Update working group on anti-money laundering legislation

You will – or should – all be aware that our working group on anti-money laundering legislation developed a tool which focused on the obligations imposed on lawyers in general and thus criminal defence attorney's also after the European Directives of 2001 and 2005.

Objections were almost immediately raised in relation to the threats to the independence of lawyers and the crucial point of professional secrecy, needed to properly defend a client's interests. This professional secrecy also allows clients to build a relationship with their lawyer which is based on confidentiality and the certainty that all information that was made available, will not leave the privileged contacts between himself and his lawyer.

The Directives imposed the famous “obligation to report” to lawyers in case they assist their clients with the foundation of companies, real estate transactions etc., which made it questionable whether these obligations could be reconciled with the principles of professional secrecy.

You might be aware of the Belgian situation, also extensively described in the memo on Belgian anti-money laundering legislation available on the ECBA–website, but it might be useful to recall.

After the Directive of 2001, the Belgian legislator eventually complied by issuing the Act of January 4th, 2004. This Act was immediately attacked by the Flemish, Walloon and German bar association in Belgium, given the fact that it possibly threatened the professional secrecy of lawyers. The Constitutional Court rendered a verdict on January 28th, 2008, giving a very detailed interpretation of the new Act, which should be interpreted as not affecting the professional secrecy of lawyers when they are assisting a client in relation to rendering legal advice or assistance in relation to pending or upcoming proceedings.

The Constitutional Court gave a very strict and I believe correct interpretation to the Act, implementing the Directive, by stating that lawyers only have an obligation to report if they assist clients with one of the activities mentioned in article 2 (3) (b) of the Directive of 2005, therefore leaving their “core business” as a lawyer and rather acting as an “agent” for their clients.

The tool which we have developed, may become irrelevant, depending on the outcome of the proceedings pending before the European Court of Human Right in the MICHAUD case.

For those not familiar with this case: proceedings were initiated before the European Court on Human Rights by Mr. MICHAUD (a French attorney) against France in relation to the obligations imposed to lawyers in the anti-money laundering legislation.

Just recently the CCBE intervened in these proceedings to put forward its statement, since the matter affects all lawyers throughout Europe. In March, the CCBE made a statement, focusing on the professional secrecy and independence of lawyers as main objections against the obligation to report.

Furthermore, the CCBE questioned the so-called artificial difference between real lawyer activities and activities which might be a reason to invoke the obligation to report. I do not share this opinion and think the difference is very clear, but will share a few thoughts at the end of my presentation.

It remains to be seen what the outcome of this case will be, but in view of the recent verdicts of the European Court in the case MATTHEWS for example, it seems likely that the obligation to report will be under pressure after the MICHAUD case.

The European Court of Justice already refused to convict the UK for not complying with the Directive when the UK gave priority to the verdict of the European Court on Human Rights which convicted the UK for infractions to the European Convention on Human Rights because of the obligation to report for lawyers. The European Court of Justice confirmed the importance of human rights, hereby threatening the Directives on money laundering.

Therefore, our working group on anti-money laundering legislation and it's effects to our profession, might have to review the tool on the website. After the verdict in the MICHAUD case, we will probably send out additional questionnaires.

I hereby grab the opportunity to make some personal comments on the topic.

It is of course crucial for us to act on independent basis as legal practitioners and that we should not betray our clients by reporting any of their activities when assisting them as lawyers, nor should clients fear that the information they give to their lawyer is confidential on just a conditional basis. Our profession will be threatened if the lawyer – client confidentiality is subject to certain restrictions.

However, I should point out the elegant way the matter was dealt with in Belgium, just this one time. We might never be champs when it comes to governing the country properly, if it is being governed at all, but the Constitutional Court found a solution for a difficult problem.

If the Directives are interpreted the way our Constitutional Court did, there should be no problem, nor a threat to the confidentiality of information in a client-lawyer relationship. I do agree with the Directives that lawyers who leave their core business should report when they are being used to cooperate with fraudulent financial constructions.

The examples from the Directive are very clear and do not concern the actual legal advice and defence in a court of law, but only real estate operations, managing assets, creating companies etc.. It is pointed out by the CCBE and other Bar Associations that we are all participators of justice, which is the reason why we should have certain rights, from which our independence and the client-lawyer confidentiality are two important rights.

Given the specific nature of our profession, we should however safeguard our position by not allowing clients to use lawyers to facilitate whatever operation they are up to and still benefit from the client-lawyer confidentiality. Therefore, I am in favour of the strict interpretation, imposing an obligation to report if lawyers leave their core business.

Clients should however not be misled about the restrictions to our professional secrecy. No one should be ignorant about the law, but nevertheless, it is a matter of fact that most clients might not be aware of all relevant and often complex legislation. This is why any firm should inform its clients beforehand about the professional secrecy and the exact provisions of the anti-money laundering legislation.
Our firm uses general terms and conditions which are given to the client at the start of every file, in which this legislation is explained as well, so a client will know that we might have an obligation to report if he engages us as an “agent” rather than as a “lawyer” in the true meaning of the word.

The obligation to report could be seen as a protection as well, since it gives a lawyer an opportunity to “opt-out” by reporting his client when he gets involved in fraudulent business. The case-law of the European Court already confirmed that the professional secrecy does not prevent a search to be executed in a law firm if the lawyer himself is an accomplice. In most of the “cases to report”, the lawyer would become an accomplice when he assists the client until the end of his operations. He would have to withdraw anyhow to avoid the risk of being prosecuted himself and if he withdraws “too late”, still faces a possible prosecution as an accomplice.

If you look at the advantages of the Directive with a very strict interpretation, no objections should be raised from our side, since the interpretation should – to my modest opinion – be the following:

- There is no obligation to report when we assist clients with legal advice and in relation to upcoming or pending legal proceedings. Our professional secrecy can not be questioned.
- There is no obligation to report when our clients seeks legal advice about certain operations. If he explains the intention to purchase a property and he explains the entire situation, we can render advice without an obligation to report.
- Only if the client immediately asks to assist with the financial operations and use the lawyer as an “agent” or decides to ask the lawyer's assistance after a preliminary advice, there is an obligation to report. However, the client should be informed by the lawyer of his obligations to report before the client has given any detailed information about the file he wants to introduce at the lawyer's firm.

⇨ In any case, the confidentiality will be secured, unless the well-informed client wants to use his lawyer for “non-lawyerish” business.

I therefore believe that it would be a pity if the entire obligation to report for lawyers would be cancelled due to different verdict of the European Court on Human Rights, whereas it is perfectly possible to execute the Directives without taking down or even harming our professional secrecy. The modest restrictions to the secrecy are totally reconcilable with the reasons why the secrecy was introduced in the first place.