European Parliament Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (PANA)

24 January 2017

Committee of inquiry questions to the Council of Bars and Law Societies of Europe (CCBE)

1. **Your organisation has co-written "A lawyer's guide to detecting and preventing money laundering", containing 40 recommendations. Do you have any indication if - and to what extent - these recommendations are being adhered to by your members?**

   The CCBE is proud to have played an active part in the drafting of the joint publication of the CCBE, American Bar Association and International Bar Association on the drafting of a "*Lawyers Guide to Detecting and Preventing Money Laundering".* This Guide provides practical advice to legal professionals. The Guide has been very well received by our members, and contains information that is of assistance to both experienced and new practitioners.

   The Guide is an example of one of the proactive measures which the legal profession has taken towards increasing awareness amongst the profession with practical examples (red flags) of money laundering risks which our members should be aware of. The Guide highlights vulnerable areas that have been identified by the FATF, and the Guide is constantly being promoted by our membership (it is also available in a number of languages due to the efforts of our Bars and Law Societies).

   The Guide is but one of the many measures which the legal profession has in place. The legal profession is making every effort to detect money laundering and to raise awareness amongst its members. The following is an example of other measures:

   - Bars and Law Societies have developed lists of indicators which illustrate risk situations which a lawyer should be aware of.
   - Bars and Law Societies carry out onsite inspections of client accounts held by lawyers and these accounts are usually subject to an annual audit (in the jurisdictions that have client accounts).
   - Bars and Law Societies provide training on AML issues to both admitted and trainee lawyers.
   - Up-to-date guidelines have been developed and promoted to assist lawyers in relation to complying with their AML obligations.
   - AML Toolkits have been developed which provide lawyers and law firms with practical 'need to know' information and contain a mixture of draft policies and procedural checklists
   - Advice has been developed for new money laundering reporting officers.
   - There are numerous email alerts about emerging money laundering typologies/red flags and AML-related policy developments.
   - There are "Hotlines" whereby many jurisdictions have a dedicated AML support phone line for their members.
   - There is engagement with the relevant national ministry and law enforcement agencies, and many other actions.

Essentially, the profession is united in efforts to educate its membership regarding money laundering risks and assist them with meeting their anti-money laundering (AML) obligations.

The legal profession is alert to the threat of money laundering and is actively taking-it on. We support any clear, workable and proportionate measures and will continue to do so. No profession wants its members to be involved in illegal activity. The legal profession is no different. It is in our interest to protect the reputation of the legal profession and any lawyer that is involved in illegal activity hurts the reputation of the entire profession. That is one of the reasons why we are so committed to fighting money laundering.

2. Do you have information as to what extent lawyers are involved in the creation, maintenance and/or governance of entities in tax havens mentioned in the Panama Papers[1]?

The only information we have on the extent of involvement is information that has been reported in the media. However, the creation, maintenance and governance of structures in the countries listed by the Committee is not illegal (particularly in the UK which is an EU Member State). The Committee should be careful not to infer that any links with these countries (or indeed the Panama Papers) implies that criminal activity has occurred. Further, we are not aware of any convictions (or indeed charges) of lawyers resulting directly from links to the Panama Papers.

3. Can you tell us to what extent lawyers are regulated when it comes to anti-money laundering and anti-tax evasion? Is this only regulated at the national level or is there also European oversight?

Lawyers are subject to a set of European harmonised rules in the area of anti-money laundering. Lawyers are covered by the obligations included in the EU anti-money laundering Directive. A legal professional is an "obliged entity" in the sense of the money laundering Directive and required to have anti-money laundering systems in place. Lawyers are subject to customer due diligence, so called CDD requirements, and reporting obligations when they carry out a number of activities. The current anti-money laundering Directive makes it very clear under which circumstances a full CDD procedure must be carried out. Moreover, legal professionals use, for many reasons (such as liability, invoicing, communication with clients, banking requirements), formalistic client intake procedures to control their ongoing client relationship, even in areas not covered by the EU Directive. In addition, lawyers operate according to the "know your client" principle.

The legal profession is highly regulated at a national level in all EU Member States. There is no European Regulator or Supervisor like that which exists, for example, for the financial services sector, as the tasks of lawyers vary across different EU Member States, in addition to differences which exist between common and civil law systems regarding how lawyers are regulated at a national level. However, each Member State's legal profession is governed by national law, and is well regulated by national law and national supervisory or self-regulatory bodies. Those bodies issue very clear and encompassing guidance, take their regulatory duties seriously and provide extensive training. Moreover, there is also guidance and ethical rules at a national, European and international level.

[1] Bahamas, Belize, British Anguilla, British Virgin Islands, Costa Rica, Cyprus, Hong Kong, Isle of Man, Jersey, Malta, Nevada, New Zealand, Niue, Panama, Ras Al Khaimah, Samoa, Seychelles, Singapore, United Kingdom, Uruguay, and Wyoming.

4. Do you think the existing national guidelines and conduct codes are adequate to prevent money laundering and tax evasion? Do you identify any loopholes?

The CCBE believes that existing national guidelines and codes of conduct are sufficient. In the CCBE's view, we do not need more regulation, or more additions to codes of conduct. The level of regulation has reached a peak which we could not imagine a few years ago. More time is needed to look at the application of the existing regulations in practice. What we need is better cooperation among national authorities. While the cooperation between Bars and Law Societies within Europe is outstanding, the flow of information, e.g. about new threats and emerging trends, from national authorities and law enforcement to Bars and Law Societies is too slow.

It should also be mentioned that a highly important concept concerns the actual proportionality of regulation. Regulation needs to be both effective and proportionate to the intended goal.

5. Do you have information about the nature and numbers of sanctions by national bar associations for activities related to money laundering and tax evasion by their members?

We do not have information on the "*nature and numbers of sanctions by national bar associations for activities related to money laundering and tax evasion by their members*" on a Member State by Member State basis.

Regarding sanctions that our members face, members of the legal profession are subject to strict sanctions (both civil and - in certain jurisdictions - criminal) for any failure to adhere to AML obligations. There are strict disciplinary procedures which can lead to being struck-off the list of lawyers and severe fines for failure to adhere to AML procedures.

6. Does your Council consider it important that lawyers see themselves as legal gatekeepers? Should lawyers report suspicious transactions? Should this be regulated at a European level?

In November 2001, the European Parliament and the Council of Ministers agreed on a text for amending Directive 91/308/EEC, the principal EU money laundering Directive. The new text, the 2001 Directive (Directive 2001/97/EC), resulted in new money laundering obligations which were to be incorporated into national legislation before 15 June 2003. The 2001 Directive obliged Member States to combat laundering of the proceeds of all serious crime. This was in contrast to the 1991 Directive, in which obligations applied only to the proceeds of drug offences. The 2001 Directive (the 2nd Money Laundering Directive) extended AML/CTF obligations to a defined set of activities provided by a number of service professionals, including accountants, real estate agents and lawyers. These defined activities consisted of mostly transactional work, such as the purchase of real estate, formation of trusts and companies, opening bank accounts and the management of client assets.

The 2001 Directive imposed upon financial institutions and professionals, obligations with regard to client identification, record keeping and the reporting of suspicious transactions. The European legal profession has continuing and serious concerns with regard to the reporting of suspicious transactions and other obligations under the 2001 Directive and the Directives since then. The requirements on a lawyer to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence is in the view of the CCBE a violation of a fundamental right. As a result, the essence of the lawyer/client relationship has, in our view, now been infringed upon as a result of the 2001 EU money laundering Directive.

In 2006 the European Union agreed their 3rd Money Laundering Directive (which remains the current basis of AML legislation for EU Member States) which brought lawyers fully into the scope of the AML regime. The 4th EU Money Laundering Directive was passed in June 2015. Each Member State has until June 2017 to transpose this Directive into their national law.

We oppose the recent trend of European institutions seeking to establish and impose new AML standards without taking the necessary time to fully understand the risks and to ensure that proportionality is maintained.

7. In your view, do activities such as assisting in the setting-up of offshore constructions fall under the attorney-client privilege? Does your answer change if there would be involvement of the client in criminal activities? Are there differences in interpretation between member states?

Professional advisers and lawyers are governed by their professional bodies to advise clients within the law. The rule of law, access to justice and legal certainty (all vital principles in every member state) require that a person be able to seek legal advice on any issue, including tax issues. A citizen must be entitled to take legal advice in any area, and his lawyer must be entitled to provide that advice. Professional secrecy/legal professional privilege is the right of the client to consult a lawyer in confidence – it is not the right of the lawyer. Professional secrecy is a privilege that ensures that any information you provide to your lawyer is kept confidential.

Professional secrecy/legal professional privilege do not apply if a lawyer takes part in illegal actions of the client. This is the case in every EU Member State. There is no 'difference in interpretation'. Privilege and professional secrecy do not, and will never, apply if a lawyer is facilitating an offence. The CCBE and its member Bars and Law Societies do 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, tax evasion or any other criminal activity.

8. To what extent is it possible for these confidentiality rules to be overridden by other ethical rules, such as conflict of interest rules?

As mentioned, professional secrecy/legal professional privilege do not apply if a lawyer takes part in illegal actions of the client. Privilege and professional secrecy do not apply if a lawyer is facilitating an offence.

9. Can you inform us if - and to what extent - lawyers should know their client. Are the current rules on client due diligence adequate in your view or should they be updated, given the findings in the Panama Papers?

A lawyer has a duty to identify the client, and is obliged to do so. This was a deontological duty before becoming a legal one. A lawyer will always know who the client is, but the client may wish to remain anonymous to the public. The client has the right to remain anonymous towards the public, but not towards the lawyer. If a lawyer is prevented from identifying a potential client, a lawyer must withdraw from professional activity.

The current anti-money laundering Directive make it very clear under which circumstances a full CDD procedure must be carried out. A lawyer cannot act for a client when they carry out a number of activities without undertaking AML due diligence on the client.

The EU AML rules apply to the following obliged entities:

> *…….. independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the:*
>
> *(i) buying and selling of real property or business entities;*
> *(ii) managing of client money, securities or other assets;*
> *(iii) opening or management of bank, savings or securities accounts;*
> *(iv) organisation of contributions necessary for the creation, operation or management of companies;*
> *(v) creation, operation or management of trusts, companies, foundations, or similar structures;*

The view that current rules are sufficient is also shared by the FATF. In their September 2016 report to the G20 on beneficial ownership in the wake of the Panama Papers they state:

'The large-scale misuse of legal persons and arrangements which was exposed in April 2016 focussed attention on the need to strengthen controls against the misuse of corporate structures. Our analysis to date does not point to specific gaps or inadequacies in the international standards.'

10. If a client wants to remain anonymous, should that be a reason for a lawyer to refuse him/her as a client?

Certainly not. There are many legitimate reasons why a client may wish to remain anonymous. However, it is important to understand, and appreciate, that a client is not anonymous to the lawyer. As mentioned in response to question 9 above, a lawyer has the duty to identify the client and is obliged to do so. This was a deontological duty before becoming a legal one. A lawyer will always know who the client is, but the client may wish to remain anonymous to the public. The client has the right to remain anonymous towards the public, but not towards the lawyer. If a lawyer is prevented from identifying a potential client, a lawyer must withdraw from professional activity.

11. Are there any rules on the conduct of lawyers in any Member States that have the effect of prohibiting lawyers from advising clients on developing or implementing tax planning schemes that have the effect of (illegally) evading any Member State taxes? Are these rules legally binding?

Any lawyer who knowingly participates in any criminal and illegal activity of a client, whether relating to money laundering, tax evasion or any other criminal activity, is complicit in a crime. Tax evasion is a crime in every EU Member State.

12. In terms of numbers of practitioners and/or turnover, do you have an indication of the importance of the offshore services business for the law profession?

CCBE member Bars and Law Societies do not have statistics on off-shore work of their members, as lawyers do not transmit such information to Bars. This is also true for other areas of law.

13. Is there any (European) supervision on national bar associations?

As indicated in response to question 3, the legal profession is highly regulated at a national level in all EU Member States. There is no European Regulator or Supervisor like that which exists, for example, for the financial services sector, as the tasks of lawyers vary across different EU Member States, in addition to differences which exist between common and civil law systems regarding how lawyers are regulated at a national level. However, each Member State's legal profession is governed by national law, and is well regulated by national law and national supervisory or self-regulatory bodies. Those bodies issue very clear and encompassing guidance, take their regulatory duties seriously and provide extensive training. Moreover, there is also guidance and ethical rules at a national, European and international level.

14. Amongst your members, do you see differences in the codes and guidelines for lawyers from EU member states and countries that are not in the EU?

The CCBE can only comment on what exists within its members. We can only imagine that in all countries where the rule of law applies, the obligations for lawyers are very comparable to those applicable in the EU.