

3. Overarching Legal Issues

Besides the differences among the national implementations of tax crime as predicate offence to ML which have been analysed above in chapter 2.2, there are overarching legal issues that concern either all countries or multiple fields of law, e.g. criminal law, financial market law, or private law. These issues will be addressed in chapter 3.

3.1 The democratic and constitutional legitimization of the FATF

The first issue that is rarely discussed in academic circles and amongst practitioners is the obvious lack of democratic and constitutional legitimization of the FATF. The participants of the FATF plenaries where the 40 recommendations are discussed and accepted are career civil servants, not even appointed Ministers, not to speak of elected officials. In addition to that, the majority of the UN member states are not represented at the FATF plenaries. The fact that most FATF-style regional bodies (FSRBs, e.g. Moneyval in Europe, MENAFATF in the Middle East and northern Africa, APG in the asian pacific region, etc.; see footnote 17 or the list on the FATF website) are participating at the FATF plenaries is no valid remedy to this second weakness in terms of democratic legitimization of the FATF.

It is quite interesting to see fully fledged democratic nations abide to international standards that are set without democratic or constitutional legitimization. It is even more interesting to see that no human rights NGO has addressed the issue that a group of civil servants forces elected parliaments to implement their recommendations into national law. This is a blatant case of putting pressure on national parliaments by threatening them to harm their nations' reputations by virtue of black lists. This situation can be qualified as one of "comply or die". The members of national parliaments seem to have no choice but to implement the FATF recommendation. One could argue that this violates the constitutional principle of independence that every elected representative ought to enjoy in Parliament.⁸⁹

It is difficult to understand that the international community has not solved the lack of democratic legitimization of the FATF by accepting the 40 recommendations in the form of a multilateral treaty, e.g. an UN convention. Only then the constitutional rights, e.g. the principle of independence that every

⁸⁹ This principle was first explained in Edmund Burke's declaration of independence that an elected representative ought to enjoy in Parliament. Burke, Edmund. *Miscellaneous Writings*. E. J. Payne, ed. Indianapolis, in: Liberty Fund, Inc., 1990. Library of Economics and Liberty [Online] available from <http://www.econlib.org/library/LFBooks/Burke/brkSWv4c1.html>, accessed on April 3, 2016.