Comments from Dominique Basdevant regarding the proposal for a fourth directive on money laundering

1. The risk-based approach

We must be cautious about the involvements of the risk-based approach and, in particular, on the consequences that could arise from the observation of existent circumstances identified as circumstances constituting a risk.

In the long-term, the evolution of the notion could impose reporting obligations as soon as certain circumstances constituting a risk exist, without the possibility to objectively assess the reality of the facts. The existence of circumstances constituting a risk would impose the report of suspicions.

We must note that this position is adopted by many banking establishments because of their practical advantage: for instance, as soon as the operation concerns some countries considered as being at risk, a report of suspicions is sent to TRACFIN.

In this respect, Article 45 of the proposal for a Directive, and in particular the paragraph 8, paves the way towards an evolution regarding the perception of the existence of circumstances constituting a risk. We could also refer to Article 11(4).

2. Information on the beneficial owner

We must also notice that Article 29 provides for the creation of an obligation for companies and legal entities to hold information on their beneficial owner. It should ease the information of lawyers on their clients.

However, can lawyers fully trust the report provided by the company? this does not seem to be possible as regard as the Article 24 that gives the lawyer the ultimate responsibility.

Generally speaking, lawyers should be able to trust the information provided by the entities referred in Article 2 and companies referred in Article 29. In the financial matters in particular, the lawyer able to verify that the funds coming from a financial establishment subjected to the provisions of the Directive are effectively « regular », as claimed by the establishment.

3. The protection of personal data

We must also remain vigilant regarding the protection of personal data.

As indicated in the explanatory memorandum, the proposal gives an angelic vision of the question. In Recital 30, it refers to the Directive 94/46/EC.

However, Articles 39 et seq of the proposal for a Directive also highlight the necessity to keep record of personal data to respect certain requirements and does not allow the person concerned to access her data.
This position is worrying as the entities subjected to Article 2 and the FIU keep record of the names of people that have been subjected to a report, 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.

4. Managers and employees of law firms

Articles 32 and 37 of the proposal apply, more specifically than before, to managers and employees.

The Article 33 should provide that the managers and employees of law firms, even though they are not lawyers, transmit their reports to the self-regulatory body and not directly to the FIU.

5. Administrative sanctions

Article 56 of the proposal sets a range of administrative sanctions in the event of non-respect of the obligations laid down in the Directive. At present, the Bar association, as the self-regulatory body, holds the disciplinary powers in case of situations where the rules on money laundering are not respected. This control and the power of sanction must remain in the hands of the Bar association.

French Bar associations do not, at present, have powers of financial sanctions, as provided by the paragraphs (f) and (g) of Article 56. It is not clear whether the Bar Associations are the adequate body to pronounce financial sanctions. In any case, their decision remains subjected to an appeal before the Court of Appeal.