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# CCBE RESPONSE TO THE PROPOSAL FOR A NEW ANTI-MONEY LAUNDERING DIRECTIVE

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## I: Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 31 member countries and 12 further associate and observer countries, and through them more than 1 million European lawyers.

The CCBE welcomes the opportunity to engage in a constructive dialogue with the European institutions and Member States with a view to seeking an appropriate balance between the needs of society in general and the rights of individual citizens in particular having regard to the current obligations imposed on the legal profession by the existing Directive and proposed obligations under the proposed revised Directive.

The following comments are in response to the Commission proposal of 5 February 2013.

## II: Preliminary Comments

Prior to dealing with the specific issues raised in the Commission proposal, the CCBE is anxious to highlight certain aspects of the role of the legal profession in the context of the Directive. A number of these comments have previously been submitted to the Commission in April 2012 and are attached again as an annex, as many of the CCBE concerns raised then remain valid today.

- The CCBE does not and never will condone the actions of any lawyer who knowingly participates in any criminal activity of a client, whether relating to money laundering or any other criminal activity. There are already professional ethical rules and disciplinary sanctions, in addition to criminal sanctions, in place to deal with lawyers who participate in criminal activity like this.
- The CCBE requests that the European institutions and Member States bear in mind that a lawyer is a member of a regulated profession, is part of the process which ensures the rule of law, and has the duty to apply the law and have it applied. The mission of an independent lawyer and member of a regulated profession relies on the absolute confidence granted by his client who must be able to consult his lawyer with all the confidentiality needed, and without fearing that his confidence may be betrayed.
- The CCBE believes that the role of the legal profession in the administration of justice is essential to uphold the rule of law. It is fundamentally different from the role of any other profession. A lawyer is required to act in the interests of his client and independently.
- The CCBE would like to emphasise that the application of a system designed for the financial services sector is fundamentally incompatible with many European legal systems and interferes

with the role of lawyers within legal systems upholding the rule of law. Amendment of the system as it applies to the financial services sector in order to apply it to lawyers will not resolve fundamental design flaws.

- The CCBE firmly believes that some of the provisions of the Directive conflict with basic core values of the profession, and as a consequence comprise an effective diminution of citizens' rights. It is of course accepted that the legal profession has to and will play its part in the fight against money laundering and terrorist financing. Therefore, clarification of the extent of such rights must take place. The guiding principle therefore is that the obligations imposed on lawyers and the consequences of such obligations for citizens must be in proportion to the perceived risks involved.
- Having regard to the general principles of law, as well as Articles 6 and 8 of the ECHR, both the ECJ and the Strasbourg Court have recognised the specific character and essential principles of the legal profession, in particular in relation to the protection of the professional secret as a principle inseparable from the independence of lawyers.

## III: Specific comments on the Commission proposal:

### (1) Exemptions to the reporting obligation (Recitals 7 and 8, Art. 12 para 4):

Recitals 7 and 8

Recitals 7 and 8 outline the scope of application as regards legal professionals. The recitals distinguish between participating in financial or corporate transactions including providing tax advice on the one hand (activities which should be subject to the directive), and information obtained either before, during or after judicial proceedings or in the course of ascertaining the legal position on the other hand (activities which should be exempt). The directive seems to operate a distinction between tax advice and legal advice, the first being subject to the reporting obligation, the second not.

The CCBE believes that tax advice cannot be separated from legal advice. Tax advice is a form of legal advice and includes advice on how to behave in proceedings and vis-à-vis tax authorities and therefore not only includes civil rights in the sense of Article 6 ECHR, but may also entail criminal and other judicial proceedings.

Article 12 para 4 and Article 33 para 2

Article 12 para 4 and Article 33 para 2 refers to the currently used wording of "*ascertaining the legal position*". Moreover, the wording does not limit "*ascertaining the legal position*" to judicial proceedings. The CCBE questions why the directive continues to use the (unclear) wording "*ascertaining the legal position*" instead of "*legal advice*" as used in recital 7.

### (2) Inclusion of tax crimes (Recital 9, Art. 3 para. 4)

The Commission proposal expressly mentions Art 114 TFEU as a legal basis. Recital 9 and Article 3 para. 4 make it clear that tax crimes threatened with more than one year of prison are included in the definition of criminal activity. Article 114 TFEU is however not a legal basis on which tax crimes can be included in the directive, as Article 114 para. 2 TFEU expressly excludes tax matters from the scope of application of the competence to harmonise legal provisions for the functioning of the internal market. This exclusion is to be understood broadly (e.g. excluding all matters of procedure, c.f. ECJ C-338/01, *Commission ./. Council,* ECR 2004 I-4829). Moreover, there is no provision in the EU treaties to grant the EU the power to decide on such a provision with qualified

majority (e.g. Art 115 TFEU could be a legal basis, but requires unanimity in the Council). It is entirely up to the member states in how far they choose to follow the FATF recommendations to include tax crimes in the definition of criminal activity for the purpose of money laundering.

The FATF recommendations (February 2012) include tax crimes as predicate offences, but leave it to each country to define the offences. They read as follows (page 113):

*When deciding on the range of the offences to be covered as predicate offences under each of the categories listed above, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences.*

The CCBE believes, in accordance with the FATF recommendations, that the provisions against money laundering are intended to prevent serious crimes. A crime punishable with just more than one year in prison, as included in the directive, is all but severe. It must be taken into consideration that any obligation to report has to be proportional in the light of Article 8 ECHR; it is believed that such an obligation regarding minor tax offences is disproportional and therefore does not meet the criteria as set out by the ECHR.

Furthermore, on grounds of subsidiarity, there is no competence to include tax crimes except for fraud affecting the Union's financial interests. The punishment of tax crimes is provided for by national law and is therefore very different across the Union. This also applies to the question of if and which tax crimes are to be considered as criminal activity in the sense of national money laundering provisions. Hence, the intended provision offends the principle of subsidiarity.

**(3) Ultimate responsibility (Recital 23, Art 24):**

As repeatedly pointed out to the Commission, third party reliance will never work if the ultimate responsibility for Customer Due Diligence (CDD) procedures remains with the obliged entity. However, Recital 23 and Art 24 maintain the rule that the ultimate responsibility for meeting CDD requirements remains with the obliged entity which relies on the third party. This provision forces the obliged entity to duplicate CDD measures and effectively prevents third party reliance.

**(4) Expiration periods on the right to hold data (Article 39)**

The proposed changes to record-keeping obligations propose expiration periods for the right to retain documents collected as a result of AML due diligence. In certain circumstances, legal professionals will need to retain documents (e.g. Wills) for longer periods of time because of professional obligations and norms of practice which may fall outside any specific law providing for the retention of such data. This will be problematic for the legal profession as the proposal that all supporting documents for a transaction must not be retained for more than ten years after the business relationship ends does not fully take into account the types of documents held by legal professionals (such as wills) or the consequences of limitation periods.

**(5) Risk assessments (Article 8)**

The CCBE notes that all law firms irrespective of size and which kind of law is practiced will be required to have written AML/CTF risk assessments, policies and procedures, as well as a process by which they can test how effective these are. In the opinion of the CCBE this will result in excessive costs and unnecessary compliance requirements, which are disproportionate to the risks involved. It is therefore important for the CCBE to emphasize once again that we find that the Directive must ensure that such requirements should be implemented in the Member States in a manner which is proportionate to the size of the law firms in question and in consultation with the

appropriate self-regulatory body of the legal profession in each Member State. Furthermore, the introduction of a requirement for AML/CTF policies and procedures to be independently audited will involve an excessive additional regulatory burden and costs on the legal services sector. Any such independent audit must not impact on the powers of the Bar or Law Society or impact on professional secrecy.

**(6) Supervision (Art 44):**

Art 44 para 3 of the draft directive obliges Member States to ensure that the competent authorities take measure to prevent criminals from holding an interest in obliged entities. For legal professionals, such a provision means that non-lawyers holding an interest in a law firm (i.e. alternative business structures) must be scrutinized and supervised as strictly as lawyers. How should such a scrutiny be organised? Who will be competent to supervise non-lawyer shareholders in alternative business structures?

**(7) The sanction regime (Art 55, 56, 57, 58)**

The sanction regime is stricter than in the current directive and goes beyond what is acceptable according to the subsidiarity principle. It is sufficient to provide that Member States take sufficient and effective measures to enforce the provisions of the directive. Unless demonstrated by convincing evidence there is no reason to go beyond such a general provision providing for effective sanctions.

In particular, the following sanctions and measures are unacceptable:

- Art 56 para 2 lit a and Art 57 require the Member States to "*name and shame*" the obliged natural or legal person or entity not fully complying with some of the provisions of the directive. Art 56 para 2 lit a mentions *"a public statement which indicates the natural or legal person"* as one of several sanctions. Art 57 para 1 reads: *"Member States shall ensure that competent authorities publish any sanction or measure imposed … including information on … the identity of persons responsible for it, unless such publication would seriously jeopardise the stability of financial markets. Where publication would cause a disproportionate damage to the parties involved, competent authorities shall publish the sanctions on an anonymous basis."*

According to those provisions, a person or entity will be blamed in public for the slightest non-compliance with the directive. However, in many Member States, administrative and disciplinary sanctions are not published.

The CCBE believes that publication of sanctions including the name of the natural or legal person is not only in conflict with data protection rules, but may also be disproportionate to the nature of the offence. Therefore, the publication of sanctions on an anonymous basis must be the rule; "*naming and shaming*" shall take place only in very exceptional cases if such publication is proportionate and justified by predominant public interest and only if there are no concerns as regards data protection and the protection of personal rights.

- In addition, the fines imposed as administrative sanctions exceed the sanctions allowed by law. The directive provides for administrative sanctions up to 5 000 000.00 EUR (Art 56 para 2 lit f) or up to 10 percent of the yearly turnover (Art 56 para 2 lit e). Such sanctions must be imposed by courts (tribunals), rather than administrative bodies. Furthermore, the fines appear wholly disproportionate to the nature of the offences.

- With regard to the provision contained in Article 58 (3) "*Member States shall require obliged entities to have in place appropriate procedures for their employees to report breaches internally through a specific, independent and anonymous channel"* the CCBE understands that

this provision is directed towards large entities only as this would not be possible in small entities where there are, for example, only two or three employees.

- The Directive must ensure that any sanction regime must be implemented in the Member States in a manner that would not permit the FIU to be involved in any disciplinary proceedings against lawyers.

**IV: Conclusion**

The above are preliminary comments from the CCBE. The CCBE is happy to elaborate on any of the above if requested.