsweise lassen sich die deutschen Anforderungen bei der Ermittlung der wirtschaftlich Berechtigten in einigen Ländern nicht vollumfänglich durchsetzen. Auch erschwert ein andernorts noch immer rigoros geltendes Bankgeheimnis eine Institutionsweiter konsequente Geldwäscheprävention.“ p. 88). Das Korrespondenzbank-System spielte auch eine Rolle bei den PanamaPapers Leaks. Es illustriert ein Geschäftsmodell, welches nahelegt, dass Banken tatsächlich nicht in der Lage sind,

For transmissions to and investment in Germany from tax havens normally only the account holders but not the owners of the money are listed who can hide behind men of straw and letter box companies. But, as mentioned above there are totally legal options which help obscuring.[89] Hence: given existing lack of transparency it is relatively safe to assume that a large share of money originating from tax havens and invested in Germany has some illicit background. This is even more likely when considering recent discoveries, e.g. by the French National Assembly's investigation into HSBC practices where it was revealed that 1293 employees of HSBC owned accounts with more than USD 100 million – a high likelihood that those employees administrated these funds for third persons by providing a "national" disguise for a "foreign" account owner. Given this national disguise, those assets would count as "Inländerguthaben", not "Ausländerguthaben". (Meinzer 2015b: 5f.)

As PanamaPapers revealed, a number of "widely accepted practices" are such that banks probably in truth do not know who is sending and receiving money for what purposes, e.g. by the Korrespondenzbanken-System, and therefore indeed "knowingly and unknowingly" aid and abet money laundering.[90]

4.3.2 Shell companies, bearer shares, trust corporations

There are quite a number of legal entities and instruments on offer for legal, illicit and illegal purposes. Some are German in origin, others have been taken on board from outside Germany:[91]

- There are cases of shell-companies, where lawyers offer complete "ready for use" shell companies (*Vorratsgesellschaften*), including bank accounts, open for purchase by third parties behind which the real investor may be hiding.[92]
- Bearer shares (*Inhaberaktien*) in stock corporations, which may obscure the identity of the real buyer. In Germany, Shareholder of AGs do not need to be published in the Handelsregister (Meinzer 2015a: 101) 'Germany has shown negligent enforcement of anti-money laundering rules, and it offers a worrisome set of secrecy facilities and instruments, such as bearer shares, which were outlawed or severely restricted long ago in many 'classic' tax havens.' ... Bearer shares are a widely used instrument in Germany even though they obscure legal and beneficial ownership. The FATF, in its 2010 evaluation of Germany, decries the "Complete lack of transparency over stock corporations that issue their shares in bearer form, and over private foundations".' (Tax Justice Network International, 2015b, p. 1+4)
- Investing into Capital Companies (*Kapitalgesellschaften*) via third parties, e.g. custodians or trustees.[93]
- Associates of a limited company (GmbH) must be named in the business register. But this can letter box companies, at acquisition the notary has to check whether everything is correct.

Ursprung und Ziel einer Geld-Überweisungskette durchschauen zu können, was viele Auflagen, die Geldwäsche verhindern sollen, als Makulatur erscheinen lässt.‚Wir hätten da gerne ein paar Briefkastenfirmen…' (2016, April 5) In: Süddeutsche Zeitung, p. 13

[89] Bei Überweisungen nach und Investitionen in Deutschland aus Steueroasen werden i.d.R. nur die Kontoinhaber, nicht aber die Eigentümer des Guthabens gewertet, die sich hinter Strohmännern und Briefkastenfirmen verstecken können. Aber: Vorstehend wurden auch ganz legale Optionen geschildert, die bei der Verschleierung helfen. Meinzer 2015b, 5f

[90] ‚Wir hätten da gerne ein paar Briefkastenfirmen…' (2016, April 5) In: Süddeutsche Zeitung, p. 13

[90] ARD Plusminus 15 May 2013 Unversteuert – Steueroase Deutschland. Retrieved from

[91] The following refers to (Henn, Meinzer, & Mewes, 2013, pp. 9-14)

[92] E.g. https://www.foratis-vorratsgesellschaften.com/

[93] E.g. http://dti.treuhandinvest.de/

- Opening Foundations or Treuhandschaften.
- Investing in Real Estate and other expensive items
- Taking part and using in Lotteries, Casinos and other games of luck
- (Mis-)Using electronic currencies such as "Bitlaundry"[94]

Panama Papers revealed the extent to which Share Deals are behind money laundering in the Real Estate Sector (see below 5.2.7).

4.3.3 Secrecy and attractivity for non-resident taxpayers

At the latest in 2012 it is widely known that also Germany has features of a secrecy jurisdiction as far as tax avoidance and evasion of third parties is concerned. It was then that a Swiss journalist demonstrated how easy it is for a Swiss citizen to hide money from the Swiss taxman with German banks – and the same applies for Austrians and citizens from outside the EU.[95] Reason for that: To increase attractivity of German banks to foreigners „Hintergrund der gesetzlichen Ausgestaltung der beschränkten Steuerpflicht im Fall von inländischen Kapitalerträgen ist dem Grunde nach schon seit 1929 das Ziel, den Finanzplatz Deutschland zu stärken."[96]

Meinzer (2015a, p. 45ff.) demonstrates in more detail how the system works and that neither tax laws nor legislation against money laundering prevents banks from accepting shady deposits from foreigners with the result that not even proof of residence may be required when opening an account. All in all, Meinzer demonstrates, something between 2.5 and 3 trillion Euros are deposited by foreigners in Germany, the main attraction being the "interest rate payment without withholding tax"of 35% which would be due for instance in Switzerland. In Germany, there are no interest rates on interest earnings of non-resident taxpayers – only resident taxpayers have to pay the final withholding tax of 25% on interest earnings of bank deposits, corporate bonds, investment funds, federal savings bonds and the therewith earned speculative gains (p.47). While this money is not taxable, at least they should be transmitted to the account holder's country of origin to be taxed there. This is not the case: In 2012, Germany transmitted interest earnings of 291 million Euro to other EU countries what would equal deposits of 24 billion Euro – this is in the light of the figures clearly understated.[97]

This assertion by Meinzer, which is backed-up by commercials and advertisements from the financial sector, is partly denied, partly qualified by senior civil servants. In discussions following the publication of Meinzers book only hesitantly and grudgingly indications were admitted, that Meinzer might be correct in his research based assertion (Meinzer, 2016a): Michael Sell, head of the tax department at the Ministry of Finance, admitted that due to Double Taxation Agreements indeed there might be a basis that private wealth holders deposits in Germany are not taxed with the mandatory 25% Flat Tax (Abgeltungsteuer), either not at all, or with some reduced rate,[98] an admission which he repeated at other occasions. At

[94] http://app.bitlaundry.com/

[95] ARD Plusminus 15 May 2013 Unversteuert – Steueroase Deutschland. Retrieved from https://www.youtube.com/watch?v=9VIzj1NVfaY (retrieved 31 March 2016) as well as the Swiss newspaper Handelszeitung 23 May 2012 "Deutsche Banken buhlen um Schweizer Schwarzgeld" und Handelszeitung 25 May 2012 "Deutsche Banken, Schweizer Schwarzgeld: Bundesrat gefordert". As to Austrian "tax refugees" see Adamek/Otto: 148.

[96] Quellensteuer auf Zinskeinkünfte von Steuerausländern Antwort der Bundesregierung auf Kleine Anfrage der Grünen. Retrieved from http://dip21.bundestag.de/dip21/btd/18/076/1807611.pdf

[98] "Bei Privatpersonen haben wir die Abgeltungssteuer, aber je nach dem wo diese Person sitzt wird das mit den jeweiligen Doppelbesteuerungsabkommen vielleicht niedriger gestellt als die 25% [...]."

the same time, Secretary of State Dr. Meister continued to deny that this privileged treatment exists at all.

Dr. Meister also did not reply to two letters written by the author of this paper in that matter, asking for confirmation or denial and proof for the selected reply.

4.3.4 Preventing transparency

The government further contributes to Germany's attraction by preventing transparency of account holder or beneficial owner of Offshore Constructions. This is due to the paramount importance of banking secrecy, data privacy and, most importantly, tax secrecy. For tax administration more transparency regarding EU assets than assets within Germany in advancing those issues, Germany even block the attempt of others to make progress, e.g.

Blocking CBCR for TNCss
Blocking public access to registers containing beneficial owner

4.4 Conclusion

Germany pretends to be the good guy, in reality a heavyweight in the world of aiding and abetting aggressive tax avoidance and tax evasion at the expense of others.

5 Criminal Illicit Financial Flows

While the previous was illustrating the wide range of "shades of grey", we now turn to the wide range of outright and clearly criminal IFFs.

5.1 Trade misinvoicing/trade mispricing

As indicated above in 1.1, 'commercial tax evasion especially through trade mispricing, are by far the largest component' of global IFFs. While Baker 2009 took a share of 60-65%, the share of trade mispricing etc. is now seen at 70.9% according to newer research of GFI, but there are no substantiating figures given with this number.[99]

5.1.1 Conceptual clarification

Trade misinvoicing/trade mispricing (Preismanipulationen beim Handel or Fehlbewertung or fehlbewertete Handelsware or Unterfakturierung)[100] is different from transfer pricing: The latter only (mis)uses legal loopholes and options to lower tax-bill, trade mispricing and has a clearer criminal intent to cheat by fraudulently manipulating bills and cheat customs officials. Boyce/Ndikumana explain the difference as follows:

> Trade misinvoicing can be detected by comparing the invoices submitted to customs authorities in the exporting and importing countries on either side of a given transaction. In principle, the quantity and value of the goods should on both invoices, so that country A's recorded exports to country B are the same as country B's recorded imports from country A.

[99] http://www.gfintegrity.org/press-release/mbeki-high-level-panel-on-illicit-flows-from-africa-conclude-successful-us-visit-mobilizing-support/

[100] Translation of trade mispricing in official documents of the European Parliament, e.g. Entwurf einer Entschließung des Europäischen Parlaments zu Steuerwesen und Entwicklung – Zusammenarbeit mit den Entwicklungsländern bei der Förderung des verantwortungsvollen Handelns im Steuerbereich, retrieved from http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0027+0+DOC+XML+V0//DE. Otherwise and normally, the translation tool linguee presents only "mispricing" which is "Fehlbewertung" and then needs to be combined with a word appropriate to trade and trading. Konversationspartner beim Zoll sprachen von „Unterfakturierung".

> In practice, however, there are often systematic discrepancies between the two. … Exporters may understate quantities or values, or importers may overstate them, as a means of capital flight. Conversely, importers may understate quantities or values – or, in the case of pure smuggling, not report them at all – to evade customs duty.
> Transfer pricing, in contrast, does not entail the submission of different information to the exporting country and the importing country. The same quantities and the same values – computed on the basis of the same transfer prices – are invoiced at both ends of the transaction. But the prices assigned for this purpose differ greatly from those that would have been paid in an arms-length transaction between different firms. Hence the scale of transfer pricing cannot be ascertained by trading partner data comparisons of the type used in capital flight measurement. … Strategies to combat both trade misinvoicing and transfer pricing related to international trade, and they often will involve international cooperation. (Boyce & Ndikumana, 2015, p. 396)

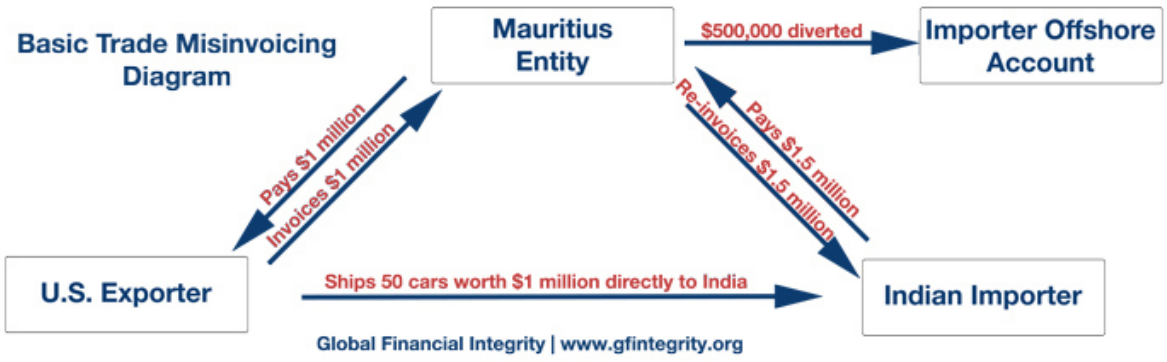
And GFI adds as follows:

> The misinvoicing of trade is accomplished by misstating the value or volume of an export or import on a customs invoice. Trade misinvoicing is a form of trade-based money laundering made possible by the fact that trading partners write their own trade documents, or arrange to have the documents prepared in a third country (typically a tax haven), a method known as re-invoicing. Fraudulent manipulation of the price, quantity, or quality of a good or service on an invoice allows criminals, corrupt government officials, and commercial tax evaders to shift vast amounts of money across international borders quickly, easily, and nearly always undetected. (Kar & Spanjers, 2015, p. 1)

Further down in their report, Kar & Spanjers distinguish between Import Over-Invoicing and Expert Under-Invoicing.

It is easier when looking at it in a graphic:[101]

Graphic 6 Illustrating Trade misinvoicing



5.1.2 Another form of corporate profit

Both export under-invoicing and import over-invoicing lead to an understatement of corporate profits. For example, the former undervalues export sales while the latter raises import costs, lowering corporate while shifting a significant portion abroad. There may be an added incentive to over-invoice imports as import taxes have declined due to tradebased globalization. Governments in developing countries have been increasingly relying on corporate and other direct taxes to offset the loss in revenues. If the marginal duty rate on imports is lower than the corporate tax rate, private businesses can still profit by overinvoicing

[101] http://www.gfintegrity.org/issue/trade-misinvoicing/

> imports as long as the higher import costs reduce corporate taxes more than they increase the additional duties payable. (Kar & Spanjers, 2015, p. 11)

A nice example is contained in the High Level Report on IFFs:

> Swiss-based companies control much of the global trade in natural resources, notably copper and ore. However, it is interesting to note that the Government of Zambia, Africa's largest copper producer, reported a total of $7.7 billion of exported copper to Switzerland for the period 2000-2009, which is not accounted for in the Swiss import data. This case mirrors that of some resource-rich African countries, which were not able to cash in on the commodities price boom between 2004 and 2008. (High Level Panel, 2015b, p. 4)

5.1.3 Trade-Based Money Laundering

As Kar/Spanjers demonstrate (2015), export under-invoicing and Import over-invoicing are also used for money laundering purposes. The assumption is that, e.g., countries producing and trafficking drugs have a larger share of IFFs than countries not involved in this "business". This presupposes that "electronically documented" activities are used to hide illicit flows and that not cash payments or "services" are used in compensation for deliveries.

"Trade based Money Laundering" is defined by the FATF as "the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their illicit origins" quoted in (Kar & Spanjers, 2015, p. 17). Criminals and terrorists use such techniques 'to hide the source of illicit funds by absorbing the funds back into the official economy' (ibid.). Here again FATF supposes that "the rapid growth in the global economy has made international trade an increasingly attractive avenue to move illicit funds through financial transactions associated with the trade in goods and services." (ibid.). And indeed: 'the difference in the ratio of misinvoicing to total trade between drug trafficking/transit countries and the other developing countries is…pronounced.' (ibid.)

5.1.4 Trade mispricing, VAT fraud, underground economy

Trade mispricing is easily done for exports into the EU because at the EU's ports of entry customs officials are unable to check imported goods adequately against the export declarations. This gives a surplus of de facto imported goods which can then be sold without any taxes, increasing the profit of the exporting business and/or those involved. With those goods declared for import, yet another fraud is possible due to the complex VAT system within the EU which is difficult to discover and even more difficult to sanction, most importantly if the exporting company is Chinese because of the still applying Death Penalty rule. A conversation partner from the tax fraud investigation department could not recall too many cases, also after enquiring among colleagues, and came up with the following summary of complex trade based fraud:

> Company A from China trades with PC supplements and imports them through a European harbor (e.g. Rotterdam) to the EU. For the importing country damage can emerge twice: First, by import, the declared commodity value is too low what cannot always be controlled due to the many commodities and the staff situation. The commodity value is according to the later realized sales value which is mostly manifold higher than the declared one. Due to this under evaluation the country (here: the Netherlands) loses already tariff income. Second, when the commodities are transported from Rotterdam to Germany by a logistics company immediately after import, then no import turnover tax is due according to §5, 1(3) UStG. But compulsory prerequisite is that the commodities are directly delivered to a company that gets

> Verfügungsmacht. But the German logistics company never gets Vefügungsmacht in reality so that tax Befreiung of EUSt was not legitime. [102]

In this case, material is brought into a country which might also increase the turnover in an underground economy, as has been found out in the case of developing countries:

> Illicit inflows through import under-invoicing can be effectively thought of as a form of "technical" smuggling where a firm uses legal trade channels to bring goods illegally into a country in an unrecorded manner. A firm may also pay lower VAT and import tariffs by under-stating the amount of imports actually entering a country…. A recent GFI report on the Philippines found that illicit inflows through import under-invoicing added significantly to the underground economy and robbed the Philippine government of at least $19.3 billion in tax revenue from 1990 to 2011. (Baker, Clough, & al., 2014, p. 7)

The case presented above by the tax fraud investigator does, in the eyes of conversation partners among customs officials, not really substantiate trade mispricing. 'Underevaluation of goods and trade mispricing is no problem because tariffs are so low that manipulation is worthless and as prices are known via the internet, so that lower prices would be noticed. Many African countries are categorized as developing countries which have privileged access to exemption from import duties.' [103]

Correctly, however, and here customs conversation partners agree, is the problem of non-payment of import-turnover tax, which is indeed a large problem in many areas, starting from electronics to brand-piracy (Markenpiraterie) to cigarettes. Regarding the suspicion of "underground economy" there is at most some cross border trade, e.g. by Vietnamese trader at the Czech border, where Germans purchase goods without paying the correct taxes. In the words of a conversation partner from Federal Customs:

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[102] The quote verbatim: ‚Firma A aus China handelt mit PC-Zubehör und führt diese über einen europäischen Hafen (z.B. Rotterdam) in Gemeinschaftsgebiet der EU ein. Dabei kann dem Einfuhrstaat zweifach Schaden entstehen:

Erster Fall: Bei der Einfuhr wird ein zu geringer Zollwert / Warenwert angegeben, was auf Grund der vielen Waren und der personellen Situation des Zolls nicht immer kontrolliert werden kann. Der Zoll-, bzw. Warenwert orientiert sich dabei an dem später erzielten Verkaufserlös. Der ist in der Regel um ein vielfaches höher, als der angegebene Wert. Durch die Unterfakturierung entgehen dem Staat (hier: Holland) bereits Einnahmen bei den Zollgebühren.

Zweiter Fall: Wenn die Waren von Rotterdam nach Deutschland durch einen Logistikunternehmer transportiert werden. Erfolgt der Transport unmittelbar nach der Einfuhr, fällt nach § 5 Abs. 1 Nr. 3 UStG keine Einfuhrumsatzsteuer an. Zwingende Voraussetzung ist aber, dass die Waren dann direkt an einen Abnehmer geliefert werden, der über die Ware Verfügungsmacht erhält. Tatsächlich erlangt der deutsche Logistikunternehmer aber niemals die Verfügungsmacht- es ist i.d.R. Lieferant, nicht Abnehmer/Weiterverkäufer, so dass die Steuerbefreiung für die EUSt zu Unrecht erfolgte.

Der dritte Steuerschaden entsteht dort, wo die unterdeklarierte Ware verkauft wird: Die kriminalistische Erfahrung zeigt, dass in den Fällen, wo bei der Einfuhr ein zu niedrig angegebener Zoll- bzw. Warenwert erfolgte, die Wahrscheinlichkeit recht groß ist, dass ein nicht unerheblicher Teil der Ware „schwarz" weiterverkauft wird wodurch dem inländischen Staat, wo der Verkauf stattfindet, Steuerausfälle entstehen. Dies würde bei einer groben Nachkalkulation des Wareneinkaufs (Wareneinkauf + Gewinnaufschlag) nicht auffallen, da hier doppelt verkürzt wird, also beim Wareneinkauf und beim Verkauf. Der tatsächliche Verkäufer ist damit auch nicht die inländische Logistikfirma, sondern die chinesische Firma. Diese müsste sich in Deutschland eigentlich steuerlich registrieren. Jedoch erfolgt dies nicht. In der Regel ohne weitere (strafrechtlichen) Folgen, da eine Rechtshilfe nach China gegenwärtig nicht erfolgt. Hintergrund ist, dass in solchen Fällen ggf. die Todesstrafe angewandt wird. Es wurde zwar inzwischen ein neues DBA mit China ausgehandelt, dass die Todesstrafe umgehen sollte. Es wurde aber noch nicht von beiden Staaten unterschrieben.'

[103] 'Unterfakturierung trade mispricing ist kein Problem, da Zölle so niedrig sind, dass Manipulation sich nicht lohnt und da Preise bekannt sind durchs Internet, dass uns niedrigere Preise auffallen würden. Viele Afrikanische Staaten sind als Entwicklungsländer eingestuft sind, die auch privilegierten Zugang haben bis Zollfreiheit.'

Import turnover tax which is not being paid is a huge problem, this are the 4200 proceedings. Commodities are imported from a third country and in the transit tariffs must be paid, but when nobody checks where the commodities are finally sold, e.g. via EBay, without turnover tax.

They do not see any problem similar to the Philippine-example since the legal situation in Germany is very different and VAT is paid to their knowledge in all cases.

5.1.5 Tax administrations and trade mispricing

Among high risk businesses for money laundering Busmann also sees cash-intensive businesses and import-export companies, the latter because of likely misuse for over and under invoicing. 'Over- or under-invoicing, mergers and acquisitions. Operating international businesses and import and export businesses offers a variety of opportunities for money laundering. By over- or under-invoicing the exchange of goods, deliberately generated deficits can be balanced with incriminated cash or noncash in the specific import or export nation. International corporate conglomerates, the use of 'bogus businesses', and long chains of international transactions impede any effective fight against money laundering.' (p. 7) In the eyes of Bussmann, 'there is a need for tax offices to intensify their controls of such practices as under- and overpricing as well as fictitious sales in general. Currently, intensive examinations of plausibility seem to be lacking; attention focuses predominantly on business expenses and not enough on the revenue side.' (Bussmann, 2015, p. 12)

5.1.6 Trade mispricing and Germany

Regarding trade mispricing only, there are, depending on the economic sectors, some states who dominate the picture of IFFs between outflowing and inflowing countries:

Table 2 Top destinations of trade mispricing IFF flows from Africa, different economic sectors

Nigeria - Oil (HS2 code 27)		Algeria - Oil (HS2 code 27)		SACU - Precious metals and minerals (HS2 code 71)		Cote d'Ivoire - Cocoa (HS2 code 18)		Zambia - Copper (HS2 code 74)	
United States	29.0%	Germany	16.1%	India	23.2%	Germany	23.6%	Saudi Arabia	23.4%
Spain	22.5%	Turkey	14.6%	United Arab Emirates	22.7%	Canada	9.4%	Korea, Rep	15.7%
France	8.7%	Canada	11.7%	Italy	14.2%	United States	9.2%	China	10.4%
Japan	8.5%	Tunisia	10.2%	United States	10.8%	Mexico	8.5%	Thailand	5.7%
Germany	7.7%	United States	6.8%	Turkey	7.2%	France	7.4%	Pakistan	2.6%
Top 5 Total	76.4%	Top 5 Total	59.4%	Top 5 Total	78.2%	Top 5 Total	58.1%	Top 5 Total	57.9%

Source 3 (High Level Panel, 2015a, p. 100)

Equally it can be assumed that other EU states profit from IFFs from Africa.

5.1.7 Trade mispricing and Africa

Trade mispricing is affecting especially African states and one might guess a link to weak governance structures. In a report done specifically for African states, Kenya included, the researcher give the following tables as overview (Baker, Clough, & al., 2014, p. vi+vii):

Table 3Summary Annual Average Trade Misinvoicing Figures from 5 African Countries (2002-2011)

Table 1. Summary of Annual Average Trade Misinvoicing Figures from Five African Countries, 2002–2011 1/, 2/
(in millions of U.S. Dollars)

Country	Export Misinvoicing		Import Misinvoicing		Illicit Outflows	Illicit Inflows	Gross Illicit Flows
	Under-Invoicing	Over-Invoicing	Under-Invoicing	Over-Invoicing			
Ghana	568	-270	-464	221	732	707	1,439
Kenya	1,029	0	-438	42	1,071	438	1,508
Mozambique	140	-79	-247	119	259	326	585
Tanzania	0	-1,034	-11	828	828	1,044	1,873
Uganda	26	-46	0	813	839	46	884

1/ Data for 2011 for Kenya, Mozambique, and Tanzania was not available at the time of writing.
2/ A negative sign indicates an inflow; a positive sign indicates an outflow.

Table 4Summary of the Estimated Average Annual Tax Revenue Loss Due to Trade Misinvoicing 2002-2011

Table 2. Summary of the Estimated Average Annual Tax Revenue Loss Due to Trade Misinvoicing, 2002–2011 1/
(in millions of U.S. dollars or in percent)

Country	Average Government Revenue	Average Tax Loss due to Trade Misinvoicing	Tax Loss as a Percent of Government Revenue
Ghana	3,494	386	11.0%
Kenya	5,242	435	8.3%
Mozambique	1,793	187	10.4%
Tanzania	3,339	248	7.4%
Uganda	1,916	243	12.7%

1/ Data for 2011 for Kenya, Mozambique, and Tanzania was not available at the time of writing.

The situation is seen especially critical for Kenya which is seen worst of the five states under examination regarding the Failed State Index and second-worst regarding the Corruption Perception Index (Baker, Clough, & al., 2014, p. 19). The specific data for Kenya is as follows for the years where data is available:

Table 5 Kenya Trade Misinvoicing vis-à-vis the world, 2002-2010

Table 4. Kenya: Trade Misinvoicing Vis-à-Vis the World, 2002–2010
(in millions of U.S. dollars) 1/

Year	Export Misinvoicing		Import Misinvoicing		Illicit Outflows (A+D)	Illicit Inflows (C+B)	Gross Illicit Flows	GDP	Total Trade	Total ODA	Gross flows as percent of GDP	Gross flows as percent of Trade	Gross flows as percent of ODA
	Under-Invoicing (A)	Over-Invoicing (B)	Under-Invoicing (C)	Over-Invoicing (D)									
2002	1,698	0	0	45	1,743	0	1,743	13,150	5,361	393	13.25%	32.51%	604.24%
2003	1,084	0	-592	0	1,084	592	1,676	14,900	6,137	523	11.25%	27.31%	523.64%
2004	1,920	0	-861	0	1,920	861	2,781	16,100	7,237	660	17.27%	38.43%	590.76%
2005	846	0	-388	0	846	388	1,234	18,700	9,442	759	6.60%	13.07%	236.43%
2006	756	0	-143	0	756	143	899	22,500	10,748	947	4.00%	8.36%	115.77%
2007	702	0	-555	0	702	555	1,257	27,240	13,069	1,327	4.61%	9.62%	151.99%
2008	844	0	-1,095	0	844	1,095	1,939	30,500	16,047	1,366	6.36%	12.08%	203.10%
2009	715	0	-305	0	715	305	1,020	30,600	14,670	1,776	3.33%	6.95%	83.28%
2010	695	0	0	332	1,027	0	1,027	32,200	17,224	1,629	3.19%	5.96%	88.49%
Average	**1,029**	**0**	**-438**	**42**	**1,071**	**438**	**1,508**	**22,877**	**11,104**	**1,042**	**7.76%**	**17.14%**	**288.63%**
Cumulative	**9,260**	**0**	**-3,939**	**377**	**9,637**	**3,939**	**13,576**	**205,890**	**99,934**	**9,379**	...	...	...

1/ Outflows (export under-invoicing and import over-invoicing) have a positive sign whereas inflows (export over-invoicing and import under-invoicing) have a negative sign. Estimates of misinvoicing are based on export and import of commodoities reported by all member countries to the United Nations for publication in the Commodity Trade database (UN Comtrade). Captial flows due to trade in services are not included in the above estimates.

5.1.8 Conclusion

There is a gap regarding the estimation of the size of problem in literature and in the assessment of conversation partners from the enforcement authorities. For them, it does not really seem to be a problem in real life. However:

- there may be a confusion of terminology, and clearly this problem was not addressed when interviewing tax auditors because it arose only when the direct interviews among tax auditors were terminated already.
- Regarding enforcement authorities, they admitted also, however, that they do not have a comprehensive insight into the situation and that indeed in the context of street markets a lot of goods could be sold which entered the EU without being registered and taxed at all.

Here, too, however, applies that enforcement authorities only deal with what they discover and investigate. What is outside their legal scope or attention or responsibility is neither of interest nor does it enter into their assessment at all.

5.2 Money laundering

The term "money laundering" has its origin in the acts of the US Mafia Boss Al Capone, who invested money from his criminal activities in a series of laundry shops, thus 'legalizing' illegally won financial proceeds.

5.2.1 Conceptual clarification

A concise definition is given by the OECD by saying: 'Money laundering is defined as the possession, transfer, use, concealment (etc.) of the proceeds of crimes' (OECD, 2013c, p. 20).

The misconception at hand is, however, that whenever a large amount of cash is displayed or spent, money laundering takes place. This is NOT the case because possessing cash or paying with cash is, per se, no offence or crime. It is only, if this cash originates in a preceding crime (*Vortat*) and exactly here the problem starts: If there is suspicion of money laundering (arising because of the display or payment of cash), authorities have THEN to start investigations into the origin of that cash and only if they can prove the preceding crime, the case of money laundering can be established. The problem in investigation and prosecution is, however, that the person possessing/spending the money and the person/organization generating the money are separate and the authorities have to link those persons with each other. Accordingly, the Clearing-Groups between the State Crime Agency and Federal Customs are not investigating themselves but only, sifting through STRs, whether those STRs have to be taken seriously and, if yes, which institution is in charge of investigation.

A list of crimes which precede the activity known as "money laundering" is given for Germany at http://www.anti-geldwaesche.de/Straftaten/Vortaten.html, including the tax related offences Steuerhinterziehung and Steuerhehlerei. Generally,

> The steps through which these funds are "laundered" or "cleaned" can vary greatly from case to case, but money laundering generally involves the following steps: (a) placement: Funds are introduced into the financial system. (b) layering: Criminal funds are separated from their source, usually through a series of transactions that may include real or fake purchases and sale of goods and property, investment instruments, or simple international bank transfers. (c) integration: The apparently clean funds enter the legitimate economy and are "re-invested" in

various ways, such as through purchasing real estate and other investment vehicles. (OECD, 2013c, p. 26) → Einspeisung, Verschleierung, Integration.

Money laundering in Germany is highly profitable, but risky due to comparatively good governance structures. But as the sub-chapters in 4.3 illustrate, there are many legal instruments and practices which can also be (mis-)used for money laundering.

5.2.2 Methodological differences resulting in quantitative indicators

One needs to be aware of the distinction between Suspicious Transaction Reports, as in the case of Germany, and Suspicious Activity Reports, as in the UK. Other elements of statistics are seizures of cash and other smuggling goods. And one needs to be aware of the fact that in Germany all STRs are forwarded to police investigations. In other states STRs might be registered but not automatically be forwarded to police and legal prosecution. (Tavares, Thomas, & Roudaut, 2010).

It is very difficult to get international comparative statistics on money laundering. The one included in the report of Henn/Meinzer/Mewes would suggest that even small states have a more efficient reporting system than Germany (p. 22)

Table 6 Suspicious Transfer Reports vis-à-vis money laundering

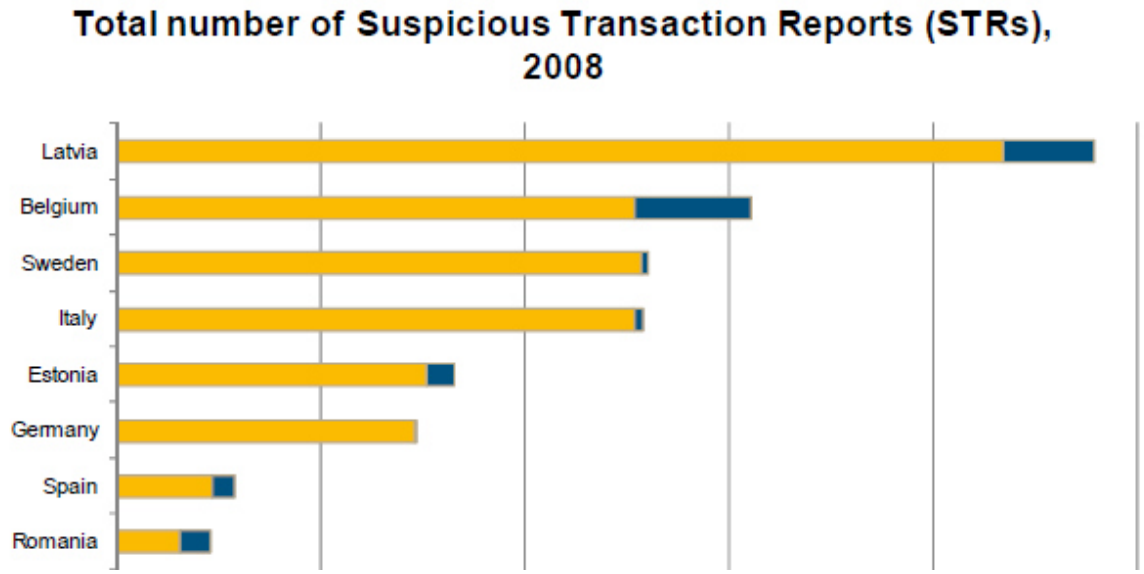
Tabelle 1: Verdachtsmeldungen wegen Geldwäsche

Land	Meldungen	Jahr
USA	600.000	2006
Japan	272.325	2009
Großbritannien	213.561	2006
Niederlande	54.605	2008
Süd-Korea	52.474	2007
Lettland	27.000	2006
Frankreich	17.310	2009
Belgien	15.554	2008
Irland	14.500	2009
Italien	14.241	2008
Deutschland	**12.868**	**2012**

On that background it would not surprise that practitioner lament that not even 0.1% of illicit money within Germany can be secured and confiscated. ‘Das deckt sich auch mit meinem Eindruck aus der Praxis, nämlich dass wir unter den aktuellen rechtlichen Rahmenbedingungen völlig machtlos sind.‘

Similar a study conducted by Eurostat and the DG Home Affairs, taking into account both financial institutions and DNFBPs (Designated Non-Financial Businesses and Professions):

Graphic 7Number of STRs, both by financial institutions and DNFBPs, one line indicating 5000 STRs



Source 4 (Tavares, Thomas, & Roudaut, 2010, p. 26)

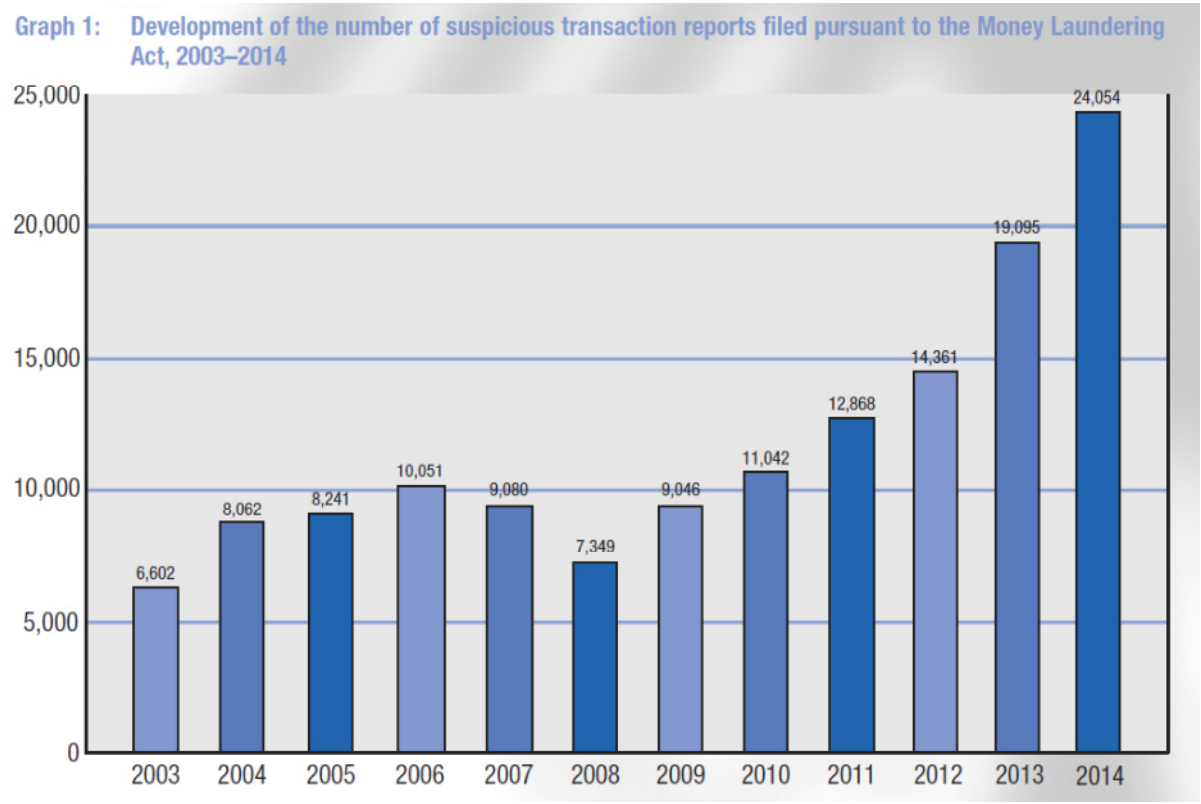
Also the publication of the Financial Secrecy Index 2015 states the low number of STRs coming from Germany, both regarding financial institutions and especially DNFBPs, in comparison with other countries. (Tax Justice Network International, 2015a)

5.2.3 Suspicious Transaction Reports Germany

5.2.3.1 Quantitative development in reports and prosecution

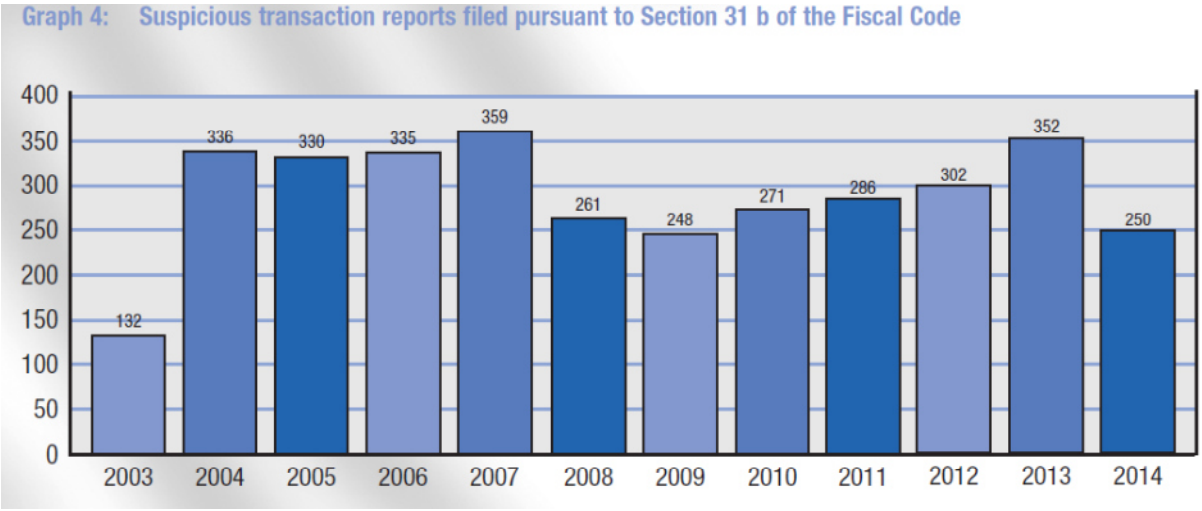
Be mindful of differences in STR and SAR and differences in treatment/registration of those reports (5.2.2). Regarding Germany, the number of STRs in general is on the rise: (Financial Intelligence Unit, 2014, p. 8)

Graphic 8 Development of number of STRs filed pursuant to Money Laundering Act, 2003-2014



In addition to those reports are those from tax authorities "pursuant to Section 31b Fiscal Code" (p.13). Here it records the first decrease since 5 years:

Graphic 9 STRs filed pursuant to section 31b Fiscal Code



The experts summarize: 'Since the beginning of the statistical data collection in 2003, the number of suspicious transaction reports increased by more than 3.5 times.' (p.10). In spite of those increases, NGOs hold against it that even though reporting went up 10% every year in 2011 and 2012, they remain low for a country of Germany's magnitude. (Tax Justice Network, 2013, p. 3).

Additionally one has to be aware that not all reported suspicions turned out to be noteworthy of further investigation, the amount of important leads increasing by 114%:

In the course of the case analysis, of all the 24,054 suspicious transaction reports transmitted to the FIU and of the 250 reports filed and transmitted pursuant to Section 31 b of the Fiscal Code, the FIU classified 298 cases as "noteworthy cases". (The six main) categories were represented as follows in 2014 (2013):

- 179 (67) cases involving transaction amounts of over EUR 3 million each
- 58 (24) cases involving politically exposed persons
- 23 (15) cases involving otherwise exposed persons
- 16 (6) cases involving economically exposed persons
- 6 (8) special case constellations
- 26 (24) cases involving a high level of public interest (media coverage)

In contrast to the declining trend recorded in the previous years' reports, a significant increase in the number of important leads from 144 to 308 was identified in 2014. This increase by 164 cases corresponds to almost 114%. (p.24)

On that background, another striking development is the steep increase of engagement on part of the public prosecutor for four years in a row and 15,789 in 2014, which, at first sight is a good one (p.20). At the same time, the number of concluded court cases is very low and not too often a case is concluded by sentencing and penalties: In 2014, only 404 cases ended that way, a mere 3% (p. 21).

In the Financial Intelligence Units annual report of (2013a), those trends are explained with the fact that the number of STRs may be rising, that, however, at the same time the quality of reports is decreasing, i.e. there is an increasing willingness to report, but a lack of knowledge what exactly qualifies as suspicious transaction. To this contributes:

- the level of suspicion has been lowered from "Verdachtsanzeige" zu "Verdachtsmeldung" (p. 15).
- Among STRs the numbers of persons with unknown nationality as well as corporations with unknown business seat have increased so that they make up almost half of STRs within their respective categories. Of 34,502 suspects, the nationality of 13,700 persons was unknown, which amounts to a share of 40% (p. 16). Clearly, those reports are difficult to follow up.
- The phenomenon of the "financial agent" needs plays an increasing role. Those are private persons who are willing to enable third parties to use their accounts in return for the payment of a fee or otherwise lucrative compensation. Those persons normally have no idea who those persons are to whom they offer their account and what kind of businesses they might support.[104] In 2014, however, the importance of the financial agent was on the decrease, whereas transactions without financial agents were on the increase (Financial Intelligence Unit, 2014, p. 12)

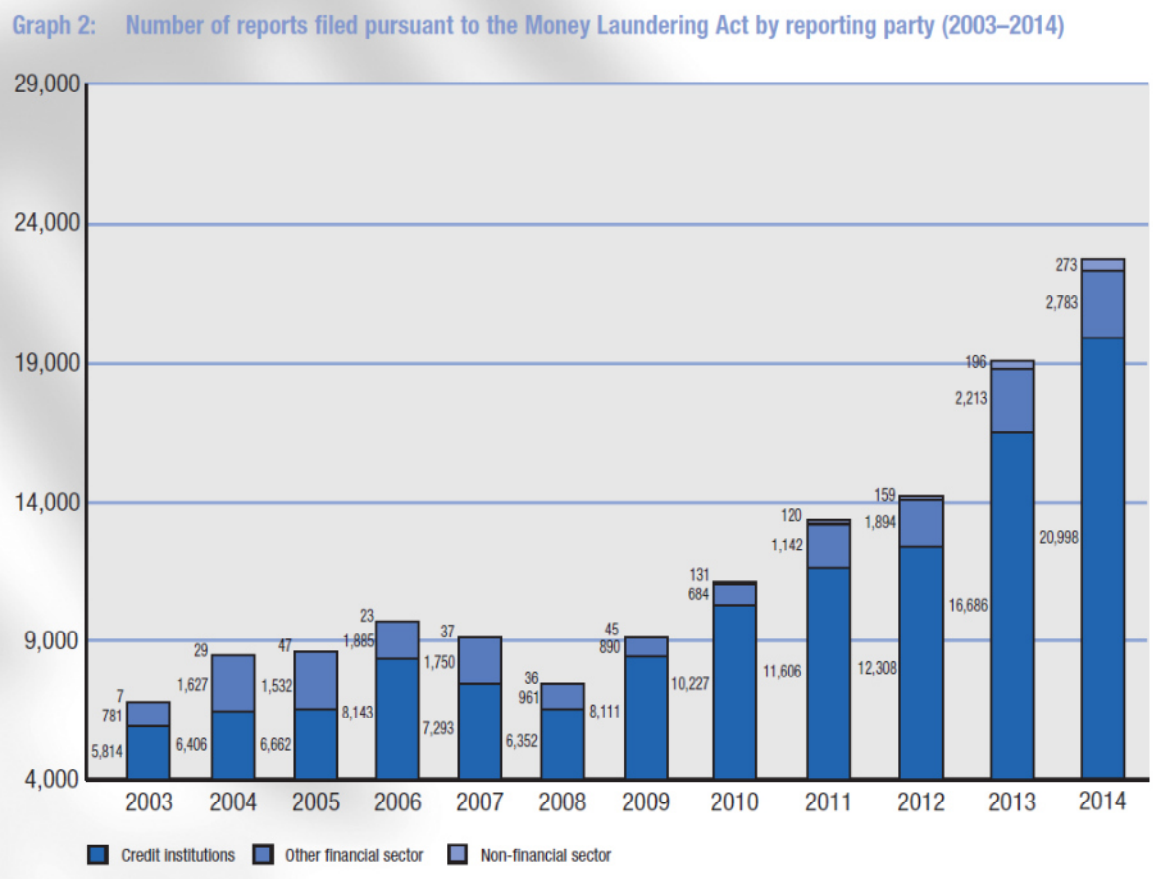
5.2.3.2 Suspicious Transaction Reports by financial institutions

With 87% (87%) of the suspicious transaction reports, most of the STRs were filed by the credit institutions this year again. Their number amounts to 20,998 (16,686). The savings banks sector recorded the largest rise with 36% (29%). Compared to the previous reporting year, the credit banks filed 26% (49%) more suspicious transaction reports. In contrast, the credit institutions organised on a co-operative basis recorded an increase of only about 15% (18%). As for the rest of the "financial sector", 2,783 suspicious transaction reports (2,213)

[104] Regarding financial agents see http://www.handelsblatt.com/finanzen/steuern-recht/steuern/bka-zahlen-finanzagenten-lassen-sich-mit-provisionen-locken/7317950-2.html

were recorded in the reporting period which results in an increase of 26% (17%). The financial services providers make up the biggest proportion with 1,861 suspicious transaction reports (1,463) and a resulting increase rate of 27% (13%). (Financial Intelligence Unit, 2014, p. 9)

Graphic 10 Number of reports filed due to the Money Laundering Act by reporting paty (2003-2014)



Source 5(Financial Intelligence Unit, 2014, p. 11)

If one has a closer look at the kinds of banks it is interesting to see that the largest number of reports comes from Saving banks, i.e. those institutions who best know their customers. On the whole the list of reporting parties looks as follows (p.10):

Table 7 Number of reports pursuant to the Money laundering Act by reporting party, 2013+2014

Table 1: Number of reports filed pursuant to the Money Laundering Act by reporting party

		2014	2013
Credit institutions	Credit banks	6,876	5,451
	Saving banks (Sparkassen and Landesbanken)	8,444	6,200
	Credit unions and co-operatives	3,678	3,194
	Deutsche Bundesbank and main branches	27	14
	Other	1,973	1,827
	Total	20,998	16,686
Insurance companies		142	125
Financial services providers		1,861	1,463
Financial enterprises		307	293
Authorities (Sec. 14 and 16 of the MLA)		473	332
	Total	2,783	2,213
Parties required to report (Sec. 2(1) no 7–13 of the MLA)	Lawyers	23	10
	Legal advisors (chamber)	0	0
	Patent attorneys	0	1
	Notaries	1	1
	Debt-collection companies, asset managers	1	0
	Auditors	4	1
	Certified accountants	0	0
	Tax consultants	7	3
	Agents in tax matters	0	0
	Trustees, service providers for companies	0	1
	Real estate agents	18	14
	Casinos	42	32
	Operators and brokers of online gambling	0	0
	Persons who deal in goods	149	100
	Total	245	163
Other reports filed pursuant to the Money Laundering Act		28	33
Totale		**24,054**	**19,095**

There seems to be some increasing effort in training and sensitizing employees and staff, and probably the BAFIN as supervisory authority is doing its job as good as possible. **But even then, management consulting agencies such as BearingPoint admit that banks do not enough to check due to the lack of resources and unwillingness to invest in that area**.[105]

[105] ‘„Fehlende Ressourcen und Investitionsbereitschaft führen dazu, dass die meisten Banken trotz gestiegener gesetzlicher Vorschriften nur einen begrenzt wirksamen Schutz vor Betrug, Geldwäsche, Terrorismusfinanzierung und daraus resultierenden Image- und Vermögensschäden vorweisen können“, so Oliver Engelbrecht, verantwortlicher Partner für Compliance im Bereich Financial Services bei BearingPoint.‘‘. Retrieved from http://www.bearingpoint.com/de-de/7-7389/geldwaesche-und-betrugsbekaempfung-bleibt-herausforderung-fuer-banken/

5.2.3.3 Suspicious Transaction Reports DNFBPs

A major problem in the field of reporting is the low turnout by DNFBPs (Designated Non-Financial Businesses and Professions):

> The "non-financial sector" filed 245 (163) STRs in the reporting year and recorded the largest rise with 50% (27%) compared to the figures of the previous year; however, this is still a very low absolute level. Within this group of parties required to report, the lawyers filed 23 (10) suspicious transaction reports and thus more than doubled the number in comparison to the previous year. They exceed the level reached in 2012 when 20 suspicious transaction reports had been filed. The "persons commercially trading in goods" filed 149 (100) suspicious transaction reports in the period under review, thus achieving an increase rate of 49%. As regards these high mathematical increase rates, it has to be considered, however, that – as before – only 1% (0.9%) of the suspicious transaction reports are filed by the "non-financial sector" although the parties required to report in this sector are much stronger in terms of numbers than those belonging to the "financial sector". (Financial Intelligence Unit, 2014, p. 9)

The weak reporting by the DNFBPs is one of the largest weaknesses of anti money-laundering provisions according to conversation partners, but also the FATF (see 5.4.3.1).

One of the reasons why this sector provides so few STRs lies in the structures in place for training, supervision and enforcement: While the financial sector is supervised at least to some extent by the Bafin, responsibility for supervising the DNFBP is with the German states and differs from state to state. Auch die Anwendungsvorschriften für die Geldwäscheprävention variieren (Meinzer 2015a, p. 96). Here, each German states varies and puts different emphases into place.

When looking at the website of the relevant Bavarian authority, the magnitude of "soft" formulation such as "may", "should", "is recommended" "when requested" hits the eye:

> The so-called non-financial sector and certain financial firms are under regional authorities' supervision (§16, 2(9) GwG). The controlling authority's task is to secure the compliance of legal requirements according to the law of money laundering (GwG) by the obligated party especially regarding the due diligence. Partially, due diligence has to be adhered to by the obligated firms towards all customers. Therefore, they can also affect normal citizens and consumers. The law of money laundering obliges customers to identify themselves upon request and in case let their ID be photocopied. Additionally, further information, like about economic beneficiaries can be prompted. For documentation purposes of the collected information, the obligated persons are recommended to use the form provided as download. In Bavaria, the focal governments of Mittelfranken and Niederbayern are in charge according to §1 GwGZustV.[106]

[106] Der sogenannte Nichtfinanzsektor und bestimmte Finanzunternehmen stehen unter der Aufsicht von Landesbehörden (§ 16 Abs. 2 Nr. 9 GwG). … Die Aufgabe der Aufsichtsbehörden besteht darin, die Einhaltung der gesetzlichen Anforderungen nach dem Geldwäschegesetz (GwG) durch die Verpflichteten insbesondere hinsichtlich der Sorgfaltspflichten sicherzustellen.

Die Sorgfaltspflichten sind zum Teil von den verpflichteten Unternehmen pauschal gegenüber allen Kunden einzuhalten. Daher können sie auch Auswirkungen auf den normalen Bürger und Konsumenten haben. Das Geldwäschegesetz verpflichtet die Kunden sich auf Nachfrage zu identifizieren und ggf. eine Ausweiskopie fertigen zu lassen. Auch können weitere Informationen z.B. zum wirtschaftlich Berechtigten abgefragt werden.

Zur Dokumentation der erhobenen Informationen wird den Verpflichteten die Verwendung des unter "Formulare" zum Herunterladen eingestellten Dokumentationsbogens empfohlen.

The task of those authorities is to do to DNFBPs that which is BAFIN doing towards the financial sector: Training, sensitizing and supervising. The level of staffing for those jobs is, however, far too low (see below, 5.2.3.5).

This observation is also shared by conversation partner of this research project: Both those working at the Bavarian State Crime Agency as well as the Nuremberg police department confirm that also in Bavaria the overwhelming reporting is done by financial institutions, but not real estate agents, tax lawyer and advisors and other counselors in financial affairs.

DNFBPs are in charge of a wide range of businesses which can be used for money laundering: Meinzer (2015a, p. 67) reports the example of Kusch Yacht, a German company commissioned to design a yacht for Teodorin Obiang, son of the Equatorial Guinee president Teodoro Obiang, amounting to USD 380 million – totally oblivious that a person earning on paper just about USD 6800 per months would probably offend against money laundering regulations and yet there was no report of this commission.

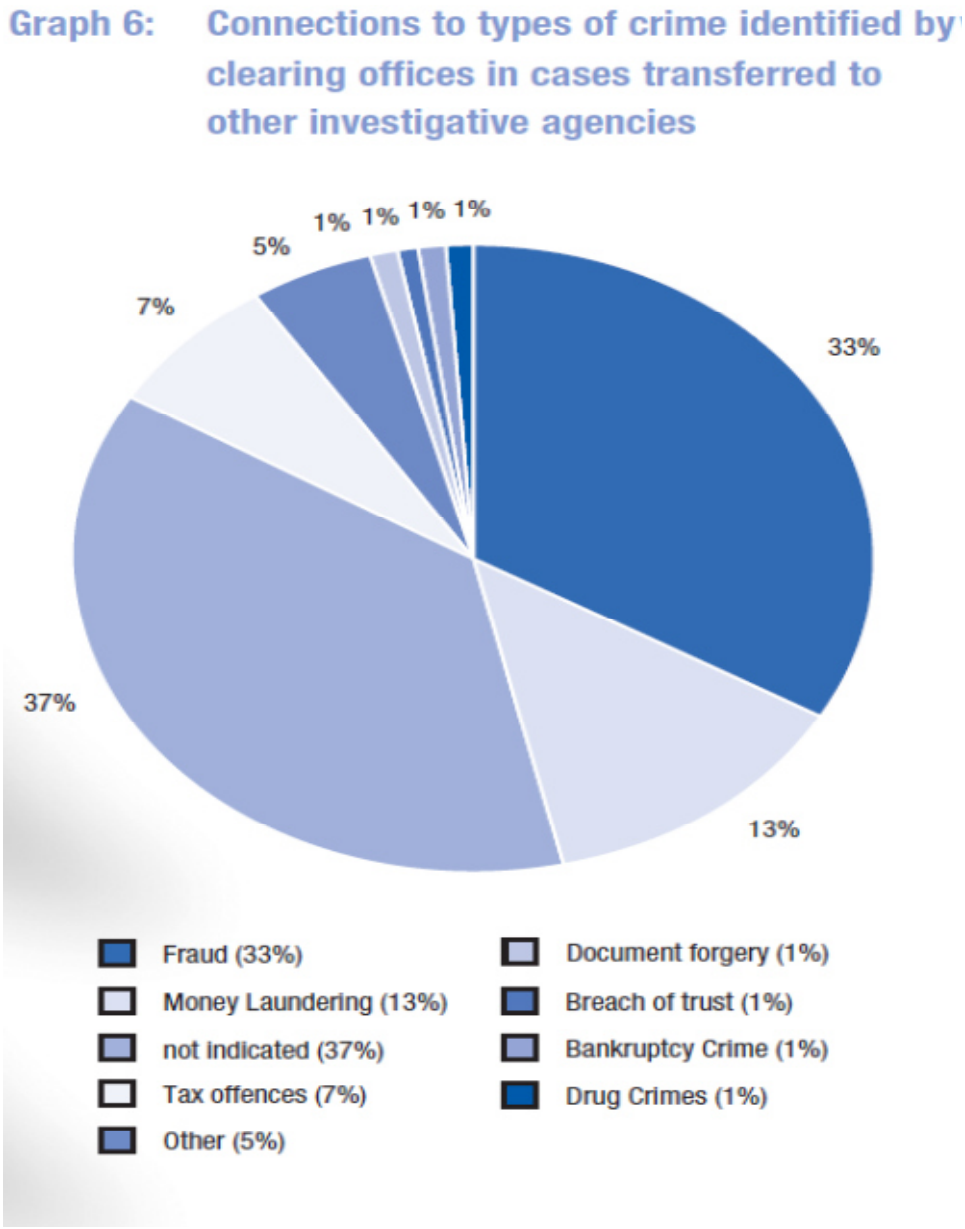
A particular sensitive area here is real estate (Meinzer 2015a, 95ff.) – see below 5.2.7:

5.2.3.4 Criminal offences underlying STRs nationally

STRs only indicate that something suspicious might take place. It is task of the investigating authorities to identify that which underlies the STR. Here, regarding Germany, the finding is as follows (Financial Intelligence Unit, 2014, p. 17)

Im Freistaat Bayern sind nach § 1 GwGZustV die Schwerpunktregierungen Mittelfranken und Niederbayern zuständig. Website “Geldwäsche, Aufsicht“ Retrieved 24 May 2016 from https://www.freistaat.bayern/dokumente/leistung/823087616506

Graphic 11Connections to types of crime identified by clearing offices in cases transferred to other investigative agencies



The interesting fact is that only 7% (2013: 4%) of all STRs could be linked to tax offences, of which tax evasion probably was one element. Some more cases could probably added from the VAT-Missing Trader Fraud.

The low share of tax related offences is also reflected in the low share of STRs assigned to tax authorities by the State Clearing Offices to follow up: In 2014, these were 8% of all forwarded cases, whereas police departments were assigned 46% of all cases (p.16).

5.2.3.5 Differences between German states

If one looks how the overall reporting breaks down to country level, the following emerges:

Table 8 STRs filed in individual German states

STRs filed in individual states			
State	2006	2007	2008
Baden-Württemberg	1 109	934	790
Bavaria	2 164	2 039	1 518
Berlin	573	698	554
Brandenburg	198	234	138
Bremen	131	96	122
Hamburg	420	343	285
Hesse	1 074	930	706
Mecklenburg Western Pomerania	98	104	89
Lower Saxony	747	692	658
North-Rhine Westphalia	2 142	1 760	1 553
Rhineland-Palatinate	339	294	222
Saarland	91	108	64
Saxony	298	370	178
Saxony-Anhalt	171	132	105
Schleswig-Holstein	336	221	250
Thuringia	160	125	117
Total	10 051	9 080	7 349

(Financial Action Task Force, 2010, p. 172f.)

This demonstrates that Bavaria, together with North Rhine Westphalia, is by far the origin of most STRs. The high number may have many reasons: The size and attractiveness of the financial sector for handling requests or the training of banking officials.

According to the FATF, a major problem is the lacking participation of German DNFBPs in combating money laundering related offences, among which are Casinos, real estate agents and tax advisors. While financial institutions are supervised by federal bodies, e.g. the BAFIN, responsibility with those groups rests with the Länder.

One of the complaints of FATF is that the Länder do not employ adequate staff to supervise the DNFBP professional groups: Even though they have right to request documents and to do on-site visits, there are in particular deficits in the area of checking real estate agents and dealer in precious stones (Financial Action Task Force, 2014, p. 33). According to FATF, the employment of that staff by the relevant Länder is as follows:

Table 9 Staff employed to combat money laundering by DNFBPs by different German states

	2009	2010	2011	2012	2013
Brandenburg					2.2
Baden-Württemberg		2	8	8	8
Bavaria				2	2
Berlin			2	2	2
Bremen				0.7	0.25
Hesse	0.2	1.8	1.6	3.85	4.1
Hamburg			2	2	2
Mecklenburg-Western Pomerania		0.2	2	1.6	1.7
Lower Saxony			3.35	5.17	6.5
North Rhine-Westphalia				n/a	n/a
Rhineland-Palatinate		0.45	1.08	8.87	9.6
Saxony-Anhalt				2	1.4
Schleswig-Holstein					2
Saarland				1.3	2.3
Saxony				1	2
Thuringia		1	2	2	2
Total	**0.2**	**5.45**	**22.03**	**40.49**	**48.05**

Source 6 (Financial Action Task Force, 2014, p. 34)

Here, of course, one may argue that the states task is not to do the job itself, but to inform, train and sensitize relevant professional groups to do that job. Here, however, the same deficit of personnel can be stated: Here Bavaria employs in 2013 one (1) full time person and none before.

Table 10 Staff employed to educate and sensitize DNFBPs to money laundering risks

	2009	2010	2011	2012	2013
Brandenburg					
Baden-Württemberg		13	36	17	6
Bavaria					1
Berlin			3	3	2
Bremen					
Hesse				3	
Hamburg					
Mecklenburg-Western Pomerania					
Lower Saxony			7	25	16
North Rhine-Westphalia					
Rhineland-Palatinate			3	25	26
Saxony-Anhalt					1
Schleswig-Holstein			1	1	1
Saarland				1	4
Saxony					
Thuringia				2	1
Total	**0**	**13**	**50**	**77**	**58**

Source 7 (Financial Action Task Force, 2014, p. 35)

It can be assumed that the same lack of supervision applies to other relevant professional groups, tax advisors included. The FATF pretty acidly states as well that even though these figures demonstrate improvement,

> it should be noted that the numbers of employees vary considerably from one Land to another, and, more importantly, do not seem to correspond to the levels of economic activity in each of them (for instance, it is difficult to imagine that the real estate market would be bigger in Saarland than in Bavaria). Moreover, the relatively low number or absence of training events in some important Länder (such as Bavaria, North Rhine-Westphalia, Hesse) raises concerns as to the real capacity of the authorities to exercise their supervisory functions in practice. (Financial Action Task Force, 2014, p. 35)

An additional deficit, FATF states, is that professional chambers for lawyers, attorneys and tax advisors have no power 'to conduct routine compliance monitoring' for their members (Financial Action Task Force, 2014, p. 36)

As example see below, 5.2.7

5.2.4 Example Cash Transfers

Difficult to trace are cash transfers outside the formal financial system, e.g. for payments in the → informal economy.

In 2012 German Customs registered ca. 34,000 cases declared cash imports of 56 Billion Euro – it can only be guessed how much has been smuggled into the country without declaration. Due to the freedom to travel, especially within the Schengen Area, only random checks are permitted to police within close proximity of nation borders. At the German-Swiss Border, Customs discovered 20 Million non-declared Euros alone, at Frankfurt Airport legal

proceedings were initiated regarding the non-declared import of 55 Million Euro. (Henn, Meinzer, & Mewes, 2013, p. 6)

The official Customs statistics records the following for 2013-2015. Of the conversation partner, nobody wanted to give an explanation for the exceedingly high seizure of cash in 2013. Hence the guess is that it has to do with repatriating efforts of citizens at times of increasing data-leaks and the negotiations of the German-Swiss Tax Agreement, which eventually was not put into practice.

Table 11 Statistics regarding uncovered cross-border cash flows

Überwachung des grenzüberschreitenden Bargeld- und Barmittelverkehrs			
	2013	2014	2015
Vorläufig sichergestellte Zahlungsmittel (in Mio. €)	573,0	6,5	8,5
Bußgeldbescheide	3.287	2.997	2.518
Festgesetzte Bußgelder (in Mio. €)	9,9	8,4	5,9

Source 8 (Zollverwaltung, 2016a)

For the EU context it is obvious that we are talking about a lot of money. An excerpt from a EU statistics reveals the following

Table 12 Cash seizure by customs at external borders

Table 3: Number of incorrect cash declarations or findings as a result of customs controls in the EU at external borders

	2007*				2008			
	on entering the EU	on leaving the EU	Total number	Amount (EUR million)	on entering the EU	on leaving the EU	Total number	Amount (EUR million)
Belgium	18	12	30	2.62	5	1	6	0.14
Bulgaria	2	8	10	1.97	3	26	29	2.75
Czech Republic	1	0	1	0.02	1	0	1	0.01
Denmark	0	43	43	1.66	1	134	135	3.85
Germany	432	214	646	23.88	1 680	1 050	2 730	930.20
Estonia	2	1	3	0.06	1	0	1	0.01
Ireland	2	0	2	0.05	1	8	9	0.17
Greece	:	:	:	:	2	6	8	0.93
Spain	4	96	100	10.36	21	236	257	18.35
France	92	53	145	4.90	1 018	559	1 577	185.27
Italy	:	:	:	:	534	581	1 115	245.91
Cyprus	8	3	11	0.19	6	12	18	0.58
Latvia	2	0	2	0.07	2	0	2	0.87
Lithuania	0	1	1	0.02	0	1	1	0.00
Luxembourg	0	0	0	0.00	0	0	0	0.00

Source 9 (Tavares, Thomas, & Roudaut, 2010, p. 34)

Surprising is the steep rise of findings for Germany from EUR 23.88 million in 2007 to EUR 930.2 million in 2008.

5.2.5 Example PEPs

Meinzer 2015a: 61ff: There are indications that banks are not really enthusiastic about checking accounts and account owner. BAFIN detected many drawbacks which are

subsequently corrected, i.e. damage has often already been done. The fact that no penalty is imposed is commented by Meinzer: “The car thief is not punished because he is giving back the car after detection.” Or: A discovered bank employee is dismissed or moved.

Meinzer (2015a, pp. 69ff.) records long lists of African ruler who used Germany for depositing money and where it is not really clear whether the distinction between public and private funds, money earned and money from crimes such as corruption has been carefully examined: Ben-Ali (Tunesia), Mubarak, Abacha (Nigeria), Mobutu Gaddafi, Obiang (Equatorial Guinee), Paul Biya (Cameroon). ‘To date, it seems to be current and from BAFIN approved method to trace a money laundering suspicion from politicians’ accounts or transactions at the earliest when these are already put on international sanctions lists.[107] Referring to the study by BearingPoint (see above, 5.2.3.2), he criticizes that in 35% of all cases banks do not inquire into the origin of wealth assets, if there are justified suspicions that the assets are in no relation to regular income.

5.2.6 Example self-laundering of money

Self-laundering of money in Germany is not yet punishable.

> Whoever participated in illegal provisioning of money and incurred a penalty with it, will not be further prosecuted because of money laundering. According to a “Wirtschaftswoche” report, the OECD is threatening to transfer Germany into the tightened supervision mode or even into the listing mode of high-risk countries if it cannot prove any concrete steps towards intensification of the combat against money laundering. The fact that so-called self-laundering money is not punishable is particularly advantageous for the Italian mafia. However, the PanamaPapers also reveal that there still exist big problems which are unsolved. The law against self-laundering money is on its way but not decided yet.[108]

A law against those practices is on its way, but has not yet been concluded.

5.2.7 Example Real Estate sector

A special study of the Financial Intelligence Unit deals specifically with money laundering in the Real Estate Sector and the deficits arising. What makes it attractive is that large wealth assets can be transferred and ownership can be hidden via Offshore constructions.

> The number of notifications of suspicion from the real estate industry is rather low. In 2010, only 292 notifications of suspicion with reference to real estates were yielded among a real estate transaction volume of around 22 billion Euro and the total number of 11.042 notifications of suspicion which suggests the existence of a dark figure. [109]

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[107] ‘Bisher scheint es jedenfalls gängige und von der Bafin abgesegnete Praxis zu sein, frühestens dann bei den Konten oder Transaktionen von Politikern… einem Geldwäscheverdacht nachzugehen, wenn diese bereits auf internationalen Sanktionslisten stehen‘. Meinzer 2015a, 73f.

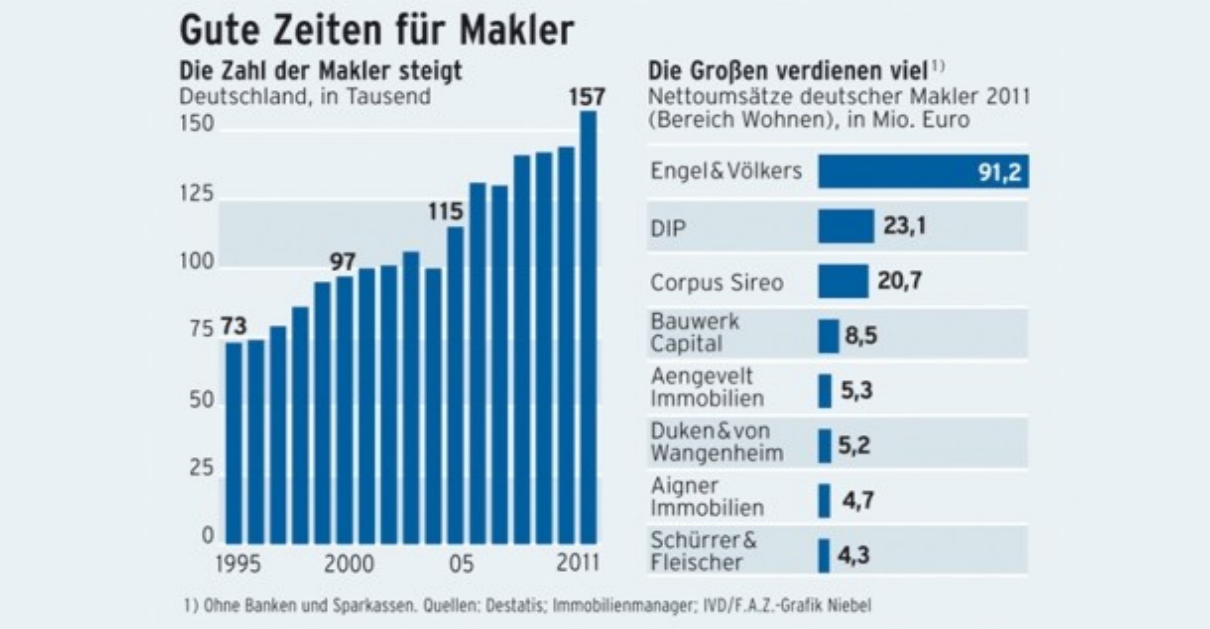
[108] Wer selbst an der illegalen Beschaffung des Geldes beteiligt war und sich damit strafbar gemacht hat, wird wegen der Geldwäsche nicht weiter belangt. Die OECD droht nach einem Bericht der "Wirtschaftswoche" damit, Deutschland in das verschärfte Überwachungsverfahren oder sogar in das für Hochrisiko-Länder geltende Listungsverfahren zu überfahren, wenn es bis Juni 2014 keine konkreten Schritte zur Verschärfung des Kampfes gegen Geldwäsche vorweisen könne. Dass die sogenannte Eigengeldwäsche nicht strafbar sei, nutze nach Einschätzung eines Experten insbesondere die italienische Mafia Bundesregierung will Kampf gegen Geldwäsche verschärfen (2014April 27). In: RP Online. Retrieved from http://www.rp-online.de/politik/deutschland/bundesregierung-will-kampf-gegen-geldwaesche-verschaerfen-aid-1.4200934

[109] Die Anzahl der Verdachtsanzeigen//Verdachtsmeldungen aus dem Immobiliensektor (ist) als eher gering zu bezeichnen. So wurden im Jahr 2010 bei einem Immobilien-Transaktionsvolumen in Höhe von rund 22 Mrd. Euro und einer Gesamtzahl von 11.042 Verdachtsanzeigen/Verdachtsmeldungen nur 292

5.2.7.1 Acquiring objects

Money laundering in the real estate sector is easy. It starts by finding a real estate agent who does not ask too many questions and is happy with cash payments. In Germany and especially Bavaria with its attractive booming real estate markets around Munich, money laundering via real estate purchasing is an attractive option. Here, in 2011 already, 157,000 real estate agents are active, other related professional groups not counted, tendency rising.

Graphic 12Real Estate Agents in Germany[110]



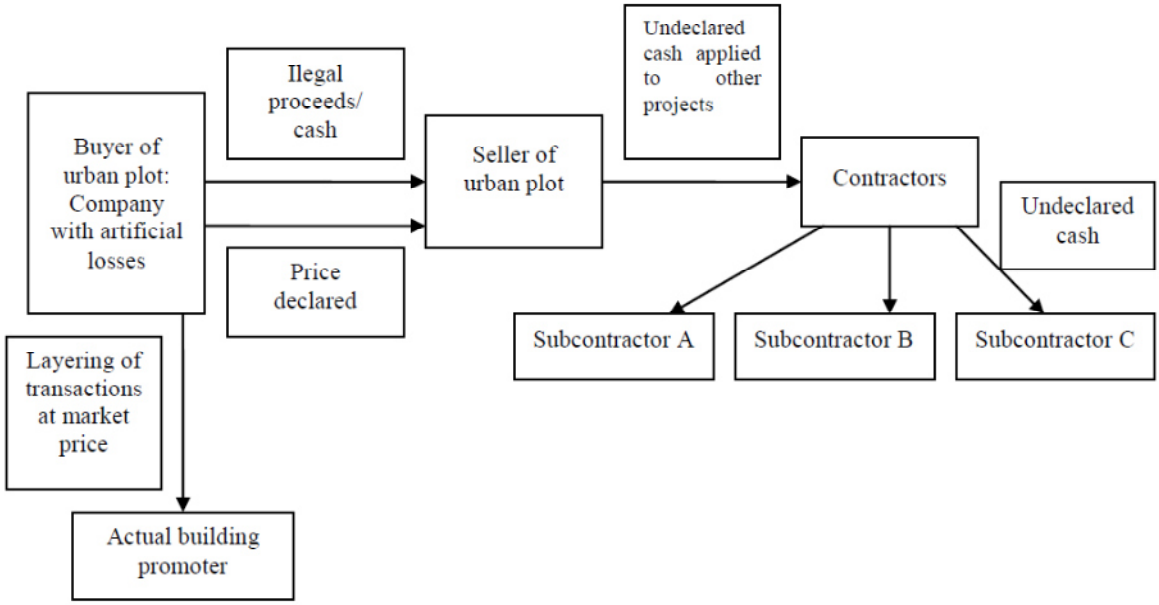
OECDs Centre for Tax Policy and Administration publications are explicit about the relationship between money laundering and tax related crimes in a publication REPORT ON TAX FRAUD AND MONEY LAUNDERING VULNERABILITIES INVOLVING THE REAL ESTATE SECTOR[111] which also gives examples how these crimes are conducted:

Verdachtsanzeigen/Verdachtsmeldungen mit Immobilienbezug (2,6 %) abgegeben, was eine hohe Dunkelziffer nahelegt. (Financial Intelligence Unit, 2013b, p. 3)

[110] Grafik aus: Scherff, D. (2013, April 29) Die neue Macht der Makler. In: FAZ. Retrieved from http://www.faz.net/aktuell/finanzen/meine-finanzen/wohnungsmarkt-die-neue-macht-der-makler-12164736.html

[111] http://www.oecd.org/tax/exchange-of-tax-information/42223621.pdf

Graphic 13 Money laundering in the real property sector



An even more detailed explanation about options to invest and hide money in the Real Estate area is given in (Financial Intelligence Unit, 2013b), including options arising from renting and letting.

5.2.7.2 Registering objects - no central ownership register[112]

Investment into German real property is very attractive for money launderer. Panama Papers reveal a number of constructs where unknown persons do their businesses, e.g. by buying real estate on which shopping centers are being built. The letter box companies and hence the supermarkets all belong to 93% to a British real estate investor, to 7% to another letter box company. These so-called share deals are commonly used. In Germany, one can save the real property transfer tax that way because is it not the property directly which is being sold but the company shares – an attractive tax loophole for large-scale investors which is being used with the help of letter box companies.

Similar tricks were applied in cases where villas changed ownership. Obviously, there is a registration of ownership in the Grundbuch at the local town hall. Whoever is in charge, however, is not equipped to sense whether money laundering is going on. And if they do it, they do not achieve a lot

> According to PanamaPapers, a Russian business manhas via a offshore-company several real estates in Wilhelmshaven and Bremerhaven. He is a man of straw for a Russian high-ranking financial manager who has best contacts to state-close corporations. The land register authority asks critically who is really behind the letter box company. But to trick the authority is routine for Mossacl Fonseca. A notary from Panama confirms the version of the man of straw and the land register authority is content. The letter box company is registered as owner and no more questions are asked. The high-ranked financial manager stays in the dark. [113]

[112] Brinkmann, B./Wormer, V. (2016, April 7) Der Dreck vor der Haustür. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/panama-papers-so-offshore-ist-deutschland-1.2936896

[113] Ein russischer Geschäftsmann hält laut den Panama Papers über eine Offshore-Gesellschaft mehrere Immobilien in Wilhelmshaven und Bremerhaven. Er tritt als Strohmann für einen russischen hochrangigen Finanzmanager auf, der beste Kontakte in staatsnahe Konzerne hat. Er wäre für einen Immobilienmakler ein so mächtiger Kunde, der russischen Politik so nahestehend, dass der Makler genau prüfen müsste, woher der Mann sein Geld hat. Doch sein Strohmann und Mossack Fonseca verhindern das. Das Grundbuchamt fragt zunächst

An advantage of money laundering is the following: The land charge register is not publicly available, not like in the UK. Besides, there are avoiding and obscuring strategies via share deals, i.e. real estate belong to a "property company" which in turn sells shares what again makes the owner anonymous. Real property transfer tax is evaded as the property company stays in possession of the real estate during the exchange of shares. In the UK, one can at least see how many letter box companies are real estate owners (see also Meinzer, 2015a, 95ff.)

Grundbucheinträge are secret, only those with "a justified interest". This makes it difficult even for investigators of the FIU.

5.2.7.3 Construction industry, (public) development projects

Another area for money laundering especially for Organized Crime Groups is construction and private and public development. Here the availability of cash provides many options for (fake) businesses which honest businesses do not have, e.g. lower calculations for wages and taxes, "subvention" of material (see GIE#). This destroys equal playing fields for competition and finally pushes honest businesses into bankruptcy. Of course, being invisible and inconspicuous and being well-connected with local and regional elites also helps to give and acquire favours. All this is part of the TOC strategy to not behave in a way that media and public wake up to the danger which its hidden presence in Germany represents for the common good (see also below 5.2.10).[114]

5.2.7.4 Size of the problems and checks

In an interview during the PanamaPapers Scandal John Christensen argued that Germany is one of the world's largest tax haven and risk state for money laundering because of options provided by the Real Estate Sector. If police wants to investigate, they have to visit individual offices which costs a lot of time. There is no overview about the size of the problem in Germany: In Berlin, e.g. 5000 accounts are known who pay real estate tax and whose owner are registered in Luxembourg, the Netherlands and other tax havens. Nothing is known about real owner behind those setups. [115]

Continuing on the table presented above (4.2.2), FATF acknowledged that DNFBP staff assigned by the German Länder was able to do 1691on-site checks at Real Estate Agents in 2013:

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kritisch nach. Es will wissen, wer wirklich hinter der Briefkastenfirma steht, die als Käufer eingetragen werden soll. Vorbildlich. Doch das Amt auszutricksen, ist ein Routinevorgang für Mossack Fonseca. Ein panamaischer Notar bestätigt die Version des Strohmanns und setzt sein Siegel auf das entsprechende Papier. Das reicht dem Grundbuchamt. Die Briefkastenfirma wird als Eigentümerin eingetragen - keine weiteren Fragen. Der hohe Finanzmanager bleibt im Dunklen.

[114] Mafia in Bayern – wenige kassieren, die Rechnung zahlen alle. (2011, March 24). In Bayerischer Rundfunk. Retrieved from http://www.br.de/nachrichten/mafia_bayern_folgen100.html

[115] Inseln werden romantisch verklärt (2016, April 5) In: SZ Papierausgabe, p. 18

Table 13 Overall number of on-site inspections of real-estate agents in Germany

Table 7. **Number of on-site inspections**

	2011	2012	2013
Real estate agents	206	466	1691
Traders in high-value goods	63	3549	1309

Source 10 (Financial Action Task Force, 2014, p. 36)

But: FATF put that also into context: 'Given the average of 260 working days in a calendar year an average employee would have the workload of an on-site visit every 2,5 working days.' (Financial Action Task Force, 2014, p. 36) and FATF is pretty open that in the breakdown to states it cannot be assumed that especially the staff in large states like Bavaria is living up to the challenge: 'for instance, it is difficult to imagine that the real estate market would be bigger in Saarland than in Bavaria.' (p. 35)

Breaking down the on-site inspections to individual states, Bavaria indeed is not presentable in comparison with other German states (Böcking & Stotz, 2016)[116]

Table 14 On-site inspections with real estate agents in Germany, sub-divided according to individual states

Bundesland	2011	2012	2013
Baden-Württemberg	230	72	21
Bayern	0	0	0
Berlin	0	55	1
Hessen			26
Hamburg		100	
Mecklenburg-Vorpommern			1818
Niedersachsen	0	50	150
Rheinland-Pfalz	0	551	973
Schleswig-Holstein	0	0	0
Sachsen	0	0	163

5.2.7.5 Conclusion

Given the staffing in the DNFBP and the number of on-site visits they are able in the area of real estate agents, it would take almost 93 years until every of the 157000 Real Estate Agents will be visited by an inspector. This quota is as bad as the likelihood of a visit for small and smallest businesses by tax auditors and gives a comfortable likelihood to get away with a lot before anything is being checked and discovered. Given also the experience with tax administration, there is little likelihood that business people refrain from lucrative and profitable deals if there is no real likelihood of checks and discoveries – even if they had some training in the issues involved.

Even a study commissioned by the BKA certifies that the real estate sector has a high susceptibility for money laundering and reminds the need for action.

> The initially mentioned and repeatedly set up hypothesis that the real estate sector is prone for money laundering activities was clearly confirmed by the study for the area of Germany. a result, the accounting firm Deloitte & Touch which was mandated to conduct the study sees as

[116] However: Giving no source for this data!

confirmed that the real-estate sector is specifically suited for money laundering. As main reasons were listed: the nature of the market, the missing sensitivity of market participants for money laundering issues, and a deficient regulation. The study's findings make clear that there is "urgent need for actions and that there are several directions for action. [117]

5.2.7.6 Solutions

More personnel, better coordination and communication among different agencies.

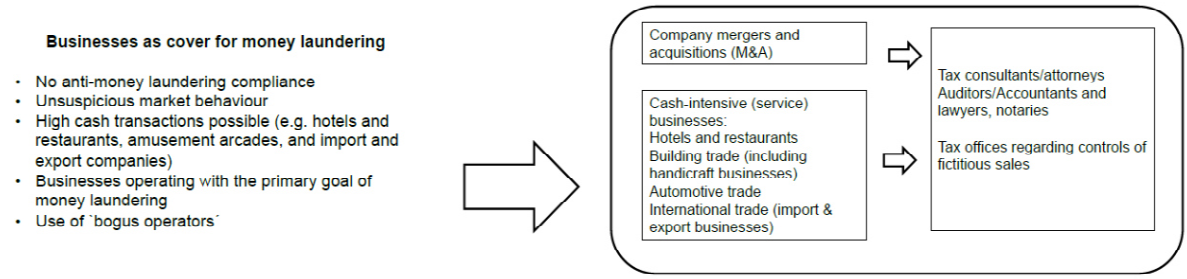
Germany could go ahead nationally, e.g. by requiring the revelation of beneficial ownership in case of the acquisition of real estate or as precondition for obtaining public commissions (öffentliche Aufträge) (Meinzer, 2016b)

John Christensen and also interviewees of this study are in favor of a central international register.[118]

5.2.8 Example small businesses

Obviously, also small and smallest businesses, e.g. restaurants, can be used for money laundering purposes. Given the frequency of checks by tax auditors for smallest and small businesses (up to once in 100 years or never, see GER/VI/4.3.3) whatever is hidden is pretty safe. See below investments into the famous Bavarian Pizzeria

Graphic 14 Money laundering by using small and medium businesses



Source 11 (Bussmann, 2015, p. 11)

5.2.9 Tax administration and money laundering

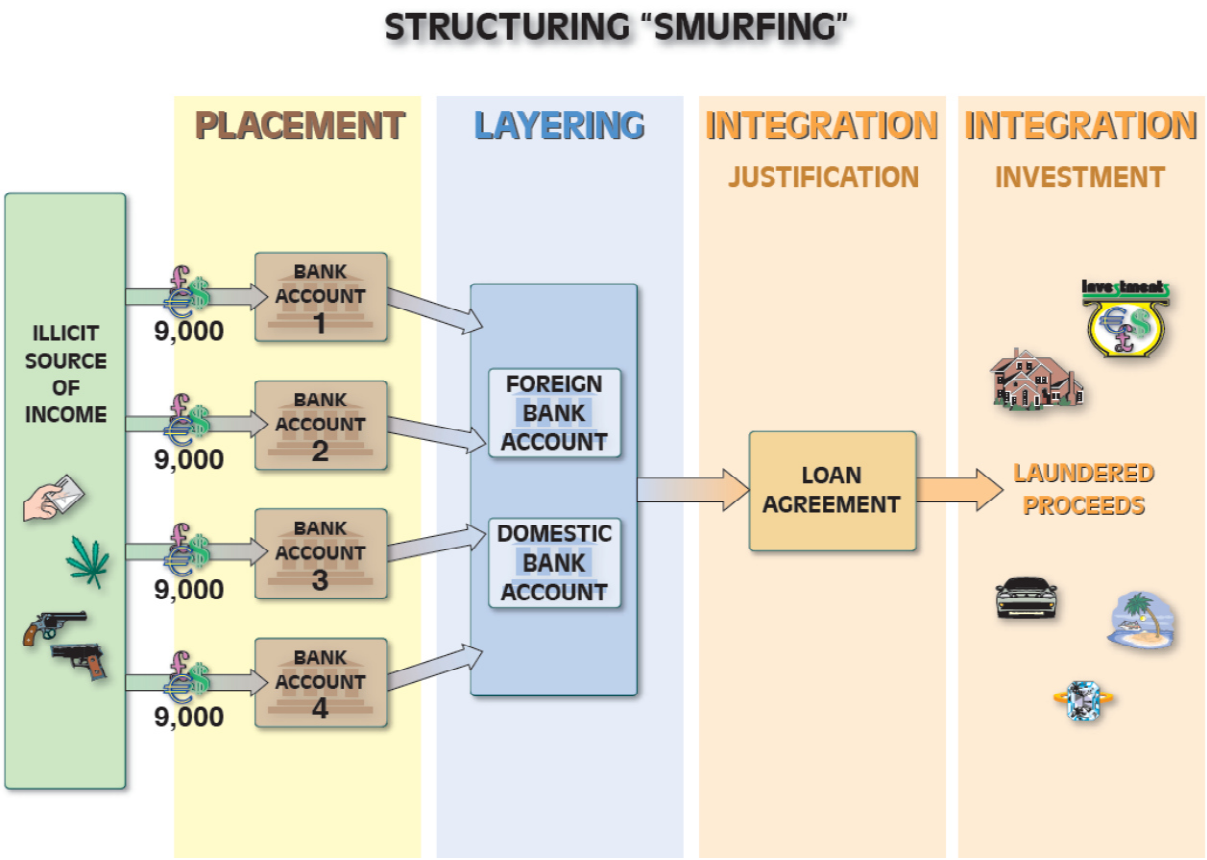
Tax authorities have a different legal basis for their reporting of suspicious transaction, namely § 31b of the Fiscal Code, which is why their reports are listed separately in STR statistics. Employees at tax administration are obliged to report any suspicion which indicates money laundering activities and the financing of terrorist acts. In this case, tax secrecy provisions in § 30 Fiscal Code are overridden by §31b Fiscal Code. Employees in almost all departments of tax administration are capable to discover suspicious transactions. It needs, however, some knowledge about typical constellations indicating money laundering activities which is why a number of handbooks were published on the international, national and

[117] Die eingangs aufgegriffene, immer wieder aufgestellte Behauptung, der Immobiliensektor sei anfällig für Geldwäscheaktivitäten, wurde durch die Studie für den Bereich Deutschland eindeutig bejaht. Als Ergebnis der Recherchen, der Umfrage und der Interviews sieht es die mit der Durchführung der Fachstudie beauftragte Wirtschaftsprüfungsgesellschaft Deloitte & Touche GmbH als bestätigt an, dass der Immobiliensektor in Deutschland besonders für Geldwäsche geeignet ist. Als Hauptgründe wurden die Beschaffenheit des Marktes, die mangelnde Sensibilität der Marktteilnehmer für die Geldwäscheproblematik sowie eine mangelnde Regulierung ausgemacht. Die Ergebnisse der Studie machen deutlich, dass es erheblichen Handlungsbedarf gibt und dass es dabei mehrere Handlungsrichtungen gibt. (Financial Intelligence Unit, 2013b, p. 15)

[118] Inseln werden romantisch verklärt (2016, April 5) In: SZ Papierausgabe, p. 18

regional level, for example (OECD-CTPA, 2009a). Those handbooks are clear and simple, containing even nice graphics such as the following regarding “Smurfing”, i.e. dividing large amounts of money into smaller ones in order to avoid obligation to declare the amount.

Graphic 15 Money laundering via "Smurfing"



For Germany, state tax administrations try themselves to sensitize their employees further and more detailed towards typical proceedings and typologies of suspicious constellations. For that purpose, special handouts and checklists exist. Since 2007, the tax auditing, tax fraud investigation, inheritance and gift tax, assessment department, real property transfer department and others (can) make use of the ‚Typologiepapier für die Finanzverwaltung zur Erstattung von Geldwäsche-Verdachtsanzeigen.‘ And indeed: tax records and accounts reveal all sorts of interesting details, e.g.

- Suspicious transaction (i.e. large payments without any recognizable delivery of goods or services – applying to private and corporate entities)
- Untypical spending on living standard regarding income
- Unusual acquisitions of real estate, real property, businesses
- Large cash payments
- Payments via Credit Cards, issued from banks located in tax havens

In the case of businesses, typical constellations are

- Untypical spending on imports or payments for exports
- Financial transaction untypical to the kind of business under examination
- Strange makeup of a company, e.g. no landline, only mobile phone
- Overprized “consultant fees” for advisors domestically and abroad
- Non-transparent ownerships of sub-contracting businesses

And, as already mentioned when it came to explaining the ordinary work of tax-fraud investigation: any observable discrepancies between declared income/turnover and life style of the individual or business owner is a further indicator.

Self-assessment of conversation partners, but also studies commissioned by the Federal Ministry of Finance come to the conclusion that tax administrations should and could do more to combat money laundering, e.g. by spending more time on businesses suspected to be set up primarily for money laundering purposes (Bussmann, 2015, p. 12).

In all cases, however, the question is once more: Is there an adequate number of adequately trained personnel which has adequate time to check on suspicious arrangements? Or is such needed examination made impossible due to the lack of personnel and time? After all, only if a well founded suspicion can arise in the first place, tax authorities are able to file a Suspicious Transaction Report to the relevant authorities. And: Even though tax administrations (the Bavarian administration included) are obliged to report money laundering and therefore circulate business areas in which the likelihood of money laundering is higher than elsewhere, it has not come to the attention of the researcher that this knowledge prompts specific checks in those sectors.

5.2.10 Bavaria

On Bavaria, a lot has been said already in the previous sub-chapters, e.g.
Covered above in 5.2.4 or 5.2.8
Here some more specific information obtained during interviews and afterward shall be presented:

5.2.10.1 Money laundering: Overview

In Bavaria, among the scarce official information available the reply of the Home Office to the inquiry of a State Parliament MP is a good starting point into the object matter (Bavarian Parliament Drs. 16/11763, 2012). Looking to the STRs from 2002-2010, the following statistics emerges:

> From 2002 to 201, the BLKA got 17.203 notifications of suspicion, thereof 14.610 referred to the banking sector and 2.593 to the non-banking sector. In total, 7.805 of the 17.203 notifications of suspicion were further prosecuted by special services. Underlying were in 6.143 cases the suspicion of § 261 StGB or a felony of § 261 StGB, in 961 cases the suspicion of other felonies, in 35 cases the suspicion of a relationship with a terroristic association, and in 666 cases the suspicion of a tax felony. [119]

This first confirms the discrepancy between the number of STRs reported by national banks/Financial institutions and DNFBPs. If one follows that which has been said in this information,

- The Ministry ducks the question aiming to learn more about critical sectors known for money laundering activities, namely real estate, insurance and lottery and

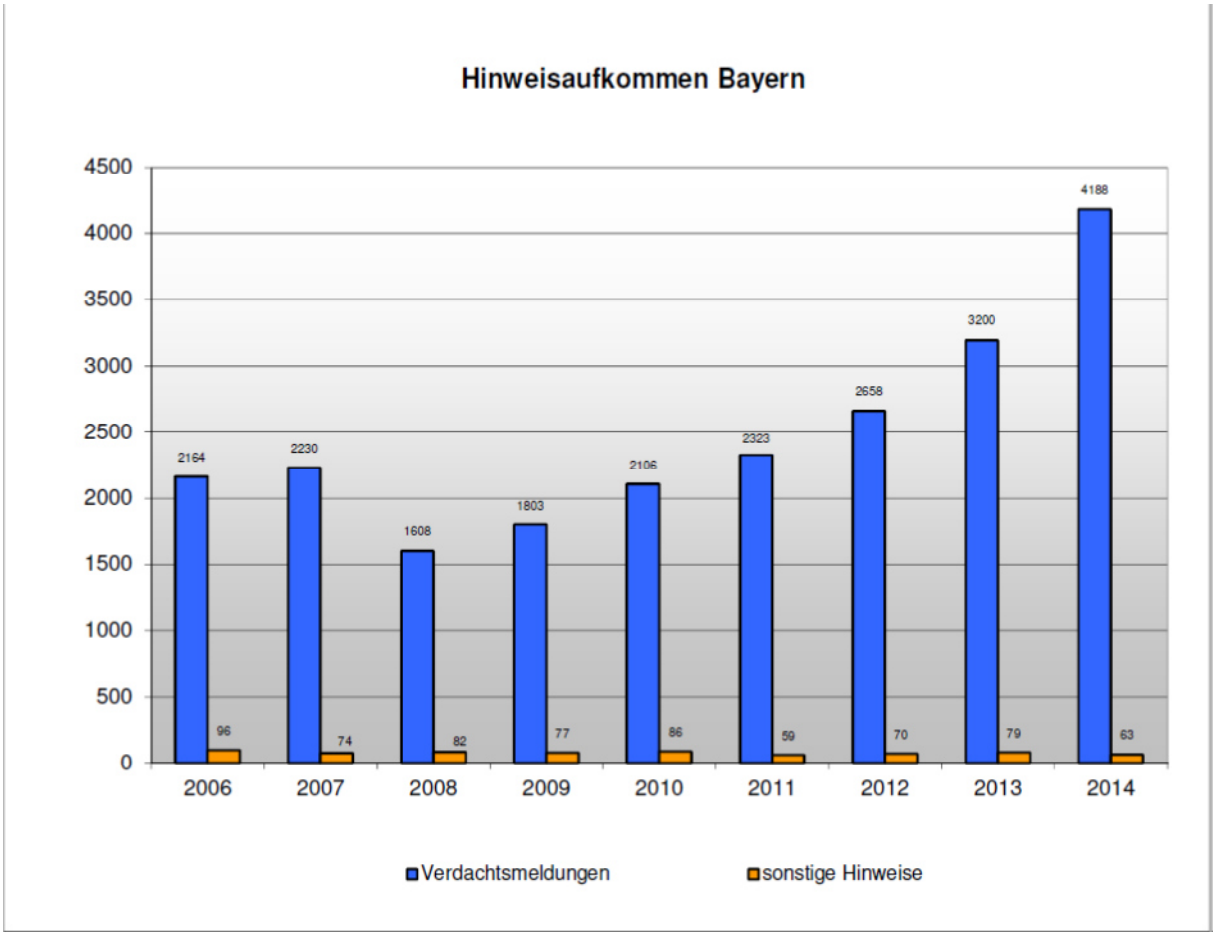
[119] Im Zeitraum von 2002 bis 2010 gingen beim BLKA nach den dort geführten Statistiken1 insgesamt 17.203 Verdachtsmeldungen ein. Auf den Bankenbereich entfielen in diesem Zeitraum 14.610 Verdachtsmeldungen, auf den Nichtbankenbereich insgesamt 2.593 Verdachtsmeldungen. Bei 7.805 der insgesamt 17.203 Verdachtsmeldungen wurden durch Fachdienststellen weitergehende Ermittlungen geführt. Zugrunde lag in 6.143 Fällen der Verdacht nach § 261 StGB oder einer in § 261 StGB genannten Straftat, in 961 Fällen der Verdacht anderer Straftaten, in 35 Fällen der Verdacht des Zusammenhangs mit einer terroristischen Vereinigung und in 666 Fällen der Verdacht einer Steuerstraftat.

gambling by saying that this is impossible without phrasing the question “more precisely”.

- The Ministry assert that there is adequate personnel in all responsible institutions
- The Ministry emphasizes the functioning cooperation and coordination between investigative and prosecuting authorities within and between German states and the federal institutions.

More currently, the Lagebild Finanzermittlung gives an update: STRs in Bavaria are on the increase, and only a tiny fraction, namely 63 as opposed to 4,188, come from tax public authorities, of those only 50 from tax administration, based on § 31b Fiscal Code:

Graphic 16 Development of STRs in Bavaria, pursuant Money Laundering Law and Fiscal Code



As in Germany as a whole, the large number comes from saving and cooperative banks, indications from DNFBPs are far too low considering their weight and role in the business:

Graphic 17 STR reports in Bavaria, subdivided to professional sectors and groups

Meldender	Anzahl der Meldungen		
Verdachtsmeldungen nach dem GwG (Ersthinweise)			***4.188***
Kreditinstitute		3.713	
private Geschäftsbanken	1.016		
Sparkassen einschließlich Girozentralen	1.354		
Genossenschaftsbanken einschließlich deren Zentralstellen	1.119		
Deutsche Postbank AG	135		
Bundesbank, Landeszentralbank	8		
sonstige	81		
Versicherungsunternehmen		27	
Lebensversicherungsverträge	15		
davon: Meldung durch Versicherungsmakler	1		
sonstige Versicherungsunternehmen	11		
davon: Meldung durch Versicherungsmakler			
Finanzdienstleistungsinstitute		240	
Finanztransfergeschäft	221		
sonstige	19		
Investmentaktiengesellschaften Finanzunternehmen		14	
Factoring	8		
Leasing	3		
Kreditkarten	3		
sonstige			
Spielbanken		2	
Behörden (§ 14, 16 GwG)		15	
Behörde im Sinne §§ 14, 16 GwG	6		
jeweils nach Bundesland zuständige Stelle	6		
mit der Kontrolle des grenzüberschr. Verkehrs betr. Behörden	3		
Andere Verpflichtete		177	
Rechtsanwälte			
Rechtsbeistände			
Patentanwälte			
Notare	1		
Wirtschaftsprüfer			
vereidigte Buchprüfer			
Steuerberater	3		
Steuerbevollmächtigte			
Immobilienmakler	6		
sonstige Gewerbetreibende (§ 2 Abs. 1 Nr. 13 GwG)	164		
Dienstleister für Gesellschaften und dgl. (§ 2 Abs. 1 Nr. 9 GwG)	3		
Andere Hinweise auf Geldwäsche (Ersthinweise)			***63***
Privatpersonen	11		
Zoll/BGS/Polizei-Bargeldkontrollen gem. §§ 12a, 12c ZollVG			
Finanzbehörden gem. § 31b AO	50		
inländische Strafverfolgungsbehörden	2		
ausländische Strafverfolgungsbehörden			
sonstige Behörden (nicht i.S.v. §§ 14, 16 GwG)			
Gesamtzahl der Ersthinweise			**4.251**

Source 12 (Gemeinsame Finanzermittlungsgruppe, 2015, p. 7)

Of all 4.251 STRs in Bavaria, clearing procedures recommended further investigations in 1,486 cases, which is 55% of all STRs. Those 1,486 cases can be sub-divided as follows:

- 872 cases re suspicion of money laundry according to § 261 StGB or re the suspicion of a therein mentioned delict,
- 423 cases re suspicion of another felony according to § 11,6 GwG,
- 6 cases re suspicion of terrorism financing and
- 185 cases re suspicion of tax evasion (§§370 ff. AO).

Interesting here is the increase in the taxation field:

- In 2013, only 17 (out of 3,279) were related to tax evasion, now 185 out of 4,251 (p.8).
- While the number of STRs originating with tax administration is 50, the number of tax related offences as predicate offence is 185, i.e. a much higher number.

Regarding the nationality of suspects, the number of Germans is 2,875, of non-Germans 2,276 and of unclear nationality 754, the latter being much lower than on the national level.

5.2.10.2 Money laundering & Organized Crime

The three major Mafia clans in Italy alone generate an annual turnover of EUR 120-180 billion, money, which needs to be laundered and entered into the formal financial system.[120]

Conversation partner from Bavarian Police forces, but also Laura Garavini, Italian MP and member of the Anti-Mafia Committee of the Italian Parliament, stated on the occasion of an expert hearing in the Bavarian Parliament that Bavaria is a preferred resting and "investment" area for Italian Mafia groups, especially for drug dealing and money laundering activities, e.g. in renewable energies. The hearing came to the conclusion that the cooperation between Bavarian and Italian authorities urgently needs to be improved. 'The globalization of crime needs to be countered by the globalization of the law', experts said.[121] Suspected or known areas for Mafia money laundering are, e.g., renewable energies, Italian Pizzeria Restaurants,[122] real estate or insurances.

Another example of money laundering has come to light via a large court proceeding in Reggio Emilia against 200 people belonging to the n'drangetha or cooperating with them. Here, the money laundering operation "Sistema Tedesco" was revealed via protocols of cell phone conversation: According to them, money is laundered via a transfer involving cheques and money automats whose withdrawals were allegedly used to buy cars. It involved Munich

[120] Mafia in Bayern: Die Arbeitsweise der N'Drangheta. (2011, March 14). In: Bayerischer Rundfunk. Retrieved 10 June 2015 from http://www.br.de/nachrichten/mafia_bayern_ndrangheta100.html

[121] Bayern ist eine Mafia Hochburg (2012, August 10). In: WAZ. Retrieved on 10 June 2015 from http://www.derwesten.de/politik/bayern-ist-eine-mafia-hochburg-id6969655.html

[122] Mafia in Bayern: Die Arbeitsweise der N'Drangheta. (2011, March 14). In: Bayerischer Rundfunk. Retrieved 10 June 2015 from http://www.br.de/nachrichten/mafia_bayern_ndrangheta100.html Der Windpark im Mafia-Land. (2012, November 3). Retrieved 10 June 2015 from http://www.rosenheim24.de/rosenheim/lk-rosenheim/lk-rosenheim/rosenheim-windpark-kalabrien-geldwaesche-projekt-mafia-rosenheim24-2595567.html Die Story: Vorsicht Mafia. (2014, April 4). In: WDR/Spiegel-TV. Retrieved from http://www.spiegel.tv/#/filme/wdr-die-story-vorsicht-mafia/

Banks and a tax consultant resident in Munich – only one Bank reported the suspicious transfer of 49.000 Euro.[123]

Links between Bavaria and Italy are centuries old, which is why also criminal links are solidly established and are, known or secretly, part of the Munich establishment and high society.[124] In general, cities with plenty of financial institutions and investment, such as Frankfurt and Munich, are favoured for Mafia groups since their activities do not really hit the eyes. Germany, and Bavaria, are sought areas for withdrawal and hiding, which is why Organized Crime intentionally tries to avoid suspicious behavior. Personnel from Mafia units has been withdrawn since 9/11 because then Islamic terrorism was in the focus. The Mafia killings in Duisburg 2007 were a turning point since Bavarian authorities realized that this also might happen in Munich or elsewhere in Bavaria. From then on, more personnel was assigned as well, also a Joint German Italian Police Task Force has been established. Assessing its efficiency, however, statements range from "remains to be seen" to "useless". 'We need cannons against Organized Crime', experts argue, 'instead we are equipped with water pistols.'[125]

After the wall came down in 1989, also Organized Crime groups from the East came into Germany and moved via East Germany into the lucrative and prosperous states Baden-Wuerttemberg and Bavaria.[126] A conversation partner from the police admits:

> Besides Italian mafia groups, we can find remarkable financial transfers especially from the former GUS-countries to Germany (partly via offshore areas – e.g., Cyprus and the British Virgin Islands). Often investments are in real estates. Focus is on Munich, Niederbayern and Unterfranken. These transactions are known via notifications of suspicion according to the money laundering law, but the unknown figures are probably large. But the actual conditions constrain the possibilities of detection.

5.2.10.3 Staffing and legal instruments

Given the low number of STRs from DNFBPs also in Bavaria and following the discussion of widespread tax-evasion, the Bavarian government established a continually strengthened a new specialist group "Sonderkommission schwerer Steuerbetrug", which emerged from the previous existing group on Money Laundering and Organized Crime (see GER/VI/4.3.6). And indeed: Given a recent information provided by the German Federal Government in 2018,[127] the Bavarians are indeed better equipped that all other German states with around 40 (Antwort 26). There are, however, still deficits also in Bavaria, especially in the area of DNFBPs: When looking at classical risk-professions such as Wirtschaftsprüfer (KPMG, PwC, EY…), Lawyers, notaries, casinos… the statistics does not record any on-site inspections in many years (annex 1).

But staffing is not everything, staff also needs competence to check which is not easy if some of the risk-professions are privileged with the right to remain silence or even the

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[123] Das „Sistema Tedesco" – deutsche Banken als Geldautomat für die Mafia (2017, February 16) http://mafianeindanke.de/das-sistema-tedesco-deutsche-banken-als-geldautomat-fuer-die-mafia/

[124] Mafia in Bayern – Wenige Kassieren, die Rechnung zahlen alle. (2011, March 24). In Bayerischer Rundfunk. Retrieved from http://www.br.de/nachrichten/mafia_bayern_folgen100.html

[125] Wie die Mafia nach Bayern kam. (2011, March 14). In: Bayerischer Rundfunk. Retrieved from http://www.br.de/nachrichten/mafia_bayern_geschichte100.html

[126] Russen-Mafia: Die neue Bedrohung aus dem Osten. In: Bayerischer Rundfunk. Retrieved from http://www.br.de/nachrichten/mafia_bayern_russenmafia100.html

[127] Antwort der Bundesregierung vom 15.8.2018 auf Anfrage von Fabio di Masi zu Geldwäsche-Aufsicht und Vollzug der Anti-Geldwäsche-Regelung http://dipbt.bundestag.de/doc/btd/19/038/1903818.pdf

obligation to protect their customers (see 5.9.4.2). And beyond: A conversation partner from among the tax consultants puts it as follows:

> In Bavaria, all notifications of suspicion of money laundry are investigates in Steufa-places. This work is done in the newly established special commission "heavy tax fraud". This department has no staffing problems as Söder massively invested. Our problem is that tax evasion is not a Vortat for money laundry and hence the investigation possibilities are restricted. This applies for whole Germany. But the departments of the attorney of law also have extreme staffing problems.

Accordingly, and not surprisingly, there is no noteworthy punishment, both in terms of finance and legal proceeding on record in the time covered by the Federal Governments Reply of 2018.

5.2.10.4 Discussion

Personnel is not everything. It is also about the instruments available for investigators and prosecutors:

According to Meinzer (2015a, pp. 97ff) organized crime has three combating problems. The first is deficient possibilities of skimming of excess profit: Even if the affiliation to a criminal organization can be verified, profit can only be skimmed if it can be proven that the profit was generated through concrete crimes. Reversal of evidence would be helpful. Cash-intense industries (e.g., restaurants, casinos, …) are often acquired by German men of straw. Meanwhile, the importance of organized crime drops whereas that of terrorism increases.

Since SKS is also in charge of financing of terrorism it can be guessed that other important investigative areas decline in importance.

5.2.11 Deficits in combating money laundering

5.2.11.1 General deficits, seen by FATF or NGOs

Mentioned already above in the context of tax evasion, the Financial Action Task Force Network has been set up by the OECD and IMF to coordinate the approach to money laundering offences. Here Germany was seen to be a country of risk and, following the 2010 Mutual Evaluation Reports findings, that German is non-compliant even in areas of Core and Key Recommendations, was placed under a regular follow-up process in order to monitor Germany's ability to improve on deficits regarding the implementation of the 40 FATF recommendations. With the third follow-up report (Financial Action Task Force, 2014) it was decided that Germanys efforts merit the removal of the country of the regular follow-up process and consider Germany to be an overall LC (Largely Compliant) country. This overall grading implies, however, that still a lot of things are deficient and needs improvement and/or that it is, due to the lack of data, difficult to see whether compliance actually exists. Some examples:

Regarding Recommendation 5, covering questions of beneficial ownership, the report says that Germany has addressed earlier deficits (pp.8ff.). However, when it comes to deficit 6 ("No clear evidence of the overall level of implementation due to relatively recent enactment of new obligations") one wonders where the optimism of the FATF originates that Germany is living up to its obligations. Even more since the question of "measuring" compliance, implementation and effectiveness is a problem throughout the report.

On p. 11 it states that a “low level of reporting suggests that not all aspects of the regime are working effectively”. The report brings a statistic provide by the German government with rising numbers of STRs, but the report reminds that ‘it should be noted that it is practically impossible to make any meaningful judgements about the effectiveness of the system without putting those figures in the context”, e.g. of the sum of all financial transactions which are done in Germany by financial institutions and other actors. If the latter is done one might realize that German reports are comparatively and surprisingly low.

Regarding DNFBPs the report notes that key-professions have a very wide understanding of professional secrecy (Berufsgeheimnis) ‘and there are strict conditions for obtaining or compelling information subject to it, which hinder the possibility for law enforcement authorities to locate and trance terrorist funds and other assets’ (p.16, a similar problem regarding other crimes of which tax evasion has to be included is treated on pp. 30ff.). This makes the FATF conclude that the problem of both participation of DNFBPs in uncovering money-laundering crimes has not addressed adequately in Germany, also due to the missing supervision and auditing function by German and professional authorities (pp. 16 & 30f.)

Overall one is surprised how often the fragmented administrative landscape in Germany is addressed as an obstacle to see and evaluate adequately whether Germany participates adequately in money laundering activities, even in activities as simple as the registration of STRs which can be registered both with federal and state authorities (pp. 23, 25, 27,31...). Here the FATF concedes that the government ‘made proposals to the Länder which were aimed at improving ...statistics. However, no information is available as to whether these efforts have led to any practical results.’ (p.26)

NGO experts argue that even the FATF recommendations are too weak when it comes to effectively countering money laundering crimes or terrorist financing.

NGOs are adamant that there are too many options for money laundering, and the problem on part of the authorities lies in definitions and resources. For example (Henn, Meinzer, & Mewes, 2013, p. 17ff.):

- Following money laundering legislation, not only banks and funds, but also lawyers, auditors, gambling houses, estate agents or tax consultants are obliged to report suspicious transactions, but to the present day not Hedge Funds or Real estate funds.
- When contracts are concluded, generally contracting parties need to be identified – except if one of the contracting parties is itself a legal (and not natural) person.
- Different from contracting parties, standards requiring the identification of the beneficial owner seem to be lower since no passport or ID card is regularly required.
- There are additional rules for “verstärkte Sorgfaltspflichten”, e.g. if a person is politically exposed or not present in person – but it seems to be up to the contracting partner whether they are bothered by such details or not.
- In the case of Treuhandschaften, there are open questions regarding the content of “Treuhänder” and from when on it is no longer permissible for a Treuhänder to conceal the beneficial owner.
- In the EU, the beneficial owner is considered to be the person who finally controls 25 % or more of a company or is beneficiary of 25 % or more of generated profits. But what about those of 24% or less?

- Finally: According to the laws, TNCs are in principle obliged to check all along their chain of subsidiaries that German standards are observed in states where they produce or trade, otherwise no business would be permitted. It can be doubted, however, whether this is the case (p.18f.).

The problem here, as always, seems to be with the resources available to check whether those being obliged to do this or that by law are actually complying. Here, the BAFIN is in charge to supervise institutions of the financial sector. It seems, however, that their efforts are very "economic", at times they even "outsource" their right to check to the "Big Four", who, of course, are in a conflict of interest: On the one hand they should advise companies on how to get profits away, on the other they are commissioned to check whether they implement regulations of anti-money laundering legislation (Henn, Meinzer, & Mewes, 2013, p. 19f.)

Even worse is the situation on the level of non-financial institutions, e.g. lawyers, notaries, real estate agents etc. Here, responsibility lies with the state or local level, where neither uniform nor effective supervision is available. A proposal by the German Council of States in 2012, to establish a national authority also for this category of transaction dealers, was rejected by the Federal government (→ why?)

5.2.11.2 Trusts and Transparency

A major deficit for channeling and hiding criminal proceeds is the continuing opacity of trusts, calling for more openness regarding beneficial ownership. Zusätzliches zu dem, was oben (etwa bei FATF 3.4.3.1) schon gesagt ist:

The collected data of company registers are not sufficient anymore in a globalized capital flows world to prevent malpractice of money laundry of dummy companies adequately (see Meinzer 2015a, p. 102).

And there is the legal option of 'property without owner' in the law of money laundering, §1, 6(2): Instead of a clearly entitled owner groups of recipients are named, such as discretionary trusts and foundations. This prevents that owners can be fiscally assigned and it is asserted that this assignment will happen in the future, while de facto payments are paid already now (via allocations or credits which are never being paid back) which are managed via secret supplemental agreements unknown to fiscal authorities. In Germany, there exist around 20.000 incorporated registered foundations and even more trust foundations. As foundation law is governed on German state level there is not even a central foundations register in Germany (Meinzer 2015a, pp. 63ff)

- Obligation to check beneficial ownership and control of assets by "natural persons" should begin with 10% and more, exceptions, e.g. in the case of TNCs controlled by shares, should be very limited. Henn/Meinzer/Mewes (p. 39ff.)
- A central register should contain information of beneficial ownership of assets Henn/Meinzer/Mewes (p. 39ff.)

5.2.11.3 Seizure of assets

Going back to what Meinzer pointed out as weakness in combating money laundering a the first is seizure of assets: In 2013, assets worth EUR 30.2 million were seized independent of specific proceedings (Financial Intelligence Unit, 2014, p. 22). How many more assets were seized after proceedings were terminated is difficult to assess. According to some, clearly, more assets could have been seized if the "Beweislastumkehr" would exist.

The original drafts and approaches of the EU guideline for securing and collecting of earnings from directives on the freezing and confiscation of instrumentalities and proceeds of crime were rather good, but were softened afterwards. But the member states can exceed these minimum standards:

> (22) With this guideline minimum rules are set. Member countries are free to arrange further warrants in their national laws, for example regarding their laws of evidence.

- Improve international cooperation and enable transnational freezing of assets Henn/Meinzer/Mewes (p. 39ff.)

In the words of a conversation partner at Federal Customs, the problem is as follows: According to the cash-DV, regarding carried money controls are the task of the customs administration. There are clear regulations in terms of controlling interrogations and the subsequent measures. In charge of such controls are the civil servants of the main tariff authorities. Due to separate authorities, checks and seizure are separate affairs.[128]

5.2.11.4 Reversal of burden of proof

No problem in all proceedings beneath the level of criminal proceedings. For the latter applies the presumption of innocence and authorities have to prove.

Regarding reversal of proof, others warn of making holes into legal standards and insist that existing legal options are adequate and are simply not exhausted because the lack of personnel. There is also a conflict of priorities on part of investigative and prosecuting authorities: If they succeed in uncovering the predicate deed (e.g. fraud) and obtain sentencing, they are happy. Even more since fraud receives a much higher punishment than money laundering. In this case they have no further interest to investigate where the money comes from or where it is hidden – they just leave it with that. A similar conflict in priorities as exists with the tax administration (see 5.9.7)

It is alright for tax law, but not for law regarding fiscal offences. Once more, conversation partners from police and customs summarized the problem:

> Given the case that I find 100.000 Euro hidden in a car that the driver did not declare. I can check that money at suspicion of money laundry, but not distrain. This would only be possible if I can prove that the money stems from a crime. But the driver does not say a word. A suggestion could be: Only to clarify what it is about the money, detached from a criminal proceeding. 'In order to keep the presumption of innocence, the money's forfeiture could be commanded, i.e. the state would get the money. This would be detached from the criminal proceedings against the one at whose place it was found.' [129]

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[128] Kontrollen nach der Bargeld/Barmittel-DV hinsichtlich mitgeführten Geldbeträge oder gleichgestellter Zahlungsmittel sind Aufgabe der Zollverwaltung (und ggfls. der Bundespolizei als Auftragsverwaltung für den Zoll). Es gibt eindeutige Regelungen hinsichtlich der vor der Kontrolle durchzuführenden Befragung und der sich daran anschließenden Maßnahmen. Derartige Kontrollen obliegen den Beamten der Hauptzollämter gemäß § 209 der Abgabenordnung (AO). Beamte des Zollfahndungsdienstes (§ 208 AO) haben diese Kontrollbefugnis nicht. Sie können jedoch im Rahmen von straf-/steuerstrafrechtlichen Ermittlungen tätig werden. Wenn also ein Landespolizist bei einer Verkehrskontrolle Bargeld in einem Auto findet, darf er den Fahrer dazu nicht im Sinne der vorgenannten DV befragen. Auch das nachträgliche Hinzuziehen von Zollbeamten heilt die Maßnahme nicht. Die Landespolizei kann dann entweder selbständig wegen Verdachts der Geldwäsche ermitteln oder nach dem PAG (Polizeiaufgabengesetz) präventiv tätig werden.

[129] ‚Gesetzt der Fall ich finde 100000 Euro in einem Auto versteckt, die der Fahrer nicht angegeben hat. Dieses Geld kann ich bei Verdacht auf Geldwäsche anhalten, aber nicht beschlagnahmen. Das ging erst, wenn

To introduce or "legalize" a reversal of the burden of proof should be easy and legit, conversation partners from trade unions argue, since it exists already: This applies for dependent employees, they have to declare when they want repayment, but not for wealthy people where financial authorities have to declare if it is true: Here the reversal of burden of proof is already valid.

5.2.11.5 Deficits regarding Vortatenliste

Conversation partners state a number of deficits in the Vortateliste in need of improvement, for example

- Business corruption (§299 StGB) should be incorporated into the catalogue of preceding crimes Henn/Meinzer/Mewes conclude (p. 39ff.)
- Tax evasion should count as preceding crimes without the addition "banden- und gewerbsmäßig Henn/Meinzer/Mewes conclude (p. 39ff.) → see below, 5.3.6.1
- Regarding IFFs from developing countries, the Vortatenliste in § 261 StGB does not contain acceptance of benefits, extortion and infidelity, only if they are concudted in a commercial or gang crime manner (Meinzer 2015a p. 76).

5.2.12 Proposed changes

In the EU, many states are only obliged to treat criminal offences as serious crimes if they are also considered to be serious under national law ("dual criminality"). The problem will be how the 4th Money Laundering Directive and its decision to include tax crimes arising from direct and indirect taxes, which would include tax evasion, will be implemented now.

Henn/Meinzer/Mewes conclude (p. 39ff.) that Germany (as other states in Europe) are in urgent need to change anti-money laundering regulations if the financial leakage from developing countries is to be countered more effectively.

- Bestechung im Geschäftsverkehr (§299 StGB) should be incorporated into the catalogue of preceding crimes
- Tax evasion should count as preceding crimes without the addition "banden- und gewerbsmäßig)
- Banks should insist upon the legal taxation of assets (and be liable if they do not)
- Obligation to check beneficial ownership and control of assets by "natural persons" should begin with 10% and more, exceptions, e.g. in the case of TNCs controlled by shares, should be very limited.
- A central register should contain information of beneficial ownership of assets
- Strengthening of checks by authorities
- Strengthening of sanctions
- Improve international cooperation and enable transnational freezing of assets

5.2.13 Conclusion

Even though annually about EUR 100 billion are being laundered in Germany, progress is slow (Bussmann, 2015):

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ich nachweisen kann, dass das Geld aus einer Straftat stammt. Der Fahrer sagt aber nichts. Vorschlag: Nur Aufklären, was mit Geld ist – losgelöst von Strafverfahren. ‚Um die Unschuldsvermutung gegen die Person aufrechtzuerhalten könnte man ja nur einen Verfall des Geldes anordnen, d.h. das Geld würde an den Staat fallen. Das wäre losgelöst von Strafverfahren gegen den, bei dem es gefunden worden ist.'

> A spokeswoman of the Federal Minister of Finances, Wolfgang Schäuble (CDU) said on Friday regarding the states "it is known that we cannot establish the detection risk", what actually would be desirable. "In fact, this is a topic you can devote to." However, as usual the ministry relegated to the states which are in charge of financial flows outside the financial sector. [130]

Banks are not doing enough (see BearingPoint, above 5.2.3.2), DNFBPs not even closely, government supervision is divided and chaotic.

Both the OECD and NGOs agree that international legal and practical arrangements in the area of beneficial ownership of trusts, fiduciary arrangements etc. contradict FATF guidelines and criteria regarding an effective approach to tax evasion and money laundering (see GW/II#).[131]

> ➔ Money laundering, conversation partners from police and prosecution argue, is a popular issue which is why there is more activity than elsewhere. On the other hand STRs create more work than they are useful, which is also indicated by the large number of bad quality STRs which lead only to very few investigations and even fewer sentences (see 5.2.3.1) At best they indicate for tax administration upon which persons to have a closer look in future.

> At a minimum, all countries should comply with the Financial Action Task Force Recommendations to combat money laundering and terrorist financing. The most recent update to those recommendations was released in 2012, introducing new priority areas on corruption and tax crimes. Despite good intentions and good policy, actually stopping money laundering often comes down to enforcement. Regulators and law enforcement officials must strongly enforce all anti-money laundering laws and regulations already on the books. This includes prosecuting criminal charges against and imposing appropriate penalties upon employees of financial intuitions who are culpable of allowing money laundering to occur. (Kar & Spanjers, 2015, p. 21)

5.3 Tax evasion

5.3.1 What are we talking about

As indicated above (2.2&3), there is a gliding scale between legal tax avoidance, aggressive tax avoidance and outright tax evasion, even though the delineation is difficult to draw. And: Of course it is legitimate for businesses to also incorporate tax planning into their decisions upon investment and employment, as staunch liberals always emphasize.[132]

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[130] Eine Sprecherin von Bundesfinanzminister Wolfgang Schäuble (CDU) sagte am Freitag mit Blick auf die Länder, es sei "bekannt, dass wir nicht das Entdeckungsrisiko herstellen können", das eigentlich wünschenswert wäre. "In der Tat ist das ein Thema, dem man sich widmen kann." Allerdings verwies das Ministerium wie üblich auf die Länder, die für Geldströme außerhalb des Finanzsektors zuständig sind. (Böcking & Stotz, 2016)

[131] 'Compliance with the Financial Action Task Force (FATF) standards with regards to beneficial ownership is also particularly low as outlined in Chapter 2.' (OECD, 2013c, p. 61). The Mapping Financial Secrecy survey demonstrates that most of the surveyed jurisdictions do not live up to the standards which are seen by FATF to be essential when it comes to combat tax evasion and money laundering (Marriage, 2013, p. 14ff.).

[132] ,"Dass Unternehmen versuchen, dort zu dislozieren, wo sie am wenigsten Steuern zahlen, ist der Preis der Freiheit", sagt der FDP-Vize Wolfgang Kubicki im DW-Interview. Steuervermeidung sei schließlich keine Straftat.' Kubitzki, W. (2016, April 16). „Steuervermeidung ist keine Straftat". In: DW. Retrieved from http://www.dw.com/de/steuervermeidung-ist-keine-straftat/av-19192918

But as has been outlined in GER/Va, tax reasons seem to be less important for important investment decisions than businesses assert them to be, especially when negotiating tax privileges for themselves. For this research project, an important distinctive element is whether elaborate Offshore Constructions are involved, i.e. options which were not foreseen or designed by the national legislator within whose realm private person or business have their residence and whose common good they are damaging with their tax planning and tax evasion.

A classic illustration of tax evasion being part of IFFs was the introduction of the European Savings Tax Directive in 2005: Between the end 2004 and the end of 2005, the flow of money into tax havens and the amount of Offshore Companies set up by banks increased noticeably, as the research of Zucman and the revelations of Panama Papers illustrate (see I/IV/6.3 and above 2.4) – i.e. here is a clear link where private and corporate actors tried to secure their private and corporate interest over and above the common good.

5.3.2 Tax evasions sensitive stance among IFFs

For the following see mostly (Blickman, 2009, p. 12ff.): Tax evasion being an illegal, not just illicit, transnational cross-border flow of some magnitude, one should have assumed that it gained early attention on part of states. This, however, was not the case. When OECD states set up the Financial Action Task Force on Money Laundering, tax evasion was kept out of focus, building on an agreement among the G7 states of 1989 to keep tax issues out of money-laundering agreements. Main reason were the interest of states to keep advantages from tax evading and avoiding behaviour which is why, not surprisingly, Switzerland and the UK belong to the most outspoken critics of including tax evasion in money laundering regimes. Until the present day, tax evasion is not explicitly included as "predicate offence" in the "40 recommendations" underlying FATFs mandate. Only recently, under the heading "definitions" it is conceded 'When deciding on the range of offences to be covered as predicate offences under each of the categories listed above, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences' – and this may include tax crimes and the smuggling of taxes and excise goods (Financial Action Task Force, 2013, p. 113).

Another problem in this context is that there was an early multilateral basis for Anti-Money laundering regimes, providing a basis for internationally investigating and prosecuting money laundering offences, e.g. the 1988 Vienna Convention. Tax evasion was, on the other hand, primarily dealt with in bi-lateral Double Taxation Treatments whose prime purpose was, however, to ensure that companies (and wealthy individuals) were not taxed twice. When realizing, that this might amount to Double-Non-Taxation rather than double taxation, a new attempt was undertaken by introducing the even more complex Controlled Foreign Corporation Rules. Those rather exacerbated than eased the problem, since all regulation could be exploited or circumvented by TNCs and HNWIs by buying advice of highly specialized international tax consultants and tax lawyers.

International regulations were made difficult by two facts: First, that major elements in tax evasion make illegal or illicit use of legal regulation, and that many options arise from the competing interest of states. Here is also a conflict of interest for banks and other institutions who, on the one hand, earn money by advising clients on tax planning, but on the other hand are those institutions whose task is to do the reporting. The situation is made more complex by the fact that there is less agreement between states on the damage of tax evasion than there is regarding money laundering: While money laundering is illegal in all states, tax evasion is a crime only in some, but not in others.

Another problem is that a mere inclusion of tax evasion in money laundering regimes would probably lead to an exponential increase of Suspicious Activity Reports (SARs) forwarded to relevant authorities, for the simple reason that there are comparatively few criminals as opposed to tax evader. A mere flood of additional information would not make prosecution of tax evader easier, given existing staff level. Here, resources of authorities need to be improved as well.

Finally, there are problems regarding the twofold nature of information channels: While money laundering is a problem of criminal enforcement agencies, tax authorities are subject to strict privacy regulations, e.g. arising from tax secrecy laws.

Obviously, the situation has changed here after the 2001 terrorist attacks and, most importantly, the World Financial and Economic Crisis as well as revelations of the Offshore, Luxembourg and Swiss Leaks scandals. By now, tax evasion is included in negotiations of G20/OECD, UN and beyond. A good summary contains (Bundesministerium der Finanzen, 2014c).

5.3.3 International context

5.3.3.1 FATCA – A (selective) game changer

The heading "A game changer" appears in (OECD, 2013c, p. 64) and it is a characterization which also came from many conversation partners. One working for the Federal Ministry of Finance put it: 'The real mover behind the scenes are the USA with their FATCA approach.' From this all other movement followed. As soon as the US pulled the big gun with FATCA, threatening to exclude states unwilling to cooperate from accessing US markets, even Switzerland agreed to abandon its time-hallowed banking secrecy:

> The Foreign Account Tax Compliance Act (FATCA) is a recent US initiative to improve tax compliance involving foreign financial assets and offshore accounts. Under FATCA, US taxpayers (individuals and companies) with specified foreign financial assets above certain thresholds must report those assets to the Internal Revenue Service (IRS). Failure to report will result in an initial penalty of USD 10 000 – and up to USD 50 000 for continued failure following IRS notification. In addition, FATCA will require foreign financial institutions (FFIs) to report information directly to the IRS about financial accounts held by US taxpayers, or held by foreign entities in which US taxpayers hold a substantial ownership interest. FFIs will also have to withhold and pay to the IRS 30% of any payments of income from US sources or proceeds from the sale of securities generating US source income made to non-participating FFIs, individuals who fail to provide information on whether they are US persons, or foreign entity (companies, trusts, etc.) account holders that fail to provide information about the identity of their US owners. The FATCA is a response to difficulties in obtaining such information through other methods, including standard EOI agreements.

The G5 entered into deliberation with the US, working upon agreements of reciprocity regarding the intended information exchange, and from there it spread within OECD states and dependent territories, emerging into the CRS agreements (see 3.4.1.3). Germany had to introduce para.117c into the Fiscal Code, regulating collecting and reporting standards of financial institutions under the new agreement.

5.3.3.2 Legal initiatives in EU, OECD...

Regarding the EU:

There are two major instruments regulating tax data exchange within the European Union: First of all the → 2005 European Savings Tax Directive EUSTD (*Zinsbesteuerungsrichtlinie*), next there is the → 2011 EU Mutual Assistance Directive

Regarding the OECD:
A major document are → Articles 26 & 27 of the Model Tax Convention on Income and Capital, another major initiative is the → AEIO/CRS process

5.3.4 Deficits and proposed changes internationally

5.3.4.1 Policy towards USA

Critics (Tax Justice Network International, 2015a) argue, however, that the US only pressurized other countries via FATCA, but do not open up themselves in return. For example, they insist on FATCA, but do not cooperate in a comparative manner in the Common Reporting Standard and Automatic Exchange of Information process of the OECD/G20, hence keeping their own tax haven privileges. Nevertheless it should be conceded that without the US movement in the tax secrecy debate would not have occurred.

> The United States' hypocritical stance of seeking to protect itself against foreign tax havens while preserving itself as a tax haven for residents of other countries needs to be countered. The European Union must take the lead here by imposing a 35 percent withholding tax on EU-sourced payments to U.S. and other non-compliant financial institutions, in the same way as the U.S. FATCA scheme does; and this should become global standard practice. (Tax Justice Network International, 2015a, p. 4)

5.3.4.2 Deficits in G20/OECD initiatives

There is a lot of criticism against continuing loopholes in the BEPS and AEOI process, especially by the Tax Justice International Network when they published their Financial Secrecy Index 2015 (Tax Justice Network International, 2015a). For example:

- Selective exchange of data by some participants (e.g. Switzerland, Caymans)
- Enacting of exchange only after 2018) Caymans
- Implementation of law in accordance to national interests (Germany)
- Keeping intransparent trusts within the UK and its dependent territories
- Keeping the practice of Bearer Shares
- Not publishing beneficiary ownership and country by country reporting
- Multiple disadvantages against developing countries, who are neither involved in the progress not adequately equipped to participate in it.

5.3.4.3 Deficits in EU initiatives

Experts of the Tax Justice Network are comparatively happy with European Progress on tax administration cooperation.[133]

- First of all, it covers not only EU member states, but also dependent territories e.g. Cayman and BVI, altogether 42 jurisdictions
- It covers all forms of income, not just 'relevant assets'.
- Different forms of income are included indirectly in the EUSTD, but the supplementary Directive on the Enhanced mutual administrative cooperation in the field of direct taxation will make up for it because the automatic exchange is on 5

[133] http://www.the-best-of-both-worlds.com/paying-agent-upon-receipt.html
http://www.taxjustice.net/2014/03/24/eu-savings-tax-directive-moves-forwards/
http://www.taxjustice.net/2014/03/06/european-union-savings-tax-directive-amendments-coming-soon/

categories of income not covered by the tax treaty, e.g. income from employment or from immovable property.

- It makes management of discretionary trusts responsible for paying taxes and obliges them to identify the beneficiary owner, or hold the one accountable who contributes to the fund or establish tax obligations of past years and bill them as soon as somebody is entitled to payment ("Paying agent upon receipt").
- Payouts of insurance wrappers are included if there are fixed payouts or payouts of a certain level.
- Includes all entities who are not "subject to effective taxation", i.e. no exceptions.
- Closes the loophole of branches – the only way out would be to move the entire structure including management to countries not under the scope. Some will do it, many won't.
- Swiss trustees of foreign trusts are covered with the Paying agent upon receipt clause.

Summarizing, it is argued by a conversation partner from NGOs, that eventually there is indeed adequate transparency so that withholding and flat taxes can be abandoned and income from capital could be integrated back into the progressive income tax.

> In fact, this procedure of taxation of these constructs at EUSTD is quite sophisticated and good. In summary: Yes, if an international system to AIE is established interest rate earnings can again be better taxed with a personal income tax rate. [134]

However, there are still loopholes here: PwC Consultants list them as follows in a PowerPoint Presentation which by now has disappeared from the internet (Gräfe & Klümpen-Neusel, 2014, p. 8)

- It covers only income from interest, not dividends. Therefore one can swap taxable income from interest into exempt products, i.e. dividends.
- Does not apply if source country and residence country is the same. If dual residence also in source country the state where tax duty exists can be hidden.
- The wirtschaftliche Eigentümer can be hidden by transferring the depot into insurance wrapper or Kapitalgesellschaft

5.3.5 National legal aspects

5.3.5.1 Tax evasion as crime

Tax evasion is defined as a criminal offence in § 370 of the Fiscal Code. It threatens imprisonment up to 10 years or monetary fines to whoever '1. furnishes the revenue authorities or other authorities with incorrect or incomplete particulars concerning matters of substantial significance for taxation, 2. fails to inform the revenue authorities of facts of substantial significance for taxation when obliged to do so, or 3. fails to use revenue stamps or revenue stamping machines when obliged to do so and as a result understates taxes or derives unwarranted tax advantages for himself or for another person.' It is different from

[134] Tatsächlich ist dieses Prozedere zur Besteuerung dieser Konstrukte bei EUSTD recht ausgeklügelt und gut, das findest du oben grob beschrieben. auch in unserer Analyse über internationalen Standard sind trusts/Briefkastenfirmen leidlich abgedeckt. in der Summe: ja, wenn ein internationales System zum AIE etabliert ist, kann man Zinseinkünfte wieder besser mit persönlichem Einkommenssteuertarif besteuern; die EUSTD allein könnte man durch Verlagerung zwar nach wie vor entgehen, aber dafür müsste man schon die gesamte Verwaltung des Vermögens außerhalb der Geltung der EUTSD verschieben. jedenfalls verbessern sich die Chancen immer weiter tatsächlich zu besteuern. http://www.taxjustice.net/2014/03/21/jurisdictions-already-aiming-loopholes-oecd-project/

"reckless understatement" (§ 374 Fiscal Code) in quantity and quality, which is why "reckless understatement is not a crime, but may (not must) be prosecuted by the tax authority as an administrative offence only. The problem for a long time was when severe tax evasion is at hand which then would require prison sentencing. Here the federal High Court (BGH) determined a damage of EUR 50,000 to be the rule which defines tax evasion "in einem besonders schweren Fall."[135]

Three elements justify the qualification of tax evasion as a crime: an objective deed (understatement or faulty statement of tax relevant information towards the authorities), and a subjective intention to do it. A problem is the determination of time, when a tax related crime has been committed. 'Bei turnusmäßig abzugebenden Steuererklärungen (z. B. Einkommensteuererklärungen, siehe auch § 149 Abs. 2 AO) wird in aller Regel die Vollendung mit Abschluss der Veranlagungsarbeiten anzunehmen sein. … Bei Voranmeldungen (insbesondere Umsatzsteuer, Lohnsteuer) geht die Finanzbehörde bereits dann von einer vollendeten Straftat aus, wenn der gesetzliche Voranmeldungstermin verstrichen ist.'[136]

5.3.5.2 Tax evasion as money laundering offence

Tax evasion is also part of the money laundering legislation which widens the investigative options for police and prosecution. Tax evasion is explicitly mentioned to be a criminal offence preceding money laundering in § 261of the Penal Code. However, the characteristics are that it is being done 'committed on a commercial basis or as a gang under section 370 of the Fiscal Code, to expenditure saved by virtue of the tax evasion, of unlawfully acquired tax repayments and allowances.' The expression "commercial basis" indicates that this illegal activity enables to a large extent somebody's livelihood, the expression "gang" requires activities of three persons or more. Right now, only the evasion of taxes and mandatory SSCs with shell-companies within the informal economy (→ GIE/#) and Turnover-Tax fraud (see 5.5) qualifies here. However, there is ongoing discussion. For example, whether a couple plus a tax consultant/lawyer/bank consultant could qualify if they cooperate in a systematic manner. Or: whether two persons might qualify already if money laundering and tax evading activities went on in a systematic way over a longer period of time.[137]

Besides the aforementioned, also receiving, holding or selling goods obtained by tax evasion is (§ 374 Fiscal Code, Steuerhehlerei) is considered to be a crime preceding money-laundering, which refers to 'products or goods in connection with which excise duties or import duties and export duties.'

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[135] ‚Das Gesetz unterscheide in § 370 AO nicht zwischen der Gefährdung des Steueranspruchs und dem Eintritt des Vermögensschadens beim Staat. Diese Gleichsetzung findet ihre Rechtfertigung darin, dass die falsche Steuerfestsetzung nahezu immer zu einem Schaden führen wird, weil eine nicht festgesetzte Steuer auch nicht beigetrieben werden kann und darf. Vor diesem Hintergrund zwischen Gefährdungsschaden und eingetretenem Schaden zu differenzieren, sei deshalb nicht gerechtfertigt. Daher sei auch die Verdoppelung des Schwellenwerts bei dem sog. Gefährdungsschaden nicht zu begründen.

Eine einheitliche Wertgrenze von 50.000 Euro gewährleiste zudem mehr Rechtssicherheit, weil sich die schwierige Differenzierung zwischen nicht erklärten Steuererhöhungsbeträgen und zu Unrecht geltend gemachten Steuerminderungsbeträgen, und in welchen Fällen nun der niedrigere oder höhere Grenzwert gelte, erübrige.' BGH: Steuerhinterziehung in „großem Ausmaß" einheitlich ab 50 000 Euro. Urteil vom 27.10.2015. Retrieved from www.stb-web.de/news/article.php/id/7623

[136] http://de.wikipedia.orGWiki/Steuerhinterziehung_%28Deutschland%29

[137] For a legal explanation see Ott, J. Bandenmäßige und gewerbsmäßige Steuerhinterziehung (§ 370a AO). In: Praxis Steuerstrafrecht 2002/2 p. 41. Retrieved 28 May 2015 from http://www.iww.de/pstr/archiv/strafverteidigung-bandenmaessige-und-gewerbsmaessige-steuerhinterziehung-370a-ao-f36616

5.3.6 Deficits and proposed changes nationally

5.3.6.1 Include tax evasion better into money-laundering provisions

The comparatively narrow definition of when Steuerhinterziehung and Steuerhehlerei is considered to occur in the context of money laundering should not blind to the fact that § 370 Fiscal Code defines tax evasion as a clear cut crime with prison sentences up to 5 years. The revised FATF guidelines of 2012 suggest that all "serious offences" should be included among the predicate offences of money-laundering. For Germany, the following would satisfy the requirements.

> Where countries apply a threshold approach, predicate offences should, at a minimum, comprise all offences that fall within the category of serious offences under their national law, or should include offences that are punishable by a maximum penalty of more than one year's imprisonment, or, for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences that are punished by a minimum penalty of more than six months imprisonment. (Financial Action Task Force, 2013, p. 34)

In the eyes of conversation partners from police and prosecution: The clearer inclusion in money laundering offences would also provide tax fraud investigators and prosecutors with more means to investigate tax evasion and related offences: 'The problem of us all is that tax evasion is no precursor for money laundry and therefore the possibilities of detection are restricted but this applies for whole Germany.'

This has been incorporated into the → EU Directive on Money Laundering, which explicitly included "ordinary" tax evasion into the catalogue of predicate offences – it needs, however, transformed into national law...

5.3.6.2 Tightening of reporting obligations

PanamaPapers trigger unity among the 16 German Finance Ministers. In their first meeting after the leak they agreed on a paper prepared by NRW Minister Borjans and Bavarias Minister Söder:

> All reporting obligations should be tightened, banks and persons that verifiably aid and abet tax fraud should be allowed to be sanctioned. Services that convey such deals should be obliged to notify this to the tax authorities. Whoever does not comply should be responsible for tax damage.[138]

Minister Söder is more specific on the details:

> Söder turns the approach upside down: Not the state and his authorities have to proof that money is misused via offshore companies, but tax payer himself has the obligation to declare. This only about the psychological effect: because persons who evade taxes and transfer their money abroad do this anyway in a hidden way in the hope to stay uncovered. Tighter controls are against tax consultants. A simple and legitim measure.[139]

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[138] Jegliche Meldepflichten sollen verschärft, Banken und Personen, die nachweislich Beihilfe zum Steuerbetrug leisten, sanktioniert werden dürfen. Dienstleister, die entsprechende Geschäfte vermitteln, sollen verpflichtet werden, diese den Steuerbehörden anzuzeigen. Wer dem nicht nachkommt, soll für Steuerschäden haften. Alle Länderfinanzminister fordern zügig Konsequenzen aus Panama Papers (2016, April 8). In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/briefkastenfirmen-alle-laenderfinanzminister-fordert-zuegig-konsequenzen-aus-panama-papers-1.2938728

[139] Im Ansatz dreht Söder den Spieß einfach um: Nicht der Staat und seine Behörden müssen nachweisen, dass jemand Gelder über Offshore-Firmen zweckentfremdet oder Steuern hinterzieht, sondern der Steuerzahler selbst hat eine Meldepflicht. Hier geht es Söder allein um den psychologischen Effekt: Denn wer

5.3.6.3 No adequate legislation regarding banks and corporations

As the case of the Carousel-Fraud with CO2 certificated (see above 1.7.2), there is a deficit since in Germany exists no option to punish banks and corporations. While the individual or collective acting of individuals is covered and sanctioned by law, practitioners lament the absence of comparable regulation for corporate actors such as businesses or banks, the latter coming increasingly into focus as enabling, aiding and abetting tax evasion and money laundering.

Of course, there is an even larger interest of banks and other forms of financial institutions in not reporting money laundering or other suspicious activities as long as there are low penalties and weak enforcement via the Bafin vs. the potentially large profits. Meinzer puts it as follows: BAFIN's primary task is the functioning, stability and integrity of the German financial center, and there must not be any scandal. It is important that the sector booms and besides the 'too big to fail' banks are now the 'too big to jail' banks. [140]

After Swiss Leaks blew in February 2015, and the involvement of German Banks became likely (see 3.5), the spokesperson of the Bund Deutscher Kriminalbeamter asked to amend this: After all, without banks and their employees being part of systematic and organized money laundering and tax evasion by offering services regarding the establishment of shell companies, not much could be achieved by persons only. Banks, however, could only be prosecuted and punished under administrative offence regulation and be punished with a fine of at most EUR 10 million which is, given the damage done to the community, close to nothing. Fines should be much higher and, at most, a bank should be losing its licence.[141] Here, Mr. Fiedler seems to find support by the finance minister of North-Rhine Westphalia, who also supports (with qualifications of course) the withdrawal of a licence for banks actively involved in tax evasion.[142]

Here it is high time to find punishments in case that banks aided and abetted tax evasion, money laundering and other shady activities and supervisory structures did not discover that. And this seems to be moving after PanamaPapers:

Steuern hinterzieht und sein Geld ins Ausland schafft, tut das ja ohnehin verdeckt und in der Hoffnung, nicht aufzufliegen. Dennoch ist dieser psychologische Effekt nicht zu unterschätzen: Wer mit seiner Unterschrift unter die jährliche Steuererklärung angibt, dass er keine Offshore-Konten hat, überlegt sich das sicher zweimal. Fliegt alles auf, ist er schnell und einfach der Lüge überführt. Schärfere Geschütze fährt Söder dagegen gegen Steuerberater und Wirtschaftsprüfer auf. Ein einfaches und legitimes Mittel, auf das man eigentlich schon viel früher hätte kommen können. Die meisten Bürger, die ihr Geld auf Offshore-Konten parken, können die verschachtelten Briefkastenkonstruktionen nicht ohne fachliche Hilfe leisten. Wer da erwischt wird, riskiert seine standesrechtliche Zulassung als Anwalt oder Prüfer. Auch hier geht es vor allem um den psychologische Effekt: Denn wer betrügen will und sich seiner Sache sicher ist, wird dies wohl auch weiterhin tun. Allerdings zeigen die Panama-Papiere wieder einmal deutlich, dass im Zeitalter der Digitalisierung eigentlich keiner mehr vor Enthüllungen sicher sein kann. Und die Strafen liegen dann klar auf dem Tisch. In: Kraft, S. (2016, April 6) Söder und die Panama Papiere. In: Bayerischer Rundfunk. Retrieved from http://www.br.de/nachrichten/soeder-panama-papers-100.html

[140] Primäre Aufgabe der Bafin ist schließlich die Funktionsfähigkeit, Stabilität und Integrität des deutschen Finanzplatzes, und da darf es keine Skandale geben. Wichtig ist, dass der Sektor boomt und neben den „too big to fail" Banken gibt es nun auch die „too big to jail" Banken. Meinzer, 2015a, 91f

[141] Pressemitteilung „Organisierte Finanzkriminalität: Verdacht auf systematische Geldwäsche und Steuerhinterziehung" (2015, February 20). Retrieved 28 May 2015 from https://www.bdk.de/der-bdk/aktuelles/pressemitteilungen/organisierte-finanzkriminalitaet-verdacht-auf-systematische-geldwaesche-und-steuerhinterziehung

[142] 'Im äußersten Fall die Lizenz entziehen' Interview mit Walter-Borjans. In: Handelsblatt. Retrieved from http://www.handelsblatt.com/my/finanzen/steuern-recht/steuern/interview-mit-walter-borjans-im-aeussersten-fall-die-lizenz-entziehen/11927274.html

> Walter-Borjans is fighting for years that financial institutions that verifiably aid and abet tax fraud should be held accountable more tightly. He even achieved that in 2014, the Federal Assembly passed a corresponding resolution. But the law proposal which plans to even withdraw the banking license in severe cases is ever since at the German Parliament. Together with Söder he succeeds in motivating the states' heads of department for a new try. The ministers of finances expect "that the law of financing also covers explicit regulations which enable the proceeding against banks in case of systematic aid and abet of tax evasion."[143]

5.3.6.4 Prohibiting deals with anybody registered in tax havens

> What should be done was unintendedly demonstrated by Deutsche Bank. It would not be per se illegal to run such deals, was what the bankers explained when it was detected that they as well were involved in Panama. If EU governments really want to take action against tax evasion, they could start exactly there. They just would have to ban "financial deposits for the benefit of such firms and persons that are legally registered in tax havens", and the whole spook would be over. The suggestion came from Helmut Schmidt. But it was not heard. [144]

When asking the Deutsche Bank via mail, whether they indeed published such a statement the PR officers replied an 12 April that this can neither be established nor verified…

> We gladly like to help you as fast as possible and forwarded your message to different positions. Unfortunately, none had any information regarding this matter. Therefore, we have to relegate you to the Tagesspiegel. [145]

5.3.7 Conclusion

Tax evasion as part of IFFs has always been considerable. Efforts of the international community to tighten rules here have their success and price in many respects:

First of all, it pushes up the price for Offshore Constructions. In the words of the owner of a large tax consultants business:

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[143] Walter-Borjans kämpft seit Jahren dafür, dass Finanzinstitute, die nachweislich Beihilfe zum Steuerbetrug leisten, stärker zur Rechenschaft gezogen werden sollen. Er hat es sogar geschafft, dass der Bundesrat im Jahr 2014 einen entsprechenden Beschluss fasst. Aber der Gesetzesantrag, der in gravierenden Fällen auch den Entzug der Banklizenz vorsieht, liegt seitdem beim Bundestag. Gemeinsam mit Söder gelingt es ihm, die Ressortchefs der Länder zu einem neuen Vorstoß zu motivieren. Unter Punkt 4 des Antrages ist nachzulesen, dass die Finanzminister erwarten, "dass in das Kreditwesengesetz explizite Regelungen aufgenommen werden, die ein Vorgehen gegen Banken im Falle der systematischen Beihilfe zur Steuerhinterziehung ermöglichen". Alle Länderfinanzminister fordern zügig Konsequenzen aus Panama Papers (2016, April 8). In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/briefkastenfirmen-alle-laenderfinanzminister-fordert-zuegig-konsequenzen-aus-panama-papers-1.2938728

[144] Was zu tun wäre, demonstrierte dagegen unfreiwillig die Deutsche Bank. Es sei ja nicht per se gesetzeswidrig, solche Geschäfte zu betreiben, erklärten die Banker, als herauskam, dass auch sie in Panama beteiligt sind. Wollten die EU-Regierungen tatsächlich gegen Steuerflucht vorgehen, könnten sie genau hier ansetzen. Sie müssten nur „Finanzeinlagen zugunsten solcher Unternehmen und Personen bei Strafe verbieten, die rechtlich in Steuer- und Aufsichtsoasen registriert sind", schon wäre der Spuk vorbei. Der Vorschlag kam übrigens von Helmut Schmidt. Auch er wurde nicht erhört. Schumann, H. (2016, April 4) Die Doppelmoral der Politik ist der eigentliche Skandal. In: Tagesspiegel. Retrieved from http://www.tagesspiegel.de/politik/panama-papers-die-doppelmoral-der-politik-ist-der-eigentliche-skandal/13401222.html Schmidt, Helmut (2009, Januar 15) Wie entkommen wir der Depressionsfalle. In: Die Zeit. Retrieved from http://pdf.zeit.de/2009/04/Wirtschaftskrise.pdf

[145] ‚Gerne wollten wir Ihnen schnellstmöglich weiterhelfen und haben Ihre Nachricht an verschiedene Stelle weitergeleitet. Leider lag jedoch keiner dieser Stelle irgendeine Information zu dieser Aussage vor. Dementsprechend müssen wir Sie an den Tagesspiegel verweisen.'

> Tax evasion was never inexpensive. In the past, it was also that Swiss banks squeezed the rich, for instance by continuously rearranging portfolios and demanding high fees for that while the profits were not proportionate. Banks in tax havens know about this customer dependency and squeeze them. Now it will become even more expensive and is not profitable anymore for many, except the ones with very big wealth. [146]

In spite of all new treaties, regulations and declarations, tax evasion is still possible and lucrative for those having money above 1 million Euro (Schumann, 2014) (Elmer, 2014).

All the leaks increase the price for Offshore Constructions: A letter box company is not inexpensive.

> The foundation construct costs almost 12.000 Euro a year. The dummy CEO of the letter box company gets 5000 Euro a year. “For many who used such offshore constructs they do not make sense because the additional costs are immense” said Jörg Schauf, expert at the Flick Gocke Schaumburg. “The offshore constructs only pay off for sums from three to five million Euro.” [147]

So, the tightening of laws and international cooperation has actually an effect. It increases the prices what demotivates many whose assets are below the critical threshold from where the international expert consulting pays off. The risk to be detected will demotivate other people. Presumably, all this is much more crucial than the change of social acceptance which only follows afterwards.

5.4 Bribery and corruption

5.4.1 What are we talking about

One link between bribery and corruption and tax evasion is that the tax subject is understating his income. That there is more to it, requires a more careful analysis.

As might be expected, there is a large body of legal writing surrounding content and scope of the terms “bribery” and “corruption” which are often used interchangeably. For the sake of simplicity “bribery” is the payment to somebody in the hope of favours being returned, “corruption” signifies more generally a system of bent or broken rules and procedures due to outside interferences. The Wikipedia definition for Corruption goes as follows

> The word **corrupt** when used as an adjective literally means "utterly broken". The word was first used by Aristotle and later by Cicero who added the terms bribe and abandonment of good habits. S.D. Morris, a professor of politics, corruption is the illegitimate use of public power to benefit a private interest. Economist I. Senior defines corruption as an action to (a) secretly provide (b) a good or a service to a third party (c) so that he or she can influence

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[146] ‚Steuerhinterziehung war nie billig. In der Vergangenheit war sie auch so, dass Schweizer Banken die Vermögenden geschröpft haben, indem sie etwa Portfolios dauernd umgeschichtet haben und dafür hohe Gebühren verlangt haben, ohne dass die Rendite in einem Verhältnis gestand hätte. Banken in Steuerparadiesen wissen um die Abhängigkeit ihrer Kunden und sie schröpfen sie. Jetzt wird es noch teurer und rechnet sich für viele nicht mehr, nur noch für ganz große Vermögen.‘

[147] ‚Das Stiftungskonstrukt kostet knappe 12 000 Euro pro Jahr. Allein der Schein-Geschäftsführer für die Briefkastenfirma bekommt 5000 Euro jährlich. „Für viele, die solche Offshore-Konstrukte genutzt haben, sind sie gar nicht sinnvoll, weil die Nebenkosten immens sind“, sagt Jörg Schauf (43), Spezialist für Steuerstrafrecht bei der Anwaltskanzlei Flick Gocke Schaumburg. „Richtig lohne sich die Offshore-Konstruktion erst ab Beträgen von drei bis fünf Millionen Euro. Retrieved from http://www.bild.de/geld/wirtschaft/panama-papers/panama-ist-ueberall-45290400.bild.html

> certain actions which (d) benefit the corrupt, a third party, or both (e) in which the corrupt agent has authority. D. Kauffman, from the World Bank extends the concept to include 'legal corruption' in which power is abused within the confines of the law - as those with power often have the ability to shape the law for their protection.[148]

Taken like that, "corruption" would be an umbrella term of which bribery (like "kickback", "extortions" etc.) is an aspect of.[149]

Another definition, pointing out different levels of it, is provided by Transparency International: Corruption can be defined

> generally speaking as "the abuse of entrusted power for private gain". Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.
> Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.
> Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.
> Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.[150]

5.4.1.1 Wider implications

As indicated already in I/IV/6.4, there is more to bribery and corruption than illegal payments since the distortion of tender and market procedures damages sound businesses and their advantage on markets. This problem exists in Germany as well as developing countries (see below 5.4.3.2), but again the problem is more severe in developing than developed countries. For example, for distorting tendering processes in poor countries eventually it turns out that bidding companies are shell companies only so if bribery ever comes to the light the company, its owners and background leads for investigation have disappeared. Or: The shell company wins the contract at an inflated price and hands on the task to a sub-contractor for a much lower price, hides the profits and eventually dissolves. Especially in Africa, some companies owning others are controlled by PEPs (politically exposed persons), which brings those economic structures close to political and governance structures (Marriage, 2013, p. 8).

5.4.2 Legal and cooperative frameworks

5.4.2.1 Legal domestic framework[151]

5.4.2.1.1 Status

In Germany the relevant legal framework covering corruption and bribery consists first of all in the Criminal Code (*Strafgesetzbuch*) under which individuals can be held criminally liable and be punished with fines of prison. If this individual acts, however, on

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[148] See http://en.wikipedia.orGWiki/Corruption.

[149] Regarding the relationship between "bribery" and "corruption" see also the distinctions provided at the website of the UKs Serious Fraud Office, http://www.sfo.gov.uk/bribery--corruption/bribery--corruption.aspx, retrieved 31 October 2014.

[150] http://www.transparency.orGWhat-is-corruption/#define

[151] Taken from a summary provided by Richter, Th. (2014) Germany. In: Mendesohn (ed.) The anti bribery and anti corruption review, Third Edition. Retrieved from http://www.hammpartner.de/data/veroeffentlichungen/germany_-_druckfassung.pdf

behalf of a business or corporate body the activities can also be liable to provisions of the Act on Regulatory Offences (*Ordnungswidrigkeitsgesetz*) and lead to the confiscation of assets which were gained as a result of criminal conduct. The German Criminal Code distinguishes between three types of bribery offences:

a bribery in the public sector involving public officials (Sections 331 to 338 StGB)
b bribery in commercial business transactions (Sections 299 to 302 StGB); and
c electoral bribery (Sections 108b to 108e StGB).

A major point of discussion was and is the grey area surrounding influence upon MPs and other political figures in § 108e StGB, esp. Para 4,[152] because according to German law only the buying and selling votes was penalized but not practices leading up to this act. For example: If somebody donated money or something else of value to an MP and was merely hoping in a very general manner that this might influence voting in a certain direction this practice was not punishable. It would have been under the United Nations Convention Against Corruption which has been signed by Germany in 2003, but ratification was – for obvious reasons – delayed by parliament until 2014.

Beyond national regulations on the federal level is the option for German States to pass regulation on state level. In Bavaria exists, for example, the 2004 Guidelines for Preventing and Combating Corruption in Public Administration (*Korruptionsbekämpfungsrichtlinie*).[153] It requires administration, for example, to identify areas which are particularly prone to corruption, that decisions in sensitive areas have to be done by two people (*Vier-Augenprinzip*), the rotation of civil servants, some mechanism of internal checks (*Innenrevision*) or the establishment of a commissioner to prevent corruption etc.

Another distinction needs to be drawn between practice/occurrences and prosecution within Germany/Bavaria and practice/occurrences and prosecution outside Germany. A national overview is given in the Bundeslagebild Korruption. Here, in 2013, two issues are noteworthy: First, the size of corruption within Germany in the area of business (even though sinking!), second development in the area "International Corruption".[154] As to the latter,

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[152] § 108e Bestechlichkeit und Bestechung von Mandatsträgern

(1) Wer als Mitglied einer Volksvertretung des Bundes oder der Länder einen ungerechtfertigten Vorteil für sich oder einen Dritten als Gegenleistung dafür fordert, sich versprechen lässt oder annimmt, dass er bei der Wahrnehmung seines Mandates eine Handlung im Auftrag oder auf Weisung vornehme oder unterlasse, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.

(2) Ebenso wird bestraft, wer einem Mitglied einer Volksvertretung des Bundes oder der Länder einen ungerechtfertigten Vorteil für dieses Mitglied oder einen Dritten als Gegenleistung dafür anbietet, verspricht oder gewährt, dass es bei der Wahrnehmung seines Mandates eine Handlung im Auftrag oder auf Weisung vornehme oder unterlasse.

(3) Den in den Absätzen 1 und 2 genannten Mitgliedern gleich stehen Mitglieder

(4) **Ein ungerechtfertigter Vorteil liegt insbesondere nicht vor, wenn die Annahme des Vorteils im Einklang mit den für die Rechtsstellung des Mitglieds maßgeblichen Vorschriften steht. Keinen ungerechtfertigten Vorteil stellen dar**

1. **ein politisches Mandat oder eine politische Funktion sowie**
2. **eine nach dem Parteiengesetz oder entsprechenden Gesetzen zulässige Spende**.

[153] http://www.gesetze-bayern.de/jportal/portal/page/bsbayprod.psml?showdoccase=1&st=vv&doc.id=VVBY-VVBY000019675&doc.part=X&doc.origin=bs

[154] 'Durch das Gesetz zur Bekämpfung internationaler Bestechung (IntBestG) werden für einige der Straftatbestände der §§ 334 ff StGB ausländische Richter, Amtsträger, Soldaten, Amtsträger internationaler Organisationen jeweils deutschen Richtern, Amtsträgern, etc. gleichgestellt. Zudem wird die Bestechung ausländischer Abgeordneter im internationalen geschäftlichen Verkehr unter Strafe gestellt.' p. 8

however, investigation is here, according to conversation partners from police and prosecution, also a matter of "worthwhileness": While legal foundation is at hand in principle to prosecute wrongdoings of German business e.g. in Africa, it is little promising it invest resources here: Incidences within Germany and the EU can faster be prosecuted and therefore are better for the success statistics than prosecution outside the EU. This could be one of the reason for sinking numbers, not necessarily the decline in offences as such.

5.4.2.1.2 Still existing deficits

The national law against bribery of MPs which had to precede ratification is still full of loopholes because of the resistance of conservative MPs in the ruling coalition. For example:

- There is still no obligation to immediately publish donations to political parties above EUR 10,000.
- Income of MPs besides their regular salary does not need to be published comprehensively, likewise (regular or temporary) income from jobs besides their public office.
- No register for lobbyists is required, publishing who is doing what lobbying in whose name on what budget.
- No federal register is required where public institutions publish contracts and reveal conditions going along with them – only the state of Hamburg adheres to this kind of transparency. [155]
- In Germany, different from France, donations to political parties are allowed by corporations who have received (or hope to receive) public orders. (LobbyControl, 2013, p. 26)

On the whole, however, Germany ranks quite positively on Transparency Internationals Corruption Perception Index, namely on rank 12 out of 177

5.4.2.2 Legal international and cooperative framework

Germany has a Law against International Bribery (*Gesetz zur Bekämpfung internationaler Bestechung*) and besides this apply provisions of the Criminal Code. Beyond that, Germany has ratified the OECD Anti Bribery Convention. It has further signed, but not ratified, the UN Convention against Transnational Organized Crime and the Council of Europe's Criminal Law Convention upon Corruption.

Related legal provisions are contained in the Act Implementing the Protocol of 27 September 1996 to the Convention on the Protection of the European Communities Interests and instruments covering associated offences such as money laundering, fraud, abuse of trust, restricting competition etc.

Germany is founding member of the Group of States against Corruption (GRECO), the Council of Europes anti-corruption monitoring body, which observes corruption prone practices and calls for/proposes improvements and reforms[156]

[155] Bundestag ratifiziert UN-Konvention gegen Korruption – nach elf Jahren. (2014, September 29). In: *Abgeordnetenwatch*. Retrieved from https://www.abgeordnetenwatch.de/blog/2014-09-29/bundestag-ratifiziert-un-konvention-gegen-korruption-nach-elf-jahren

[156] See http://www.coe.int/t/dghl/monitoring/greco/default_en.asp

5.4.3 Bribery and corruption in Bavaria/Nuremberg

The status of implementation of the 2004 Guidelines for Preventing and Combating Corruption in Public Administration was checked in 2012 by the Bavarian Court of Auditors. He starts his observations that, according to the crime statistics in Bavaria, roughly one third of allegations of corruption and bribery relate to the public sector (Bayerischer Oberster Rechnungshof, 2012, p. 41ff). Among the authorities checked is also the Bavarian Tax Administration. While the Court criticizes a number of other institutions explicitly because of their lacking favour of implementing the provisions of the Guidelines, the tax authority was not mentioned explicitly and critically by the Court. In this chapter, the first two relevant categories are dealt with, namely bribery/corruption of or involving civil servants and bribery/corruption involving commercial practice.

5.4.3.1 The situation of civil service and tax administration

Conversation partner to this study, e.g. police officers, agree that corruption of civil servants in Germany and Bavaria is no major problem anymore, especially in the field of bribery/corruption of civil servants: Here especially because of the 2004 Guidelines for Preventing and Combating Corruption in Public Administration, widespread training of civil servants, very tough punishment and widely publicized sentences. For example, in one case a civil servant in charge of road construction was bribed with EUR 800, but, when it was discovered, was punished to the payment of EUR 9000, and, in addition, got a stop on promotion and a transfer to another department.

However: There are highly publicized cases illustrating the link between bribery and tax evasion. For example the former Lord Mayor of Bad Kissingen, Laudenbach, in his previous job policeman. He accepted EUR 434,000 “consultancy provision” for arranging the sale of a nice house to a Russian investor, “forgetting” in the process to pay due taxes for the total amount. To this contributed a sophisticated network of transferral and hiding: The money originated from an account in Cyprus and was transferred only to a small part to German accounts. Rather it found its way to accounts of third persons or specifically opened for those transferrals in Austria. Laudenbach was sentenced to 2 years 8 months imprisonment. Also a relative of him were sentenced to prison on probation for assisting in the deal by providing access and use of his accounts.[157]

Regarding the Bavarian Tax Administration, the application of the Guidelines for Preventing and Combating Corruption in Public Administration is important since an “endangerment analysis” conducted in 2013 resulted in the insight that ‘almost all areas’ in tax administration are ‘particularly prone to corruption, especially positions dealing with the assessment and collection of taxes.’[158] Result of this analysis, at least the way the authors of the 2013 Annual Report of the Bavarian Tax Administration see it, is, however, that a multitude of measures are in place which can effectively prevent corruption so far and no need for further action is needed beyond continuing this periodical review every four years.

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[157] Bad Kissingens Ex-OB muss ins Gefängnis. (2014, September 03). In: Bayerischer Rundfunk. Retrieved 6 August 2015 from http://www.br.de/nachrichten/unterfranken/inhalt/prozess-steuerhinterziehung-laudenbach-wuerzburg-100.html Farkas, S. (2015, August 5). Ein Jahr für Beihilfe zur Steuerhinterziehung. In: Mainpost. Retrieved 6 August 2015 from http://www.mainpost.de/regional/bad-kissingen/Steuerbehoerden-Steuerbetrug-Steuerfahnder-Verwandte;art766,8858204

[158] ‚Im Bereich der Finanzämter führte die Untersuchung zu dem Ergebnis, dass nahezu alle Arbeits- und Aufgabenbereiche besonders korruptionsgefährdet sind, da die Dienstposten – unabhängig von den jeweiligen Qualifikationsebenen der Beschäftigten … verbunden sind, insbesondere mit der Festsetzung und Erhebung von Steuern. Nur in wenigen Bereichen ist keine bzw. nur eine normale Korruptionsgefahr vorhanden.‘ (Bayerisches Landesamt für Steuern, 2014, p. 23)

In the eyes of tax administration practitioner, however, the measures implemented are at times counterproductive when it comes down to do the proper job, namely to collect and administrate taxes. Even though in wide areas of tax administration there were never any attempts of bribery, all employees are obliged to follow proceedings which lower tax administration efficiency without improving anything. One conversation partner from a small department in charge of investigating employees deduction of mandatory security contributions gave the following example: Following present rules, cases should rotate among tax officials in order to decrease the risk of bribery. But: If you only have 2 or 4 civil servants in the relevant department they are going to play ping pong with those cases among each other anyway. And: Whenever a case is transferred from one civil servant to the other it requires a lot of work to get into it which is time wasted. And: Efficient taxation does have to do with trust and familiarity with a case so that tax administration and the taxed person can resolve emerging questions fast and efficiently. This relationship is not endangered. For normal procedures, so the conversation partner, existing supervising structures are sufficient. Clearly, the conversation partner admits, there might be cases giving rise to suspicion and then of course a careful examination makes sense. On the whole, he argues, it would be better to let people do their job and have a mobile inspection coming from outside making chance samples in order to safeguard due process – similar to the procedures applying to police work.

5.4.3.2 Commercial sector

The more prominent bribery/corruption cases also in Bavaria involve private commercial sector[159] and it is here where Bavaria had and has a number of high profile corruption cases. Most well-known is probably the case of the Siemens Company: In 2008 they agreed to resolve a string of bribery cases in Europe and the US with a settlement involving the payment of USD 1.6 billion. But there were also less well-known cases such as the one of Ferrostaal (GER/IX) or, more in the region of Nuremberg, the Siemens-AUB or Max Bögl-IKEA case. The Siemens-AUB case involved covert payments of EUR 30 million between 2001-2006 to a Mr. Schelsky with the goal to establish a local trade-union alternative, the AUB[160], to the nationwide operating trade union IG Metall, which otherwise had been in charge of representing employees interests in bargaining negotiations. Subsequently, Schelsky became the head representatives of employees in Erlangen and bargaining negotiations became more and more employer friendly. The case blew after investigation into tax evasion had been initiated, but it involves besides bribery and tax evasion also charges of fraud and abuse of trust. In 2005, Mr. Schelski was sentenced to prison and the repayment of EUR 3.2 million, his counterpart of Siemens was sentenced on probation.[161] Schelsky took legal redress and his case had to be re-opened in November 2014 with the perspective of a lower sentence.[162] Data relevant for Siemens bribery and corruption practice by senior Siemens employees is also part of the PanamaPapers leak, which may result in further investigation and prosecution (Süddeutsche Zeitung, 2016a).

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[159] §§ 298 and 299 Criminal Code, see http://dejure.org/gesetze/StGB/299.html

[160] Arbeitsgemeinschaft Unabhängiger Betriebsangehöriger (Organisation of Independent Employees).

[161] Verdacht auf Steuervergehen: Staatsanwaltschaft verhaftet ehemaligen Siemens Berater (2007, February 16). In: *Handelsblatt*. Retrieved from http://www.handelsblatt.com/unternehmen/industrie/verdacht-auf-steuervergehen-staatsanwaltschaft-verhaftet-ehemaligen-siemens-berater/2770882.html. Corruption Scandal deepens. Fresh Blow For Siemens as Senior Executive Arrested. (2008, March 28) In: *Der Spiegel*. Retrieved from http://www.spiegel.de/international/business/corruption-scandal-deepens-fresh-blow-for-siemens-as-senior-executive-arrested-a-474390.html. Gewerkschafter Schelsky muss in Haft. (2008, November 24. In: *Stern*. Retrieved from http://www.stern.de/wirtschaft/news/unternehmen/siemens-skandal-gewerkschafter-schelsky-muss-in-haft-646695.html

[162] http://www.br.de/nachrichten/mittelfranken/inhalt/siemens-aub-wilhelm-schelsky-neues-strafmass-100.html

The Max Bögl Ltd. is a large regional construction company and got involved in the IKEA scandal. The Swedish furniture company was doing brisk business for decades which necessitated the building of new magazines and shops as well as renovation and expansion of existing ones. This was managed by a subsidiary, the IKEA Property, and some of its employees asked construction companies for "bonus payments" of 1% of the total contract value if they wanted to increase their chances of obtaining the contract. The Max Bögl company did this for years without any complaint. The scandal had not been detected if the former lover of a head of department had not given in to her pain of conscience and disclosed the affair in a letter to a state prosecutor specialized in corruption cases.[163] Regarding criminal charges, Mr. Bögl and his former head of department accepted in 2007 a court settlement involving the payment of fines and, in the case of the head of department, a one year suspended prison sentence. Regarding financial issues, civilian law proceedings were ongoing in 2010, which is the date of the last retrievable news report upon that case.[164]

But there is also widespread suspicion in more normal areas, for example, in öffentlichen Ausschreibungen: Some contender submit offer close to the own costs just to keep the business alive. And yet other contender get the job for reasons which are not transparent or apparent. Here one can either suspect bribery of some sort or the calculation with illegal methods, e.g. the evasion of taxes and social mandatory contributions, which will be dealt with in G/IE#.

The Schottdorf fraud case is of interest since it also involves a form of Kickbacks which is the most widespread form of commercial corruption.[165] It involves the owner of a medical laboratory service (Schottdorf) and thousands of physicians using his services in a way which leaves all with a handsome profit, amounting to half a billion of Euro or more damage for insurances and patients. Because of strange circumstances, only 1 case out of thousands could be investigated and prosecuted and provides the following information:

> The physician from Munich sent examinations from his private patients to the laboratory service Schottdorf which was correct as these were special laboratory services. But the laboratory should have sent bills to the patients. Instead, the physician sent bills – and much higher prices than he paid himself to the laboratory. These are so-called kickback payments from which the physician and the laboratory are benefitting.[166]

Also specialized lawyer agree that the Schottdorf System deserves the label "Kickback":

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[163] Balzli, B./ Schmitt, J. (2006, August 28) Schwedische Gardinen. In: *Der Spiegel*. Retrieved from http://www.spiegel.de/spiegel/print/d-48680026.html

[164] Schumann, H. (2010, February 17) Deutschlands spektakulärste Bauskandale. In: Wirtschaftswoche. Retrieved from http://www.wiwo.de/unternehmen/korruption-deutschlands-spektakulaerste-bauskandale-seite-all/5563676-all.html

[165] https://de.wikipedia.orGWiki/Kick-back

[166] Der Münchner Arzt hatte die von seinen Privatpatienten entnommenen Proben an die Laborgruppe Schottdorf geschickt. Da es sich um Speziallaborleistungen handelte, war das korrekt. Allerdings hätte dann auch dieses Labor die Rechnung an die Patienten stellen müssen. Das geschah aber nicht. Stattdessen stellte der Münchner Arzt die Laborleistung als seine eigene in Rechnung - und zwar zu einem viel höheren Preis, als er selbst an die Augsburger entrichtet hatte. Er soll seine Patienten um etwa 750 000 Euro geschädigt haben…. In der Fachsprache werden solche Geschäfte als Kick-back-Zahlungen bezeichnet. Von ihnen profitiert sowohl der Arzt, der sich darauf einlässt, als auch letztlich das Labor, das er beauftragt, denn es erhält so Aufträge, die es möglicherweise sonst nicht bekommen hätte. Mittler, D./Szymanski, M. (2014, May 5) Justiz weist Vorwürfe im Fall Schottdorf zurück. In: Süddeutsche Zeitung. Retrieved 25 June 2015 from http://www.sueddeutsche.de/bayern/verjaehrte-aerzte-betrugsverfahren-justiz-weist-vorwuerfe-im-fall-schottdorf-zurueck-1.1950313

> Recently in Bavaria, the "Soko Labor" was suspended which also investigated against the laboratory physician Bernd Schottdorf from Augsburg. Their investigations induced beside others that a physician from Munich was sentenced re fraud to three years and three months.[167]

On that background the course of investigation and prosecution against the CSU crony Schottdorf are even more surprising – or depressing (see GER/VIa/4.5.7).

5.4.4 Bribery by German companies and private persons abroad

5.4.4.1 Hide & seek

In Germany, bribery of foreign officials was tax deductible as long as 1999 and therefore part of normal business dealings. Also the recent Anti-Corruption Report by the European Commission states that there is still need for improvements in the private sectors dealing with foreign public and business partners. While there is quite some improvement noted in the area of large TNCs, there remains the problem of small and medium enterprises (European Commission, 2014a, p. 8f.).

All this is supported by information provided by conversation partner working in the investigative sector. One police officer confirms that in his opinion large companies are increasingly reluctant to bribing: They depend less from bribe than their good reputation to get contracts. This is different with middle sized companies who are more desperate since here the company might be at stake if a contract is coming or not.

According to conversation partners from the prosecution and business sector, the fact of bribing foreign public officials still exists, but since it is no longer tax deductible it shows in the books under different names, e.g. "consultancy/consulting fee", "provision", "contingencies/unforeseeable", "legal counselling" or even "material". One conversation partner from the business sector told the story that bribery of one official was hidden in the post "fencing", i.e. the costs of fencing the construction side was much higher in the budget than the actual costs spent on the project. Or: The budget claims to have build a street leading to the construction side which, given its costs, must be a super-highway. In reality, there is still a mud track. These posts may be totally fictious (i.e. they exist without anything was being done in return) or the payment is over-proportionate regarding that which has been done in return.

An example in case is the one by Krauss-Maffei-Wegmann which started as a case of tax evasion and continued to involve bribery abroad. [168]

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[167] In Bayern wurde zuletzt die „Soko Labor", die auch gegen den Augsburger Laborarzt Bernd Schottdorf ermittelte, aufgelöst. Deren Ermittlungen führten unter anderem dazu, dass ein Münchner Arzt wegen Betrugs zu einer Haftstrafe von drei Jahren und drei Monaten verurteilt wurde (LG München I, 27.08.2010 - 7 KLs 572 Js 46495/08 sowie BGH, 25.01.2012 - 1 StR 45/11). Arztstrafrecht – Neue Schwerpunktstaatsanwaltschaften in München und Nürnberg. In: Fachanwälte für Strafrecht am Potsdamer Platz. Retrieved from 25 June 2015 from http://www.fachanwaelte-strafrecht-potsdamer-platz.de/unser-service/aktuelles/arzt-und-medizinstrafrecht/schwerpunktstaatsanwaltschaften-in-muenchen-nuernberg-und-hof.html

[168] Krauss Maffei Wegman – Korruptions- und Bestechungsfall Griechenland im Jahr 2003. Bei Razzia 2014 ging es um Steuerhinterziehung, aber nicht mehr um die Korruptionsvorwürfe, die zu diesem Zeitpunkt schon verjährt waren. ‚Ein Ex-Manager des Panzerbauers Krauss-Maffei Wegmann (KMW) soll bei Rüstungsgeschäften mit Griechenland an Schmiergeldzahlungen beteiligt und dabei 1,15 Millionen Euro für sich selbst abgezweigt haben…. Der Vorwurf der Bestechung ist inzwischen verjährt. Der angeklagte ehemalige KMW-Vizepräsident für internationales Marketing sagte, der stellvertretende Rüstungsdirektor in Athen sei bestochen worden. „Es war bekannt, dass in südosteuropäischen Ländern ohne diese Zahlungen Verträge nicht

The accused received a prison sentence of 11 months suspended on probation, the company was sentenced to pay a fine of EUR 175,000 because of tax evasion and bribery. Remarkable: The affair took place in 2001, after the change of law no longer permitted bribery to be a business expense. Yet, the money was booked exactly as that. A tougher sentence was no longer possible due to the elapsed time and time-barring.

5.4.4.2 Doing business in Africa

Conversation partners working in international business and criminal prosecution have the feeling, that bribery/corruption in Africa is stronger than elsewhere, both as far as personalized corruption and institutionalized corruption is concerned. They also concede the truth of a frequent excuse by businesses, that there is no way of conducting any business without bribery in some states – which is why it is still done either directly or via intermediaries. Conversation partners reported their experiences in Nigeria, Cote d'Ivoire, Zimbabwe, Kenya and South Africa. Another good illustration of the point is the Ferrostaal case (GER/IX).

Realizing investment in Africa requires bribes on two levels: First, ahead of the deal, second, by implementing the project. The first level requires much more money and, depending on the size of investments, requires millions of Euros. Sometimes negotiation partners on the African side set up shell "consultancy" companies just for the negotiation at hand, write exorbitant bills which are to be paid on foreign accounts. The second level, implementing the project, requires constant bribery on the level of small civil servants: Customs, to speed up the release of goods, police and security to pay attention to the construction side, administration to get this or that paper or inspection done reasonably fast. This sector of bribery, conversation partner from the business sector argue, is not the problem: Civil servants in Africa are badly paid exactly because they have access to this kind of "supplementary payment". This money is used to feed a family, it is socially acceptable and does, even when stretched over years, not accumulate to amounts common on the first level. Especially in industries which have to do with arms development, production, export etc. there is always bribery and corruption because it is of big secrecy on both sides anyhow and those whose task it is to expose bribery and corruption are part of the deal themselves. Some deals are probably just done because large amounts of bribery are available in this sector, without any real necessity or need corresponding to the purchase at stake. A specifically sad example are the consequences of the Black Empowerment Policy of South Africa: The original idea was to establish a black medium size business sector by linking new businesses with companies coming from outside and wanting to invest in South Africa, i.e. a variation of "Learning by cooperation". The reality in many cases is that those companies are owned or run by high ranking ANC members whose lifelong service for the nation is rewarded that way. Those people have no idea of, and interest in, running a business, but are very much aware of their influence regarding the investor and his desire to do business within the South

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zustande kommen." KMW habe nie selbst „nützliche Aufwendungen" geleistet. Auslandsgeschäfte liefen aber fast immer über Vertreter und Vermittler vor Ort. Bei Aufträgen über 100 Millionen Euro seien zwei bis drei Prozent Vermittlungs- und Beratungsprovision marktüblich. Einzelheiten habe er von den Partnern vor Ort gar nicht wissen wollen: „Meine und unsere Haltung war: Lass mich damit in Frieden, das ist deine Angelegenheit." Aus: Prozess gegen früheren KMW Manager (2015, October 19). In: Merkur. Retrieved from http://www.merkur.de/bayern/ruestungsmanager-olaf-landgericht-muenchen-verdacht-steuerhinterziehung-5660535.html . Gericht verhängt Bußgeld gegen Panzerbauer KMW. (2015, December 3). In: FAZ. Retrieved from http://www.faz.net/aktuell/wirtschaft/unternehmen/bussgeld-gegen-panzerbauer-kmw-wegen-steuerhinterziehung-13947276.html

African Republic. Up to the present day conversation partner conclude, it is almost impossible to get government contracts without paying bribes.

Publicly known examples for bribery by German companies regarding the countries participating in this study are: The report "The Puppet Masters" starts with two examples, one of which involves bribery by the German Company Daimler, the second Anglo Leasing and Finance in Kenya (van der Does de Willebois & al., 2011). Another Kenyan case relates to the former Finance Secretary from Kenya, Chris Okemo and Samuel Gichuru, manager of Kenya Power, who allegedly received bribes with the help of the Deutsche Bank via the Tax Haven Mauritius. Right now, Okemo is accused in 15 cases, Gichuru of 40 cases of bribery and money laundering.[169] In the case of Zambia, the case of Ferrostaal should be referred to.

5.4.5 Tax administration and bribery/corruption

As tax secrecy concerns are expressively overridden when there is suspicion of money laundering and terrorist financing due to an explicit regulation in the Fiscal Code, a similar requirement concerning bribery/corruption is contained in § 4 Abs. 5, Nr. 10 S. 3 Income Tax Law[170]. Here, too, tax officials have the obligation to report their suspicion to the relevant authorities both in cases of national and international business transactions. There is also some consistent interpretation of law by courts that employee of tax administration should notify relevant authorities when they come across crime in the course of their regular work. For example regarding bribery in June 2008 the Financial Court of Baden-Württemberg,[171] confirmed in July 2008 the Federal Financial Court. The judges also confirmed that such passing on of information is only permissible in accordance with § 30 Abs.2 AO, i.e. if a law explicitly permits it. If, therefore, the reference § 4 Abs. 5, Nr. 10, S. 3 of the Income Tax had not existed and applied, the tax auditor had acted wrongly. The interesting case is that the reported deed has been waved through at a check covering the years 1995-1999, because in those years bribery was not yet prohibited. The situation was difficult when the books of the years 2000-2004 revealed the continuation of the established practice, but now § 299 Penal Code established the prohibition of bribery. The courts also established that tax auditors do not have to worry themselves whether indications will suffice for sentencing. This is the job of the state prosecutor. An initial suspicion (Anfangsverdacht) arising from the facts is adequate (see below 5.9.6).

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[169] (Henn, Meinzer, & Mewes, 2013, p. 15), containing also the following references: Charles Abugre: The world of dirty money. Pambazuka, Issue 540, 21.07.2011. http://pambazuka.org/en/category/features/75085, Galgallo Fayo: Okemo, Gichuru extradition case to proceed. Business Daily Africa, 05.02.2013. www.businessdailyafrica.com/Okemo-Gichuru-extradition-case-to-proceed-/-/39546/1685928/-/b1xs44/-/index.html.

[170] ‚Die folgenden Betriebsausgaben dürfen den Gewinn nicht mindern: … (10) die Zuwendung von Vorteilen sowie damit zusammenhängende Aufwendungen, wenn die Zuwendung der Vorteile eine rechtswidrige Handlung darstellt, die den Tatbestand eines Strafgesetzes oder eines Gesetzes verwirklicht, das die Ahndung mit einer Geldbuße zulässt. [2]Gerichte, Staatsanwaltschaften oder Verwaltungsbehörden haben Tatsachen, die sie dienstlich erfahren und die den Verdacht einer Tat im Sinne des Satzes 1 begründen, der Finanzbehörde für Zwecke des Besteuerungsverfahrens und zur Verfolgung von Steuerstraftaten und Steuerordnungswidrigkeiten mitzuteilen. [3]Die Finanzbehörde teilt Tatsachen, die den Verdacht einer Straftat oder einer Ordnungswidrigkeit im Sinne des Satzes 1 begründen, der Staatsanwaltschaft oder der Verwaltungsbehörde mit. [4]Diese unterrichten die Finanzbehörde von dem Ausgang des Verfahrens und den zugrundeliegenden Tatsachen;

[171] Schelling, D. (2008, July 24) Mitteilungspflicht der Finanzämter über festgestellte Schmiergeldzahlungen. In: IWW, Retrieved from http://www.iww.de/pstr/archiv/steuergeheimnis-mitteilungspflicht-der-finanzaemter-ueber-festgestellte-schmiergeldzahlungen-f9952 Reference for the Bundesfinanzhof: BFH, Beschluss vom 14.07.2008, Az. VII B 92/08.

This seems to justify the existence of handbooks whose task is to assist tax officials to discover cases of corruption and bribery, e.g. (OECD-CTPA, 2009b).

> 'In order to conceal bribes, taxpayers will generally use the same techniques they use to conceal income. Tax examiners will therefore have to look for evidence of bribery in the same way as they look for evidence of fraud. Taxpayers who knowingly understate their tax liability often leave evidence in the form of identifying indicators. (OECD-CTPA, 2009b, p. 17)

In addition to not-declared surplus income, there are a number of other indicators for suspicious spending.

- High spending on "consultancy" or in countries, where the business has own local branches: Whats the point of having branches if one has the need to spend that much on consultancy. Similar explicit hiring of subcontracting consultancy companies for a longer period.
- High spending of "operative costs" (Betriebsausgaben) where it is not obvious what exactly has been acquired with it.
- Still existing cash spending with excuses such as "we need to pay worker who do not have bank accounts"
- usual methods of payment or transfers, the existence of "slush funds"[172], i.e. whenever there are transactions involving countries known to be secrecy jurisdictions etc.

For all cases, handbooks offer a wide range of techniques to identify those indicators and consolidate initial suspicions into something which justifies further action.

In spite of the said, there are continuous problems to get the all-decisive initial suspicion (Anfangsverdacht): It is difficult for tax auditors to detect these posts in annual accounts of a company which are consolidated. It would be easier to detect them if the books themselves would be examined. Then, suspicious entries could be spotted, e.g. if a number has too many "00" or if an abroad business partner has an account in Germany where money is transferred. However, most potential leads are extremely well disguised: For example, money is booked, cancelled, re-booked and transferred across the balance sheet, sometimes with equivalent service, sometimes without etc. Or you have a booking with a faked receipt (*Abdeckungsrechnung*). You simply need training, experience and a lot of time to find out.

And here again a well-known problem arises: That of time and capacities. It is not possible nor required of the tax auditor to look into all this when he comes for routine inspection, which is why it is difficult for him to get the "initial suspicion" (*Anfangsverdacht*) in the first place which then would justify a more careful investigation. Therefore, also the lowering of threshold of proof by the BFH does not really help to solve the problem.

5.4.6 General problems in combating bribery and corruption

From the investigators point of view the main problems in fighting bribery and corruption are (1.) to get an initial suspicion that something is wrong and (2.) to get a proof.

[172] 'Corporate slush funds are accounts or groups of accounts generally created through intricate schemes outside of normal corporate internal controls for the purpose of making political contributions, bribes, kickbacks, personal expenditures by corporate officials and other illegal activities. Top level corporate officers are generally involved and the schemes are carried out by various transactions through the use of both domestic and foreign subsidiaries.' (OECD-CTPA, 2009b, p. 29)

In spite of that which is said in 5.4.5 regarding tax administration and on the whole, detection is relatively easy in Germany. There is still a culture valuing honesty, trust in playing by rules and transparent competition. Therefore, if something goes wrong, there is the risk of charges by competitors. Other entry doors for investigations are observations by colleagues, neighbours, (former) family members and lovers, finally people tend to make mistakes and there is, compared with other countries, widespread transparency.

Problems increase if an investigation needs to cross international borders. Even then, this is comparatively easy within Europe: Here it is rather a matter of time until you get an answer due to the 'Swedish Initiative' and the Administration Cooperation Directive (see#). Sometimes you have to wait for months, if not years (in the case that the approached authority has own investigations going on). If, however, Africa is involved, prosecution agencies there are not so much interested in investigation either because they profit from the situation or because the damage is not high enough to get their scarce resources involved. Finally, there are principal barriers preventing further investigation and cooperation with other authorities, as in the case of China and its Sonderwirtschaftszonen. Here German authorities do not cooperate because China has a death penalty on bribery, corruption and the participation in tax evasion. A conversation partner from the police:

> There are many common commissions with the tax authority and the financial authority. Decisive for police involvement is that there is a criminal incident. This is the case for infidelity, corruption or existence of a black cashier for paying corruption. This is for instance for bills of consulting, coaching where no performance was given or overpayment was paid. Also here, the proof is the big problem: the black cashier can be in a country where the banking secret is especially protective. [173]

5.4.7 What is being done against it?

5.4.7.1 Nationally

Over the past years, large companies installed internal compliance systems which in many cases are executed by external auditor or lawyer firms. They can operate much easier in international contexts when they are commissioned by the headquarter than public authorities depending on international legal cooperation. As long as the reports of those companies are satisfying, public prosecution can accept those standards. This is mainly done by large companies who fear for their reputation, because if there are rumours of investigations because of bribery, this will cost deals and customers as is illustrated by the Ferrostaal Case (GER/IX). This leaves the wide field of medium size enterprises which also have considerable size and financial power.

This leaves the question of corruption at the very top, especially among the elites of a country. One police officer says

[173] Es gibt viele gemeinsame Kommissionen mit der Steuerbehörde und der Finanzbehörde. Entscheiden, ob Polizei dabei ist, ist, ob es einen Straftatbestand gibt. Dieses der Fall der Untreue, Bestechung, oder dem Anlegen einer schwarzen Kasse (dieses Untreue dem Arbeitgeber gegenüber) aus den dann Bestechungsgelder gezahlt werden können. Hier geht es etwa um Rechnungen für Consulting, Coaching, Beratung, wo keine Gegenleistung erbracht wurde oder wo die Gegenleistung überbezahlt wäre. Auch hier ist der Nachweis das große Problem aus zwei Gründen: zum einen kann diese schwarze Kasse in einem Land liegen, welches durch das Bankgeheimnis besonders geschützt ist (Steuerparadies). In diesem Fall haben die Behörden dieses Landes kein Interesse, bei der Aufklärung zu helfen. Noch schlimmer ist, wenn diese Behörden korrupt sind, und schneller ein Hinweis an den Betreffenden ergeht als das bei den eingeleiteten Untersuchungen etwas sichergestellt werden könnte. Noch schwieriger ist, wenn diese konnten durch verschachtelte Konstrukte geschützt sind, die über mehrere Länder verteilt sind, wo Behörden korrupt sind, kein Interesse haben oder beides der Fall ist

> ‘Overall, I got the impression that there are many efforts in the field of street-level corruption, but not in the elite corruption (This is also partially my private opinion). In this context, it is also peculiar that Germany to date as one of the few countries did not ratify the anti-corruption convention of the UN. But this is currently again on the political agenda. Additionally, there are other interesting law gaps, e.g. in the field of sports or physician corruption. [174]

According to conversation partners at the police, first of all, legal clarifications are needed, e.g. of §§ 299f StGB (*Angestelltenbestechung*) or § 108e (*Politische Korruption*) since provisions here are too open to interpretation and it is difficult to construct a tight case for court. And indeed there was the attempt to reform § 108e when making national law compatible with the UN Convention Against Corruption. The new version has still a number of holes and flaws, especially regarding the burden and way of proof, e.g. inhowmuch a decision or vote by an MP does not indeed correspond to his conscience, the limitations and implication contained in para 4, where, so fear experts, only lengthy court debates will lead to some precision.[175]

Most importantly, lobbyism and the influence of lobbyism on political decisions is a problem since those people are not only in touch with holder of political office during the time when they exert those offices (§108e, 4 StGB), but also outside that time, during private meetings... Thus, also many things going on there are, in his view, cases of bribery but they do not have legal instruments to go against it. Helpful would be further the Italian model of the “reversal of the burden of proof”: if there are suspicious transfers it would not be up to the police to prove foul play, but up to the suspect to prove that everything is fine. Beyond that a public register of those companies who have been excluded from public contracts. On the whole, the main problem in the field is how to find out about it since each party profits from it. Many options to hide practices involve tax havens and certain anonymous accounts which are difficult to research.

Regarding this kind of corruption, especially lobbyism, see e.g. GER/VIa).

5.4.7.2 Internationally

Regarding international cooperation, conversation partners from tax auditing and fraud investigation as well as police admit that a lot of good things are brought on the way, especially within the EU, OECD and G20 context.

For example: As early as 1992, the OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations[176] recommends joint audits also for the discovery of tax evasion and bribery (OECD-CTPA, 2009b, p. 24) A major evaluation of made experiences

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[174] ‚Insgesamt ist bei mir der Eindruck entstanden, dass es sehr viele Bemühungen im Bereich street-level corruption gibt, nicht aber im Bereich elite corruption (Das ist jetzt ein Stück weit auch meine private Meinung). In dem Zusammenhang ist auch auffällig, dass Deutschland bisher als eines der wenigen Länder die Antikorruptionskonvention der UN nicht ratifiziert hat. Das wird politisch aber gerade wieder mal angegangen derzeit. Daneben gibt es andere interessante Rechtslücken, z. B. im Bereich der Sport- oder Ärztekorruption.‘

[175] Michalke, R. (2016, June 3) Der neue § 108e StGB – „Bestechlichkeit und Bestechung von Mandatsträgern“. In: Compliance Berater 6/2014. Retrieved http://www.hammpartner.de/data/veroeffentlichungen/abdruck_cb-2014-6_michalke.pdf

[176] http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=85&InstrumentPID=82&Lang=en&Book=

was undertaken for the Sixth Meeting of the OECD Forum on Tax Administration 2010, in the "Joint Tax Report"[177]

But here, it is again unlikely that there is equal benefit for developed on the one side, and poor and developing sub-Saharan states on the other, because they lack administrative and IT infrastructure and equipment and because the laws and regulations according to which audits are conducted are biased towards the rules of developed states.

In the case of both Bavaria and Africa, however, all conversation partners argue that the best legal framework is worth nothing if there is no trained staff employed in adequate numbers and no political will to support African tax administration in obtaining this staff.

5.4.7.3 What should be done against it

Independence of jurisdiction from governmental ministries

➔ Suggestions for improvements at (Schlötterer, Macht und Missbrauch - von Strauß bis Seehofer, 2010) (Schlötterer, Wahn und Willkür: Strauß und seine Erben oder wie man ein Land in die Tasche steckt, 2013)

➔ Suggestions for improvements for Germany in the Germany paper of the European Commissions' Anti-Corruption Report (European Commission, 2014b).
- No freedom of information, no legislation on access to public information (only Hesse and Saxony are here on Bavarian standard. Baden Württemberg at least drafted a law, Lower Saxony promised to do it) p. 4
- No regulation on lobbying, no obligation for registration of lobbyists or reporting of contacts between lobbyists and public officials p.5
- No sufficient protection of Whistleblower p. 4f.

➔ Register for companies that work with corruption
➔ Section 1504 of Dodd/Frank Act: Requires companies to disclose their payments to government officials. This, however, is voluntary. And: This helps curbing corruption, but not IFFs from commercial activities (High Level Panel, 2015a, p. 45)

5.4.8 Conclusion

This chapter demonstrates once more, that tax administration nationally and internationally is well placed to uncover all sorts of wrongdoing, in this case bribery and corruption. But it also demonstrates, that many good opportunities will probably be lost because of time constraints when conducting national routine checks, and even more so internationally since the OECD option mentioned above of joint audits does not receive adequate backing and, accordingly, adequate staff.

Facing these constraints, therefore, a much better way to uncover wrongdoing here is, in the eyes of a conversation partner at the police, the support of whistleblowing.This is, in theory, supported by the European Commission and the European Parliament (European Commission, 2014b). When looking at the Directive regarding Trade Secrets from 27 May 2016 (see 5.10), trade secrets are much better protected that the position of those thinking about denouncing illegal acts. To find such a misbalance in this document is even more deplorable since commercial bribery and corruption seem to be far more widespread and

[177] Joint Audit Report, retrieved from http://www.oecd.org/tax/administration/45988932.pdf

damaging than the corruption of civil servants and is closely linked with the corruption of the political leadership of a country.

Facing these constraints, therefore, another approach seems to be in need of support: More transparency in whatever pertains also to national and international business doings, so that tax auditors, whistleblower and other members of the interested public (e.g. journalists and NGOs) have an easier job to monitor shady dealings and uncover that which is attempted to hide (see more below 5.9.5).

The largest problem here as in other areas is the corruption among political and economical elites which puts them into the position to define laws for their protection and/or for declaring fishy practices to be legal and legitimate. Here is one reason for separating the state prosecution service from the Ministry of Justice to make it more independent. Even more important is, however, everything which sheds light into dealings among elites at societies top level.

5.5 Criminal tax fraud with turnover tax/VAT

5.5.1 What are we talking about?

A tax fraud investigator joked: 'If you rob a bank you very likely get little money but risk heavy prosecution and punishment. If you want to be a millionaire fast without a lot of risk: Turnover Tax Fraud would be the thing to do.' Indeed, the damage is considerable: For Bavaria EUR 1 billion alone.

According to conversation partners, there are not too many serious options for cheating for ordinary citizens, perhaps some in the context of the Shadow Economy. The lions share is linked to organised criminal behaviour, transgressing international borders,[178] which is also seen that way by the Federal Central Tax Office.[179] Since this area is outside the original scope of the study, however, only one major and very lucrative example for international Turnover Tax Fraud shall be presented.

5.5.2 Missing trader- and Carousel-fraud

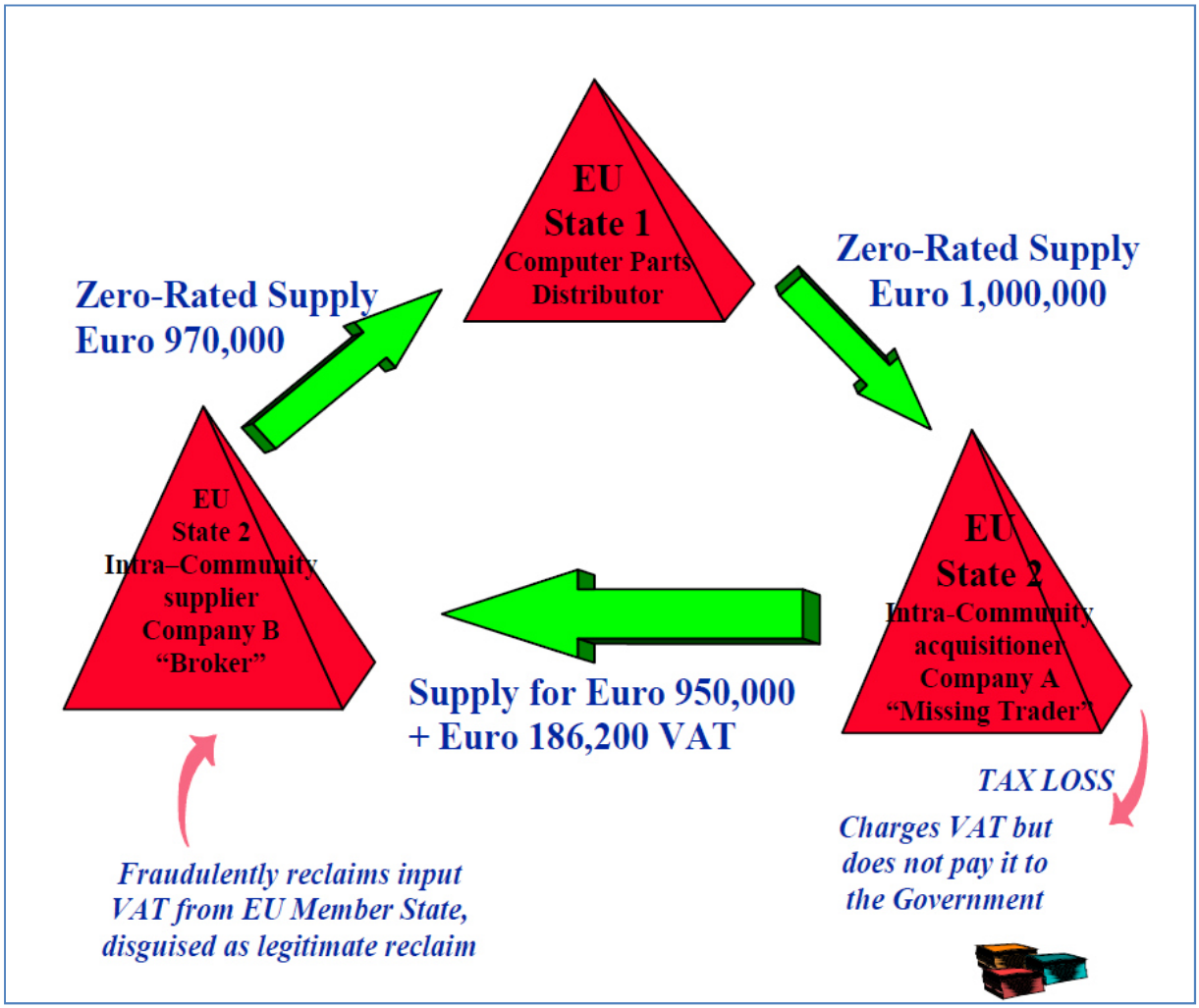
The most well known and well examined trick is known under the name "Missing Trader Fraud" and "carousel fraud". The easiest way to participate is to open a company and to obtain a VAT registration number in any EU member state. This enables the company to trade and then purchasing goods free from VAT in another EU member state, selling them at a VAT-inclusive purchase price in their country and then going missing or defaulting without paying the VAT due to the Government. The following graphic illustrates a simple model of a VAT Carousel (Financial Action Task Force, 2007, p. 21ff.):

[178] See, for example, the following quote: 'In addition to using violence and intimidation, organised crime now operates through corruption. As for money laundering, not only does it frequently go hand in hand with activities typically associated with organised crime, but it is also closely linked to corruption, tax fraud, and tax evasion. As a result, organised crime, corruption, and money laundering, though distinct phenomena, are, in reality, often interrelated and call for targeted action.' Explanatory statement on p. 41 of the Report on organised crime, corruption and money laundering (A7-0307/2013) of 26 September 2013. Retrieved from http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0307+0+DOC+PDF+V0//EN

[179] http://www.bzst.de/DE/Steuern_International/USt_Betrugsbekaempfung/USt_Betrugsbekaempfung_node.html

- Company “A” in one EU country purchases goods from a supplier in another EU country, at a zero VAT rate.
- Having acquired the goods, he supplies them to another trader (Company “B”, within the same country) for a price + VAT. However, company “A” does not pay the VAT to the EU Member State and becomes a “missing trader”.
- Company “B” then supplies the goods to an EU country (often the same company as the original supplier) and claims back the VAT that he has paid when he bought the goods from Company “A”.

Graphic 18 Simple model for a Carousel fraud



Source 13 (Financial Action Task Force, 2007, p. 22)

Those chains of trade can become, of course, more complicated. There were Carousel Frauds involving up to 200 “buffer-trader” between the broker and the missing trader, obscuring their relationship and making it even more difficult for authorities to unravel the network. Trader now also export goods outside the EU in the attempt to break the “audit trail” by incorporating Export Processing Zones in their scheme. While profits increase fast and steadily, it is mostly impossible for authorities to detect any fraud before those missing companies are abandoned and its owner disappear finally and for good.

Table 15 Profit in a Carousel Fraud

	Cost	Sales price	Profit	Input VAT	Output VAT	Net VAT Due to Customs	Net Vat paid/(repaid) per £m
Misser	110	100	-10	0	17.5	17.5	0
Buffer 1	100	102	2	17.5	17.85	0.35	3500
Buffer 2	102	104	2	17.85	18.2	0.35	3500
Buffer 3	104	106	2	18.2	18.55	0.35	3500
Broker	106	110	4	18.55	0	-18.55	-185500
Net profit			0				-175000
Net profit %			0				17.5

Source 14 (Financial Action Task Force, 2007, p. 23)

Given the options provided by internet trading, nowadays not even goods need to be transported anymore. More recent trends are trading electronically in pollution and emission rights, but here, too, fraud can happen: in one case EUR 220 million profit were gained in minutes –trader behind the scheme were assisted by employees of the Deutsche Bank. The entire fraud was organized as a Carousel Fraud, amounting to an overall damage in turnover tax fraud of EUR 850 million. Uncovering the fraud required the cooperation of over 1000 policemen home and abroad and a lengthy prosecution before some of those involved were sentenced to prison. Meanwhile, not only the originators of the scheme were sentenced for tax evasion, also seven employees of the bank have been accused of "organized tax evasion".[180]

Also the Cum-Ex Scandal was organized according to a Turnover-Tax Carousel Fraud (see above, 1.7.1)

5.5.3 Carousel Fraud and Terrorist Financing

As tax fraud investigators from Bavaria uncovered, carousel fraud is also used by islamist terrorists to finance their holy war. Under the label "Economic Jihad", a group of Germans of Turkish origin organized an international Turnover Tax Fraud via a system of letterbox companies, getting a two digit million Euros of refunds from tax administration for turnover never done in the first place. This network was discovered by the SKS special investigatory squat of the Bavarian tax fraud investigators whose ordinary task is to uncover organized tax evasion, tax fraud or money laundering. This illustrates the importance of investigating carefully also suspicious tax transactions when attempting to combat religiously motivated terror financing, and most certainly a good cooperation between tax fraud investigators and other investigating authorities.[181]

5.5.4 Tax Administration and Missing Trader Fraud

On the whole, however, there are problems in practical implementation and enforcement.[182] Regarding Germany, two issues help: First, the understaffing of Turnover

[180] Ott, Kl. (2013, July 25). Die EU – eine Goldgrube für Betrüger. In: *Süddeutsche Zeitung*. Retrieved from http://sz.de/1.1730226 "Bandenmäßige Steuerhinterziehung". (2015, August 13). In: Frankfurter Allgemeine Zeitung. Retrieved from http://www.faz.net/aktuell/wirtschaft/unternehmen/anklage-gegen-acht-banker-bandenmaessige-steuerhinterziehung-13748028.html

[181] Gotteskrieg gegen deutsche Finanzkassen. (2016, February 14). In: Tagesschau. Retrieved from https://www.tagesschau.de/inland/terror-islamisten-bayern-101.html

[182] Praxisprobleme bei den neuen Revers-Charge-Fällen. Retrieved from http://www.haufe.de/steuern/kanzlei-co/umsatzsteuer-praxisprobleme-bei-den-neuen-reverse-charge-faellen_170_273910.html and Stolperfalle Reverse Charge (2012, November 29). Retrieved from http://www.haufe.de/steuern/kanzlei-co/stolperfalle-reverse-charge-hintergrund_170_148526.html

Departments and their problems to look carefully into suspicious cases (see GER/VI/4.3.6), second the existence of 16 tax authorities and the problems of communication between them helps (see GER/VU/3). Conversation partner from police and prosecution argued, that fraudsters preferably use constructions and deals where large amounts of goods can be traded fast, which requires that the traded goods are ideally small, light (or even weightless), and precious. The most curious case was the trade with certificates relating to spent (!) phone minutes (Telefon-Guthabenkarten). Fraudsters are very happy with the German tax administrative structure since communication delays between authorities do not merely exist between Germany and Lithuania, but also between Mecklenburg-Vorpommern and Bavaria. In the case that something suspicious come up and until a *Kontrollmitteilung* has been written and submitted, there is some likelihood that the fraudulent scheme has already been conducted and its participants have disappeared.

Given the "suspicion" that the turnover-tax-fraud departments are intentionally understaffed because German states want to save costs in areas where tax revenue mainly belongs the federation, there is reasonable doubt that the situation in the enforcement sector will improve substantially in the foreseeable time.

Not everybody shares this sceptical view. Some argue, that the coordination between the 16 *Länder* has improved. But cooperation does not seem to be wholeheartedly and openly: The central coordination at the Federal Central Office for taxes states 'that the Länder tend to provide relevant information only when they expect to obtain additional information in return that benefits the assessment or prosecution of individual cases' (Bundesrechnungshof, 2012b, p. 43). Due to the federal structure, there is also no centralized management of information on the number of intra-Community VAT fraud cases and related VAT losses.

The preceding illustrates how important the framework is for any effective investigation and prosecution efforts and once more the question arises whether the federal and decentralized structure of the German taxation system is a blessing or a burden.

5.5.5 Combating VAT tax fraud

5.5.5.1 EU

This kind of fraud within the European Union is going on over two decades, since the abolishment of border controls in the EU in 1993 and the introduction of a 'temporary' VAT system was introduced for trading goods between EU member states. This temporary system is still in place because the introduction of a permanent system would require unanimous decisions by all member states, which is difficult to obtain. For this reason, also temporary solutions in prevention, detection and repression are in place which are, to say the least, not adequate.

The problem on EU level is the half-hearted approach and the big gap between rhetoric and declaration on the one hand, and adequate action on the other, taking into account realities as created for crime via electronic technology. EU directives exclude crucial areas from prosecution and even hamper administrative cooperation. A major problem here is also the provision for legislation and activities to protect national interests, obstructing progress by the need for unanimity within the EU.

> Tax administrations of the different member states at present manifest considerable helplessness in combating these types of phenomena, but each to a different degree. Freedom of movement for people, goods, capital and services within the EU leads to visible asymmetry

> in intra-community trade, particularly in such goods as: cell phones, integrated circuits (particularly micro-processors and chips), natural gas and electric power certificates, provision of telecommunications services, deliveries of raw metals or semi processed elements of metals, deliveries of game controls, laptops, tablets, and even cereals and industrial crops (Council Directive, 2013/43/EU). In the light of this, the European Union already in 2006 adopted the possibility of applying the mechanism of reverse VAT charges (Article 199), adopting Council Directive 2006/112 EC of 28 November 2006 on common system of value added tax (which curbed the plague of VAT extortion, particularly for scrap metal), which was changed by Council Directive, 2010/23/EU of 16 March 2010, and after that by the aforementioned Council Directive 2013/43/EU. By this measure the requirement to pay VAT was shifted to the end customer for whom the given service was performed or a commodity delivered, classified to reverse charge category and adopted in national legal system. It was the last of these directives (Council Directive 2013/43/EU) which allowed for applying the reverse charge principle for a period of at least two years, but not later than until end 2018. This briefly presented characterisation shows how leaky is the tax system, particularly in relation to VAT, in the whole European Union. The protracted community decision-making mechanism and absence of consensus on many issues makes even the very exchange of information on tax issues highly unsatisfactory. One can even formulate the thesis that in the given legal and organizational state of affairs, earning money on extorting taxes from given countries is a profitable business, and well secured within the crime carousel saves from penalization. At that, the various legislative implants, instead of supplementing each other and addressing issues in a systemic way, in the field of indirect taxes constitute an assemblage of inconsistent norms and recommendations. One could mention only that the adopted Council Directive 2011/16/EU of 15 February 2011 on administrative co-operation on tax issues and waiving Directive 77/799/EEC covers all tax groups with the exception of their most important part, that is the indirect taxes (VAT, excises and customs duties). At the same time, (EU) Council Regulation 904/2010 of 7 October 2010 on administrative co-operation and combating value added fraud does call into being Eurofisc – a decentralized co-operation network for VAT (Raczkowski, 2011), but defines exchange of information according to 20th rather than 21st century standards. Even though it sets up spontaneous and automatic possibilities for transfer of the necessary information, but supplements it with an extensive catalogue of exclusions, allowing for refusals to provide information in practically every single case. In addition, specifying a maximum period of three months for providing return information implies a purely historical time, as it does not reflect the speed of economic turnover and by the same does not allow for taking actions when taking such actions would be warranted. ... Visible in this respect is a duality of approach. On the one hand declarative statements about co-operation and community actions, and on the other hand legislation and provisions for actions which allow for protecting the national economy and even unfair competition. In addition, tax services in many countries, same as politicians, all too rarely take part in scholarly conferences, seminars or meetings with business people, cutting themselves off from the necessary knowledge and possibilities of securing external support. In effect, often when issuing tax decisions or interpretations they have no idea how real economic turnover takes place, where are the hazards and how can taxpayers be bolstered to act consistently with the law, by facilitating conduct of legal business operation. (Schneider, Raczkowski, & Mroz, 2015, p. 40f.)

Rather than EUROFISC, fraud of this kind should be prosecuted ‘through coordinate actions in executive mode’, e.g. with OLAF, the European Anti-Fraud Office (Schneider, Raczkowski, & Mroz, 2015, p. 46).

On 7 April 2016, the EU Commission presented an Action Plan against this kind of fraud.[183] Under this they promise to come forward with definitive rules for a single European

[183] VAT Action Plan (2016, April 6) Retrieved from http://europa.eu/rapid/press-release_IP-16-1022_en.htm also Greive/Tauber (2016, April 7) So unterschlägt die Mehrwertsteuer-Mafia Milliarden. In: Die

VAT area in 2017, where cross-border taxation would still be done following the rate in the destination country as it is today. However, an EU wide web-portal would enable tax payments to the local tax authority which then would forward it to the receiving authority and it would abolish in-between taxation and refund steps. The EU Commission criticise the Reverse Charge Method, favoured by member states among which is also Germany, because it is prone to fraud and requires a lot of reporting, that way pushing up administrative costs.

5.5.5.2 Internationally

But also outside the EU framework, cooperation is going on, even though not satisfactorily, e.g. in the cooperation of Financial Intelligence Units, an intergovernmental cooperation within the so-called Egmont-Group,[184] who are, in turn, observers within the FATF:

> 'The parties covered by the Act filed 37 suspicious transaction reports with links to VAT missing trader fraud in Germany in 2013. Compared to the previous year (22), this is again a slight increase of the absolute case figures. In relation to the total number of suspicious transaction reports filed in 2013, the number of STRs linked to this trend can be regarded as very low.' (Financial Intelligence Unit, 2014, p. 30)

Insights into the problems at hand in international cooperation are provided by a joint report by the three national Courts of Auditors of Belgium, Netherlands and Germany (Bundesrechnungshof, 2012b). The courts suggest two more radical solutions and some more conventional improvements. The more radical solution to the problem would be payment of VAT only in the country of origin, or the option for states to introduce a general Reverse Charge System. Following a communication from the European Commission of 6 December 2011, however, there is no willingness both on part of the Commission and the member states to move along with the radical solutions (p.31), while at least partial Reverse Charge operations are meanwhile discussed and introduced.

In 2015, the Courts of Auditors for Germany, Austria and Hungary looked into the problem and came to equally devastating results: Summarizing, the courts state: The system Eurofisc which was established for combat against value-added tax fraud failed. Eurofisc's goal is it to inform countries about suspicious cases and doubtful companies and to help authorities to find frauds. But they did not succeed according to a report from Rechnungshöfe. Information is reported inconsistently. Transparency and clarity is missing. Sometimes countries do not respond. [185]

Welt. Retrieved from http://www.welt.de/wirtschaft/article154109769/So-unterschlaegt-die-Mehrwertsteuer-Mafia-Milliarden.html

[184] http://www.egmontgroup.org/about

[185] Das zum Kampf gegen den Mehrwertsteuer-Betrug eingerichtete System Eurofisc verfehlt seine Wirkung. Ziel von Eurofisc ist es eigentlich, die Staaten über verdächtige Fälle und dubiose Firmen zu informieren und die Behörden somit auf die Spuren der Betrüger zu bringen. Doch daran scheitert es nach dem Bericht der Rechnungshöfe.

So stellten die Prüfer fest, dass die Informationen je nach Arbeitsbereich und Koordinator unterschiedlich dargestellt wurden. Ja, sogar die Jahresberichte unterschieden sich in Form und Inhalt von Jahr zu Jahr, weshalb ein direkter Vergleich schlichtweg nicht möglich sei. Schwerer noch, so die Rechnungshöfe, wiege aber der Umstand, dass auch die Daten selbst "nicht vergleichbar und schwer verständlich" waren.

Zudem fehle es bei Eurofisc an Transparenz und Klarheit darüber, nach welchen Kriterien die einzelnen Staaten Unternehmen als dubios einstuften, argumentieren die Prüfer. So wurden beispielsweise für eine einzige Firma innerhalb von drei Jahren beinahe 11 000 Warnhinweise bei Eurofisc gesammelt. Der vor dem möglichen Betrug gewarnte Mitgliedstaat stufte das Unternehmen hingegen als "nicht dubios" ein.

5.5.5.3 Nationally

This leaves room to manoeuvre for states to combat this kind of fraud in the more conventional areas of prevention, detection and repression within the temporary system. But here again are numerous indications that detection and enforcement is only as good as the legal ground is adequately prepared and communication between states is efficiently enacted. Not surprisingly, there are a number of problems regarding Germany since the responsibility also of combating international crime is with the 16 *Länder* and not with the Federation.

There seems to be some progress in the field of prevention, especially regarding background checks before a VAT identification number is issued to new businesses. One important obligation for new businesses is the mandatory submission of VAT returns on a monthly base for a period of two years. However, in one area known to be potentially risky, namely the transferral of business ownership, the introduction of a monthly submission scheme was rejected in Germany 'because the disadvantages were believed to outweigh the advantages' (Bundesrechnungshof, 2012b, p. 36).

Regarding detection of fraud, a VAT Information Exchange System (VIES) was put into place between states. Within the system, however, two or even four months can elapse between the date of an intra-Community supply and the time when the EU Member State of the intra-Community acquisition was informed. Furthermore, 'intra-Community supplies and the amounts concerned should be checked as to their consistency with the supplies in the same trader's VAT returns', but this system is not yet in place in Germany – a working group is commissioned to advance this issue (Bundesrechnungshof, 2012b, p. 38) . Here, too the Courts of Auditors have a long-time recommendation: eventually, a transaction-by-transaction match should be possible for authorities. The Courts admit, however, that, given complexities in the matter, the implementation of this may take a very long time (p. 39). The Courts criticize generally, that the information exchange between relevant authorities between states is lacking and wanting. Information exchange is time-consuming and all too often deadlines are exceeded. Even though 'the new EU regulation on administrative cooperation states in its introductory considerations that "the time limits laid down in this Regulation for the provision of information are to be understood as maximum periods not to be exceeded"', the courts state 'this joint follow-up audit reveals however that timely response to information re-quests is

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Wenn sich die Staaten überhaupt zurückmeldeten. Laut Prüfbericht gab es etwa im Zusammenhang mit auffällig gewordenen Zollverfahren nur in einem Drittel der gemeldeten Fälle eine Rückmeldung des betroffenen Staates.

Mitunter wussten die Staaten gar nicht, wie gefährlich die Unternehmen einzuschätzen waren. Das lag daran, dass manche von ihnen einfach von den vereinbarten neun unterschiedlichen Einstufungen abwichen und sich unabgesprochen neue Kategorien ausdachten. Was eigentlich kein Wunder ist. Denn man hatte die vereinbarte Einstufung zwar beschlossen, anschließend aber vergessen, sie offiziell bekannt zu geben.

Die aus diesen Einträgen resultierenden Datensätze sind nach Aussagen der drei Rechnungshöfe nur sehr schwer vergleichbar und damit auch schwer nachzuverfolgen. Hinzu kommen gravierende Probleme bei der IT-Ausstattung. So verwendeten zwar alle Länder für ihre Aufstellungen Excel-Tablen, allerdings in unterschiedlichen Versionen, weshalb das System extrem fehleranfällig geworden sei. Hunderte unterschiedliche Excel-Tablen ließen sich zudem nur sehr mühsam und von Hand vergleichen, denn eine gemeinsame Datenbank mit Analyse- und Auswertungsinstrumenten steht bislang nicht zur Verfügung.

Aber auch die internen Abläufe bei Eurofisc sind offenbar nur schwer nachzuvollziehen. Zwar sind Protokolle jeder einzelnen Sitzung vorgesehen. Es fehlt aber an Vorgaben, wie und bis wann diese Protokolle zu erstellen sind. Teilweise gab es nur Präsentationsunterlagen. Mitgliedsstaaten, die nicht an den Sitzungen teilnahmen, wussten deshalb auch nichts über die Beschlüsse. Bohsem, G. (2015, October 2) Konfuse Kontrolleure. In: Süddeutsche Zeitung. Retrieved from http://www.sueddeutsche.de/wirtschaft/steuerhinterziehung-konfuse-kontrolleure-1.2674008 The report itself: Joint report on of the Supreme Audit Institutions on EUROFISC. Retrieved from https://www.bundesrechnungshof.de/de/veroeffentlichungen/sonderberichte/langfassungen/2015-sonderbericht-eurofisc-ein-multilaterales-fruehwarnsystem-der-mitgliedstaaten-zur-bekaempfung-des-mehrwertsteuerbetrugs-1

still a problem' (p.41). Indeed: given the speed of Missing Trader and Carousel Fraud, timely transmission of information will be key for successful detection and prosecution.

Clearly, solutions are difficult to find, especially since there are widely diverging ideas within the EU and its member states. While, as shown above, the Courts of Auditors recommend VAT payment in the country of origin, trade unionists suggest payment by the end consumer, who finally purchases the product.[186]

5.5.6 Conclusion

International tax fraud is closely interlinked with other forms of illicit financial frauds, for example money laundering, since the proceeds of fraud need to be entered again into the formal financial system (Financial Action Task Force, 2007).

The best solution would be to replace the "temporary system" within the EU, which provides the basics for this kind of fraud, with clear and simple legal solutions. This research supports the proposal by the joint courts of auditors above, namely either taxing VAT only in the country of origin, or the option for states to introduce a general Reverse Charge System.

While the large solution is still pending, meanwhile, Reverse Charge Procedures[187] were introduced at least partly in areas which are specifically prone to this kind of fraud. Here one finds certain areas of construction and cleaning services, trading in waste, electricity, gas, emission certificates, computer and phone chips, gold etc. According to conversation partner, however, the attempt of Germany, to generalize the Reverse Charge Method to all businesses, did not find the required unanimous support.

Given the tensions and lack of effective cooperation between the tax administrations German states but also of institutions between EU states and/or at EU level another question is whether combating of this kind of fraud should be centralized e.g. at the Federal Central Tax Office or the European OLAF.

One very important observation should not be forgotten: in spite of all crime and cheating, expert opinion is draw to attention that even though there are billions in Euro lost every year, the largest loss in VAT revenue is not so much weak compliance or enforcement, but policy decisions regarding reduced rates and tax exemptions. If there were a consequent application of a uniform system, VAT revenue would increase greatly.[188] Reduced rates and tax exemption, however, are within the authority of European Union member states and therefore an area of reform – at least in principle. Here again, however, it seems to be more likely that states try to stick to the present system for fear of being disadvantaged in international trade.

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[186] This, again, is a solution which would improve the situation both nationally and internationally. Stupka, W. „Steuerkrieg" in Deutschland. In: *Der Wecker* 2013/07. Retrieved from http://www.verdi-finanzamt.de/wecker.html

[187] Springer Gabler Verlag (Herausgeber), Gabler Wirtschaftslexikon, Stichwort: Reverse-Charge-Verfahren, online im Internet: http://wirtschaftslexikon.gabler.de/Archiv/54348/reverse-charge-verfahren-v7.html

[188] See Executive Summary of European Commission, DG TAXUD (2013) 2012 Update Report to the Study to quantify and analyse the VAT Gap in the EU-27 Member States. Retrieved from http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/vat_gap2012.pdf

5.6 Asset Recovery

5.6.1 The Role of Germany

As stated above in the chapter about money-laundering (Cases and dimensions) quite a number of African ruler are on record for using financial services in Germany.

For that reason, also ways and means of asset recovery are of interest for this research project. In the wake of the Arab Spring Revolutions it became apparent, that all dictators of Northern African States have substantial financial assets deposited in Germany. In the case of Libya, Germany froze assets totalling 6 Billion Euros, whereas it was not immediately apparent whether the money belonged to the Libyan government, Central Bank or the Gaddafi family.[189] An IMF report of 2010 compares the proceeding of different states in this area: In 2007, Germany froze 219 Billion Euros,[190] while Germany received 2002-2007 requests to freezes assets totalling to more than 5 Billion Euro. The latter amount is one of the highest emerging in the IMF report, the money which was de facto seized was one of the lowest stated in the report. Even Switzerland, whose secrecy also covered assets of corrupt and totalitarian politicians, improved its legal framework in the area of asset recovery and acts more swiftly in case there is suspicion at hand. (→ überprüfen, ob aktuelleres als (Henn, Meinzer, & Mewes, 2013, p. 24f.).

As it seems also from the OECD report, Germany seems to overeager to implement and adopt efficient instruments and best practices, compared with other states (OECD, 2013c, p. 92ff.).

5.6.2 International Cooperation

- ➔ Tracking Anti-Corruption and Asset Recovery Commitments (2011) and Tracking Asset Recovery Commitments, Part 2 (2013)
- ➔ OECD/StAR Initiative 2010-2012: Not yet reliable data on progress (OECD, 2013c, p. 96)
- ➔ Also Germany is entering co-operation with other states in order to reduce in- and outflow of IFFs, e.g. with the Kenyan Asset Recovery Agency and the Financial Reporting Centre.

> Africa loses more than $50 billion annually in Illicit Financial Flows (IFF). Kenya lost approximately $1.51 billion between 2002 and 2011 to trade mis-invoicing (High Level Panel Report on IFF from Africa). Kenya is increasingly playing a promi-nent role alongside Nigeria as "one of the two biggest hubs for economic and organised (transnational) crime in Sub Sahara Africa"(IPC 2011). As the strategically most important commercial hub in East Africa and having the largest port in the region, and a robust financial sector Kenya is a hub of criminal networks with worldwide significance. The Basel AML Index 2015 ranks Kenya as one of the countries with the highest risk of money laundering in the world (rank 11). Also, according to Global Financial Integrity (GFI report 2014), Kenya loses around 8.3% of its annual government revenue due to illicit financial flows (IFF). In this context, corruption represents one of the most important factors in the increase of illicit financial flows to and from Kenya, being on the one hand an enabler of illicit transfers and on the other hand a driver of IFF (funds derived from corruption crimes, which are transferred to or from the country). The country has the requisite legislations such as the Proceeds of Crime and Anti-Money Laundering Act, 2009. However, there is no distinct national policy for addressing the

[189] Reuters (2011, April 17) 'Germany aims to use Gaddafi's money to pay for aid'. Retrieved from http://www.trust.org/item/?map=germany-aims-to-use-gaddafis-money-to-pay-for-aid/

[190] IMF (February 2010) Federal Republic of Germany: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism. IMF Country Report Nr. 10/78 p. 21

problem of illicit financial flows. The two main institutions responsible for illicit financial flows, the Asset Recovery Agency (ARA) and the Financial Reporting Center (FRC), are yet to be fully operationalised. Also, Kenya's integration into international networks combating IFF remains inadequate.

Objective

The overall aim of this national project component is to reduce the volume of illicit financial flows transferred into, through and out of Kenya. Intermediate objectives include: 1.) Improvement of technical and methodological capacities of state authorities to detect, prosecute and recover illicit funds; 2.) Amelioration of domestic inter-agency exchange and cooperation between key institutions combating illicit financial flows; 3.) Enhancement of cross-border, inter-agency cooperation in regional networks of the Eastern African region.

These activities are funded by the German Ministry for Development and Economic Cooperation and implemented by the GIZ.

5.6.3 Bavaria

There was only one case concerning Bavaria and Africa which the State Crime Agency remembered: In 2003, a drug dealer from Nuremberg escaped to Gambia in the hope to avoid prosecution. Due to bilateral police cooperation, however, he was eventually arrested and sentenced, his possessions confiscated.

5.7 Financing of terrorism

When starting this project there was the opinion that financing of terrorism was not really high on the agenda. It still is not. Fact is, as illustrated by the replies to the questionnaire sent to the Home Offices, that resources needed in the field of research relevant areas are withdrawn in order to investigate terrorism.

Meinzer 2015a, p. 103: Inzwischen ist (islamist.) Terrorismus hoch auf der Agenda, OK Kriminalität sinkt in der Bedeutung. Panama Papers illustrated that Offshore Consructions are used by representatives of both groups[191]

Link between tax fraud and terrorism → Bavarian example of economic jihad above in 5.5.3.

5.8 Illicit ownership of art

A final area has come to the public attention in the wake of data leaks, namely the hiding of illicitly or outright illegally acquired pieces of art, among which one finds also art stolen from Jews during the Nazi regime. Art is also gaining importance among the worlds top wealth-holder as area of investment ("Investment of Passion"), and it is interesting that here the same structures are used to conceal items and ownerships as they are used in other areas of IFFs.[192]

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[191] Regarding financing of terrorism: Munzinger/Obermaier (2016, April 5) An der goldenen Kette. In: SZ. Retrieved from http://www.sueddeutsche.de/politik/terrorfinanzierung-an-der-goldenen-kette-1.2935660

[192] ‚Ganz offensichtlich werden viele Bilder über Briefkasten-, über Offshore-Firmen in Panama, aber auch auf den British Virgin Islands und auf den Cayman Islands gehandelt. Das heißt, die werden von Firma zu Firma weiterverkauft, dann wieder an Unterfirmen, an Unter-Unterfirmen, so lange, bis eigentlich überhaupt nicht mehr klar zu ersehen ist, wem so ein Bild denn eigentlich noch gehört. Denn auch das haben wir ja in den letzten Tagen erfahren: Oft sind es Strohleute, die dann als Geschäftsführer von Unter-Unter-Unter-Unterfirmen in Panama oder anderen Offshore-Ländern fungieren. Das ist ein Schluss, den man ganz klar ziehen kann: Der internationale Kunsthandel bedient sich derselben Strukturen, wie es große Banken tun, wie es große private Geldeigner tun, wie es aber zum Beispiel auch das organisierte Verbrechen tut.' "Viele Bilder werden über Briefkastenfirmen gehandelt" (2016, April 04). In: Deutschlandfunk. Retrieved from

5.9 Combating criminal IFFs – legal, ethical and institutional issues

5.9.1 The need for conceptual clarity - material norm and enforcement

In 1991 the German constitutional court emphasized that every legal norm needs to be enforced adequately and fairly. If a legal norm for some cannot be enforced it creates injustice so that also the legal norm might be invalid (Legalitätsprinzip). This is, in principle and theory, a good thing.

Given public discussion, however, the project wants to point to the following:

First of all one needs to consider the distinction between the illegal and the criminal: While the illegal can be done unintentionally due to the lack of knowledge or even out of a good intention, the criminal intention is intentionally damaging the common good and therefore judged to be "more grave" (see I/IV/6.1).

Once that categorical difference is observed, this research argues that there is a qualitative difference between ordinary crime committed by individuals or small groups and well-organized, perhaps even transnationally organized Crime? Here again, politicians and media at times over-dramatize things by asserting "Organized Crime" where perhaps only imitation or parallel activities exist, e.g. within interacting social and commercial networks (see G/IE#).

At the same time, and regarding the assignment of resources, "Organized Crime" is neglected: Politics tends to combat that crime harder which is felt by the public. Accordingly, in Bavaria there is no lobby for an increased and more effective prosecution for crimes not immediately and tangibly hurting anybody, but only affecting the common good. 'Es gibt auch keine Lobby für die Verfolgung von Straftaten, wo es keine direkt erkennbaren Geschädigten gibt.'

All this has to do with the link between the legal, public and political, see below 5.9.10.

5.9.2 The problem and the lack of political will?

The biggest problem for investigators and prosecutors lies in the increasing complexity of national taxation law and problems arising from dealings involving several countries with comparable complex taxation law. Here it comes to the options of legal tax avoidance, a core element of tax justice, and its misuse for illicit, illegal and criminal purposes: The instruments are the same, e.g. fiduciary trusts, shell companies, foundations etc. the point is: how to use them and in what contexts. It is obvious, that this is also a wide field for tax consultants and tax lawyers because here a lot of money can be earned. Some participate in this business, some don't. Conversations partners emphasize, however, that they think that most of crooked deals are being done outside Germany. E.g. that some cooperate with a German tax advisor regarding his national assets, while he operates with a local lawyer in developing countries, who claims to be "well-connected" and capable to take care of bribery and other "local customary habits." Sometimes, of course, such risky practices fail because opponents might bribe higher. Such practices are then not revealed towards the German tax consultant, if they are, a number of those indicate that they do not want to

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http://www.deutschlandfunk.de/panama-papiere-viele-bilder-werden-ueber-briefkastenfirmen.691.de.html?dram:article_id=350487

continue business relations since there is too much at stake regarding their own professional licence.

Here it is an increasing problem for the tax administration to identify when individual legal practices suddenly assumes a quantity that there is severe damage arising towards the interest of the common good and the community. There seems to be, however, an emerging international understanding ever since the OECD coined the term “aggressive tax avoidance”, indicating that there is a limit to that which is permissible.

Then it is the task of lawyers and lawmakers to close this gap and make this practice illegal – with the result that new options are being opened and the lawyers and lawmakers have to start their work again. Exactly because of the justice principle, tax administration and lawmaker are reacting to violation rather than acting proactively.

Internationally, complex taxation norms are not harmonized between domestic tax regimes, international bi-lateral tax treaties and regulations by bodies such as the European Union – which again has impact on rulings of courts (OECD, 2013a, p. 33). That way,

> (t)he interaction of withholding tax rules in one country, the territorial taxation system in another country, and the entity characterisation rules in a third country may combine to make it possible for certain transactions to occur in a way that gives rise to no current tax and have the effect of shifting income to a jurisdiction where, for various reasons, no tax is imposed. Often it is not any particular country’s tax rule that creates the opportunity for BEPS, but rather the way the rules of several countries interact. (OECD, 2013a, p. 44)

All this, too, has to do with the link between the legal, public and political, see below 5.9.10

5.9.3 The need for legal harmonization and simplification

5.9.3.1 Double Criminality

Occasionally there was already the observation that transborder support for investigation or even prosecution depends on the principle of Double Criminality, i.e. whether a crime is a crime by law both in the country where it was committed in accordance to national laws and the country where the suspect is living.[193]

This also applies to aggressive tax avoidance and tax evasion: The amount of legal loopholes within national tax legislation, and even more between different national systems is one of the main facilitating and enabling features here, exploitable by highly specialized lawyers and tax consultants, especially from the Big 4 and wealth managers.

Since legal simplification is as less likely as in the national context (see GER/Va), harmonization should be aimed for nationally and internationally, out of which more regulation and better enforcement will automatically result (Deutsche Steuer-Gewerkschaft, 2015).

5.9.3.2 Categorical differences, grey areas

How difficult it is, is shown by three examples: In Germany, tax evasion is defined as punishable act in § 261 StGB, in Switzerland it is not. There the enhanced form of tax

[193] Zur „Doppelten Strafbarkeit“ siehe https://www.mpicc.de/files/pdf2/teil4.pdf

evasion, i.e. tax fraud as punishable act.[194] Also, small but important differences exist between the popular tax evasion instrument of 'trusts' according to Anglo-Saxon law and the 'trust'-constructs according to German law with different obligations for transparency. Finally, tax consultants do not any problems with redefining interest earnings into dividend earnings (see 16.4.1) and so on. All this leads to legal bypassing of sanctions of some countries against financial deposits in some tax havens so that financial products and tax havens change. [195]

From such and similar questions depends finally whether requests of administrative assistance are allowed, i.e. whether authorities in which country a proceeding is defined as punishable gets assistance from authorities of another country.

5.9.3.3 Approving tax avoidance schemes by tax administration,

One problem is that many models of offer for aggressive tax planning and tax avoidance are perfectly legal in accordance to existing law, some conflicts arising between the subtle differences and incompatibilities between Anglo Saxon and European constructions, e.g. Trusts or Treuhand constructions (5.9.5.3). During the Luxemburg Leaks it was discussed already to inform other EU states of tax rulings, i.e. models enabling corporations to practice (aggressive) tax avoidance.[196] But it took PanamaPapers to move Wolfgang Schäuble to the proposal to first have corporate models of tax avoidance checked and approved by German tax administrations in order to diminish the fact that those models otherwise were uncovered (if at all) on the occasion of tax auditors visits. The question is, however, whether tax administrations are personally adequate equipped to check those constructions in the first place. [197]

5.9.3.4 Information about tax rulings

See → Mutual Assitance Directive/Tax Rulings Directive of 8 December 2015

5.9.3.5 Simplifying taxation of TNCs

There is also the proposal to simplify the taxation of TNCs rather than setting up complex structures to monitor activities TNCs via CbCR etc., for example by introducing Common Consolidated Corporate Tax Base (CCCTB) combined with formula apportionment.

Supported by experts in support attending the Public Hearing of the Finance and AWZ Committee of the German Federal Parliament on the impact of tax avoidance and tax evasion on developing countries: (Haldenwang, 2016)

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[194] Wie schwer dies ist, belegen drei Beispiele: In Deutschland ist Steuerhinterziehung in § 261 StGB als Straftat definiert, in der Schweiz nicht. Dort galt nur die gesteigerte Form der Steuerhinterziehung, nämlich der Steuerbetrug, als Straftat. See http://www.steuer-hinterziehung.ch/

[195] Ebenso gibt es feine, aber wichtige Unterschiede zwischen dem populären Steuervermeidungsmittel „Trust" nach angelsächsischem Recht und der „Treuhand"-Konstruktion nach deutschem Recht mit unterschiedlichen Transparenzverpflichtungen. Schließlich haben Steuerberater keine Probleme, Zinseinnahmen in Dividendeneinnahmen „umzudefinieren" (siehe 16.4.1) usw. All dies führt dazu, dass Sanktionen einiger Staaten gegen einige Anlageformen in einigen „Steueroasen" ganz legal dadurch umgangen werden, dass Anleger Produkte und Steueroasen wechseln (Fauser & Godar, 2016).

[196] Juncker will automatisch über Steuerdeals informieren. (2014, November 12). In: Süddeutsche Zeitung http://www.sueddeutsche.de/wirtschaft/steueroasen-in-der-eu-juncker-will-automatisch-ueber-steuer-deals-informieren-1.2216859

[197] Schäuble erwägt Genehmigungspflicht für Steuersparmodelle (2016, April 8) In: FAZ. Retrieved from http://www.faz.net/agenturmeldungen/adhoc/spiegel-schaeuble-erwaegt-genehmigungspflicht-fuer-steuersparmodelle-14168408.html

5.9.4 Secrecy protecting private, corporate and criminal wealth holder

5.9.4.1 Banking secrecy

Banking secrecy did not always exist in Germany but was introduced after World War II. There is a verdict by the Federal Constitutional Court to abandon it since 1993, without the government complying.[198]

a) Vor dem Ersten Weltkrieg gab es für die Steuerbehörden keine gesetzliche Grundlage, im Veranlagungsverfahren Auskünfte bei Kreditinstituten einzuholen. Die Gesetzgebung der Nachkriegszeit enthielt jedoch zahlreiche Bestimmungen, die den Banken Offenbarungspflichten auferlegten, um Steuerhinterziehungen entgegenzuwirken. Die wichtigste Regelung, die den Banken eine Auskunftspflicht auferlegte, enthielt § 189 der Reichsabgabenordnung vom 13. Dezember 1919 (RGBl. S. 1993). Aufgrund dieser Vorschrift waren Kreditinstitute verpflichtet, dem örtlich zuständigen Finanzamt ein Verzeichnis ihrer Kunden mitzuteilen und monatliche Bestandsveränderungen anzuzeigen. Die Anzeigepflicht sollte dem Steuerpflichtigen die Sicherheit nehmen, durch Kapitalanlage bei einem Kreditinstitut Steuern hinterziehen zu können (Verhandlungen der verfassunggebenden Deutschen Nationalversammlung, Bd. 338, Anlagen zu den Stenographischen Berichten, Nr. 759, S. 592). In den Fällen des § 189 RAO konnte sich das Finanzamt sodann nach § 209 Abs. 2 RAO durch Stichproben überzeugen, ob die Angaben steuerpflichtiger Bankkunden zutrafen.

Durch die Verordnung über Erleichterungen der Anzeigepflicht nach § 189 RAO vom 27. Januar 1920 (RGBl. S. 126 f.) wurde die Auskunftspflicht der Banken modifiziert. Danach beschränkte sich das Verzeichnis auf solche Kunden, deren Guthaben am 30. Juni 1919 mehr als 3.000 Mark betrug. Die Zugangsverzeichnisse hatten alle Kunden zu erfassen, deren Guthaben oder Konto im letzten Geschäftsjahr einen Zinsertrag von mehr als 60 Mark aufwies. Depot- und Schließfachkunden waren dagegen vollzählig aufzunehmen.

Ein Erlaß des Reichsministers der Finanzen vom 1. Juli 1920 (RStBl. 1920 S. 377) schränkte die Ermittlungsbefugnisse der Finanzbehörden weiter ein. Danach war nur noch ein Auskunftsersuchen in bezug auf bestimmte Kunden zulässig. Die Auskunftspflicht sollte hingegen nicht mehr zur Aufdeckung unbekannter Steuerfälle benutzt werden. Insbesondere sollten nicht Auskünfte darüber verlangt werden, ob eine bestimmte Klasse von Personen, die nicht namentlich bezeichnet war, bestimmte Rechtsgeschäfte abgeschlossen habe. Ebenso sollte nicht nach Einlagen von Angehörigen eines bestimmten Gewerbezweiges in einem bestimmten Zeitraum oder nach Personen, die zu bestimmten Zeitpunkten Wertpapiere erworben hätten, gefragt werden.

Durch Art. VII des "Gesetzes über die Berücksichtigung der Geldentwertung in den Steuergesetzen" vom 20. März 1923 (RGBl. I S. 198) wurden § 189 (Einreichung von Kundenverzeichnissen) und § 209 Abs. 2 RAO (Stichproben in den Fällen des § 189) gestrichen. Die Begründung dieses Gesetzes hob hervor, zwar sei die Aufhebung dieses nicht unwirksamen Mittels zur steuerlichen Erfassung von Kapitaleinkünften wenig wünschenswert, doch dürfe wegen der immer größer werdenden Zahlungsmittelnot nichts unversucht bleiben, das nicht produktiv genutzte Kapital der Wirtschaft zuzuführen (Verhandlungen des Reichstags, I. Wp. 1920, Bd. 376, Anlagen zu den Stenographischen Berichten, Nr. 5490, S. 17 f.).

Nach der Abgabenordnung hatten die Finanzbehörden jedoch weiterhin die Befugnis, gemäß § 177 in Verbindung mit § 209 Abs. 1 RAO Auskünfte von Dritten einzuholen, die für die Feststellung von Steueransprüchen von Bedeutung waren. Außerdem berechtigte eine allgemeine Steueraufsicht (§ 201 RAO) zu Auskunftsersuchen an Kreditinstitute. Der Reichsminister der Finanzen berücksichtigte jedoch Einwände, die gegen die als zu weitreichend empfundene Ermittlungstätigkeit der Finanzbehörden von seiten der Kreditinstitute erhoben wurden, und schränkte diese Ermittlungstätigkeit ein (vgl. Erlasse vom 9. Juli 1932, RStBl. 1932 S. 657, vom 13. Januar 1936 und vom 26. Juli 1937).

Nach dem Zweiten Weltkrieg wurden die Beschränkungen der Ermittlungstätigkeit durch den Erlaß des Direktors der Verwaltung für Finanzen des Vereinigten Wirtschaftsgebiets an die Oberfinanzpräsidenten, Landesfinanzämter und Finanzämter (vom 2. August 1949, sog. Bankenerlaß, abgedr. in: DStZ/B 1949, S. 242) geregelt. Danach war das Vertrauensverhältnis zwischen den Kreditinstituten und ihren Kunden besonders zu berücksichtigen. Die Finanzämter durften von Kreditinstituten keine einmaligen oder periodischen Mitteilungen von Konten bestimmter Art und Höhe verlangen. Die stichprobenweise Feststellung von Guthabenkonten oder Depots und die Ausschreibung von Kontrollmitteilungen wurde untersagt. Die Angabe von Bankkonten und Sparkassenguthaben sollte von Steuerpflichtigen nicht verlangt werden.

Der 1963 vom Bundesminister der Finanzen gebildete Arbeitskreis für die Reform der Reichsabgabenordnung und ihrer Nebengesetze befaßte sich eingehend mit der Frage, ob die Grundsätze des Bankenerlasses 1949 in die Abgabenordnung übernommen werden sollten. Der Arbeitskreis lehnte dies jedoch ausdrücklich ab. Es wurde darauf hingewiesen, daß der Erlaß unter den besonderen Verhältnissen kurz nach der Währungsreform zustandegekommen sei, eine Sonderregelung für Banken bei der Erfüllung der Auskunftspflichten nicht überzeuge und daß es in der Öffentlichkeit Stimmen gebe, die im Interesse der Gleichmäßigkeit der Besteuerung eine Aufhebung des Bankenerlasses forderten (Schriftenreihe des BMF, Heft 13, 1970, S. 31 f.).

Auch bei der Beratung der Abgabenordnung 1977 wurde erörtert, ob der Bankenerlaß in die Abgabenordnung aufzunehmen sei.

In der Begründung zum Regierungsentwurf heißt es hierzu:

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[198] BVerfG-Urteil vom 27.6.1991 (2 BvR 1493/89) BStBl. 1991 II S. 654

"Im Rahmen der geltenden Reichsabgabenordnung haben die Kreditinstitute im Besteuerungsverfahren den Finanzbehörden gegenüber kein Auskunftsverweigerungsrecht. Es gilt danach für die Kreditinstitute nichts anderes wie sonst für Dritte, die als Auskunftspersonen in Betracht kommen. Durch den sogenannten Bankenerlaß vom 2. August 1949 sind lediglich gewisse Richtlinien aufgestellt worden, die dem Schutz des Vertrauensverhältnisses zwischen Kreditinstitut und Kunden dienen, die Einzelauskunftspflicht der Kreditinstitute nach §§ 175, 201, 209 AO jedoch unberührt lassen. Es hat sich in der Vergangenheit keine Notwendigkeit gezeigt, hieran etwas zu ändern. Der Entwurf sieht deshalb davon ab, für die Kreditinstitute abweichende Bestimmungen über ihre Auskunftspflicht in die neue AO aufzunehmen. Insbesondere besteht angesichts der zufriedenstellenden Praktizierung des Bankenerlasses keine Notwendigkeit, seine Regelungen in das Gesetz zu überführen. " (BTDrucks. VI/1982, S. 95)

b) Nach Inkrafttreten der Abgabenordnung 1977 wurde der Bankenerlaß neu gefaßt. In einem Schreiben vom 31. August 1979 an die Finanzminister (Finanzsenatoren) der Länder gab der Bundesminister der Finanzen die neuen Richtlinien für finanzbehördliche "Ermittlungen bei Kreditinstituten" bekannt (BStBl I 1979 S. 590).

(…)

1. Bei der Anwendung der im Einführungserlaß zur AO 1977 (BStBl 1976 I S. 576) unter Nr. 1 und 2 zu § 88 niedergelegten Grundsätze ist auf das Vertrauensverhältnis zwischen den Kreditinstituten und ihren Kunden besonders Rücksicht zu nehmen. Danach kann für den Regelfall davon ausgegangen werden, daß die Angaben in der Steuererklärung vollständig und richtig sind.

Aufgrund dieser Sachlage wird festgestellt, dass bis zu 50% der Kapitaleinkünfte nicht erklärt werden und Steuerhinterziehung stattfindet. Die Richter schließen daraus:

2. Dieser schon für 1981 festzustellende Erhebungsmangel hat seine wesentliche Ursache in dem Bankenerlaß 1979, der eine wirksame Ermittlung und Kontrolle der Einkünfte aus Kapitalvermögen verhindert und sich damit als strukturelles Vollzugshindernis darstellt.

c) Diese vom Bankenerlaß veranlaßten Beschränkungen der Steuerermittlung sind nicht etwa verfassungsrechtlich geboten. Vielmehr bestätigt die Rechtsprechung des Bundesverfassungsgerichts zum grundrechtlichen Datenschutz, daß steuerliche Kontrollmitteilungen und Auskunftspflichten mit den Grundrechten der Banken und der Bankkunden vereinbar sind.

…; jedenfalls rechtfertigt das überwiegende Allgemeininteresse an der Offenlegung steuerlich erheblicher Angaben diesen Informationseingriff und beschränkt insoweit das Grundrecht auf Datenschutz. Der - auch strafrechtlich sanktionierte - Steueranspruch des Staates begründet sich aus dem Umstand, daß der Betroffene am staatlichen Leben teilnimmt, ihm insbesondere Schutz, Ordnung und Leistungen der staatlichen Gemeinschaft zugute kommen. Deshalb darf ihm ein Anteil an den finanziellen Lasten zur Aufrechterhaltung des staatlichen Lebens auferlegt werden.

Angesichts der Gefahren der automatisierten Datenverarbeitung ist ein - amtshilfefester - Schutz gegen Zweckentfremdung durch Weitergabe und Verwertungsverbot erforderlich (BVerfGE 65, 1 (46)). Diesen Anforderungen genügt § 30 AO, der das Steuergeheimnis als Gegenstück zu den weitgehenden Offenbarungspflichten schützt.

4. a) Der Gesetzgeber hat es bei den Auswirkungen des Bankenerlasses bewenden lassen, weil er aus gesamtwirtschaftlichen Gründen vermeiden wollte, daß Kapitalanleger ihr Geld aus dem Inland abziehen. Die damit in Kauf genommenen beträchtlichen Steuerverkürzungen und die daraus folgende Ungleichheit des Belastungserfolgs lassen sich indessen aus den oben (C I 3) dargelegten Erwägungen nicht durch gesamtwirtschaftliche Gründe rechtfertigen.

a) Allerdings muß sich dem Gesetzgeber jedenfalls gegenwärtig die Erkenntnis eines solchen Erhebungsmangels aufdrängen. Das Steuerreformgesetz 1990 hat die Unzulänglichkeit der bisherigen Steuererhebung selbst anerkannt. Das Gesetz führte für die Kapitalerträge, die bisher nicht der Kapitalertragsteuer unterlagen, eine - allerdings nur zehnprozentige - Quellensteuer ein und übernahm in diesem Zusammenhang den wesentlichen Inhalt des Bankenerlasses als § 30a in die Abgabenordnung. Zudem bot das Gesetz für den Fall einer Nacherklärung bis zum 31. Dezember 1990 Ahndungsfreiheit und Steuerfreistellungen für bisher nicht erklärte Kapitalerträge an. Die Quellensteuer ist jedoch nach nur sechsmonatiger Geltungsdauer durch das Gesetz zur Änderung des Steuerreformgesetzes 1990 wieder entfallen. Die Ahndungs- und Steuerfreiheit hat nur - wie sich aufgrund der in der mündlichen Verhandlung (vgl. oben A II 4) mitgeteilten Ergebnisse jetzt übersehen läßt - eine zwar nicht unbeachtliche, aber im Blick auf das gesamte Ausmaß der Steuerverkürzungen keinesfalls hinreichende Wirkung erzielt**. Übrig geblieben ist von den gesetzgeberischen Neuregelungen die gegenläufige Bestimmung des § 30a AO. Im Ergebnis ist so lediglich ein Hindernis für die Gewährleistung von Gleichheit im steuerlichen Belastungserfolg verfestigt worden. Damit tritt die Verantwortlichkeit des Gesetzgebers für eine erneute Nachbesserung offen zutage.**

Zwar hat der Gesetzgeber eine Frist zur Nachbesserung, diese sollte aber bis 1.1.1993 erfolgt sein.

The situation changed after the World Financial and Economic Crisis and the banking secrecy has been loosened between tax liable non-Germans and tax administration. Equally, the conference of the 16 state Finance Ministers voted for the abolition of this regulation at their meeting on 2 June 2016 (Finanzministerkonferenz, 2016a).

5.9.4.2 Tax secrecy

The current version of the fiscal secret was issued in 1975. Schlötterer argues that in comparison to the public interest the fiscal secret of the single person should stand back. In case of tax evasion is it not the single evader who must be protected but society's interests. [199]

There is a conflict of interests between the fiscal secret and the fundamental mandate of authorities to clarify facts of a case. It should be dissolved in favor of an effective criminal justice. The fiscal secret is also cut off when the economic situation of people is determined (e.g. information disclosure due to benefits of §30a AO). Hence, conflicts of interest between fiscal secret and criminal justice could also be dissolved. Federal Council and Finance Committee were against the easing of the fiscal secret which the government intended to decide (§161,2 StPO).[200]

Tax secrecy in Germany has a high rank, but not a constitutional rank as it is e.g. the case in Switzerland. However, as an expertise of the Wissenschaftlicher Dienst des Bundestags argues, it has constitutional importance also in Germany, because it derives from the constitutional right of informationelle Selbstbestimmung. Breaking or abolishing tax secrecy would not be possible due to constitutional reasons[201] - a view which can be contested, based upon rulings by the Federal Constitutional Court (see below 5.9.5).

In two areas it is defined that tax secrecy is overruled: In § 30a AO black labour and misuse of benefits, in § 30b aspects of money laundering, terrorism and tax evasion. The tax official is also obliged to break tax secrecy in case of bribery and corruption, based on regulations in the Income Tax (see above Tax administration and bribery 5.4.5).

Other potential limitations to tax secrecy included in § 30 section 4, Nr. 1-5 Fiscal Code are open to interpretation[202] so that the ordinary tax official has hardly time to bother about those details as long as the proper object under investigation, i.e. whether taxes are properly paid, is not afflicted.

Given the high rank of tax secrecy one might wonder how much the fear to break tax secrecy deters tax officials to report suspicions coming to their attention. This is seen by conversation partners from both tax administration and police, especially since many of those accused or suspected are quick to launch legal proceedings against the tax administration, which binds resources needed elsewhere

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[199] Schlötterer in a private communication on 20.03.2014

[200] Dazu: Göhler für die Bundesregierung in 14. Sitzung des Sonderausschuss für Strafrechtsreform am 25.9. 1973, auch NJW: Interessenkonflikt zwischen Steuergeheimnis und grundsätzlichem Auftrag der Behörden, Sachverhalte aufzuklären, ist zu Gunsten einer wirksamen Strafrechtspflege aufzulösen. Steuergeheimnis ist auch durchbrochen wenn es um die Feststellung der wirtschaftlichen Situation der Leute geht (z.B. Auskunftspflicht wg. Leistungsbezügen in §30a AO). Dann könne man auch Interessenkonflikte zwischen Steuergeheimnis und Strafrechtspflege entsprechend auflösen. Bundesrat und Finanzausschuss waren gegen Lockerung des Steuergeheimnisses, welches Regierung eigentlich vorgesehen hatte (§ 161 Abs. 2StPO). Ebenso Kohlmann, G. in Seebode, M. (1992) Festschrift für Günter Spendel zum 70. Geburtstag. DeGruyter, pp. 261f.

[201] Ramthun, Chr. (2014, April 17) Das Steuergeheimnis im internationalen Vergleich. In: Wirtschaftswoche. Retrieved from http://www.wiwo.de/politik/ausland/heimlichtuerei-vorm-fiskus-das-steuergeheimnis-im-internationalen-vergleich/9777830-all.html

[202] E.g. ‚There is a compelling public interest in such disclosure; such compelling public interest shall be deemed to exist in particular where… economic crimes are being or are to be prosecuted, and which in view of the method of their perpetration or the extent of the damage caused by them are likely to substantially disrupt the economic order or to substantially undermine general confidence in the integrity of business dealings or the orderly functioning of authorities and public institutions'

5.9.4.3 Professional Secrecy

Equally, the FATF and other conversation partners from the prosecution are worried about high professional entitlements to remain silent in cases of investigation for too many professional groups in Germany, see § 53 StPO[203] The FATF argues that German standards are non-compliant with their requirements (Financial Action Task Force, 2014, p. 30).

There are, however, some exemptions in § 53, 1 regarding Syndikus lawyers and assistants,[204] and a number more exemptions in § 53, 2 regarding penal investigations and prosecutions, among which also money laundering is explicitly listed. Against those exemptions more lobbyism is undertaken in order to broaden the right to silence for members of certain professional groups.

This kind of protection in Germany is more comprehensive than elsewhere in the European Union, for example, tax consultants are covered in Germany, but not (yet) in the EU. As to the latter, however, lobbygroups are at work.[205]

5.9.4.4 Social- and Statistical Secrecy

Another serious obstacle for investigations inside an authority or between authorities arise from the consequences of Social (§35 SGB I) and Statistical Secrecy (§ 16 Bundesstatistikgesetz) and subordinate legislation on state level. Summarizing a group talk with Officials from the Federal Customs Administration, it is stated that a single authority has not much insight into a complex picture, i.e. how certain phenomena and delicts could be interconnected. This is also due to the data and information flows with other authorities and departments – within and between different departments, for which sometimes no clear rules exist. For fiscal secret issues there are some exceptions according to §30a AO. Similar regulations may be valid for the exchange of statistics compiled by one authority, but maybe not allowed to be forwarded to others. [206]

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[203] http://dejure.org/gesetze/StPO/53.html

[204] Die in der Strafprozessordnung geregelten Anwaltsprivilegien gelten für den Syndikusanwalt nicht. Grund dafür ist das Gebot der effektiven Strafverfolgung. Eine Einbeziehung der Syndikusanwälte in den Anwendungsbereich des § 97 StPO (der Beschlagnahme nicht unterliegende Gegenstände) und des § 160a StPO (Zeugnisverweigerungsrecht) würde die Gefahr hervorrufen, dass den Strafverfolgungsbehörden relevante Beweismittel nicht zur Verfügung stünden. Hingegen haben auch die Syndikusanwälte im Zivilprozess ein Zeugnisverweigerungsrecht und müssen von daher einer gerichtlichen Anordnung zur Urkundenvorlage nicht nachkommen. https://www.juris.de/jportal/portal/page/homerl.psml?nid=jpr-NLSRADG000416&cmsuri=%2Fjuris%2Fde%2Fnachrichten%2Fzeigenachricht.jsp

[205] See, e.g. Stellungnahme der Bundessteuerberaterkammer zum Vorschlag der Europäischen Kommission für eine Verordnung des Europäischen Parlaments und des Rates zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr (Datenschutz-Grundverordnung-Entwurf) Vorschlag vom 25. Januar 2012. Retrieved from https://www.bstbk.de/de/presse/stellungnahmen/archiv/20120924_stellungnahme_bstbk/index.html

[206] Als einzelne Dienststelle hat man wenig umfassenden Einblick in ein komplexes Gesamtbild, d.h. wie bestimmte Phänomene und Delikte vernetzt sein könnten. Das hängt auch am Daten- und Informationsaustausch mit anderen Dienststellen zusammen – sowohl innerhalb der eigenen Behörde, wenn es etwa um unterschiedliche Tätigkeits- und Ermittlungskomplexe geht, aber auch zwischen verschiedenen Behörden, die im selben Tätigkeits- und Ermittlungskomplex zusammenarbeiten, wenn es keine klare rechtliche Regelung für den Daten- und Informationsaustausch gibt. Dabei kann es vorkommen, dass ein Kollege in einer anderen Dienststelle der eigenen Behörde im eigenen Haus, etwa in einem Drogen-Ermittlungsfall, von mir wissen möchte, ob ich in meinem Arbeitsbereich schon mal Person X begegnet bin, ggf. in welchem Zusammenhang und welcher Örtlichkeit. Diese Information darf ich ihm nicht geben, wenn ich sie habe.

Oder: Ich darf, als Mitarbeiter von Behörde A, in bestimmten eine Information von Behörde B abfragen, wenn dies rechtlich geregelt ist. Umgekehrt darf Behörde B mich nicht um eine Information bitten, selbst wenn ich auf demselben Gebiet wie Behörde B tätig bin und diese Information habe, weil es hierfür eben keine eindeutige rechtliche Regelung gibt. Ganz zentral ist hier das Sozialgeheimnis, welches noch über dem

Interestingly enough, this missing information flow between authorities (and, in consequence, their lack of cooperation) is also stated to be one of the key weaknesses of combating IFFs in Africa (High Level Panel, 2015a, p. 36). → see also below Saviano in "IFFs from Germany and African governance issues"

5.9.4.5 Trade Secrecy

With the OECDs AEOI initiatives and reform plans of the European Commission to strengthen regulations in the 4th Anti-Money Laundering Directive in the wake of Panama Papers, business interest and their "loudspeakers" perceive an all-out assault on tax secrecy. 'Die EU fordert von den Konzernen die Offenlegung ihrer Steuern. Sie verlangt nicht weniger als das Ende des Steuergeheimnisses.[207]' But: An escape is at hand: In 2014, the EU introduced a

> clear and coherent legal regime protecting against misappropriation of trade secrets in EU Member States. This decision will promote innovative companies, ensure fair and honest competition and create a secure environment conducting to innovation, the exchange of valuable know-how and cross-border commercial activities within the internal market. [208]

To the extent that the banking and tax secrecy is being undermined, industry interest groups are trying to strengthen the trade secrecy, even though they are not able to tell the public how (backwards) transparency of tax data will enable anybody to draw conclusion of innovative research, products or other plans to be competitive on tomorrows markets.[209]

Steuergeheimnis angesiedelt ist. Beim Steuergeheimnis gibt es in § 30a AO immerhin einige Ausnahmen, wo es „durchbrochen" werden kann, das Sozialgeheimnis hingegen ist umfassend. Ähnliche Auflagen kann es beim Austausch von Statistiken geben, die eine Behörde anlegt, die aber wiederum nicht an andere weitergegeben werden darf, weil es hier ein „Statistikgeheimnis" gibt. Entsprechend gilt: Wenn ich nach begründetem Anfangsverdacht, in einem Strafverfahren ermittele, gibt es keinen unkomplizierten Datenaustausch innerhalb oder mit anderen Behörden: Innerhalb meiner Behörde kann es sein, dass bestimmte Daten mir zwar nicht rechtlich verwehrt sind, dennoch aber nicht zugänglich sind, weil ich keine Freigabe dafür habe (etwa bestimmte Datensätze, die mit Organisierten Verbrechen zu tun haben). Zwischen den Behörden kann man nicht ohne weiteres herausfinden, ob bzw. was Polizei, Steuerbehörden oder Zoll über „meinen" Verdächtigen in ihren Datenbanken haben, gegen den ich gerade ein Strafermittlungsverfahren führe.

Früher war es so, dass man Porschefahrer mit einem alten Opel jagen musste. Heute wären Behörden prinzipiell in der Lage, einen Porsche zu bekommen. Nur bekomme ich aufgrund rechtlicher Gründe keinen Führerschein. Dies betrifft etwa das, was technisch im Abhörbereich möglich wäre oder hinsichtlich der Vorratsdatenspeicherung.

Um einen guten Kuchen zu backen, braucht es viele Zutaten. Aber wenn mir in meinem Verfahren Backpulver fehlt, darf mir der Kollege aus der Nachbarbehörde ohne ausdrückliche Be-Rechtigung dazu keines geben, selbst wenn er es hat.

Eine Finanzpolizei, in der alle relevanten „Zusammenarbeitsbehörden" in eins zusammengeschlossen wären, würde deshalb an sich wenig nützen, solange weiterhin unterschiedliche Tätigkeitsfelder derart abgeschottet bleiben.

[207] Kafsack, H. (2016, April 9) Skandalgetrieben. In: FAZ. Retrieved from http://www.faz.net/-gqe-8fo9k

[208] See here for the EUs 2014 Directive http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/142780.pdf. For the direction, the national implementation is taking, see http://www.euractiv.com/sections/innovation-enterprise/uproar-over-protection-trade-secrets-311777, and for the NGO view see http://corporateeurope.org/sites/default/files/attachments/statement_-_eu_trade_secrets_directive_needs_amendments.pdf

[209] 'Der Bundesverband der Deutschen Industrie (BDI) fürchtet durch die EU-Pläne gegen Steuervermeidung durch Großkonzerne die Offenlegung von Geschäftsgeheimnissen. Durch die öffentliche Aufschlüsselung von Gewinnen und Steuerangaben nach Ländern drohten deutschen und europäischen Unternehmen Wettbewerbsnachteile, erklärte BDI-Hauptgeschäftsführer Markus Kerber am Dienstag. "Mitbewerber werden durch die Veröffentlichungspflicht sensibler Unternehmensdaten auf

On 27 May 2016, the European Council unanimously agreed on the passage of the "Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure",[210] which had been passed previously by the European Parliament by a majority of 503 vs. 131 by 18 abstentions. The Directive contains a lot about the protection of trade secrets and comparatively but also something (even though comparatively little) to benefit investigative journalists, its sources and whistleblower in general (see below 5.10)

5.9.4.6 Privacy, Data protection and criminal investigation

The most basic secrecy is the protection of data privacy Data (§ 5 Bundesdatenschutzgesetz). The right to individual freedom and privacy is enshrined in Art. 12 of the Declaration of Human Rights, Art. 8 of the European Convention of Human Rights, Art. 2 of the German Basic Law and ranks accordingly high in all subsequent legislation and application of legislation. Data protection and privacy and transparency concerns gaining importance and impact in the area of criminal investigations, especially in the times after the NSA scandals. However: Consequences arising from this are more and more an obstacle to the investigation of crimes:

In earlier time it was only necessary to inform a suspect that surveillance of his phone is being done. Now it is also required to inform those not being suspected, but with whom the suspected is phoning. Of course, the duty to inform starts only after the information cannot endanger the successful investigation. There is, admittedly, uncertainty regarding the meaning of the world "zeitnah", but one can also imagine that police informs faster than needed because they want to pre-empt problems with lawyers. And: the amount of time needed for documentation work, frequent application for permission from judges etc. eats time which would be needed for real investigative efforts. And where to draw the line? If a person insists to know what authorities collect about him, those information do not exist in isolation from information related to third parties. How to reveal information without violating the rights of those third parties? Here the cat bites its tail and a large amount of insecurity remains.

Next there is the increasing pressure to reveal techniques of surveillance in court proceedings or the sources of information, e.g. informants. In both cases this might be justified in the context of "fair trial". Fact is also, however, that it weakens law enforcement because once certain tricks of the police are revealed the "bad ones", who are informed via lawyers, can adjust their strategies due to this newly acquired knowledge. And: An informant exposed at some stage is known and cannot be used again in the field at a later stage.

Regarding international cooperation, Germany is looked upon with increasing suspicion and scepticism because in Germany are so many leaks. Colleagues from abroad no longer want to entrust information to German authorities for fear that it finds its way into the media or to suspects due to procedural information requirements

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Unternehmensstrukturen und Margen schließen." Vor allem, wenn ein Unternehmen nur ein Großprojekt in einem Land verantworte, könnten Konkurrenzen aus aller Welt "die Projektstrukturen der erfolgreichen Unternehmen aus Europa" erkennen, erklärte Kerber. Er kritisierte auch zusätzliche Kosten und bisher unklare Fristen der Berichtspflicht für die Unternehmen. Aus Deutschland wären dem BDI zufolge 1200 Firmen betroffen.' BDI fürchtet durch EU-Steuerpläne Offenlegung von Geschäftsgeheimnissen (2016, April 12). In: Business Panorama.de. Retrieved from http://business-panorama.de/news.php?newsid=349488

[210] http://data.consilium.europa.eu/doc/document/PE-76-2015-INIT/en/pdf

Insofern gilt nach wie vor, dass Datenschutz auch Täterschutz sein kann und das ist der Bevölkerung schwer zu vermitteln.

5.9.4.7 Conclusion

Both data privacy or tax secrecy are to be taken serious. However: at all times it was also uncontested that this right, as well as tax secrecy, may be infringed for the purpose to investigate and prosecute crime.[211]

According to conversation partner from state prosecution, tax secrecy and social secrecy are the best protected secrecies in Germany – banking secrecy cannot be compared here. If tax secrecy applies, he argues, even the prosecutor has problems to proceed when he wants to investigate and combat crime. As explained in 5.7.3.2, there are situations overruling this secrecy and areas for interpretation on part of the tax official, but the problem is twofold (1.) getting an initial suspicion due to the lack of resources, (2.) getting certain that the initial suspicion is strong enough to legitimately overrul tax secrecy. Even though the BGH lowered the threshold for tax officials there seems still to be a great uncertainty which is why probably a number of reports are not being done.

The biggest question regarding tax secrecy is why we do need secrecy in the first place. When, for example, looking into the legal reasons of why setting up offshore companies are possible and permitted (see 2.4.3), not too many convincing reasons can be seen which benefit the common good and not just the interest of some privileged few. Why not simply prohibiting those options rather than establishing highly complex arrangements for data exchange and transparency which, in the end, are also open to misuse and will demonstrate enforcement deficits.

On the whole, it is always an exercise in balancing goods. As former EU Commissioner Algirdas Semeta puts it after Luxemburg Leaks and the extent of damage this behaviour does to the public: 'Tax transparency is more important than data privacy.'[212]

5.9.5 Transparency

5.9.5.1 Equal treatment of all regarding transparency

Federal Court Judge Thomas Fischer points out that there is a misbalance in transparency towards authorities regarding dependently employed or those obliged to inform when receiving benefits (see above, 5.9.4.2) on the one side, and and private, corporate and criminal wealth holder on the other:

> 'Those who are endangered complain about the violation of the tax secret as if it is a human right to keep crimes secret… One should differentiate: There is the tax secret, and it is violated now and again. … One should point, however, to the scandal where it is: the crime of tax evader. The tax secret is protecting – perhaps – the guilty tax evader. But it has not been devised to protect him and to veil his crimes in secrecy. It has been devised to protect all taxpayers from unveiling, via financial details of his life, all details of their private life or their business connections. For every dependently employed, who reveals rebates to his employer, the risk of violation of tax secrecy is more substantial than for a tax evader, whose secret account is revealed on a tax data CD.' (Fischer, 2014).

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[211] https://de.wikipedia.orGWiki/Privatsph%C3%A4re und https://de.wikipedia.orGWiki/Pers%C3%B6nlichkeitsrecht_%28Deutschland%29

[212] Semeta, A. (2013, June 5) Offshore Leaks transformed tax policy. Press Release. Retrieved 2015, February 10 from http://euobserver.com/economic/120382

5.9.5.2 Equal treatment of all regarding verification and enforcement

Similarly, there is a misbalance when it comes to verification and enforcement: On the level of recipients of social benefits there are many more checks and controls whether given declarations are "really true" as there are on the level of private, corporate and criminal wealth holder who, additionally, engage in aggressive lobbyism, suggesting that checks and controls as such are an insult by putting up a Generalverdacht against all wealth holder. So, for example, the CSU commenting on the suggestion that Bavaria does not implement adequately the 1991 verdict of the Federal Constitutional Court regarding the complementarity of Declaration and Verification (see GER/Va/7.3)

The economist Reinhard Blum from Augsburg argues that capital is a shy deer and therefore one might not fight too harshly. Which kind of change of legal awareness emerges when it is about setting legal norms and limits to economic processes, individual quests for material wealth? Because no one - especially in a private property based market economy - would come up with the idea to let thieves threaten them, they would even steal more if punishments and controls would increase! Quoted in (Borchert, 2014, p. 153)

5.9.5.3 Legal expertise regarding privacy and transparency

- (Hüsken) Gutachten zu Frage, ob die wirtschaftlichen Berechtigten in einem Unternehmensregister veröffentlicht werden können

8 Dem englischen Begriff der „beneficial ownership" entspricht in Deutschland folgende Legaldefinition: „„Wirtschaftlich **Berechtigter**" im Sinne dieses Gesetzes ist nach dessen § 1 Abs.6 GWG die natürliche Person, in deren Eigentum oder deren Kontrolle der Vertragspartner letztlich steht oder die natürliche Person, auf deren Veranlassung eine Transaktion letztlich durchgeführt oder eine Geschäftsbeziehung letztlich begründet wird.'

8f. Hierzu werden nicht nur Konstellationen im Kontext des Handelsregisters untersucht, sondern auch jene rechtsfähiger Stiftungen und Rechtsgestaltungen, wo treuhänderisch Vermögen verwaltet wird.

Stehen der Veröffentlichung von Namen natürlicher Personen als wirtschaftlich Berechtigte von Unternehmen und Stiftungen in öffentlichen Registern Grundrechte entgegen, v.a. das Recht auf „informationelle Selbstbestimmung"?

10ff. Hierzu hat das BVerfG verschiedentlich, etwa im Rahmen des „Volkszählungsurteils" vom 15.12.1983[213], Stellung genommen und die „Sphärentheorie" entwickelt, nach der zwischen Intimsphäre, Privatsphäre und Sozialsphäre differenziert werde muss. Danach gilt der Schutz der Privatsphäre nicht absolut und schrankenlos.

Das entsprechende Urteil des BVerfG wird im Beschluss 7 E 15.81 des VG Würzburgs vom 13.02.2015 wie folgt zitiert:[214]

> Es steht jedoch nicht der gesamte Bereich des privaten Lebens unter dem absoluten Schutz der genannten Grundrechte. Wenn der *Einzelne* als ein in der *Gemeinschaft lebender Bürger* in *Kommunikation* mit anderen *tritt*, durch sein Sein oder *Verhalten* auf andere *einwirkt* und dadurch die *persönliche Sphäre* von *Mitmenschen* oder *Belange* des *Gemeinschaftslebens berührt*, können sich *Einschränkungen* seines *ausschließlichen Bestimmungsrechts* über seinen *Privatbereich ergeben*, *soweit* dieser nicht zum *unantastbaren innersten Lebensbereich gehört*. Dem als absolut *unantastbar* geschützten Kernbereich privater Lebensgestaltung der Intim- und Geheimsphäre ist die Privat- und Sozialsphäre in der Schutzintensität nachgelagert. In dieser hat der *Einzelne* die *Einschränkungen* hinzunehmen, die im überwiegenden

[213] Siehe http://openjur.de/u/268440.html

[214] Eingestellt auf http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2015-N-43387?hl=true

> Allgemeininteresse oder im Hinblick auf grundrechtlich geschützte Interessen Dritter unter strikter Wahrung der Verhältnismäßigkeit vorgenommen werden….

Analog kann die Frage gesehen werden, ob die Vergütungen der Vorstandsmitglieder der gesetzlichen Krankenkassen zulässig ist. Hierzu meint das BVerfG, dass die Schaffung von Transparenz eine legitime Motivation des Gesetzgebers sei, wenn das Prinzip der Verhältnismäßigkeit gewahrt bleibt, etwa, indem die Veröffentlichung berufsbezogen ist und insgesamt keine Rückschlüsse auf das Gesamtvermögen möglich sind.[215]

> 32 Personenbezogene Daten über die Vergütung im ausgeübten Beruf des Grundrechtsträgers ermöglichen Rückschlüsse über dessen wirtschaftliche Verhältnisse im privaten Bereich. Indem diese Daten veröffentlicht und damit allgemein bekannt werden, wird jedermann in die Lage versetzt, in diese Verhältnisse, wenngleich nur in einem begrenzten Maße, Einblick zu nehmen. Die Veröffentlichung personenbezogener Daten stellt im Vergleich zu anderen Eingriffsmöglichkeiten, etwa der bloßen Erhebung, verwaltungsinternen Speicherung und Weitergabe an bestimmte Dritte, eine besonders weitgehende Form des Eingriffs in das Recht auf informationelle Selbstbestimmung dar. Gewicht gewinnt dieser Eingriff zusätzlich, wenn die hier zu veröffentlichenden Informationen, wie die Beschwerdeführer unter Beifügung von Belegen anführen, Gegenstand einer umfangreichen, teilweise unsachlich geführten öffentlichen Diskussion zu werden drohen. Damit besteht zumindest die Gefahr, dass allein aufgrund des Bekanntwerdens der hier verfahrensgegenständlichen Angaben persönliche Verhältnisse der Beschwerdeführer öffentlich in einer Weise erörtert werden, die ihnen aufgrund von Umständen, die sie selbst nicht beeinflussen können, in Bezug auf ihr öffentliches Ansehen und ihr öffentliches Handeln nicht zum Vorteil gereicht.
> 33 Bei der Gewichtung des Eingriffs ist andererseits zu berücksichtigen, dass die Informationen nicht die engere Privatsphäre der Beschwerdeführer, sondern ihren beruflichen Bereich betreffen. Veröffentlicht werden nicht die für die persönliche Lebensgestaltung entscheidenden Einkünfte der Beschwerdeführer, zu denen auch Zuflüsse aus anderen Quellen zählen können, sondern lediglich die von Seiten der Krankenkasse gezahlten Vergütungen und Versorgungsleistungen. Rückschlüsse auf Einkommen oder gar Vermögen der Beschwerdeführer sind daher nicht umfassend möglich.

Entsprechend gilt:

> 42 Es ist verfassungsrechtlich nicht zu beanstanden, dass der Gesetzgeber im Rahmen seines Einschätzungsspielraums bei der Abwägung dieser gegenläufigen Interessen dem Transparenzinteresse und damit der Möglichkeit zur Kenntnisnahme der Vorstandsbezüge von öffentlichen Funktionsträgern den Vorzug vor deren Interesse an Geheimhaltung gegeben hat.

Auch der Europäische Gerichtshof lege im Umgang mit Daten zum Arbeitseinkommen keinen besonders strengen Maßstab an, so das BVerfG in Randnummer 45.

15f. Ergo: Die Erhebung und Veröffentlichung der Daten wirtschaftlich Berechtigter in einem Unternehmensregister verletzen die Rechte auf informationelle Selbstbestimmung und Berufsfreiheit nicht, weil sie weder die Intim- noch Privatsphäre betreffen,

> sondern die Sphäre der sozialen, d.h. gesellschaftlichen und wirtschaftlichen Interaktion. Veröffentlicht werden sollen auch nur Daten betreffend einzelne Facetten der wirtschaftlichen Interaktion der Betroffenen und nicht etwa genaue Angaben über Gesamteinkommen und Vermögen der Betroffenen. Zudem ist nicht ersichtlich, dass das Recht „im Geheimen“ Geschäfte abwickeln bzw. von wirtschaftlicher Interaktion profitieren zu können, nach dem

[215] BVerfG, Beschluss der 1. Kammer des Ersten Senats vom 25. Februar 2008, - 1 BvR 3255/07 - Rn. (1-48), http://www.bverfg.de/e/rk20080225_1bvr325507.html

> Rechts- und Verfassungsverständnis des Bundesrepublik Deutschland besonders schützenswert wäre.

17f. Ein Problem bei Trusts ist, dass dieser angelsächsischen Rechtsfigur kein direktes Pendant im deutschen Recht entspricht.

> In Bezug auf die treuhänderische Verwaltung von Vermögensgegenständen in wirtschaftlichen Kontexten wird vielmehr auf die Gesellschafterstruktur von Kapitalgesellschaften und den „wirtschaftlich Begünstigten" von wirtschaftlichen Transaktionen im Sinne der oben zitierten Vorschriften des GWG abzustellen seien, um die Personen zu erfassen, die letztendlich wirtschaftlich von bestimmten Transkationen profitieren. Diesem Ziel trägt die gesetzliche Definition des „wirtschaftlich Berechtigten" im GWG und die entsprechende Erfassung und Veröffentlichung der Daten entsprechend Rechnung.

5.9.5.4 Public registers responding to systemic/institutional corruption?

As CD leaks, insider reports such as the one by Elmer and leaks starting with Offshore Leaks leading to Panama Papers illustrate, the entire capitalistic market system has degenerated into something which is unhealthy for the common good: The original idea of partner competing at eye level with creativity and innovation for customers is less and less working because there is no longer a level playing field for all. Small and medium businesses are disadvantaged on the markets by large businesses, especially transnational banks and other TNCs who have options to outsource production, decrease tax burdens and increase profits via Tax Havens which small and medium businesses do not have. At the latest the PanamaPaper leaks illustrates that those practices are no longer exceptions in the rule, but more of a rule which destroys and distorts fair competition, damages entire economies[216] and profits large player far more than small and middle ones. That way, market economy is more and more playing in favour of large, dominant player, oligopolies and perhaps even financial feudalism.

Here a serious question needs to be asked whether some transparency and traditional forms of governmental cooperation is adequate to combat that sorry state of affairs. Both insider such as Elmer and NGO activists from the Tax Justice Network international question that and require rather drastic measures by calling for publicly accessible registers for businesses. If, for examples, those registers are only accessible to tax administrations and "entitled third parties", not much will be achieved: Classically, authorities can only be active if they have an initial suspicion (Anfangsverdacht), but it is questionable that an employee of the Bavarian tax administration gets this initial suspicion by just receiving data within the AEOI agreement from Panama. How could he, for example, discover bogus directors of Shell Companies without doing some research on names, which is not his business and which is, probably, prohibited by still existing tax secrecy regulations. Here, therefore, NGOs and journalists need to have open access because it is those who revealed most of the relevant scandals in the nearer past. A conversation partner puts it like this:

> Distortions in market economies damage seriously the common good and all society, which is why society as a whole has a justifiable interest of open access to this data. The extent of

[216] Zick/Tilouine (2016, April 13) Unter Kleptokraten. In: SZ. Retrieved from http://www.sueddeutsche.de/politik/kongo-brazzaville-unter-kleptokraten-1.2947471 . Pfaff/Zick (2016, April 13) Krieg und Öl: Wie Söldner Briefkastenfirmen nützen. In: SZ. Retrieved from http://www.sueddeutsche.de/politik/panama-papers-krieg-und-oel-wie-soeldner-briefkastenfirmen-nutzen-1.2947473 Pfaff/Zick (2016, April 13) 24 000 000 000 000 Dollar in der Erde. In: SZ. Retrieved from http://www.sueddeutsche.de/politik/rohstoffhandel-dollar-in-der-erde-1.2947475

> institutional corruption is such that you cannot fight it with authorities strangled by national laws. Against that, only swarm intelligence can counter it.[217]

Hence: A lot would argue in favour of transparency, as it is the case in Italy. Germany and its states drag their feet: A recent information provided by the German Federal Government in 2018 states,[218]

> Bis Ende Juli 2018 wurden in das neue Transparenzregister 136 368 wirtschaftlich Berechtigte für insgesamt ca. 55 000 Rechtseinheiten eingetragen. Über 35 000 wirtschaftlich Berechtigte haben dabei ihren Wohnsitz im Ausland (Antwort 38). Gut 10 000 Eintragungen betreffen „fiktive" wirtschaftliche Berechtigte wie Geschäftsführer etc. (Antwort 41). Der Bundesregierung liegen keine Informationen über das Ausmaß der Umgehung der Registrierung im Transparenzregister vor, etwa bei Firmen, wo kein Anteilseigner 25% besitzt, oder wo durch eine Verkettung von ausländischen Gesellschaften die Mitteilungspflicht auf den wirtschaftlich Berechtigten selber über geht und mangels Sanktionen vermutlich oft nicht wahrgenommen wird (Antworten 40 & 42).

And because states as Italy are strict on those transparency issues, Organized Crime is moving to Germany where there is still obscurity and lack of transparency.

Important is that the Netherlands and the UK are in favour of open registers and that Germany is still trying to restrict that. Germany could also go ahead nationally, e.g. by requiring the revelation of beneficial ownership in case of the acquisition of real estate or as precondition for obtaining public commissions (öffentliche Aufträge) (Meinzer, 2016b)

Other experts in support of public registers are, e.g. in the context of the Public Hearing of the Finance and AWZ Committee of the German Federal Parliament on the impact of tax avoidance and tax evasion on developing countries: (Haldenwang, 2016). As it was put by Richard Murphy:

> All tax systems eventually work by encouraging the highest degree of compliance possible. This is best achieved in this area by requiring public country-by-country reporting. Nothing will change corporate tax avoidance behaviour more than this. (Murphy, 2016)

5.9.5.5 Publication of treaties

While Germany at least publishes DTAs, not even this is done by African states. Kenya, for example, had to go to court for the publication of a DTA between Kenya and Mauritius. The government held the position that, since it is an agreement and not a treaty, parliament does not need to be involved for ratification. TJN Africa holds against it the suspicion of unconstitutionality since it would deprive Kenya of urgently needed resources, especially as far as income from capital, dividends, interest or royalties are concerned.[219]

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[217] ‚Das Ausmaß der institutionellen Korruption ist so gigantisch, dass nur Schwarmintelligenz eine Chance hat, ihr Einhalt zu gebieten.' (Meinzer, 2016b)

[218] Antwort der Bundesregierung vom 15.8.2018 auf Anfrage von Fabio di Masi zu Geldwäsche-Aufsicht und Vollzug der Anti-Geldwäsche-Regelung http://dipbt.bundestag.de/doc/btd/19/038/1903818.pdf

[219] Guguyu, O. (2016, February 4) Treasury keen to evade Parliament in Mauritius Tax row. In: Daily Nation. Retrieved from http://www.nation.co.ke/business/Defends-controversial-Mauritius-tax-agreement/-/996/3061760/-/97qif4/-/index.html

5.9.6 The initial suspicion in context

5.9.6.1 The Anfangsverdacht (initial suspicion)

An initial suspicion is more than a gut feeling. Conversation partners report that they sit in the office feel that a case "stinks to high heaven." But this gut feeling is not enough evidence to sign a search warrant. An initial suspicion satisfying legal standards also requires indications in what direction one needs to investigate. If this does not exist, that's it. One can agree that there is very likely more to it but with the instruments available by law nothing more can be initiated. And if there are more instruments for law enforcement this will be on the account of civil liberties – which is always a matter of balancing values. Here you can say: "Well, this time you won, next time I will catch you" and hope for the best. If one does not take it as a game one has ulcers or burnout soon. On that background: Yes, there is probably a huge Dunkelfeld where a lot is not discover and not investigatable. Probably there would be more possible if the tax auditor or tax fraud investigator would have time, but this is not for certain either. This was, by the way, the situation with Mollaths accusation. Later it became clear that he was right, but with the instruments at hand the prosecutor could not have acted differently and come to a different conclusion.

In a 2008 verdict concerning the obligation of tax officials – in the case at hand a tax auditor – to forward a case to investigative and prosecutive departments, the supreme financial court of Germany, the BFH, also looked into the threshold set by the definition of an initial suspicion. Doing that, it lowered the level, giving tax officials more freedom and peace of mind when conflicts between preserving tax secrecy and forwarding a case arise: The court states: 'According to § 4, 5 (10,3) EStG, a suspicion which encompasses the information of criminal proceeding arises when it is an initial suspicion as defined by criminal law. Thus, there must be sufficient actual factors for a deed according to § 4, 5 (10,1) EStG. '[220]

5.9.6.2 nemo tenetur se ipsum accusare

The next problematic issue is the old legal principle that an accused cannot be forced to blame himself. If this is the case, the evidence collected that way cannot be used in court. If now the tax auditor comes across some fishy entries in accounts he is not in the situation to tell the business owner "show me those receipts" because this might create that situation. In this case, his task is to inform the relevant authorities for taking over. In this case, however, the auditing of the business terminates at the same time and no surplus revenue can be collected in this case which leads to the next problem

[220] Ein Verdacht i.S. des § 4 Abs. 5 Nr. 10 Satz 3 EStG, der die Information der Strafverfolgungsbehörden gebietet, besteht, wenn ein Anfangsverdacht im Sinne des Strafrechts gegeben ist. Es müssen also zureichende tatsächliche Anhaltspunkte für eine Tat nach § 4 Abs. 5 Nr. 10 Satz 1 EStG vorliegen …

Wenn im Gesetzgebungsverfahren zum StEntlG 1999/2000/2002 davon die Rede war, dass die Mitteilungspflicht erst bei hinreichendem Tatverdacht (vgl. BRDrucks 910/98, S. 170) eingreifen soll, so kann dem nicht gefolgt werden. Denn strafprozessual ist für die Einleitung eines Ermittlungsverfahrens durch die Staatsanwaltschaft nur ein Anfangsverdacht, also zureichende tatsächliche Anhaltspunkte erforderlich (§ 152 Abs. 2 der Strafprozessordnung --StPO--). Da mit der Mitteilung nach § 4 Abs. 5 Nr. 10 Satz 3 EStG aber der Staatsanwaltschaft gerade die Prüfung ermöglicht werden soll, ob ein Ermittlungsverfahren einzuleiten ist, wäre es sinnwidrig, die Mitteilung von einem Verdachtsgrad abhängig zu machen, der nach der StPO erst für die Anklageerhebung (§ 170 Abs. 1 StPO) und die Eröffnung des Hauptverfahrens (§ 203 StPO) erforderlich ist (so auch zutreffend Randt, Schmiergeldzahlungen bei Auslandssachverhalten, Betriebs-Berater 2000, 1006, 1013). Bundesfinanzhof: Beschluss vom 14.07.2008 – VII B 92/08. Retrieved fromhttp://www.iww.de/quellenmaterial/id/34380

5.9.7 Diverging interests/resources of institutions

5.9.7.1 States vs. federal level, Financial Equalization Mechanism

A major obstacle on the way towards a better, more effective exchange of information and cooperation between German Authorities is the problem of the Equalization Mechanism. No state wants to invest into areas where other states might reap the benefits and here certainly also the ongoing negotiations towards the Föderalismusreform will not change anything substantially. Similar, as has been pointed out above (5.5.4) there is the unquenchable rumour that states do not invest into the Turnover Tax Fraud department because the majority of proceeds would benefit the federal level.

5.9.7.2 Tax authorities vs. investigative authorities

While the prime interest of the tax administration is revenue collection, the prime interest of crime investigators is the investigation of crime. Those interests collide, since crime investigation does not generate revenue for the tax administration, but binds personnel for cooperation with investigators which would be needed elsewhere. This even applies in the case of businesses where no tax could be collected anyhow since they are bankrupt: Here still might be some value for crime investigators, but no value for tax administration. If therefore tax fraud investigators complain that their efforts are not speedily taken up and processed by the prosecutor, there is also the opposite feeling that they do not find open doors with tax administrators.

5.9.7.3 Tax authorities/investigative authorities vs. prosecution and courts

In GER/VI/4.3.6.2. it has been said that public prosecution is a bottleneck for the tax fraud department. This is conceded by the prosecutors: prosecutors change frequently, because many cases are dealt with by beginners ahead of their further career as a judge. Here, they hand over their findings, the get their search warrant, evaluate their findings, hand it over, more investigation is called for, perhaps even involving issues abroad in complex tax cases... At the same time, prosecutors complain that when they want to investigate, there are not adequate staff on part of the tax authorities (see above 4.8.5). All authorities want to have more personnel and argue that the inter-authority cooperation would profit from more personnel in each and everyone of them. There is wide agreement that there is a huge Dunkelfeld in the area of corruption, bribery, money laundering, tax evasion which is never discovered because tax auditors and tax fraud investigators have no time to investigate carefully. This, of course concerns most of all the Finance Ministry since more tax auditors and tax fraud investigators would earn more money than they cost to start with, and then more money would exist for others as well.

Here, however, others contradict: In Nuremberg, contacts between prosecution and investigators are good and no conflict is seen. This certainly is different in Munich where other cases in quality and quantity are dealt with and different amounts of revenue are at stake. Here it can well be the case that here tax officials decide differently. But also in Nuremberg, if there is a case of “tatsächlicher Verständigung”, tax authorities rather prefer settlements involving payments than prosecutors who argue for other things, e.g. (suspended) sentencing.

5.9.7.4 Financial institutions

Banks calculate risk of detection against profitability of business. One of the reasons for a this lack of enthusiasm are low penalties: At best Ordnungswidrigkeit-Bußgeld which is in no relationship to potential gains, no prison sentencing, no withdrawal of the license to do

business, as requested at least by the NRW finance minister Borjans and the Federation of Criminal Officers.

Saviano paints a painful image of how criminal proceeds corrupt political, administrative, economical and financial structures in many countries of the world, illustrating, how even brothers and children of presidents and the world's most noble banking institutions are involved in this lucrative trade. He even includes a little analysis that it was criminal cash which in the end saved the global financial system from breaking down because it was that money and nothing else which provided needed liquidity when everybody refused to lend and borrow.

> 'Antonio Maria Costa, head of the UN Office on Drugs and Crime, said he has seen evidence that the proceeds of organised crime were "the only liquid investment capital" available to some banks on the brink of collapse last year. He said that a majority of the $352bn (£216bn) of drugs profits was absorbed into the economic system as a result. ... "Inter-bank loans were funded by money that originated from the drugs trade and other illegal activities... There were signs that some banks were rescued that way." Costa declined to identify countries or banks that may have received any drugs money, saying that would be inappropriate because his office is supposed to address the problem, not apportion blame. But he said the money is now a part of the official system and had been effectively laundered.[221]

This view is also supported by German experts.[222] And Saviano is also adamant that the main places to launder criminal money is New York and London[223] He illustrates, how corruption paves the way both for the activities and all the efforts to effectively obstructing discovery and prosecution. Summarizing, for example, services of Raul Salinas de Gortari, brother of a Mexican president, and his wife in the money laundering business, Saviano states

> The problem that emerges from this interminable saga is the frequent lack both of tools of legal recourse and often of interest in going after dirty money, even when the accused is not a notorious member of some criminal organization but an exponent of that elite and that institutional apparatus that is needed to keep the machine of white profit running. Cocaine money first buys politicians and officials, and then, through them, the shelter of the banks. (Saviano, 2015, p. 257)

Besides punishment (see above 3.5.3) is the loss of trust and reputation that which the banks fear most. This could also be obtained by widely reported arrests and explanation of the reason for it. This would eventually result in the loss of customers. For that reason exposing banks participation in the Offshore Game and publication about it is much worse than the highest possible penality.

A final punishment could be the withdrawal of banking licence.

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[221] Drug money saved banks in global crisis (2009 December 13). In: Der Guardian. Retrieved from http://www.theguardian.com/global/2009/dec/13/drug-money-banks-saved-un-cfief-claims

[222] Jürgen Roth in Mafia in Bayern – Wenige Kassieren, die Rechnung zahlen alle. (2011, March 24). In Bayerischer Rundfunk. Retrieved from http://www.br.de/nachrichten/mafia_bayern_folgen100.html

[223] ‚Today New York and London are the world's largest laundries for dirty money. No longer those fiscal paradises of the Cayman Islands or the Isle of Man, now it's Wall Street and the City of London. In the words of Jennifer Shasky Calvery, at that time chief of the Asset Forfeiture and Money Laundering Section of the Department of Justice, during a testimony before the American Congress on February 8, 2012: "Disguised in the trillions of dollars that is transferred between banks each day, banks in the U.S. are used to funnel massive amounts of illicit funds."' (Saviano, 2015, p. 250)

> Initiated by North Rhine Westphalia, Baden Wurttemberg and Lower Saxony, Federal Council passed already in 2014 a bill for stricter sanctions. But this advance was in vain under the coalition of that time. The 10-points-plan of Federal Minister of Finance Wolfgang Schäuble does not contain any concrete sanctions against banks, but the Ministry considers to give the authorities more competences. According to the law of banks, BAFIN can give and withdraw banking licenses. However, tax offences are not explicitly regulated there. 'It is not sufficient just to identify single bank employees.' [224]

This should be clearly the case where Banks did not do their jobs even though there are warnings on record, as in the case of the Berenberg bank, where two compliance officer warned of clients but, in turn got sacked (see 3.6).

5.9.8 Institutional cooperation

Diverging interests of institutions most certainly also impact on their willingness to cooperate on different levels:

5.9.8.1 Regional – national cooperation

As it seems, the differences between German states and the clumsiness of communication between German authorities is part of criminal business activities, e.g. in Carousel Fraud.

But equally problems exist even within the own country, if different authorities, subject to different ministeries, are involved. E.g. when there is an investigation in issues arising from the informal economy/cheating turnover taxes, wages and mandatory social contributions: The prosecutor is involved (Justice Ministery), the FKS (Finance Ministry) and the Rentenversicherungsträger (Social Ministry) who have to calculate the damage existing for the community due to the case. This takes ages, but is a "given" in any complex organized society. Even within prosecution there are differences in Bavaria: The Bemessungslisten are different and different measures are applied in Munich, Nürnberg and Bamberg. This, however will not impact upon decision where criminals are active: They want to avoid discovery anywhere, and do not choose their location in view of the lowest possible prosecution.

5.9.8.2 Centralisation and Decentralisation

The question of centralism and decentralism is a difficult one. As tax fraud investigators put it in GER/VI/4.3.7, it is very important to have people investigating crime on the spot where the crime has happened. "If I have a question to a crime I call the local Criminal Police and the officer comes within 5 minutes. If I call the State Crime Agency it will kill half a day of his working time to just travel to me."

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[224] Bundesrat hatte auf Initiative von Nordrhein-Westfalen, Baden Württemberg und Niedersachsen bereits 2014 einen Gesetzesantrag für härtere Sanktionen verabschiedet. Der Vorstoß lief allerdings unter der damaligen schwarz-gelben Koalition im Bundestag ins Leere. Im 10-Punkte-Plan von Bundesfinanzminister Wolfgang Schäuble sind keine konkreten Sanktionen gegen Banken vorgesehen, das Ministerium prüft jedoch, den Aufsichtsbehörden mehr Kompetenzen zu geben. … Nach dem Gesetz über das Kreditwesen kann die Bundesanstalt für Finanzdienstleistungsaufsicht (Bafin) Banklizenzen erteilen und entziehen. Steuerstraftaten sind allerdings nicht ausdrücklich darin geregelt… „Es reicht nicht aus, einfach nur einzelne Bankmitarbeiter zu identifizieren", meint der NRW-Minister NRW Minister droht Banken mit Lizenz-Entzug. (2016, April 14). In Handelsblatt. Retrieved from http://www.handelsblatt.com/unternehmen/banken-versicherungen/steuerhinterziehung-und-panama-nrw-finanzminister-droht-banken-mit-lizenz-entzug/13447310.html

At the same time one needs a more effective cooperation outside the local area, especially where international crime is concerned. For example, carousel fraud: Here, investigation of a case from 2009, whose offences go back to 2004, is dragging on even in 2015 because it involves 4 different states. Communication is difficult. Certainly, is movement within the European Union via Eurojust (EU Judicial Coordination Unit) which coordinates complex investigations and brings together investigators or OLAF in the area of fraud and corruption.[225] Or Joint Investigative Teams. Or the Bavarian International Tax Authority in Munich (GER/VI/4.3.3.5). But this is too little yet. Regarding the investigation of Verstöße gegen das Außenwirtschaftsgesetz (Embargoe-related issues) centralisation works well for Customs who has its center for the entire South Germany in Stuttgart.

5.9.8.3 International cooperation within the EU

Here one has to distinguish between cooperation within the EU and outside the EU.

Even within the EU it is simple to say "follow the money –it leads you to the perpetrator." This, however , is not easily possible if offshore accounts are involved. And one should not underestimate simple tricks such as transport of cash or drugs via couriers: In a Europe with open borders this is a widespread and easy practice. And even if one catches a courier, he does not know the really important people who engage and pay him

Of course, there is the option for Rechtshilfe and international cooperation. This, however, is fraught with holes and delays – and if one thing counts in investigations it is speed.

First of all, international cooperation requires that a crime in one land is also considered to be a crime in the other state. This involves that Germany refuses to cooperate with other states where a criminal offence is threatened with the death sentence, as it is with China, where a lot of corruption and money laundering traces end.

Second, there are various levels of international cooperation which can be conducted at different speed:

- From authority to authority
- From ministry to ministry
- From government to government

Third, issues of language skills, combined with the obligation that the language at court is German.

Such a cooperation also includes risk if the cooperating authority in the other country is involved in criminal affairs itself. Here one risks that the cooperating authority warns the criminals and the case is bust.

Finally there is even within Europe a diverging enthusiasm in cooperation: Very bad are experiences with the UK, incalculable with Italy, good with Austria.

At the same time, also German/Bavarian investigators are getting a bad image abroad due to their data protection and privacy related constraints. Investigators from abroad are getting increasingly reluctant to entrust information to German authorities for fear that those

[225] http://www.eurojust.europa.eu/Pages/home.aspx and http://ec.europa.eu/anti_fraud/index_en.htm

are leaked somewhere either to suspects or media – and conversation partners from police admit that this fear is sadly justified.

5.9.8.4 International cooperation outside the EU

It is worse outside the EU:

"If there is a lead going to Africa I just drop it and forget it. It would lead to nowhere and is not worth the bother." Similar, there are limits when China is involved where corruption is punished with the death penalty.

That there are problems at the African end of investigations, is openly admitted by conversation partners from the African police forces. A conversation partner working in a police force in a West African state puts it like this:

> Now to express my opinion, your assertion on "copying the German style of governance" in these countries is of course a little mistake some of the organisations are making. Not because what they propose is bad or not accurate, just because they neglect some aspect of the issues. The police in our part of the world is fully, yes "fully" under administration dominance. Rare are those services which can initiate such a criminal investigation without the go ahead of the administration (government, police hierarchy, parliament etc.). The police (security agencies in general) are not independent, the government can at all level suspend cases.
>
> Beside the police, the justice system is another bottleneck in the fight against financial crimes; rich men never lose cases!!! Coming back to Mali specific case, the need of deep and very structured security sector reform is needed. There is a need to first strengthen the third "counter power", the civil society (far from political influence) to make them capable to oversight

5.9.8.5 Central investigative units for Financial Crime?

Nationally: To prevent delays and confusion regarding information or competence/jurisdiction as illustrated here[226] or above in "Sozial- und Statistikgeheimnis". It would stop delays and institutional jealousies arising as described above (5.7.7). It would also take into account the blurring borders between many kinds of national and transnational Illicit Financial Flows.

Something of the kind of the Austrian Finanzpolizei,[227] the Italian Guardia di Finanza,[228] the Spanish Policia Fiscal.[229]

For Germany, it would unite the

- Tax Fraud Investigators of Tax Administration

[226] Kontrollen nach der Bargeld/Barmittel-DV hinsichtlich mitgeführten Geldbeträge oder gleichgestellter Zahlungsmittel sind Aufgabe der Zollverwaltung (und ggfls. der Bundespolizei als Auftragsverwaltung für den Zoll). Es gibt eindeutige Regelungen hinsichtlich der vor der Kontrolle durchzuführenden Befragung und der sich daran anschließenden Maßnahmen. Derartige Kontrollen obliegen den Beamten der Hauptzollämter gemäß § 209 der Abgabenordnung (AO). Beamte des Zollfahndungsdienstes (§ 208 AO) haben diese Kontrollbefugnis nicht. Sie können jedoch im Rahmen von straf-/steuerstrafrechtlichen Ermittlungen tätig werden. Wenn also ein Landespolizist bei einer Verkehrskontrolle Bargeld in einem Auto findet, darf er den Fahrer dazu nicht im Sinne der vorgenannten DV befragen. Auch das nachträgliche Hinzuziehen von Zollbeamten heilt die Maßnahme nicht. Die Landespolizei kann dann entweder selbständig wegen Verdachts der Geldwäsche ermitteln oder nach dem PAG (Polizeiaufgabengesetz) präventiv tätig werden.

[227] https://de.wikipedia.orGWiki/Finanzpolizei_%28%C3%96sterreich%29

[228] https://de.wikipedia.orGWiki/Guardia_di_Finanza

[229] https://de.wikipedia.orGWiki/Polic%C3%ADa_Fiscal

- The FIU
- FKS and investigative units of the Federal Customs Authority
- Departments of State and Federal Police Authorities dealing with Financial and Fiscal Crime.

Here, the transfer of the Financial Intelligence Unit from the BKA to Customs might be a first step towards more centralization.[230]

Internationally see above, combating VAT fraud Eurofisc/OLAF.

5.9.9 Executive vs. Legislation and Jurisdiction

5.9.9.1 Financial & IT globalization and crime opportunities

Most of the regulation discussed above regarding checks and controls of money laundering refers to the formal financial sector. It probably will work, and increase the of crime actors turning to the "shadow banking sector" (see I/IV/5.3.2f.), a major area of deregulated financial activities and of major importance for the World Financial and Economic Crisis.

> Economist Paul McCulley first used the phrase "shadow banking system" in 2007 at a financial conference. In his speech, he defined the shadow banking system as financial institutions that do not take deposits in the traditional sense. The shadow banking system is a network of financial institutions comprised of non-depository banks - e.g., investment banks, structured investment vehicles (SIVs), hedge funds, non-bank financial institutions and money market funds. They could be described as financial intermediaries that conduct functions of banking without access to central bank liquidity or safety nets like deposit insurance. Shadow banks make most of their money by acting as intermediaries between large borrowers and large lenders. They earn their revenue from interest rate spreads and the fees they charge for their services ... Given the specialised nature of some shadow banks, they can often provide credit more cost-efficiently than traditional banks. The shadow banking system is very important for the economy because it provides funding to traditional banks and without this funding, traditional banks would not lend money, which would then slow growth in the wider economy. As shadow banks do not take deposits in the traditional sense, they are/were subject to less regulation than traditional banks.[231]

It is widely agree that the Shadow Banking sector is a continuing risk for the stability of the World Financial and Economic Order, because it eludes efforts of regulation, still handles large amounts of money and is interlinked with the formal banking sector, thus still threatening a global crisis if something goes wrong in some of its segments. The Euro-Area is the, as a whole, the largest Shadow Banking Sector, followed by the UK, Switzerland and the UK. Within the Euro Area, major actors are Ireland, with its sector having the volume of 1190% of GDP, Britain 147%, Germany "only" 73%.[232]

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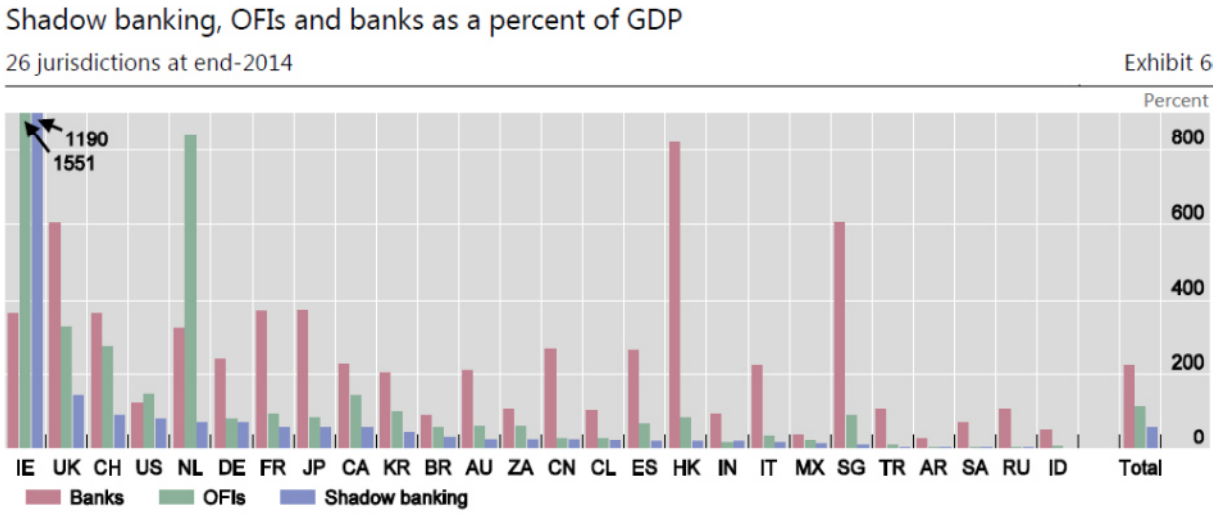
[230] Zehn Punkte Plan gegen Briefkastenfirmen (2016, April 11) Retrieved from http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Weitere_Steuerthemen/Informationsaustausch/2016-04-11-Aktionsplan.html

[231] - See more at: http://www.matrixrecruitment.ie/matrix_social/social_details/the-impact-of-shadow-banking-on-the-financial-services-jobs-market#sthash.NzosnMhz.dpuf

[232] [p. 12] Financial Stability Board, Shadow Banking Monitor 2015, retrieved from http://www.fsb.org/2015/11/global-shadow-banking-monitoring-report-2015/

Graphic 19 Shadow Banking and Other Financial Institutions and banks as percent of GDP



How to balance the interests of all involved, without driving illicit financial markets? Even the head of the FATF admits in a speech that this sector has advantages for many people by facilitating banking services to them if otherwise they would be excluded, and he reports specifically experiences from Africa. At the same time he insists that checking customers identity is key for preventing misuse and that due customer diligence and risk assessment should also be applied in this area. His conclusion: 'Most likely what is required, I think, is the communication of more flexible regulatory practice and standards, and more refined and intelligent assessment of risk.'[233] The question here is, however, how to supervise that all this is indeed taking place, which is why NGOs reject plans of the European Union to introduce a Kapitalmarkt-Union with better integrated financial markets, enabling businesses to get credit also outside the financial sector. They, rather, call for a stricter regulation and central overseeing agencies.[234]

Hawala Banking and other IT and Communication Technology based transfer options.[235]

5.9.9.2 Requested investigative means and opposition

Clearly: Police investigators are on the forefront of those investigation, feeling their deficits and trying to adjust their investigative rights and technical means to the reality within and against they have to work. Hence they are requesting a number of investigative tools which clash with traditional world view:

Beweislastumkehr. It is a high value to consider somebody innocent unless proven guilty. Why should it in the area of money laundering and tax evasion be different.

➔ It would be important to have clear rules when it applies or not, e.g. if there are indications for Organized Crime or Steuerstraftaten im großen Ausmaß, wobei das Ausmaß entweder EUR 50,000 oder EUR 100,000 betragen kann.[236]

[233] Wilkinson, R. (2014, October 8) The danger of driving both illicit markets and financial exclusion. Retrived from http://www.fatf-gafi.org/documents/documents/danger-illicit-markets-financial-exclusion.html

[234] http://www.dgb.de/themen/++co++af6d7558-c0f4-11e5-8458-52540023ef1a

[235] Dies Schlupflöcher nutzt der IS für die Terrorfinanzierung (2015, November 11). In: FAZ. Retrieved from http://www.faz.net/-gqe-8ab4n

- ➔ One really has to think about alternatives. Regarding Beweislastumkehr there could be an obligation for **transparency rules**. For example, that everybody is obliged to document from a certain extent of assets where those originate from. This is, e.g., part of the new self-declaration rules: Everybody has to document not only how much he evaded, but also where the assets come from.
- ➔ Another compromise here is that the Beweislastumkehr will be permissible in Steuerrecht, but not in Steuerstrafrecht, where the state keeps its obligation

Abhören von Telefon:

Obligation to inform those surveilled: It has only to be done if the "investigative success is not endangered."[237]

Surveillance mobile internet

Modern communication is organized via encrypted internet applications such as WhatsApp . Hardly anybody uses the phone anymore.[238]

Data-Storage (Vorratsdatenspeicherung):

The goal is not to store all content of conversations but merely who phoned how long when with whom under which number.[239] Das Problem ist aber, an diese Verbindungsdatenerstmal ran zu kommen. Die Hürden sind so hoch, dass man versucht ist es gleich zu lassen.

Computer-Online-Durchsuchung:

It is a difficult area to balance, because once you start is, where are the limits? For example, why not demanding that sexual offenders have to prove their innocence? Or why not conceding torture in certain circumstances, as has been the discussion surrounding the Frankfurt abduction case of Jakob v. Metzler?

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[236] Zu entsprechenden Entscheiden des BGHs siehe Meyberg, A. Zum „großen Ausmaß" i.S. des § 370 Abs. 3 S. 2 Nr. 1 AO" In: Praxis Steuerstrafrecht, Ausgabe 3/2012, Seite 55, Retrieved from IWW Institut, http://www.iww.de/index.cfm?pid=1314&pk=152495&spid=1296&opv=13492&spk=1289

[237] Bei der TKÜ ist es ja nicht so, dass man die abgehörten Personen sofort informieren muss. Eigentlich ist es so, dass sie erst informiert werden müssen, wenn der Ermittlungserfolg durch die Information nicht mehr gefährdet werden kann. Natürlich gibt es den Begriff „zeitnah", aber d.h. natürlich nicht, dass die Personen noch am Tag selbst informiert werden müssen. Dieser Begriff ist auslegungsfähig, sie kann aber verstehen, wenn Beamten zu schnell informieren, einfach, um Schwierigkeiten mit Anwälten auszuweichen.

[238] Moderne Kommunikation läuft auf eine Art und Weise, die nicht mehr überwachbar ist. Am Telefon reden eh nur noch die Blöden. Whatsapp ist nicht überwachbar, dort ist alles verschlüsselt. Bei solchen Medien müsste Überwachung über Trojaner erfolgen, die in System eingeschleust und aktiviert werden und dann Kommunikation übermittelt bevor sie verschlüsselt wird. Bundestrojaner ist durch BVerfG bzw. nur bei kapitalen Verfahren möglich ist.

[239] Die aktuellen Möglichkeiten bei der Vorratsdatenspeicherung sind völlig unzureichend. Die Bevölkerung denkt, dass es hier geht, für alle sofort Inhalte zu speichern. Darum geht es gar nicht. Es geht einfach darum, Verbindungsdaten zu speichern, um zu wissen, wer wann mit wem telefoniert hat. Aktuell ist es so, dass zum Beispiel Ermittlungen im Bereich von Vergewaltigungen nicht geführt werden können, weil man keinen Zugriff auf Informationen hat, aus denen hervorgeht, mit wem das Opfer in den letzten drei Monaten telefoniert hat

5.9.9.3 Burden of proof in tax and economical proceedings

Another defence line of prosecutors is that tax fraud auditors and policemen often assume that their investigation is watertight and fit for process, while prosecution has a vivid vision of highly paid tax lawyers on the other side of the room who will tear that which has been submitted into pieces. Here, therefore, often additional investigations are required which understandably annoy police and tax fraud investigators. This is, however, unavoidable especially in cases involving economic or financial crime which often operates in a shadow area between the legal and illegal and it needs a very careful examination to proof where the line has been crossed. For example: If in 2007 many just bought and sold certain derivatives because everybody did it, it is very complicated to proof intentional fraud in a specific case. There is an additional problem since Haftfälle have to be dealt with as a matter of priority since the Federal Constitutional Court asked for that. This leads to a postponement of all cases not involving Haft.

There is now a reversal of burden of proof if the tax auditor finds a tax shelter scheme. Up to now, the tax auditor had to proof misuse. To add are the options of the Directive 2014/41/EU of the European Parliament and the Council of 3 April, 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union in allowing national states to exceed the minimum standards. See (Kekeritz & Schick, 2013, p. 13).

A police officer, proof-reading the chapter on IFFs in the reports Short Version, comments regarding the reversal of burden of proof. If I may say this, I would appreciate a voice that contradicts somewhere the cited concerns. From a legal, but especially from a moral perspective I highly doubt why the state should have the duty to protect illegally acquired property. Above all, it is questionable in how far the acquisition of incriminated property within the BGB is possible at all and that this in other Western democracies, e.g. Italy, seems to be legally tenable.

Here in particular applies also recommendation of German Supreme Courts to beef up investigative resources in the areas of tax, financial and economic crimes so that here no preference regarding prosecution in comparison with other crimes exists (see GER/VI/9.2.1)

5.9.9.4 Verdict of the Federal Constitutional Court

A number of tools required for the investigation and prosecution of international crime has been contained in the BKA Gesetz[240] which regulates entitlements and cooperation of federal and state police authorities, among which were also some of those listed above. Those tools were also meant not only to investigate crime, but also to prevent crime. The Court approved the goals and intentions of the law in principle, also (most of) the tools provided, but had a number of requests to balance those options and applications against constitutional entitlements such as privacy, the protection of innocent etc. Remarkably, the verdict was not unanimous. Two judges voted against it because they hold that the Court goes into too much detail regarding how the executive has to do its job. The two diverting judges argue that another balance could have been stricken which would still be reconcilable with constitutional entitlements. Some concession, they argue do have to be accepted by citizens for the price of public security. Both the Home Secretary and the Head of the Federal Crime Agency

[240] http://www.bka.de/nn_205932/DE/DasBKA/Auftrag/bkag/bkag__node.html?__nnn=true

emphasized that options for preventing terrorism were only applied 15 times since the law came into force in 2009.[241]

Clearly, overall the question is whether the verdict strikes a balance between constitutional entitlements, requirements of combating international crime and terrorism and the resources available to the police. And, if it is true that options were used only 15 times it is certainly not excessively and abusively used (even though caution is needed since the numbers were given by the authorities themselves and it does not say how often options were applied in other cases.)

5.9.9.5 Conclusion

The German Rechtsstaat is based on formal justice, not material justice. Therefore one has to acquit somebody even if there is wide conviction of his guilt just for the sake of preventing the sentencing of an innocent against whom the same level of evidence could be accumulated. This is not satisfying, but a high value which needs to be balanced against other values and interests. Therefore one has to be careful where to open holes in the system and creating exceptions.

But: There is the need for compromise both on part of the political experts and the public. And since political experts are closest to police and other experts they are obliged to inform the public and alert them to the challenges posed by Financial and IT globalization for international crime. And yet: They do not do it.

5.9.10 The public and the political

5.9.10.1 Invisible crime, "felt" crime

Legal institutions execute the law which has been discussed in public and decided in politics, where legal experts may (or may not) enter their view in hearings. Many constellations can be reduced to this simple fact. On that background, the personnel situation can be explained: Adequate staffing of police and prosecution in the field of inner security or organized crime is not popular with the public since this kind of crime is not felt and accordingly not experienced to be a personal threat – which is part of the strategy of organized crime. That's why there are 9 people in traffic control and burglary and only 7 in economic crime. On the other hand: traffic offences and burglaries HAVE to be investigated, there is no room to manoeuvre, while investigating economic crimes are so time consuming that there is room to manoeuvre. Equally, they do not think that elementary investigative tools will be accorded to them, especially the surveillance of communication – this area is a infested minefield since the NSA revelations

> "There is no lobby for any crime having no immediate and recognizable victim. If there is a body on the ground with a knife in his heart, everybody is alarmed. If money is laundered and destroys correct bidding procedures and jobs, nobody gets the link that this, too threatens their way of life and merits adequate attention."

[241] Regarding tools and critique oft he court: BNA Gesetz teilweise verfassungswidrig (2016, April 20). In: Die Zeit. Retrieved http://www.zeit.de/digital/2016-04/bka-gesetz-zu-terrorbekaempfung-ist-teilweise-verfassungswidrig . Regarding critique of the verdict: Zwei Richter stellen sich gegen ihre Kollegen. (2016, April 20). In: Die Welt. Retrieved from http://www.welt.de/politik/deutschland/article154558701/Zwei-Richter-stellen-sich-gegen-ihre-Kollegen.html

5.9.10.2 The media and priorities in combating crime

In their responses to the questionnaire of the research project, both Ministries of the Interior denied to answered the question about the correlation of "prosecution influenced by media" and punishable prosecution as they are currently too busy to have capacities for that (dispatched clerks for refugee reception, after the terroristic attacks in November in Paris is the focus on Islamist terror). One interviewee from the police commented this as follows:

> That your questions are not heard right now, is (unfortunately) no surprise to me. Even if I am not directly involved in the refugee topic one feels that this currently absorbs the public attention completely. You are of course absolutely right, unfortunately this topic as well is again only perceived for a short term and in an isolated way; but the topics we were discussing about cannot be separated there from – e.g. people from the Balkans flee primarily because of lack of prospects which prevail in their countries due to organized crime and corruption. [242]

5.9.10.3 Complex crime investigations and statistics

Supreme courts requested several times that there is a misbalance in investigating and prosecuting "ordinary" crime on the one hand, and complex economical-financial-tax related crimes on the other. The judges point to the complexity of cases, the amount of damage and the danger of Verjährung. Against this, the judges argue, strengthening of resources in the investigative, prosecution and legal departments is seen as remedy to restore trust of the population in the unbiased treatment of crimes on part of the authorities. Here needs to be mentioned (see GER/VI/9.2.1):

- The verdict of the Federal Constitutional Court of 1991
- The verdict of the BGH of 2005

5.9.10.4 Statistics and OK Reporting

Important are successful investigations. Because statistics are important for public reporting and the feeling of security in population. This again impacts on the attribution of resources which are given rather to those who present spectacular statistics or cases than those who need to investigate 5-10 years before being able to bring the case to justice.

This can happen by redefining crimes, e.g. no longer is the finding of drugs a criminal act but whatever is more than 5 grams.

This happens that those departments with cases of easy investigation get comparatively more officials.

This happens with OK-Reporting, suggesting everything is fine

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[242] Beide Innenministerien lehnten es ab, die Frage nach dem Zusammenhang zwischen „medial beeinflusster Strafverfolgung" und strafwürdiger Strafverfolgung zu beantworten, da man augenblicklich zu beschäftigt sei um hier für Kapazitäten zu haben (Abgestellte Beamte zur Flüchtlingsaufnahme, nach den Novemberanschlägen von Paris Schwerpunkt Islamistischer Terror. Dies kommentierte ein Gesprächspartner aus dem Polizeibereich wie folgt: Dass Ihre Fragen gerade keine Beachtung finden, wundert mich (leider) gerade überhaupt nicht. Auch wenn ich nicht direkt mit der Problematik Flüchtlinge zu tun habe, spürt man, dass dies gerade vollständig die öffentliche Aufmerksamkeit aufsaugt. Sie haben natürlich völlig Recht, leider wird auch dieses Thema wieder nur kurzfristig und isoliert gesehen; dabei sind doch gerade die Themen, die wir auch gemeinsam diskutiert haben, doch gar nicht davon zu trennen - z. B. fliehen aus meiner Sicht die Balkanflüchtlinge doch primär vor der Perspektivlosigkeit, die in ihren von Organisierter Kriminalität und Korruption zerfressenen Staaten herrscht.

Problem: Hardly any department gets personnel to just investigate that which seems to be worthwhile the effort, even though no quick result is likely. Here, other states, e.g. Italy, have a different approach.

Regarding the Principle of Legality, each case has to be investigated thoroughly. However, in complex areas, only 10-20% of all reports or initial suspicions can be investigated thoroughly – the others are ticked off the list. This applies both for police and the investigation of black labour

5.9.10.5 The internationally popular and the helpful

The same applies for development policy in terms of migration prevention: There you would have to invest and would only benefit in the mid-term time range. So one prefers to invest again in teachers and policemen that are needed right now.

Regarding the combating of root causes of migration, politicians do not want to do things too well since it would deprive them of photoshots, illustrating their own importance.

A conversation partner from development NGOs put it like this: Income-oriented development projects are not popular. As politicians cannot inaugurate any schools or wells. However, this would be beneficial for all in the long run: Better tax earnings mean investment in infrastructure and social systems which makes investment more attractive, increases trade etc. The problem is that this reduces the power basis of the Ministry of development aid as it will not have that much budget any more at same point of time.

He continue that to his opinion the Bavarian government does not pay so much attention to that because the Balkans are closer where an integration of the Munich based International Tax Office seems likely. But why not trying via the CSU Minister Müller. If the Federal government would like to do something like that, and there would be enough arguments also via the GTZ, then the state tax administrations should be requested to deputize civil servants as the Federal government does not have any experiences in the area of tax administration. Then the regional clerks would have to be dispatched and temporarily be granted a leave. He would be confident that this would be met with response from the administration and volunteers would come forward – in spite of the tense situation in administration.

5.9.11 Conclusion

First, there are deficits in national and legal framework which does not live up to realities created by financial and IT globalization, business practice and other forms of global competition.

Second: Even given legal norms and entitlements are difficult to apply in specific situation, if, e.g., a tax auditor is under pressure when checking books. This pressure may be time, but it may also be the felt desire by his institution or the lack of interest to be punished for rash decisions.

Third: Plenty of secrecy regulations prevent one civil servant or several civil servants working on the same case to join forces in effectively investigative crime – even though combating crime was always a priority in public law. Linked to this is the extent to which personal, corporate and criminal interests are protected against the public interest and the common good. While privacy concerns and data protection rank high, one has to be aware that any crime affects the common good in many ways. Firstly, and most obviously, because

of the evasion of taxes and mandatory social security contributions, secondly, because of the destruction of sound governance and economic structures. Here, more than ever Algirdas Semeta view is important which he formulated in the wake of Offshore Leaks: 'Tax transparency is more important than data privacy.'[243] Here, however, is a wonderful example how plans are linked to persons: As soon as Algirdas Semeta was replaced as Commissioner for Finance by Lord Hill, the tone changed: When EU Commission President Juncker and Commissioner Moscovici proposed in the wake of Luxembourg Leak that Corporations are obliged to publish tax rulings, Lord Hill opposed it heavily. The reason: Data protection and privacy concerns.[244]

Fourth: everybody is unhappy with existing levels of cooperation: within Bavaria, on the national level, on the international level. Tax administrators complain that police and prosecutors are lacking energy and efficiency, the other way round accuses tax officials from withholding information from them due to prevailing interest in revenue and tax secrecy constraints and that senior tax administration management never provide adequate staff in quantity and quality for cooperating in investigative affairs because they want to keep their best for the original goal, namely collecting revenue: "They give us few, and those few are not the best", one prosecutor put it.

One should learn from the conclusions drawn from the High Level Panel on IFFs regarding the entire complex of criminal, illegal and illict financial flows: Better coordinating tax authorities with the work of other investigating and prosecuting authorities, i.e. the "whole of government approach". 'Key in this regard would be the re-examination of policies which restrict the use of tax information solely for that purpose without the ability to share the information with law enforcement agencies.' (High Level Panel, 2015a, p. 44).

5.10 Whistleblower and leaked information?

5.10.1 The importance of whistleblower

The importance of whistleblower for uncovering and investigating crime is widely accepted to crack open a door towards sophisticated fraud constructions. "The best thing which can happen to you is a cooperative witness" was something told frequently in this context. This includes people willing to illegally copy and leak data. For example

5.10.2 Problems for whistleblower

At the same time, conversation partners at prosecution admit, applies the saying "Everybody loves treason, but nobody loves the traitor." Best is a witness who himself is accused and is willing to cooperate in order to reveal a bigger picture for concessions in his own case.

Regarding the protection of whistleblower, who, if the status quo continues for Germany are the only way to uncover wrongdoing, misdeeds and serious deficits, the situation for them in Germany is among the worst among G20 countries. A comparative study conducted by academic and NGO experts[245] 'analyses the current state of whistleblower

[243] Semeta, A. (2013, June 5) Offshore Leaks transformed tax policy. Press Release. Retrieved 2015, February 10 from http://euobserver.com/economic/120382

[244] EU streitet über Kampf gegen Steuervermeidung (2015, February 09) Retrieved 2015, February 10 from http://www.finanznachrichten.de/nachrichten-2015-02/32767468-eu-kommission-streitet-ueber-kampf-gegen-steuervermeidung-003.htm

[245] Wolfe, S.; Worth, M.; Dreyfus, S.; Brown, A.J. (2014, September) Whistleblower Protection Laws in G20 countries – Priorities for Action. Retrieved from http://transparency.org.au/wp-

protection rules in each of the G20 countries, applying to the identification of wrongdoing in both the public and private sectors.' (p. 1). Regarding public sector legislation (p.6), Germany ranks 7th worst, far behind China, India and South Africa, regarding the private sector laws (p.7), Germany ranks right in the middle, still behind China or South Africa. Even though one might consider whether existing rule and existing practice might not overlap in all cases, these findings also reflect the theoretical willingness of a state to protect those who are willing to risk their personal career and safety – and that of their families who in such cases are also under pressure, as the case of Elmer (Elmer, Bankenterror, 2014), Gustl Mollath and others illustrate:

A similar judiciary scandal seems to take place in Germany's number one banking center, Frankfurt/M. There one female whistle blower from DZ bank in April 2013 was first excluded and bullied, the fired. In total, with 20 layoffs. The lawsuits of dismissal protection number 1 to 18 were resolved in her favor, number 19 was definitely lost in April 2013. How they wanted to get rid of her, can be read now under www.ansTgeslicht.de/Mobbingsprotokoll. Also this document was held back from the bank and public attorney's office. More under www.ansTageslicht.de/DZBank.

5.10.3 Initiatives to protect whistleblower

On 27 May 2016, the European Council unanimously agreed on the passage of the "Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure",[246] which had been passed previously by the European Parliament by a majority of 503 vs. 131 by 18 abstentions. The Directive contains a lot about the protection of trade secrets and comparatively little to benefit investigative journalists, its sources and whistleblower in general. While "trade secret" is defined quite clearly and leaves the company a lot of leeway to apply it to those areas it wants to be covered by it and since it is quite clear when and under what circumstances the disclosure of a trade secret is unlawful even by a third party,[247] the wording regarding the protection of journalists and whistleblower is relatively unspecific. The decisive passages are:

> (19) While this Directive provides for measures and remedies which can consist of preventing the disclosure of information in order to protect the confidentiality of trade secrets, it is essential that the exercise of the right to freedom of expression and information which encompasses media freedom and pluralism as reflected in Article 11 of the Charter of Fundamental Rights of the European Union, ('the Charter') not be restricted, in particular with regard to investigative journalism and the protection of journalistic sources.
> (20) The measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in

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content/uploads/2014/09/FINAL__-Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for__-Action.pdf

[246] http://data.consilium.europa.eu/doc/document/PE-76-2015-INIT/en/pdf?utm_source=Scottish+Legal+News&utm_campaign=7e79685e7c-SLN_25_05_16&utm_medium=email&utm_term=0_07336e1dbf-7e79685e7c-

[247] 'The Directive states it is unlawful to use or disclose trade secrets if they have been obtained by breaching a confidentiality agreement and/or breaching a contractual duty to protect trade secrets. And, any third parties who "at the time of use or disclosure, knew or should, under the circumstances, have known that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully" are equally liable. In other words, if a whistleblower obtains the information from an employee who, for example, is contractually bound to keep information confidential, any subsequent disclosure may pose substantial problems for the whistleblower.' Taken from: Orrick, Herrington & Sutcliffe (2016, May 27) Can You Keep A Secret? The European Union's New Directive on Trade Secrets and its Impacts on Whistleblowers. Retrieved from http://www.lexology.com/library/detail.aspx?g=441a74d0-3afc-4025-9c91-a7d5d5488190

> which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed. This should not be seen as preventing the competent judicial authorities from allowing an exception to the application of measures, procedures and remedies in a case where the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out in this Directive.

It is left to national governments, what exactly "adequate protection" implies. Most importantly, the whistleblower is in the difficult situation to see whether the clause applies to the information he or she wants to reveal, thus the burden of proof is first of all with the whistleblower. It is up to national authorities to salvage the doing of a whistleblower who acted in good faith, but one wonders whether this is the kind of protection people in such a situation of conscientious conflict look for.

Pro:

- ➔ EU Parlament (CRIM-Kommittee) für Schutz of Whistleblower http://www.spiegel.de/wirtschaft/unternehmen/fast-eine-million-sklavenarbeiter-leben-in-dereu-a-927563.html
- ➔ 4th Money laundering directive, but only "appropriate protection"
- ➔ (European Commission, 2014b), p. 4f.

5.10.4 Conditions and limits to use whistleblower

In order to protect better the whistleblower, one could specify the legitimacy of the whistleblowers action by qualifying that his deed is neglectable if it contributes to the prosecution of a larger crime

US and Canada pay informants for providing information on tax evasion both nationally and offshore http://www.irsrewards.com/ and http: //www.cra-arc.gc.ca/leads/ Problem tougher than voluntary whistleblower who act out of a conscience. Here it is just wanting money which is an inferior motive. Quite a number of conversation partners among police and prosecution, in this situation, would not like to follow the US and Canadian example.However: The position of tax fraud administration, that this might be part of the dirty compromise with reality, also apply.

As long as self-declaration is the only and privileged way in penal law to escape penal prosecution, there should be also protection for whistleblower since they may seek a way to escape illegal doings and excuse themselves from prosecution that way. That they ask money for their material is understandable since they will loose their professional occupation. After putting away the option of self-declaration (which probably will not happen), there would still be the analogy to witnesses in Organized Crime Procedures, even more so since tax related offences are normally opening insights in other, more severe crimes, as has also been confirmed by the Swiss Leaks scandal.

Finally, one has to consider that organized crime and terrorism also benefits of payment forms provided by shadow banking and internet technology:

6 Conclusion

Given our definition of IFFs and its link to our research goal to combat poverty and inequality (see I/IV/6), the „broadness" and „fuzziness" of the concept may be irritating for legal experts. It does illustrate, however, the broad range and extent of damage for developing countries as well as the potential use for developed countries. Still, of course, whatever figures are circulated, one needs to pay attention to the small print and methodological detail.

Regarding the partner to this research, Kenya is estimated to loose on average USD 83 million annually, Sambia USD 2.9 billion annually due to IFFs. With that, Kenya ranks 49, Sambia 125 out of 149 on GFIs list of examined developing countries (Kar & Spanjers, 2015, p. 28). The latter is particularly alarming since the annual state budget for 2014 was at USD 2.7 billion. According to conversation partners from the Zambian Revenue Authority, that estimate of losses appears reasonable: In contrast to Kenya which has a much more diversified economy, it's easier to engage in misinvoicing in a mineral exploitation focused economy which has deficiencies in monitoring outputs and pricing mechanisms.

Sadly there are no corresponding statistics to those of GFI matching outflows from developing countries with inflows to developed countries.

Nevertheless, developed countries should realize that they must not profit from those financial flows, not only because of their ambiguous nature, but also because they devoid poor countries of urgently needed resources, resulting in poverty, social instability and, finally, migration or all forms of violence, be it crime or terrorism.

In all that, one should not underestimate the importance of tax related issues when it comes down to combating even Organized Crime: In the US it was not possible to prosecute and sentence Al Capone, who, after all, invented “money laundering”. Until some clever civil servant was able to construct a case of tax evasion – this, finally, broke his neck.[248]

Hence all should be done to advance knowledge about the links between poverty, IFFs and our profit on the one hand, and the undesirable consequences on the other.

‘OECD country systems still have weaknesses that allow the entry of illicit funds. It is important that OECD countries take measures to avoid becoming safe havens for illicit financial flows from the developing world’ (Fernholz & Fernholz, 2012, p. 18)

7 Positions and Policies on (combating) IFFs

- ➔ Not surprisingly, especially groups from developing countries deal with combating IFFs, e.g. (High Level Panel, 2015a), equally NGOs or IGOs assisting developing countries in their efforts, e.g. (Kar & Spanjers, 2015) or GIZ Polifund measures.[249]
- ➔ Improvements are also possible with “classical” administrative assistance to tax administrations, as Germany does with Zambia.
- ➔ More detail See Positions and Policies Paper

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[248] See http://en.wikipedia.orGWiki/Al_Capone

[249] GIZ Activity Profile 2015 Polifund Project "Combating Illicit Financial Flows" in Kenya

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