



Représentant les avocats d'Europe
Representing Europe's lawyers

11/09/2002

FATF Secretariat,
2, rue André Pascal
75775 Paris Cedex 16
France

Re: Consultation Paper on the Review of the FATF Forty Recommendations

Dear Sirs,

The Council of the Bars and Law Societies of the European Union (the CCBE), as the representative body of the Bars and Law Societies of the European Union, comprising in excess of 500,000 lawyers, has considered carefully the FATF Consultation Paper on the Review of the Forty Recommendations of 30 May 2002.

The CCBE represents lawyers before such institutions as the European Court of Justice, the European Court of Human Rights, the European Commission and the European Parliament as well as defending principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The CCBE welcomes and appreciates the important work undertaken by the FATF in countering money laundering. The CCBE is fully aware of the devastating effect which money laundering and other corrupt practices can have on a democratic community. Bars and Law Societies from the European Economic Area do not condone the actions of lawyers who knowingly participate in any criminal activities, including money laundering. The CCBE is pleased to have the opportunity to comment on the FATF Consultation Paper, and in this regard would make the following observations: -

The 2001 Money Laundering Directive:

The FATF Consultation Paper makes reference to the 2001 Money Laundering Directive and its application to lawyers.

The CCBE, on several occasions and at all stages of the legislative process, expressed its views on the Directive to the European Commission, European Parliament, Council of Ministers, Member States of the European Union and organisations defending Human Rights.

The CCBE continues to have no objection to the extension of most of the obligations contained in the 1991 Directive, save in one critical respect, namely the obligation imposed upon lawyers to disclose any suspicion they might have to the police authorities regarding possible money laundering transactions. This is indeed a fundamental breach of a client's right to confidentiality, a right that is recognised in the jurisprudence of the European Court of Human Rights and the European Court of Justice.

Conseil des Barreaux de l'Union européenne – Council of the Bars and Law Societies of the European Union

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RAT DER ANWALTSCHAFTEN DER EUROPÄISCHEN UNION - CONSEJO DE LOS COLEGIOS DE ABOGADOS DE LA UNION EUROPEA - CONSIGLIO DEGLI ORDINI FORENSI DELL'UNIONE EUROPEA - RAAD VAN DE BALIES VAN DE EUROPESE UNIE - CONSELHO DAS ORDENS DE ADVOGADOS DA UNIÃO EUROPEIA - ΣΥΜΒΟΥΛΙΟ ΤΩΝ ΔΙΚΗΓΟΡΙΚΩΝ ΣΥΛΛΟΓΩΝ ΤΗΣ ΕΥΡΩΠΑΙΚΗΣ ΕΝΩΣΗΣ - RÅDET FOR ADVOKATSAMFUND I DEN EUROPAEISKE UNION - EUROOPAN UNIONIN ASIANAJAJALIITTOJEN NEUVOSTO - RÅD LÖGMANNAFELAGA I EVROPUSAMBANDINU - RÅDET FOR ADVOKATFORENINGENE I DET EUROPEISKE FELLESSKAP - RÅDET FOR ADVOKATSAMFUNDEN I DEN EUROPEISKA UNIONEN

It is vital to understand therefore, that the professional secret, as it is known in civil law jurisdictions and clients' rights to privilege, as it is known in other jurisdictions, are not rights reserved for the benefit of professional bodies, as, in this case the lawyers' professional bodies, but on the contrary are fundamental rights of the citizen. Any breach of these rights will inevitably lead to a violation of citizens' civil liberties and their rights of defence. It is possible that proceedings could be brought under the European Convention on Human Rights to render a decision null and void on the grounds of entrapment, as the betrayal of the client's trust, which is the basis of the relationship between lawyer and client, amounts to self incrimination.

In addition, the lawyer, who is an independent professional and a member of a regulated profession, plays a vital role in the prevention of crime in advising clients of their legal obligations. The lawyer is both the client's adviser and also the guardian of the rule of law. This role will be compromised unless the lawyer is fully aware of all relevant circumstances regarding the client's instructions. Clients are more than likely to be inhibited in disclosing such circumstances where they believe that the lawyer who is under an obligation to make reports based upon mere suspicion could not be trusted.

Finally, how could one imagine that a lawyer could continue to provide legal assistance and advice to a client where he has reported suspicions? It is unthinkable that, following a report based on mere suspicion, a lawyer should be obliged to continue to act on behalf of a client and continue to supply information to the authorities, thus making the lawyer an accomplice.

It is not without any reason that the importance of professional secrecy has recently been restated by the Council of Europe in a recommendation on the freedom of exercise of the profession of lawyer (principle 1.6) dated 25th October, 2000.

However, there are difficulties in assessing the lawyer's role in a democratic society which are attributable to two sets of factors.

The first factor deals with society's needs for law and order the principle of which is of course justified, since democracy as well as the economic order must not be destroyed by the principles that they are defending. Money laundering as well as corruption and other comparable crimes live and develop in the shadow of a society based on principles of freedom. Therefore, this professional secrecy, which is the sanctuary of a democratic society, can become the den of a Mafia-like society. However by imposing excessive security measures, there is a significant risk that a society which is based upon the protection of the fundamental freedoms, could be destroyed.

The second factor, which is more concrete, is due to the difficulty of taking into account the lawyer's role and mission which can vary from one country to another.

The lawyer is above all an adviser. Adviser of the judge when he assists or represents a party before a court by introducing arguments which will allow the court to make a decision. The lawyer is an adviser of the citizen or company by contributing to the consolidation, in the legal area, of their social, economic and financial relationships. In both cases, the lawyer, who is an independent member of a regulated profession, ensures that the law is respected and acts in society's interest.

In such activities, the lawyer can only act by complying with professional rules of confidentiality. Failing this, he cannot fulfil his mission. It is inconceivable that, in a relationship based on trust, a breach of trust would not alter the role of a lawyer, who would be turned into either a policeman or a spy.

Non-uniform implementation

Having regard to the outcome of the 2001 Directive, Article 3 provides that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 June 2003 at the latest.

The CCBE fears that, due to certain discretionary elements of the Directive, and their subsequent implementation into the national law of each Member State, the implementation of the Directive will result in a non-uniform application across Europe. As a result, the attached Action Points have been issued to its member Bars and Law Societies.

At present, the CCBE is already in a position to conclude that, in the few Member States that have reached an advanced stage in the implementation process, worrying inconsistencies are apparent concerning the discretionary provisions of the Directive.

The Canadian experience

The greater use of reporting suspicions creates serious difficulties as the Canadian experience illustrates. The Federation of Law Societies of Canada launched a constitutional challenge last year over certain parts of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and in particular ss. 5(i) and 5(j).

The Act will prevent Canadians from obtaining confidential legal advice from their lawyers. The legislation requires lawyers to submit details of their clients' confidential financial affairs to the federal government, contrary to the profession's ethical rules.

The Federation of Law Societies of Canada and the Attorney General of Canada have reached an agreement for a test case in the Supreme Court of British Columbia to resolve the constitutionality of the Act. The CCBE believes that the outcome of this case may also have an impact on the legislation against money-laundering around the world.

Options proposed in the FATF Consultation Paper:

The CCBE has been invited to comment on the provisions contained in the consultation paper relating to lawyers and in particular to comment on the options for coverage of lawyers as set out in paragraph 5.5.3. of the paper. Before doing so, the CCBE would however wish to make the following comments and observations in regard to certain paragraphs of Section 5.4. as follows:

1. Paragraph 272 through to 274 states that lawyers have been consistently mentioned in FATF typologies reports as being linked to money laundering schemes and cases.

At paragraph 272 a number of reasons have been put forward as to why lawyers appear to be frequently involved in money laundering.

At paragraph 273, in addition to the reasons specified therein, the statement appears, that it has been uniformly observed both by FATF's members and other international organisations that as anti-money laundering controls are effectively implemented in the financial sector, money launderers are turning to other sectors, including the use of professionals, to launder their illegal proceeds.

Even if it is clear that lawyers are involved with the risk of money laundering, it appears that any information available, which would allow the assessment of their involvement, is anecdotal and not based upon serious statistics.

Before consideration is given to the imposition of a compulsory reporting obligation for suspicious transactions, it is firmly submitted that compelling evidence and statistics are required, rather than referring to anecdotal elements in order to demonstrate beyond doubt that the services of lawyer are being used on a significant scale by persons in order to disguise their proceeds of crime. FATF are accordingly invited to supply that information.

If it happened or if it can happen that, from time to time, lawyers breach the fundamental principles of their profession, such incidents, howsoever serious and regrettable, cannot justify the removal of one of the fundamental pillars of a democratic society.

Neither the CCBE nor any of the European Bars and Law Societies condone the activities of such lawyers who are only criminals and who must be submitted to the full rigour of the criminal law.

As a result of a client's trust, the lawyer may have suspicions on a money laundering operation. There are two possibilities: either the lawyer will stop assisting, or he will continue to do so but in the latter case, due to his knowledge, he becomes an accomplice to a criminal breach and he is not a lawyer anymore. In any case, he should not report suspicions while continuing to assist the client. But if he stops assisting the client, the money laundering operation does not happen and no report of suspicions is justified except for the report of an intention (to launder) and the report of a previous criminal activity. In this case, the lawyer would become a police informer.

2. At paragraph 274 the paper states that due to the "professional secrecy or privilege" that exists in relation to certain types of communication with clients, the application of the requirement to report suspicious transactions will need to be closely examined.

The CCBE would remind the authors of the report that there is a sharp distinction between professional secrecy as this concept is applied in civil law jurisdictions and that of the legal professional privilege as applied in common law jurisdictions. In civil law jurisdictions, the obligation of professional secrecy is one imposed by law upon legal professionals, whereas in common law systems legal professional privilege is a right of a client and is a right which may be asserted primarily during legal proceedings, but also in circumstances which may generally be regarded as privileged. It is suggested that the failure to appreciate this distinction has bedevilled the authors of the EU directives, resulting in a "hotch potch" amalgamation of two very different concepts. In the opinion of the CCBE, the exemption from reporting in relation to Court proceedings and the giving of legal advice should at the very least be mandatory.

3. Turning to the options for coverage of lawyers referred to on pages 100 through to 103 of the consultation report, the CCBE comments as follows:-

- 3.1. Section 1A refers to coverage of lawyers and sets out three options. Strictly without prejudice to the grounds of objection previously referred to, the CCBE believes the provisions of any statutory control should only apply to lawyers and independent legal professionals where they are acting in their capacity as financial intermediaries on behalf of or for the benefit of their clients - in other words option 2. The CCBE would submit that such an option has the merit of distinguishing between the activities of the lawyer who provides legal services and the lawyer who is permitted under the law of the relevant state to act as a financial intermediary.

- 3.2 Suspicious transaction reporting and increased diligence

The CCBE would be utterly opposed to Option 1 for the reasons previously set out. Again, without prejudice to the overall position of the CCBE regarding the reporting of suspicious transactions, the obligation to report (if at all) should be limited to Option 2 but with the possibility of Option 3.

The CCBE believes that, if the option of a self-regulatory organisation (SRO) applies then the SRO should have a discretion to withhold suspicious transaction Report (STR) from the Financial Intelligence Unit (FIU).

The SRO would be in a position to determine whether or not the circumstances disclosed by the lawyer to the SRO justify a breach of the professional secrecy. In addition, having regard to the complexity of the rules applying to "privilege" there may well be circumstances where a lawyer might or might not report a suspicious transaction in circumstances where such privilege did or did not apply on the grounds of an imperfect awareness of his obligation. In other words, the SRO would be able to advise the lawyer in question whether or not privilege did apply and furthermore would, where legal professional privilege did not apply, direct the lawyer to make the necessary report, such direction having authoritative status.

- 3.3. Whether or not “tipping off” should be permitted or not permitted, it is clear that the inability of a lawyer to inform his client of the steps which he has taken on behalf of the client goes to the very heart of the relationship between lawyer and client. Apart from the principle that a lawyer must at all times act in the best interest of his client, the fact remains that the relationship of lawyer and client is based upon absolute trust. It is accepted, though, that where that trust breaks down, because, for example, a lawyer might be concerned about the bona fides of his client, then the traditional obligation of the lawyer is to refuse to act on behalf of that client.

The CCBE would therefore consider that a tipping off should not be deemed to occur where the lawyer, becoming aware that his client may become involved in money laundering, advises his client of the legal consequences of doing so. This would have the merit of complying with the fundamental basis of the lawyer/client relationship, namely that the lawyer advises the client of the application of the rule of law and its respect.

- 3.4. Regulation and Supervision

The observations contained in this paragraph relating to regulation and supervision deal, in a superficial way, with the relationship between Bars and Law Societies and the State. So far as the European Union is concerned, this role ranges from those Bars and Law Societies who independently from the State supervise their members in relation to matters of conduct and to those Bars and Law Societies who in fact exercise powers which have been delegated to them by the State. Indeed there would be Bars and Law Societies where a “mixture” of both concepts apply. The significance of these roles is well illustrated in the celebrated decision made by the Court of Justice of the European Communities in the NOVA Case (*J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV / Algemene Raad van de Nederlandse Orde van Advocaten, Case C-309/99*) to which the authors of the report are referred.

Suffice it to say at this stage that the CCBE would be extremely concerned that, in the context of the fight against money laundering, a body such as FATF should seek to debate with National Governments issues regarding the oversight and supervision by State Authorities of the Bars and Law Societies themselves. Whilst the Bars and Law Societies would have no objection in working closely with National Governments to ensure that proper procedures are in place so that the activities of lawyers who might or might not be engaged in money laundering are in accordance with such regulatory systems within the Member States, the CCBE opposes that a report of this nature should attempt to undermine that relationship.

For these reasons, the CCBE believes that the issue of supervision in terms of anti-money laundering procedures should be a matter best left to individual Member States to negotiate and discuss with their Bars and Law Societies and not unduly influenced by FATF.

Conclusion:

The CCBE believes that these observations should be taken into account by the FATF, should the FATF be considering a similar or wider application of the 2001 Directive.

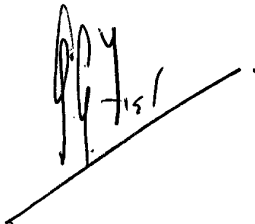
Furthermore, it is really too early in the implementation process to determine the impact of the 2001 Directive. It would be necessary to allow a sufficient period of time to pass before assessing the impact of the Directive and its consequences, both positive and negative.

The CCBE is satisfied that access to legal services for money laundering purposes can be effectively eliminated through professional rules adopted by bar associations without the necessity to make reports. By way of an example, you are invited to become acquainted with the CARPA institution in France, of which we would be happy to provide you with more details.

It is the firm conviction of the CCBE that, in a democratic society, the individual's right to unrestricted and independent legal advice and assistance cannot and must not be abandoned.

We hope that our comments on the various proposed options are of interest and assistance to your work.

I look forward to hearing from you at your earliest convenience.

A handwritten signature in black ink, appearing to read 'J. Fish', is written over a diagonal line that extends from the bottom left towards the top right.

John Fish
CCBE President