



---

## **CCBE RESPONSE TO THE APRIL 2012 COMMISSION REPORT ON THE APPLICATION OF DIRECTIVE 2005/60/EC**

---

**Conseil des barreaux européens – Council of Bars and Law Societies of Europe**

*association internationale sans but lucratif*

Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail [ccbe@ccbe.eu](mailto:ccbe@ccbe.eu) – [www.ccbe.eu](http://www.ccbe.eu)

---

## **CCBE Response to the April 2012 Commission Report on the application of Directive 2005/60/EC**

---

### **A: General Comments**

#### **1. Introduction**

This paper is in response to the Commission report on the application of the Third Anti-Money Laundering Directive – Directive 2005/60 (the “Directive”). The CCBE response focusses in particular on the section dealing with the treatment of lawyers and other independent legal professionals.

The CCBE also wishes to avail of the opportunity to raise with the Commission a number of issues, which in its opinion merit further consideration by the Commission in the context of the forthcoming review of the Directive and its impact on the legal profession. A number of these comments have previously been submitted to the Commission in September 2011.

#### **2. Preliminary Comments**

Prior to dealing with the specific issues raised in the Commission report, the CCBE is anxious that certain aspects of the role of the legal profession in the context of the Directive should be highlighted.

- 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 Commission 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 – the CCBE would like to stress that legal privilege and professional secrecy must be maintained in all cases. 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.
- The CCBE wishes to emphasise that, following the entry into force of the Charter of Fundamental Rights of the European Union having the same value as the Treaties, and the EU accession process to the European Convention on Human Rights (ECHR), a new

environment has been established. The European Institutions are required to comply with fundamental rights as expressed in the Charter and the ECHR and as interpreted by case law.

- 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.
- Compliance with these requirements is consubstantial to the rule of law. The CCBE further notes that any Commission initiative, which does not comply with fundamental rights, in particular ECHR Articles 6 and 8 and Articles 47 and 7 of the Charter, is incompatible with primary EU legislation. The revision of Directive 2005/60/EC must absolutely take into account these new requirements arising from the Lisbon Treaty.
- The CCBE welcomes the opportunity to engage in a constructive dialogue with the Commission 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 obligations imposed on the legal profession by the Directive. It is important therefore to recognise that insofar as legal challenges are currently taking place and insofar as legal challenges may take place in the future regarding the provisions of the Directive and their implementation in Member States, the contents of this response and any proposals by the CCBE are made on a strictly without prejudice basis.

## **B: Comments on the Commission report**

With regard to the “Commission’s assessment of the Directive’s treatment of lawyers and other independent legal professionals” The CCBE makes the following comments:

### (1) Professional secrecy

The Commission report refers to the issue of a lawyer’s obligation of professional secrecy and the fundamental right to a fair trial. The Commission provides that the European Court of Justice has ruled on this issue and *“Although the judgement concerned Directive 91/308/CEE, the main findings of the Court remain valid for the Third AMLD. Based on this ruling, it can be considered that the AML obligations imposed on legal professionals do not infringe the right to a fair trial as guaranteed by Article 47 of the EU Charter of Fundamental Rights and Article 6 of the ECHR.”*

Professional secrecy is a concept which is not extensive, and the legal profession does not have an extensive interpretation of it. The CCBE believes that there exists numerous case law that has not been referred to in the report by the Commission which demonstrates that the reporting obligations imposed on a lawyer are in violation of Article 8 of the European Convention on Human Rights. Up until recently this specific Article has never been tested before the European Court of Human Rights (ECtHR). The CCBE is currently intervening in support of a challenge against provisions of the Directive based on Article 8 of the European Convention on Human Rights (ECHR) (*Requete no 12323/11 Michaud v. France*).

### (2) Suspicious transaction reports

The Commission report provides that *“The Deloitte study found that levels of reporting of suspicious transactions by some nonfinancial professions (in particular lawyers) are low compared to those of FIs. The issue of under-reporting in some jurisdictions remains a concern, and consideration could be given to ways to improving levels....”*

The CCBE does not accept that there is any evidence to support the assertion that there is a problem of under-reporting by the legal profession. The CCBE respectfully submits that a comparison based on figures relating to banking and other financial institutions or professions is inappropriate and consequently misleading, as the activities of lawyers are fundamentally different. By what yardstick, other than a comparison with financial institutions that are involved in thousands of transactions on a daily basis as opposed to lawyers who are not involved in so many transactions, can the level of

reporting by lawyers be measured? What evidence is available at a national level, which clearly demonstrates that lawyers are not making reports in circumstances where they should be doing so? This is based on inappropriate comparisons.

In the absence of empirical evidence, it is impossible to conclude one way or another that current reporting levels by the legal profession are an accurate reflection of the actual state of affairs. Experience would suggest that the provisions of the Directive, as implemented in the Member States, act as deterrents for would-be money launderers to utilise the services of lawyers.

A further point to bear in mind is that the presumption of the Commission as to a lower level of reporting that occurs as compared to the Commission's expectations may very well be a reflection of the very proper ethical standards taken by lawyers who discourage their clients from entrusting them with instructions that amount to a breach of the Directive. Applying this in a robust fashion, organised criminals and intending money launderers realise that lawyers are unlikely to turn a blind eye if requested to facilitate anything that might support money laundering.

Moreover, the CCBE believes that information lawyers dispose of is generally more accurate than information obtained by other professions. Based on the information available and the high level of professional qualification, lawyers are enabled to high quality reporting so that cases that do not merit to be reported are singled out before filing an STR.

The CCBE notes from discussions with the Commission that the United Kingdom has been singled out as having a high level of reporting. The CCBE wishes to stress that as a consequence of the consent procedures in place in the United Kingdom, together with the "all crimes" approach, the breadth of the provisions in the UK and the number of offences in the UK would otherwise be treated as civil law matters in other jurisdictions. No information is available as to the level of effectiveness of such reports in the prosecution of the more serious crimes generally regarded as money laundering and terrorist financing.

### (3) Role played by Bars

Lawyers practicing under continental law jurisdictions - in which professional secrecy is imposed in the interests of justice and society as the basis of the relationship of trust which exists between clients and lawyers - are particularly concerned about the proposal referred to in paragraph 2.7 of the Commission report '*Clarification that in cases where Member States conclude that transmission of Suspicious Transaction Reports (STRs) is being filtered, they should actively consider requiring reporting to be made direct to the FIU*'. If this proposal were implemented, the role of the Bar and/or Law Society as a guardian of professional secrecy would become meaningless - professional secrecy is not an option but an obligation placed upon the lawyer in the public interest.

The role of Bars and Law Societies in the prevention of money laundering, when acting as an interface between lawyers and the FIU, is recognised in both 2<sup>nd</sup> and 3<sup>rd</sup> AML Directives, is recognised by law, is recognised by the FATF recommendations and is recognised by national and European case law.

The role of the Bar and Law Society involves ensuring the proper implementation of rules, which require reporting in certain circumstances.

Thus, the Bar and Law Society shall ensure that STRs are within the scope of the Directive and legislation, and that any inappropriate statement shall not - except in cases provided by the Directive - be transmitted to the FIU as it would constitute a breach of confidentiality imposed on the lawyer.

If the statement received from a lawyer falls under the scope of reporting obligations under the law, the Bar and Law Society will submit it to the FIU within a short time.

In other words, the Bar or Law Society does not 'filter' statements, and their interventions do not result in statements being withheld from the FIU under the relevant legislation, but rather ensures that any reporting received shall be in accordance with the legislation and does not constitute a breach of professional secrecy, which is recognised and protected in Europe.

The CCBE urges the Commission to dismiss its proposal regarding direct reporting to the FIU as referred to in paragraph 2.7.

#### (4) Definition of transaction

The Commission report provides that “*Article 2 (1) (3) (b) sets the scope of the Directive to apply to “notaries and other independent legal professionals, when 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 execution of transactions for their client” concerning a number of listed activities (buying and selling of real estate, managing client money, etc). Lawyers’ representatives have queried which “transactions” are covered, and consideration could be given to a possible clarification in this respect.*”

According to FATF's (revised) Recommendation 23 non-financial transactions are not included in a lawyer's reporting obligation.

#### (5) CDD measures

In the present digital society it is not an exception anymore to have contact with clients on a non face-to-face basis. Though CCBE acknowledges that money launderers may prefer non-face-to-face contact, it does not endorse the position that every non face-to-face business relationship in itself should already lead to a higher risk and therefore to enhanced CDD-measures. The risk based approach of the Directive already enables the institution to focus on those non-face-to-face relationships that actually have a higher risk.

#### (6) Self-Regulatory Bodies

The Commission has stated that “*Consideration could be given to whether self-regulatory bodies should continue to be tasked with ensuring compliance with AML standards, or whether their role needs to be further defined ....*”

The infringement by a lawyer of the reporting obligations under the national AML either to the FIU or the Bar and Law Society as appropriate are normally dealt with by the Bar and Law Societies within their framework of disciplinary proceedings in their capacity of being responsible for the overall supervision of lawyers compliance with their legal obligations. The CCBE believes that the role of the Self-Regulatory Body should be left to Member States as each Member State has its own system and resources and consequently it is best left to individual Member States to organise this aspect.

### **C: Issues that require consideration by the Commission when revising the Directive**

As mentioned in our response of September 2011 the CCBE considers that the following matters require further consideration by the Commission when revising the Directive:

- The scope of the Directive in relation to lawyers.
- Scope of money laundering offences
- The reporting obligation based on suspicion.
- Exemption from the reporting obligation.
- Exceptional circumstances.
- The relevance of judicial proceedings.
- Third party reliance.
- Customer due diligence for small practices.
- Identification of beneficial owners.
- Politically exposed persons.
- “Tipping Off” where a lawyer ceases to act.
- Data Protection

- Anonymity.

## 1. The scope of the Directive in relation to lawyers.

Article 2 (3) (b) of the Directive describes the scope of the Directive as it applies to notaries and “other” independent legal professionals.<sup>1</sup>

*“when 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 execution 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 or similar structures.*

The CCBE considers that the opening paragraph of this Article is obscure in regard to the role of lawyers where they provide services in connection with the transactions specified in the Article. In particular the CCBE believes that the emphasis on such words as “participate” and “planning” in this paragraph seems to suggest a degree of involvement by a lawyer in the transaction which goes far beyond the usual services provided by lawyers.

A more appropriate wording of this paragraph might be on the following lines:

*“(b) notaries and other independent legal professionals, when they act on behalf of and for their client or assist in the execution of transactions for their client concerning the:”* followed by the activities (i) to (v) as above.

## 2. Scope of money laundering transactions

Closely connected to the issue of the scope of the Directive as it affects the legal profession has been the concern of the CCBE regarding the extent to which the provisions of the Directive have enabled Member States to extend the obligations of the Directive including to criminal activities not necessarily associated with the proceeds of crime derived from organised crime or terrorism. The CCBE would wish to discuss with the Commission the many issues arising from the scope of the Directive.

## 3. Mandatory reporting based on “Suspicion”

The CCBE has considered the effect of the obligation under Article 22 1 (a) of lawyers to inform the FIU where the lawyer **“knows, suspects or has reasonable grounds to suspect”** that a money laundering or terrorist offence is being or has been committed or attempted.

The CCBE does not accept that a lawyer should ever be placed in a position where he should be under a mandatory obligation based on mere suspicion, still less that he could be subject to criminal sanction for failing to do so. It is worth noting that in many jurisdictions “suspicion” is considered to be a low threshold.

Should the position in this regard remain unchanged, the CCBE, the Bars and Law Societies and practitioners, would be left in the uncomfortable position, that they must consider the circumstances or conditions under which a “suspicion” may be the basis for a report.

It is assumed that it is not in the interests of FIUs that STRs should be filed which are of little qualitative value in the context of a criminal investigation.

<sup>1</sup> For the purpose of this report, the CCBE has preferred to use the word “lawyer” rather than “independent legal professional” other than where a suggested amendment to the Directive is made. The CCBE is aware that the expression “independent legal professional” is unsatisfactory and may require further consideration. Neither has the CCBE attempted to consider the position of other non-financial professionals.

Furthermore difficulties of interpretation can arise in the course of making a distinction between circumstances where a lawyer “suspects” that a money laundering offence or terrorist offence is being or has been committed or attempted and where a lawyer might be deemed to have or have not “reasonable grounds to suspect such offences.

In the first instance the test (the subjective test) would appear to be based on grounds, which are minimal and not necessarily reasonable, whereas under the second test (the objective test) the grounds for reasonableness can be either rebutted or affirmed on evidence in the event of proceedings being brought against the lawyer. The combination of both tests in the Directive is confusing.

The CCBE therefore believes that the test based on reasonable grounds to suspect, should be deleted provided that the test of suspicion is defined by reference to facts that are in existence and not merely based on conjecture. The advantage of this approach would at least establish a uniform understanding at the European level. The CCBE proposes that this be covered in the Recitals to the Directive.

#### **4. Exemptions from mandatory reporting**

The CCBE has considered at some length the provision at Article 23 2. which exempts a lawyer from making an STR in circumstances where the information he receives from a client or one of his clients:

- in the course of “ascertaining” the legal position of his client;
- performing the task of defending or representing the client in legal proceedings.

Whilst the second set of circumstances (legal proceedings) do not present any difficulty, the first set of circumstances has given rise to considerable doubt in some jurisdictions as to its meaning and practical application.<sup>2</sup> For example, in the United Kingdom and in Ireland these difficulties do not arise due to the provision in the implementing legislation by the application of the long established principles relating to legal privilege. However, in the Netherlands, for example, these difficulties do arise as the Dutch legislator has limited the notion of “ascertaining the legal position” of a client only to the very first meeting with that client. All legal advice after this first meeting is not exempt, which clearly is not in compliance with recital 22 of the Directive.”

It has been assumed of course that the wording is intended to reflect the statements in recital 20 to the Directive where, after stating that there must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position of a client, the recital goes on to state:

*“Thus, legal advice shall remain subject to the obligation of professional secrecy and then describes the conditions under which this would not apply.*

As a consequence it has been further assumed where a lawyer receives information during the course of providing legal advice concerning the transaction or in regard to the legal position of the client in regard to the transaction, the lawyer will not be under an obligation to make an STR.

It would seem logical therefore that specific reference should be made to legal advice in the operative provisions of the Directive rather than relying upon the expression “ascertaining the legal position” which in a number of jurisdictions is considered to be obscure.

A further issue, which the CCBE considered, is the variations at a European level regarding the rules relating to the non-disclosure of confidential information concerning the affairs of clients.

Thus a lawyer would not be obliged to make an STR where he receives information arising from communications passing between the lawyer and his client, which are subject to legal *privilege*.

Is there any reason therefore that the same principle could not be followed in other jurisdictions where the issue of legal advice is covered by the civil law concept of professional secrecy or such other legal codes of confidentiality?

FATF's Interpretive Note to Recommendation 23 seems to be more consistent in this matter saying that lawyers *“are not required to report suspicious transactions if the relevant information was obtained*

---

<sup>2</sup> One needs look no further than some of the observations in cases coming before the ECJ and national courts.

*in circumstances where they are subject to professional secrecy or legal professional privilege" while further stating that "This would normally cover information lawyers receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings."*

The wording could be something on the following lines:

*"Independent legal professionals shall not be obliged to disclose information which they receive or obtain on one of their clients where such information is subject to professional secrecy or legal professional privilege".*

In this regard it was noted by the CCBE that in France there is no requirement to report if the lawyer withdraws from the case thus ceasing to give legal advice before the conclusion of any transaction.

## **5. Reasonable excuse**

Arising from its consideration of the circumstances where a lawyer is not bound to make an STR, the CCBE has considered whether there might be other exceptional circumstances where it is reasonable that a lawyer should be excused from making an STR.

Bearing in mind that lawyers provide their services in most instances on a "one to one" basis (unlike for example a financial institution where there would be a degree of anonymity for those who make the reports), there may be circumstances in which a lawyer felt that his personal safety would be put in jeopardy if the client discovered that he had made an STR.

There may indeed be other circumstances where a Court might take the view that there are exceptional and that it would be reasonable to excuse the lawyer - in other words the defence of "reasonable excuse" which the CCBE considers should be included in the Directive. Nor should a defence of reasonable excuse be limited to failure to make an STR, but it could also apply to other obligations such as non-compliance with CDD requirements.

## **6. The relevance of Judicial Proceedings**

A somewhat puzzling feature of the Directive is whether or not transactions, which are the subject of judicial proceedings, including administrative, arbitration or mediation proceedings fall within the activities set out in Article 2(3) (b). At first sight it is difficult to equate the wording of this Article with the list of activities set out in the Article, unless the draughtsman had in mind those circumstances where Court approval may be required in order to give effect to the transaction, as for example in relation to family law proceedings, merger proceedings or real estate transactions requiring land transfer approval. The only express reference to legal proceedings is in the context of the exemptions from reporting at Articles 9.5 and 23 2. and thus by implication it is thought that judicial proceedings might be covered.

The CCBE assumes that judicial, administrative, arbitration and mediation proceedings are excluded from this list of activities.

In this regard, the CCBE also refers to the following paragraph in the ECJ judgment of 26 June 2007 in Case C305/05:

*"34. Moreover, as soon as the lawyer acting in connection with a transaction as referred to in Article 2a(5) of Directive 91/308 is called upon for assistance in defending the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt, by virtue of the second subparagraph of Article 6(3) of the directive, from the obligations laid down in Article 6(1), regardless of whether the information has been received or obtained before, during or after the proceedings. An exemption of that kind safeguards the right of the client to a fair trial."*

## 7. Third Party Reliance

Although Article 14 provides that Member States may permit persons and institutions covered by the Directive to rely on third parties to meet the due diligence requirements of the Directive, unfortunately the practical value of this derogation is severely diminished by the further provision that the “ultimate responsibility” shall remain with the persons seeking to rely on the third party

It is a regular feature of commercial transactions, especially in cross border transactions, that more than one lawyer or firm will represent a common client. In these instances the “lead” firm will have carried out the appropriate due diligence in which event other lawyers acting for the same client may well take the view (and especially their clients!) that to carry out a due diligence exercise all over again is unnecessary duplication. Having said that the lead firm, whilst no doubt happy enough to share the results of its due diligence with the other lawyers, might well be reluctant to accept a legal liability in respect of that information.

The CCBE takes the view that it should also be open to Member States to limit the “ultimate responsibility rule” by specifying conditions to be complied with before the third party due diligence can be relied upon.

The question also arises as to the extent that a lawyer can rely upon third parties who are not lawyers – although Article 14 would appear to permit this, this is not always the way in which it has been interpreted by Member States. FATF’s Interpretive Note to the revised recommendation 17 gives a clear answer to this question stating: *“The term third parties means financial institutions or Designated Non Financial Businesses and Professions that are supervised or monitored and that meet the requirements under Recommendation 17.”*

In order to address some of the problems in relation to reliance, the Law Society of England and Wales has proposed:

- A person who is regulated in his home Member State should in principle be reasonably entitled to rely upon other regulated entities (including of course lawyers) either in his home Member State or other Member States provided such other regulated entities are subject to appropriate risk based CDD procedures, unless there is evidence which rebuts that presumption
- Where reasonable reliance is demonstrated, the other regulated entity being relied upon is responsible for carrying out CDD in accordance with its own laws and procedures and that the person so relying is not liable either for his own failure to carry out CDD or the failings of the other regulated entity.
- The other regulated entity should not be subject to any civil or other legal responsibility to the person relying.
- A reliance certificate (however informal) should list the details of the evidence that has been collected and this should be sufficient for reliance. While the person relying should be entitled to seek copies of the evidence there should be no legal obligation on them to obtain it.
- If law enforcement agencies want copies of the evidence, they should make the request directly to the other regulated entity.

## 8. Tipping off where a lawyer ceases to act

“Tipping Off” (referred to in the Directive as “Prohibition of disclosure”) raises issues, which go to the heart of the lawyer/client relationship. Article 28 of the Directive provides that the disclosure is prohibited in two instances, namely:

- the fact that information has been transmitted, or
- that a money laundering or terrorist financing investigation is being or may be carried out.

To what extent therefore is the principle compromised that a lawyer should always be entitled to challenge his client should he suspect that a criminal offence has occurred or may occur during the course of a transaction and prior to its completion, bearing in mind that under Article 22 there is an

obligation to make an STR “promptly” once there is a suspicion that money laundering or terrorist financing “is being or has been committed or attempted”.

This principle would be regarded as an essential feature of the lawyer’s independent role in the administration of justice, in the first instance to ensure that a criminal offence does not take place and secondly to ensure that the lawyer does not become involved in the crime.

The exercise of this right to challenge the client can have the following consequences:

- That the client is deterred from his intended course of action in which case the obligation to make an STR does not arise;
- That the client can produce evidence which allays the lawyer’s suspicions, in which case the obligation to make an STR does not arise, or
- If neither of the above is satisfied, then the lawyer has no alternative but to make an STR and cease acting for the client.

The question, which concerned the CCBE, is the extent to which the foregoing principle is in conflict with the provisions of the Directive in regard to:

- a) Article 22 and the obligation to report “promptly”;
- b) Article 28 and the prohibition on disclosure.

Furthermore to what extent does Article 28 6 resolve any of the issues referred to above? This Article provides that a lawyer who seeks to dissuade a client from engaging in illegal activity, this will not constitute a disclosure within the meaning of paragraph 1 of Article 28.

- a) As regards Article 22. Insofar as this Article requires lawyers to promptly inform the authorities, we assume (but seek clarification) that a lawyer will not be under an obligation to report until he has taken such steps as are necessary in order to establish whether there are facts which would give rise to a suspicion requiring the making of an STR or to advise his client not to commit a criminal offence. The wording of the Article is such that a lawyer might be excluded from doing so.
- b) As regards Article 28, do the steps described above amount to “Tipping off” to the extent that the lawyer would be obliged to disclose to his client the basis for his suspicions, which if not answered satisfactorily could lead to the lawyer making an STR?

There is an argument that Article 28 6 might be of assistance to the lawyer in these circumstances but unfortunately it is oddly worded. In the first instance the circumstances in which the lawyer seeks to dissuade his client are linked to a “disclosure” within the meaning of paragraph 1. But paragraph 1 as a whole refers to making a disclosure after an STR has been made or that a money laundering or terrorist financing investigation is being or may be carried out.

Presumably this was not the intention, as otherwise Article 28 6 makes no sense.

It is noted, however, that under Article 7 (c) a lawyer is obliged to apply CDD (inter alia):

*“When there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold”*

This wording appears to envisage the circumstances or occasions which “trigger” the obligation to apply CDD and may even do so where a business relationship, as defined in Article 3 (8) has not been established.

Does the Commission agree that a lawyer is entitled to challenge the client (or more likely the potential client) in these circumstances and subsequently in the event that a suspicion arises after the business relationship has been established?

The CCBE has therefore come to the conclusion that the Directive should reflect the principles above by providing clarification that:

1. A lawyer shall be entitled to defer the making of an STR under Article 22 to enable him to dissuade the client from engaging in an illegal activity or to obtain further information from his client as to whether or not there are in fact grounds for his suspicion:

**Conseil des barreaux européens – Council of Bars and Law Societies of Europe**

*association internationale sans but lucratif*

Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

22.06.2012

2. That in either event such steps shall not be deemed to be in breach of the prohibition on disclosure: and
3. That in the event of the lawyer ceasing to act after making an STR in accordance with professional ethics, which alone will not be deemed to be a breach of the prohibition on disclosure.