

Délégation française
- CCBE -

Comments on the proposal for a fourth directive on money laundering

The [proposal for a Directive](#) amending the [Directive 2005/60/EC](#) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing was presented on the 5th of February.

This proposal introduces a range of important changes as regards to the lawyer's profession. On the grounds of the recent case law of the European Court of Human Rights, the European Commission has formally recognized the powers regarding the control over reports of suspicions by the self-regulatory body. (I)

Furthermore, the proposal gives an important role to the self-regulatory body. The new measures that are defined, in particular regarding the sanctions and the risk-based approach, can be implemented in a safe and sustainable way only if these bodies control the process (II).

Moreover, the context regarding fundamental rights in the European Union has changed. The expectations vis-à-vis the European Commission, the European Parliament and the Member States have significantly increased. They have the obligation to respect the rights protected by the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. If they fail to do so, the measures taken could be brought before the national and European courts (III).

Therefore, the role of the self-regulatory bodies should be promoted and reinforced by referring to the fundamental rights, as well as the decisions of the European Court of Human Rights.

It is essential that the decision-making process that will lead in 2014 to the adoption of the proposal for a fourth Directive strictly respects these requirements.

It is essential that the CCBE remains vigilant concerning the activities of the CRIM Committee of the European Parliament on organised crime, corruption and money laundering. This Committee is expected to issue several reports before the end of 2013.

The [preliminary report](#) on money laundering, presented in February 2013 highlighted the need to strengthen the reporting mechanisms for legal professions¹.

I. The definition of the powers of control over reports of suspicions by the self-regulatory body

- One of the main innovation of the Directive concerning legal professions is the addition of a new recital 27, that reads as follows :

*« 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 reference made to the case law of the European Court of Human Rights refers obviously to the *Michaud c. France* case of 6 December 2012, (Application no. [12323/11](#)).

In this judgment, the European Court of Human Rights has justified the interference with the right for respect the private and family life enshrined in Article 8 of the Convention, in the framework of the provisions transposing the third Directive on money laundering, by the central role played by the chairman of the Bar as a self-regulatory body and compulsory intermediary between the lawyer and the Financial Intelligence Unit.

For the European Court of Human Rights, the fact that the report of the lawyer is transmitted in the first place to the chairman of the Bar aims at ensuring that the fellow professional having:

*« **doubts about the existence of « suspicions » in a given case can seek the advice of an informed and experienced colleague.** »*

Therefore, it is the central role of trusted third party that justifies the non-violation of the “legal professional privilege”, as a corollary of the right to respect the private life. The

¹ For the rapporteur, Salvatore Iacolino, « *professionals in the sectors concerned should be required to exercise strict due diligence in relation to their customers, but also to their employees and to all those parties with whom they have business relationships (suppliers, contractors, etc.), so that all risk of criminal infiltration can be contained.. According to a study drawn up at the request of the Commission, the frequency of anti-money laundering reporting in most non-financial professions in the Member States is very low. Your rapporteur therefore recommends that reporting mechanisms for suspicious transactions be strengthened, also by introducing codes of ethics* ». Working document of the CRIM Committee, 1 February 2013, p.3.

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violation would contravene the Charter and the Convention and would go against the lawyer-client relationship, in particular the necessary respect of confidentiality.

Thus, the Court justifies the interference because:

« the legislation has introduced a filter which protects professional privilege : lawyers do not transmit reports directly to Tracfin but, as appropriate, to the President of the Bar Council of the Conseil d'Etat and the Court of Cassation or to the chairman of the Bar of which the lawyer is a member. It can be considered that at this stage, when a lawyer shares information 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, professional privilege has not been breached. The fellow professional concerned, 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 Article L. 561-3 of the Monetary and Financial Code have been met (Article L. 561-17 of the same Code; see paragraph 38 above). The Government pointed out in this regard that the information is not forwarded if the chairman of the Bar considers that there is no suspicion of money laundering or it appears that the information reported was received in the course of activities excluded from the scope of the obligation to report suspicions. »

In its reasoning, the French government points out that the purpose of the designation of the self-regulatory body is to filter the reports. This body is thus entrusted with a wide margin of appreciation in controlling whether suspicions exist.

This control is even widened by the definition adopted by the Court the notion of « **legal advice** » during which the information obtained is exempted of reports of suspicions.

It is the French government which decided to refer to the definition proposed by the “Conseil National des Barreaux” in its [resolution](#) (only in French) adopted on 18 June 2011. Having regard to this element, the Court has adopted the same definition. Therefore, this definition must base the determination of the scope of the exemption.

In fact, the Court considers that, according to the rules in force, lawyers are not subjected to the obligation to report suspicions:

« 97 [...] 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. »

The definition of « legal advice » provided by the “Conseil National des Barreaux” and to which the French government refers in its reasoning before the Court² is:

« 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 »

The French version of the Directive does not target directly the notion of « legal advice» but rather the notion of « assessment of the legal situation ». The English version is larger and mentions the notion of « legal advice ».

Moreover, as stated by the Commission in recital 7:

« [...] There should, however, be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position of a client. Thus, legal advice should remain subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering or terrorist financing, the legal advice is provided for money laundering or terrorist financing purposes or the lawyer knows that the client is seeking legal advice for money laundering or terrorist financing purposes. »

Therefore, there is no doubt that the definition of « legal advice » recognized by the Court must be the one that shall be used in order to establish the scope of the exclusion set out in the directive regarding the obligation of reporting.

² In point 70 of the judgment, the Court considers the arguments of the French government as follows: « As to the notion of « legal advice », the Government considered that no lawyer could seriously be unaware of its meaning, especially as it was clearly defined in both legal theory and case-law as well as by the General Assembly of the Bar Council (which, in a resolution adopted on 18 June 2011, defined it 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 »). »

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The legal advice is not limited to the beginning of the lawyer-client relationship. It covers the whole intellectual advisory process that preludes to the taking of a decision. This counsel may, and sometimes must, lead to dissuade the client to participate to a money laundering operation.

In this respect, we must reaffirm that Article 38(6) of the Directive continues to explicitly exclude from the notion of disclosure the advice that aims at dissuading the client. **In this context, the whole system can continue to be based on the idea of preventing the denunciation through the reinforcement of the dissuasion process.**

Therefore, the self-regulation body holds a wide power which is, according to the Court, the necessary requirement justifying the interference of Article 8. In fact, this body is able to verify the existence or not of suspicions, but also the fact that the information contained in this report are not covered by the scope of exemption as defined by the directive.

The indication in recital 27 clearly refers to this power, as defined by the case law of the European Court of Human Rights.

- Recital 28 combined with Article 33(2) of the proposal for a directive also refers to this control.

Pursuant to recital 28:

« 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. »

Pursuant to Article 33:

« 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

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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. »

Thus, the Directive allows Member States to designate self-regulatory bodies. These bodies may decide **not to transmit** the information provided by the independent legal professions. Indeed, pursuant to Article 33(2), Member States « *shall not apply* » the obligations of reporting 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 opened by the previous wording³, in particular regarding lawyers. In addition, it confirms the contours of the self-regulatory body's control.

This body is designated in order to ensure, first, that the report does not enter in 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.

II. The central role of self-regulatory bodies in the global implementation of the legislation on money laundering

The proposal for a directive introduces a range of new provisions, in particular, regarding sanctions (A) and the risk-based approach (B) which have impact on the lawyer's profession.

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* »

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In regards to the potential risks for the profession, these two innovations highlight the strategic importance of setting up the self-regulatory bodies at the heart of the mechanism.

In this respect, it is essential to notice the central role that the European Parliament already recognizes to these bodies⁵. This position is also confirmed by the Basic principles on the role of lawyers adopted by the United Nations in 1990⁶.

A. Sanctions

Pursuant to Article 55 of the proposal for a directive:

« Member States shall ensure that obliged entities can be held liable for breaches of the national provisions adopted pursuant to this directive.

Without prejudice to the right of Member States to impose criminal penalties, Member States shall ensure that competent authorities may take appropriate administrative measures and impose administrative sanctions where obliged entities breach the national provisions, adopted in the implementation of this Directive, and shall ensure that they are applied. Those measures and sanctions shall be effective, proportionate and dissuasive. [...] »

Article 56 points out, in particular, that Article 55 shall at least apply to situations *« [...] where obliged entities demonstrate systematic failings in relation to the requirements of the following Articles [...] »*:

(b) 32, 33 and 34 (suspicious transaction reporting) [...] »

One needs to remain alert to the power that is given to Member States to organize systems of administrative sanctions towards obliged entities.

It would not be acceptable that the potential administrative sanctions are not managed by self-regulatory bodies. Therefore, we shall consider integrating the sanctions listed in Article 56 to the list of sanctions which can be pronounced during a disciplinary action.

Furthermore, it is essential to note that those bodies already possess disciplinary powers in order to decide of appropriate sanctions. They shall retain the monopoly on the exercise of this power towards the lawyers under their jurisdiction.

⁵European Parliament [resolution](#) on the legal professions and the general interest in the functioning of legal systems, 23 March 2006.

⁶[Basic principles](#) on the role of lawyers adopted on 7 September 1990 by the United Nations.

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B. The implications of the risk-based approach

Recital 14 of the proposal for a Directive clearly points out that:

*« The risk of money laundering and terrorist financing is not the same in every case. **Accordingly, a risk-based approach should be used.** The risk-based approach is not an unduly permissive option for Member States and obliged entities. It involves the use of evidence-based decision making to better target the money laundering and terrorist financing risks facing the European Union and those operating within it. »*

Pursuant to Article 6 of the proposal for a Directive, the European Banking and Financial Supervisory Authorities shall provide, within two years, a joint opinion on the risks related to money laundering.

On this basis, Member States shall take appropriate steps to identify, assess, understand and mitigate the money laundering risks (Article 7).

Furthermore, pursuant to Article 8:

*« Member States **shall ensure that obliged entities take appropriate steps to identify and assess their money laundering and terrorist financing risks taking into account risk factors including customers, countries or geographical areas, products, services, transactions or delivery channels. These steps shall be proportionate to the nature and size of the obliged entities.***

2. The assessments referred to in paragraph 1 shall be documented, kept up to date and be made available to competent authorities and self-regulatory bodies.

*3. Member States **shall ensure that obliged entities have policies, controls and procedures to mitigate and manage effectively the money laundering and terrorist financing risks identified at Union level, Member State level and at the level of obliged entities. Policies, controls and procedures should be proportionate to the nature and size of those obliged entities.***

4. The policies and procedures referred to in paragraph 3 shall at least include:

(a) the development of internal policies, procedures and controls, including customer due diligence, reporting, record keeping, internal control, compliance management (including, when appropriate to the size and nature of the business, the appointment of a compliance officer at management level) and employee screening.

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(b) when appropriate with regard to the size and nature of the business, an independent audit function to test internal policies, procedures and controls referred to in point (a).

5. Member States shall require obliged entities to obtain approval from senior management for the policies and procedures they put in place, and shall monitor and enhance the measures taken, where appropriate. »

Thus, this Article provides for the implementation by Member States of a range of internal measures and procedures that will be beared by obliged entities.

It clearly appears that, although the implementation of those mechanisms shall be proportionate to the size of the entity, those measures may constitute an important administrative and financial burden.

Furthermore, it is essential that these rules can be implemented in an efficient way and that only the self-regulatory bodies may, and shall, control this process.

In this context, the self-regulatory body plays a determining role. It must have the possibility to ensure that the implementation of those mechanisms is effective. Above all, it shall ensure a constant assistance to the colleagues in order to share risks and costs.

The self-regulatory body shall be the cornerstone of the implementation of the legislation on money laundering affecting lawyers. It probably involves the establishment and the financing of a genuine assistance service at national level.

III. The necessary compliance of the national and European provisions with the provisions of the Charter and the Convention

It is essential to highlight the fact that this new proposal is embedded in a new context regarding fundamental rights at European level.

In fact, the entry into force of the Lisbon Treaty set to the Charter of Fundamental Rights of the European Union at the same level than the Treaties.

Furthermore, pursuant to Article 6(3) TEU:

« 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. »

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Finally, in addition to the reference to the Michaud case in Recital 27, the proposal underlines the necessary respect of the provisions of the Charter, in particular of the right to respect for private and family life, as well as the right to an effective legal remedy.

In fact, pursuant to Recital 46:

*« This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular, the respect for private and family life, the right to protection of personal data, the freedom to conduct a business, the prohibition of discrimination, the right to an effective remedy and to a fair trial, and the right of defence. »*⁷

It is clear from the foregoing that both the Member States and the European institutions shall respect the rights defined in the Charter and the Convention, as well as the case law deriving from them.

In this respect, it is essential to ensure that both the wording of the new proposal for a Directive and the transposition measures are complying with the Charter, the Convention and the case law.

In case this compliance is not respected, lawyers would have the possibility to point out the incompatibility of those measures with the Charter, the Convention and the case law of the European Court of Human Rights.

⁷ The question of the right to data protection, highlighted by this recital, calls for vigilance. Indeed, Article 39 of the proposal for a directive provides for the retention of personal data and does not allow the access of the concerned person to her data. This position is worrying as the entities subjected to Article 2 and the FIU keep record of the names of people having been the object of reports of suspicions, even if this report has not been followed by any sanction. Those entities also consider these people as being « at risk ». In those cases at least, the deletion of personal data should be mandatory.

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- Overall, through the explicit reference to the human rights and the case law of the European Court of Human Rights, the proposal for a Directive consolidates the step forward resulting from the Michaud case for the entire profession in Europe.

The reporting system is, in itself, not acceptable. However, the intervention of the self-regulatory body enables to balance the system and to avoid important violations of Article 7 of the Charter, Article 8 of the Convention and more generally of professional secrecy.

According to the provisions of the Directive, the self-regulatory body benefits from a wide control. It allows filtering in order to avoid transmitting the reports covered by the scope of exemptions defined in the Directive that must be read in conjunction with the definition of legal advice provided by the ECHR. Furthermore, the control of self-regulatory bodies must evaluate also the « substance » of the suspicion.

- Beyond the question of the reports, these bodies must play a central role within the system.

In fact, it shall be the only ones having the power to pronounce administrative sanctions, in case of violation of the rules defined in the Directive. It shall also constitute an advisory structure regarding the implementation of the new rules on the risk-based approach.

This role must necessarily be central in all the Member States. Indeed, it is essential, pursuant to the provisions of the Directive, to ensure a uniform implementation of the rules on money laundering in view of ensuring their efficiency. Furthermore, as the essential role played by self-regulatory bodies is recognized by the case law of the European Court of Human Rights, the non-compliance with its recommendations could lead to appeals on national transposition measures. Finally, these bodies offer numerous guarantees regarding a good administrative implementation of the provisions on money laundering and could lead to reduce the costs related to this implementation.

Therefore, it is essential to promote these arguments before the European institutions during the negotiations on the proposal.

In this respect, it is very important to obtain guarantees from the European Parliament which already claimed its strong support to the preservation of professional ethics, as well as the importance of self-regulatory bodies for legal professions in its [resolution](#) of 23 March 2006.

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