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## **CCBE comments on the Commission Staff Working Document**

**“The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering”**

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#### Summary

1. The CCBE continues to hold the view that the right for a client to consult a lawyer in confidence is a fundamental right and is constitutionally protected in a number of countries. The CCBE believes that the introduction of reporting requirements on lawyers is a violation of this fundamental right, and a disproportionate and unnecessary response to the serious problem of money laundering.
2. The CCBE would stress that for those lawyers, or for members of any other profession, that are knowingly involved in money laundering activities, the EU money laundering legislation or the FATF Recommendations will not prevent those lawyers from continuing their activities.
3. 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.
4. As admitted by the Commission in the working document, the response to the Commission questionnaire was disappointingly low. As a result, it would be most unwise to place too much reliance on the accuracy or validity of the information supplied to the Commission.
5. The CCBE believes that the part of the questionnaire dealing with reporting obligations was hardly conducive towards eliciting valuable information. For example some of the questions were so phrased that, in order to obtain an answer, an element of self-incrimination was involved. The CCBE pointed this out to the Commission in advance of the questionnaire being publicly circulated.
6. With regard to the reference in the report to the “extensive” interpretation of the legal privilege by practitioners, the CCBE believes that this seems to imply that practitioners are interpreting the exemption from reporting in a manner to suit them. The CCBE does not accept that the automatic instinct of a lawyer faced with a suspicion would be to seek to excuse himself or herself from making a report by taking an unacceptably liberal, or (to use the Commission’s wording), “excessive” interpretation of the exempting provisions. On the contrary, it is far more likely that, faced with the possibility of being implicated in the wrongdoing of a client, the lawyer would either cease to act for that client and/or make a report.
7. As part of the Commission’s conclusions, the Commission suggests that the survey has shown that efforts should concentrate on three main areas, one of which is “improving the quality of the national legislation implementing the anti-money laundering rules adopted at European level”. The CCBE would respectfully submit that reliance upon the explanations set out in the Report for either the low level of reporting by legal professionals or the perceived reluctance on the part of legal professionals to report, should not, in the absence of a more in-depth and scientific examination of the issues involved, justify further steps being taken by the Member States which in effect would result in unnecessary and possibly, more repressive legislation.

## I. Introduction

8. The Council of Bars and Law Societies of Europe (CCBE), representing over 700,000 lawyers through their member bars and law societies, makes the following comments on the Commission report on the impact of the second Money Laundering Directive on the legal profession. The CCBE is pleased to have the opportunity to raise these comments during the meeting with the Commission and Member States in Brussels on 13 February 2007.
9. The European Union money laundering legislation and its application to the legal profession is an issue on which the CCBE has devoted considerable resources for the past number of years.
10. However, from the very beginning, the CCBE believed that the introduction of reporting obligations (which were previously confined to financial institutions) on lawyers who are members of a regulated profession would result in a breach of the independence of a lawyer and the irrevocable violation of the principle of client confidentiality. Access to legal advice is jeopardised, and the subsequent defence cannot be guaranteed, if the necessary confidence must be betrayed by the obligation imposed on lawyers to report their suspicions to authorities designated by the draft Directive.
11. The CCBE continues to hold these views and wishes to emphasise that the right for a client to consult a lawyer and be assisted by a lawyer in confidence is a fundamental right and a right that is constitutionally protected in a number of countries. In common law countries, the right for a client to consult a lawyer in confidence is a client's right, and a client's privilege, not the privilege of a lawyer. This is a privilege which the client can waive if he so wishes. In civil law jurisdictions, the concept of "professional secrecy" differs from that of client confidentiality. With regard to professional secrecy, in some civil law jurisdictions this is a right of the client while in other civil law jurisdictions the obligation belongs to the lawyer and the lawyer can not disclose information about their client.

## II. The second money laundering Directive

12. The CCBE cannot understand why lawyers who are members of a regulated profession have been included in the scope of the reporting obligation as contained in the second money laundering Directive. The European Parliament Petition Commission itself formally recommended to the Civil Liberties, Justice and Internal Affairs Committee to modify the text of the directive by taking into account legal professional secrecy in its recommendation of January, 18 2005.
13. The CCBE has consistently requested that the Commission and the Financial Action Task Force on Money Laundering provide evidence that lawyers are being unwittingly used to facilitate money laundering activities which would justify reporting obligations being imposed on the legal profession. Such evidence has never been provided by either the Commission or the FATF.
14. The CCBE would also like to highlight the following point - for those lawyers, or for members of any other profession, that are knowingly involved in money laundering activities, the EU money laundering legislation or the FATF Recommendations will not prevent those lawyers from continuing their activities.
15. The CCBE does not and never will condone the actions of any lawyer who knowingly participates in any criminal activity of his client, whether relating to money laundering or any other criminal activity. There are already professional ethical rules and disciplinary sanctions which are enforced by the regulatory authorities, in addition to the criminal sanctions which are in place to deal with lawyers who participate in criminal activity like this
16. The CCBE believes that the introduction of reporting requirements on lawyers is a disproportionate and unnecessary response, and one which is being challenged before the European Court of Justice, in addition to a national challenge in France and Poland. The CCBE believes that more appropriate and useful measures could be put in place.
17. The Commission report has been drafted due to the insistence by the European Parliament that a provision be included in the second money laundering Directive that the Commission examine the impact of the second money laundering Directive on the legal profession. The European Parliament singled out the legal profession due to the different role and function

which the legal profession performs in society. The obligation to report has had a significant impact on this role and function.

18. Without prejudice to the above position, the CCBE would like to make the following comments on the Commission report.

### III. Commission report

19. The CCBE called on the Commission to produce its report on the impact of the second money laundering Directive prior to proposing a draft third money laundering Directive. The CCBE cautioned that this would be the proper and sensible approach, and would be in line with the Better Regulation measures to which the Commission has committed itself. Regrettably, this was not the case with the result that a third money laundering Directive has now been agreed.
20. The CCBE is concerned with what the Commission believes to be the low level of compliance by the legal profession with reporting requirements. The Commission report set out possible reasons for this and certain conclusions relating to the necessity to improve the effectiveness of the rules.

#### Low response to information gathering

21. Para. 4 - In describing the examination process conducted by the Commission, the report states that the response to the information-gathering exercise has been "somewhat disappointing", and in particular the response from lawyers' professional organisations was "significantly" lower. Furthermore, with the exception of the UK and Spain, the response from individual practitioners was not high, either. Some reasons for this low response are suggested (e.g. recent implementation of laws, difficulty in obtaining quantitative and qualitative replies and information). However no reference has been made in the report that a possible reason for a poor return from individual practitioners may have been due to the nature of the information sought in the questionnaire sent out to practitioners. The fact that there has been a low response to the information-gathering exercise should not be interpreted as meaning that the report is an accurate reflection of the situation as it exists.

#### Delays in implementation of the second Directive

22. Para 8 - In relation to the delays in the transposition process in the Member States, the report notes that this has resulted in few Member States having a sufficiently long experience with the application of anti-money laundering rules to the legal profession - an admission which suggests that the report is premature (this was also one of the reasons why the CCBE cautioned against the proposal for a third Money Laundering Directive at such an early stage).

#### Definitions of criminal activity

23. Para 11 - The CCBE agrees with the Commission that the various definitions of criminal activity in the different Member States can give rise to difficulties, especially with regard to cross - border activities. Insofar as the Commission's working document has detailed perceived difficulties for legal professionals, especially in regard to reporting obligations, a factor which has given rise to practical difficulties for practitioners stems from the opportunity which Member States have availed of in widening the scope of criminal conduct. It is the CCBE's understanding that the original intention behind the introduction of Directives at the European level in the fight against money laundering was to seek to prevent access to the financial system by organised crime and to prevent terrorist financing. Nevertheless, some Member States have availed of the latitude afforded by the Directives to apply the obligations to a much wider field of criminal activity than was, we believe, envisaged by the Commission.

It seems to the CCBE that this has proved to be a complicating factor, possibly to the extent that the focus of practitioners in regard to difficulties with the legislation has shifted away from suspicions in regard to criminal proceeds derived from, for example drug money, to tax related issues, especially in the field of family law where unsubstantiated allegations are often made. This seems to the CCBE to be a retrograde development, and the CCBE would urge the

Commission to carry out a further inquiry into the degree to which the original aim of the Directives have been, in practice, diluted.

#### Cross-border referrals

24. Para 15 (ii) - The report refers to the issue of cross-border referrals and the difficulties being experienced by practitioners. The proposals in the third Money Laundering Directive are noted in this regard, but the CCBE questions how confident practitioners will be in relying on information supplied when they will continue to have ultimate responsibility?

#### Trusts

25. Para 15 (iii) – The issue of a lawyer’s responsibilities and difficulties in regard to the identification of beneficial owners in certain types of trusts still remain. Although the difficulties are noted, it would have been helpful if such difficulties were acknowledged and some positive action proposed.

#### Legal privilege and litigation

26. Para 20 – The Commission makes the statement that the reporting obligation is “subject to legal privilege in relation to litigation”. This is an incorrect statement. The exemption, (which is quoted in the footnote), is not, according to the Directive, solely confined to litigation matters and extends to ascertaining the legal position of the client in regard to the transactions covered by the Directive. This link to litigation is repeated by the Commission later on in the report and is wholly incorrect.

#### Low number of reports

Paras - 38 to 46 - These paragraphs deal with the issue of reporting trends, what the Commission believes are the reasons for the low level of reports to national authorities as well as describing the difficulties experienced by practitioners. The CCBE believes it is worth noting that the part of the questionnaire dealing with reporting obligations was hardly conducive towards eliciting valuable information. For example some of the questions were so phrased that, in order to obtain an answer, an element of self-incrimination was involved.

The Commission has noted that the number of reports made by independent legal professionals on suspicious transactions is particularly low as compared to reports made by financial institutions and with the exception of the UK. The Commission puts forward a number of “concurring” reasons which seem to explain the low number of reports. The CCBE would like to inquire as to what scientific evidence the Commission has used to form these views. The first reason given is that there is a general perception that the application by professionals of the legal privilege in relation to litigation, in particular when interpreted extensively, contributes to the explanation for the low numbers (with a mistaken reference again to litigation). Where does this general perception come from? What evidence is there that practitioners are excusing themselves from making reports based upon an “interpretation” of the privilege other than what can be clearly inferred from the provisions of the Directive? What does the Commission mean by “interpreted extensively”? Is the Commission suggesting that practitioners are interpreting the privilege incorrectly, and if so in what way?

The second reason given is that there are practical difficulties in applying the rules as reported by stakeholders, and these are referred to in Section 5.2. If there are practical difficulties, the fault is to be found in the legislation. If the defects are in the legislation, it is hardly surprising that practitioners run into difficulties.

Lastly, the Commission quotes that stakeholders are forced to concentrate on the due diligence process, thus distracting from the “evaluation” of potentially suspicious transactions. The CCBE is surprised by this as there is no doubt that a practitioner conscious of his or her obligations to carry out a due diligence exercise is hardly going to ignore the reporting obligation.

#### Position in the United Kingdom

27. Para 40 (second part) – This paragraph notes the very different picture which has emerged in the UK, and the reasons put forward for this i.e high penalties, a committed enforcement policy from the authorities, wider definition of criminal activity, and ambiguity in the interpretation of national law with regard to the need to report in the context of litigation (the mistaken reference to litigation again), the result being a higher prevalence of precautionary reporting. The CCBE would like to stress that the UK legislation has given rise to great difficulty in its application and the high number of reports is not reflective of the effectiveness of the legislation.

#### Factors influencing reporting

28. Para 41 – This paragraph puts forward a number of factors which may also have an influence on the number of reports. In the first instance, it is suggested that practitioners prefer to avoid situations which would require them to make reports and therefore break the relationship of trust with the client. The Commission goes on to state that this is a view not shared by the legal profession or by a number of public authorities. The Commission further states that, in any event, no particular evidence supporting either position or measuring the impact can be presented. If this is the case, why repeat the perception? It appears to the CCBE that a great deal of the contents of this report are based on perceptions and suppositions, and not on facts. To repeat a perception may only add credence to it and should not be included.

#### Leaking of information following reports

29. The Commission also refers to the lack of confidence by practitioners in the reporting system, due to a perception of unjustified disclosures. The Commission further states (in the very next sentence) that the identity of the practitioner may be disclosed in subsequent judicial proceedings in some Member States. This is more than a perception. Reference is made also to the leaking of information and possible reprisals. It is surprising that the Commission has not paid due regard to these concerns and expressed them in their conclusions.

#### Recognition of suspicious transactions

30. Para 45 (i) – The Commission refers to difficulties in recognising suspicious transactions, and a number of factors are described which could have the effect of making it difficult for a practitioner in developing a suspicion. Whilst some of the “explanations” may be true and might militate against a practitioner forming a suspicion, one person’s suspicion may not be another’s. No doubt there may well be psychological reasons why a practitioner may convince him or herself that there is nothing untoward about the transaction. The CCBE has always maintained that a system of reporting based upon mere suspicion and not on fact gives rise to an irreconcilable conflict.

#### Interpretation of legal privilege

31. Para 45 (ii) – The Commission once again refers to the delimitation of legal privilege. The Commission states that, in the absence of a clear delimitation in the national law (or in supplementary guidelines) or of a clear interpretation by the courts, practitioners will continue to be confronted with practical difficulties. This, as a reason for not reporting, is quite illogical. The first question the practitioner will ask is: have I got a suspicion? It is only after that will he or she will check whether or not the suspicion arose during the course of ascertaining the legal position for the client. The time line does not support the contention put forward in this paragraph.

#### Commission conclusions

32. On pages 33 to 35, the Commission sets out its conclusions, namely that the survey has shown that efforts should concentrate in three main areas;
- Improving the quality of the national legislation implementing the anti-money laundering rules adopted at European level;
  - Increasing outreach and awareness efforts;
  - Exploring whether there are additional tools that can be used in facilitating compliance.
33. The CCBE would respectfully submit that reliance upon the explanations set out in the Report for either the low level of reporting by legal professionals or the perceived reluctance on the part of legal professionals to report, should not, in the absence of a more in depth and scientific examination of the issues involved, justify further steps being taken by the Member States which in effect would result in unnecessary and possibly, more repressive legislation. For example at no stage in the report has consideration been given to the distinct possibility that the implementation of the directive into national legislation and the existence of a reporting obligation has had a deterring effect upon the use of the legal profession as a means of furthering money laundering. In other words, even as matters stand, the impact of existing money laundering measures may well have had a positive effect by reducing the risk of legal professionals being targeted by money launderers.

#### **IV. Conclusion**

34. The CCBE believes that the introduction of reporting requirements on lawyers is a disproportionate and unnecessary initiative. The CCBE believes that more appropriate and useful measures could be put in place, for example, different procedures and practices. The CCBE is willing to work with the Commission (and the FATF) towards developing practical and effective suggestions.