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NOTE TO THE ATTENTION OF THE CCBE PRESIDENCY

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This note aims to answer the Presidency queries regarding the outcomes of the ECHR Michaud case (*ECHR, Michaud vs. France, req. n°12323/11*). In particular, we will consider the “filter mechanism” aspect that the Court referred to in its decision and whether Bars may wish to consider this approach (I). Moreover, we will assess how the decision in the Michaud case has been reflected in the wording of the new proposed anti-money laundering Directive (II).

I. THE MICHAUD CASE: “THE FILTER MECHANISM” AND ITS CONSEQUENCES FOR BARS.

1. The Michaud judgment. The French system: a safeguard to a proportionate interference with the legal professional privilege of lawyers.

In its judgment, the Court, assessing whether the obligation for lawyers to report suspicions is an interference with the professional privilege of lawyers and the confidentiality of exchanges between the lawyers and their clients, in breach of Article 8 of the Convention, observed, firstly, the “**continuing interference**” constituted by the obligation for lawyers to report suspicions.

Then, the Court examined whether the interference was justified.

The Court concludes that, regard being had to the legitimate aim pursued and the particular importance of that aim in a democratic society, the obligation for lawyers to report suspicions, as practised in France, does not constitute disproportionate interference with the legal professional privilege of lawyers. This conclusion results from the combination of two elements: firstly, the fact that lawyers have the obligation to report only when carrying out specific activities, with the exemption of other activities (i) and, secondly, the fact the legislation has introduced a filter which protects professional privilege, through the intervention of the chairman of the Bar of which the lawyer is a member (ii).

i. The Court upheld the provisions limiting the cases where lawyers do have the obligation to report suspicions.

The Court picks up on points made by the “Conseil d'Etat”, which, in 2010, decided that if Article 8 of the Convention protects the fundamental right of professional secrecy, the obligation for lawyers to report suspicions do not form an excessive breach of this Article. It reached that conclusion regard being had to the general interest served by combating money laundering and to the guarantee provided by the exemption from the scope of the obligation of information received or obtained by lawyers in the course of activities connected with judicial proceedings, or in their capacity as legal counsel (save, in this latter case, where the lawyer is taking part in money laundering activities, or the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes) (§121).

The Court lists off the situations where lawyers do have the obligation to report suspicions and the cases where the Monetary and Financial Code specifically requires the exemption. The Court concludes that, because of these provisions, the obligation to report suspicions does not therefore go to the very essence of the lawyer's defence role which forms the very basis of legal professional privilege (§127 and §128).

The Court also acknowledges that the activity of legal advice is exempted from the scope of the obligation to report suspicions.

In France, the activity of 'legal advice' can be defined as "a personalised intellectual service consisting, on a given question, of offering an opinion or advice on the application of a rule of law with a view, for example, to the taking of a decision". This definition comes from a resolution of the General Assembly of the "Conseil National des Barreaux" of 18 June 2011 and was quoted by the French Government in its submission.

The Court endorses this definition, by considering that, in line with the existing rules, lawyers "are not bound by the same rules when acting as legal counsel or in the context of judicial proceedings in connection with one or other of the above activities. The Court deems that these indications are sufficiently clear, especially considering that the texts concerned are aimed at lawyers and, as the Government have pointed out, the notion of "legal counsel" is defined by the Bar Council, inter alia." (§97)

ii. The role of the chairman of the Bar: the definition of his power to « filter »

The Court considers that, with the intervention of the chairman of the Bar, **"the legislation has introduced a filter which protects professional privilege"**.

The Court further specifies that, because legal professional privilege is shared with a fellow professional who is not only subject to the same rules of conduct but also elected by his or her peers to uphold them, there is no breach. (§129)

The Court underlines that the chairman of the Bar **who is better placed than anybody to determine which information is covered by lawyer-client privilege and which is not, transmits the report of suspicions to Tracfin only after having ascertained that the conditions laid down by the Monetary and Financial Code have been met** (§129).

Therefore, the Court specifies that the chairman of the Bar abstain from transmitting a report of suspicions when it comes to activities exempted by the Monetary and Financial Code that **relate to judicial proceedings, whether the information they have was received or obtained before, during or after said proceedings, including any advice given with regard to the manner of initiating or avoiding such proceedings, nor where they give legal advice, unless said information was provided for the purpose of money laundering or terrorist financing or with the knowledge that the client requested it for the purpose of money laundering or terrorist financing.**

However, by using the wording « filter » and by specifying that the chairman of the Bar **"is better placed than anybody to determine which information is covered by lawyer-client privilege"**, the Court seems to define widely the power of the chairman of the Bar.

In that respect, it should be noted that the French legislation implementing the 2005 Directive is somewhat vague in this regard: Article L.561-17 of the Monetary and Financial Code states that **the chairman of the professional body send the report to Tracfin when the conditions set forth in the Code are met.**

However, with regards to the Court's reasoning, one could consider that it is not only, for the chairman of the Bar, to simply sort the reports received from lawyers to assess whether they do fall into the scope of the Monetary and Financial Code and therefore are transmitted to Tracfin or whether they come within the scope of the activities which are exempted and therefore are not transmitted.

On the contrary, the Court underlines that the transmission of the report of suspicions to the chairman of the Bar seeks to ensure that **"any lawyer who has doubts about the existence of "suspicions" in a given case can seek the advice of an informed and experienced colleague"** (§97).

When using the wording "filter", the Court refers to the power of the chairman of the Bar to assist the lawyer and who guarantees professional secrecy and fully controls the existence of suspicions.

2. The effects of the judgment Michaud for European Bars

The justification of the interference, as admitted by the Court concerns only France. The Court found that "as implemented in France and having regard to the legitimate aim pursued and the particular importance of the latter in a democratic society, the obligation for lawyers to declare their suspicions is not a disproportionate interference with lawyers' legal privilege."

It is therefore the French mechanism and the presence of the two conditions above mentioned, including the condition of a "filter", which validates the interference which the declaration of suspicions may have on the right to respect for private and family life.

Nevertheless, the case Michaud concerns the French rules adopted as measures implementing the Directive. As such, all EU member States should be in a situation similar to that of France and are concerned by the case Michaud.

Therefore, the European Bars may consider the following:

- 1) The obligation for lawyers to report suspicions is a "permanent interference" to the right to respect for private and family life protected under Article 8 ECHR and 7 of the Charter of Fundamental Rights of the European Union.
- 2) The interference is justified only under certain conditions. As regards France, it is under two cumulative conditions.

It belongs to European Bars to examine what conditions are implemented in their national legal systems which may justify interference or, on the contrary, which may not justify it.

- 3) If the judgments of the European Court of Human Rights does not have an erga omnes effect, they form, however, the Court's jurisprudence on the rights and freedoms guaranteed by the Convention that "the High Contracting Parties shall secure to everyone within their jurisdiction(...)" (Article 1 of the Convention).

This requirement also applies to the interpretations arising from these provisions. Indeed, if the Court's judgments have no effect erga omnes, according to the Interlaken Declaration of 19 February 2010 the High-level Conference on the future of the European Court of Human Rights: "*the Conference recalls the responsibility of member States to guarantee the application and implementation of the Convention and, therefore, calls upon member States to commit themselves : [...] to take into account the developments of the jurisprudence of the Court, in particular to consider the consequences following a judgment finding a violation of the Convention by another member State especially when their legal system has the same problem of principle.*"¹

As stated by the Court itself: "Its decisions are not only to decide the pending case, but more generally, to elucidate, safeguard and develop the standards of the Convention and thus to contribute to compliance by States of their obligations as member States"¹.

It is what the President Costa called authority of "the thing interpreted" or indeed the "de facto erga omnes effect" of the judgments of the Court². This principle is particularly relevant concerning the Michaud case since the interpretation of the Court concerns measures transposing a directive which aim is to harmonize the rules of the EU Member States.

It follows from the foregoing that the Member States are obliged to respect the rights defined by the Convention, **as well as the interpretation that the Court makes in its case law.**

When the Court does not validate the interference only if a "knowledgeable and experienced lawyer" plays a protective role of filter, it means, implicitly, the need or the obligation for member States to designate an independent self-regulatory body or, in any event, a system providing a guarantee equivalent to the French system as validated by the ECtHR.

Therefore, the national bar associations must require the transposition of the European provisions on anti-money Laundering is done pursuant the judgment Michaud.

Whereas Michaud judgment was adopted before the presentation of the proposed Fourth Directive and whereas Article 6 § 3 of the TEU provides that "fundamental rights, as guaranteed by the

¹ ECHR, 7 January 2010, *Rantsev vs Cyprus and Russia*, Req. n°25965/04, §197; ECHR, 9 June 2009, *Otuş vs Turkey*, Req. n°33401/02, §163.

² Introductory [Speech](#) of Jean-Paul Costa, before the 'Conseil d'Etat français', 19 April 2010. See also the [contribution](#) from Christos Pourgourides, during the conference of Skopje, of 1 and 2 October 2010, about the subsidiarity principle and the article of Andrew Drezemczewski, Head of the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe, « Quelques réflexions sur l'autorité de la chose interprétée par la Cour de Strasbourg » in *La conscience des droits : mélanges en l'honneur de Jean- Paul Costa*, Coord. P. Tituín, Dalloz, 2011.

European Convention for the Protection of Human rights and fundamental Freedoms and as they result from the constitutional traditions common to the Member States are part of Union law as general principles ", it is necessary to assess the impact which the judgment of the ECtHR has had on the re-drafting of the directive.

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Considering that the Michaud decision has been rendered before the publication of the new proposed anti-money laundering Directive, and considering that Article 6 §3 TEU states that "*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*", it is necessary to assess how the decision in the Michaud case has been reflected in the wording of the new proposed Directive

II. THE EFFECTS OF THE MICHAUD DECISION ON THE WORDING OF THE NEW PROPOSED DIRECTIVE

- **The reference, in Recital 27 to the Michaud case**

The new proposed Directive contains a new Recital 27 providing that: "**Member States should have the possibility to designate an appropriate self-regulatory body of the professions referred to in Article 2(1)(3)(a),(b), and (d) as the authority to be informed in the first instance in place of the FIU. In line with the case law of the European Court of Human Rights, a system of first instance reporting to a self-regulatory body constitutes an important safeguard to uphold the protection of fundamental rights as concerns the reporting obligations applicable to lawyers**".

- **The removal of any explicit reference to the "lawyer" ("avocat" – in the French version)**

The 2005 Directive was referring to lawyers in its Recital 20, which is not the case anymore with this new proposed Directive, despite the Michaud decision and the reference to the ECHR case law in Recital 27.

- **The non-transposition of the "filter" mechanism as defined by the Michaud decision**

The new proposed Directive provides, in its article 33:

"1. By way of derogation from Article 32(1), Member States may, in the case of the persons referred to in Article 2(1)(3)(a), (b), and (d) designate an appropriate self-regulatory body of the profession concerned as the authority to receive the information referred to in Article 32(1).

Without prejudice to paragraph 2, the designated self-regulatory body shall in cases referred to in the first subparagraph forward the information to the FIU promptly and unfiltered.

2. Member States shall not apply the obligations laid down in Article 32(1) to notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that such exemption relates to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings."

In the Michaud decision, the ECHR acknowledges the power of control over reports of suspicions by the self-regulatory along with its power to verify that the information contained in the report of suspicion do not fall within the scope of the activities exempted by the Directive.

In that respect, Recital 27, when referring to the ECHR case law, refers to this control.

Recital 28 combined with article 33 also refer to this control:

"Where a Member State decides to make use of the exemptions provided for in Article 33(2), it may allow or require the self-regulatory body representing the persons referred to therein not to transmit to the FIU any information obtained from those persons in the circumstances referred to in that Article."

Therefore, the proposed Directive allows Member States to designate self-regulatory bodies. These bodies may decide **not to transmit** the information provided by the independent legal professionals.

Indeed, in line with Article 33 (2), Member States “*shall not apply*” the obligations to report suspicions laid down in Article 32(1).

The first sentence of Article 33(2) eliminates the right for Member States to impose the direct and unfiltered transmission that was still open by the previous wording³, in particular regarding lawyers. In addition, it confirms the contours of the self-regulatory body’s powers of control.

This body is designate in order to ensure, first, that the report does not fall within the scope of exemptions defined by the Directive and second, that, in accordance with the reference laid down in the Michaud case, it may exercise its role of “*informed and experienced*” colleague in order to determine the reality of the suspicions.

Therefore, it is only after this control that the self-regulatory body might transmit the report to the FIU.

In fact, pursuant to the second sentence of Article 33(1), if the report must be done “*promptly and unfiltered*”, the transmission is made by the self-regulatory body only after the control, as this transmission is made “*without prejudice*”⁴ to the derogatory provisions of the second paragraph.

Thus, when reading the Directive, especially its Recitals 27 and 28 combined with Article 33, one could conclude that this proposed new Directive is consistent with the findings of the Michaud decision.

Nevertheless, as the wording of the second sentence if Article 33 (1) is ambiguous, it should be clarified, so that all Member States can beneficiate from a consistent transposition of the system validated by the ECHR.

Also as mentioned before, as the Court only validate the interference under the condition that an “informed and experienced” colleague acts like a protective filter, it embodies, implicitly, the necessity, if not the obligation, for Member States, to designate an independent self-regulatory body, or, in any case, a system that provides an equivalent safeguard comparing to the French system validated by the ECHR.

Therefore, the wording of the first paragraph of Article 33, could be clarified as follow:

*“1. By way of derogation from Article 32(1), Member States may **must**, in the case of the persons referred to in Article 2(1)(3)(a), (b), and (d) designate an appropriate self-regulatory body of the profession concerned as the authority to receive the information referred to in Article 32(1).”*

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³ Pursuant to Article 23 of the Directive 2005/60/EC “*Member States shall not be obliged to apply the obligations laid down in Article 22(1)*”. Therefore, the new wording is more restrictive.

⁴ The « Vocabulaire juridique » of G. Cornu defines this formula as the « expression couramment employée dans les textes de loi pour indiquer que la règle posée laisse intégralement subsister telle autre disposition ». The Oxford Advanced Learner’s Dictionary defines the English notion of *without prejudice* as follows : “without affecting any other legal matter”.