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Directive 2005/60/EC and Its Application to French 'Avocats'

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The French government has decided to go ahead and implement into domestic law directive 2005/60/EC, dated 26 October 2005 (the 'Third EU Money Laundering Directive').

In the meantime, the deadline for implementation (15 December 2007) has passed. Therefore, the Third EU Money Laundering Directive has direct effect in France.

The Ordre des Avocats de Paris (amongst others) is campaigning to ensure that the transposing legislation preserves client confidentiality. Writing in the Bulletin du Barreau de Paris dated 29 January 2008, Christian Charrière-Bournazel, Bâtonnier de l'Ordre des Avocats de Paris, cited with approval, decision number 10/2008 of the constitutional court of Belgium (dated 23 January 2008). This decision concerns the legislation which transposed directive 2001/97/EC (also known as the Second EU Money Laundering Directive) into Belgian law. The decision examines two concepts which are key to the transposition of the Third EU Money Laundering Directive: the filter provided by the bâtonnier and the prohibition on tipping-off. This article examines those issues.

The Filter Provided by the Bâtonnier

Article 23(1) of the Third EU Money Laundering Directive provides that 'member states may, in the case of the persons referred to in art 2(1)(3)(a) [auditors, external accountants and tax advisors] and (b) [notaries and other independent legal professionals], designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the first instance instead of the FIU [financial intelligence unit—in France, TRACFIN]'.

> The Third EU Money Laundering Directive has had direct effect in France since 15 December 2007. But the representative bodies of the French 'avocats' are fighting for amendments to the transposing legislation.

This designated self-regulatory body [in France, the 'bâtonnier' who sits at the head of the bar to which the relevant

lawyer belongs] must forward the information to the FIU 'promptly and unfiltered'.

For the Belgian constitutional court, the control of the bâtonnier is a key element in the protection of client confidentiality. It is the bâtonnier who decides whether or not to forward the declaration of suspicion and not the lawyer.

There is ambiguity in the wording of art 23. What is the point of a self-regulatory body being inserted into the chain if that self-regulatory body is not intended to exercise some degree of control? A self-regulatory body which exercises no control would only create extra bureaucracy and delay. The transposing legislation should address this ambiguity.

The Prohibition on Tipping-Off

Article 28(1) of the Third EU Money Laundering Directive stipulates that the 'institutions and persons covered by this Directive' may not disclose 'to the customer concerned or to other third persons the fact that information has been transmitted in accordance with arts 22 and 23 or that a money laundering or terrorist financing investigation is being or may be carried out'. This is the prohibition on tipping-off.

Article 28(6) specifies that where the 'persons referred to in art 2(1)(3)(a) and (b) seek to dissuade a client from engaging in illegal activity, this shall not constitute a disclosure'.

So dissuasion is permitted. But what happens if a legal representative seeks to dissuade a client from engaging in illegal activity and fails?

The constitutional court of Belgium held that a prohibition on tipping-off was not a disproportionate measure. If a lawyer tries to dissuade a client and fails, he must make a declaration of suspicion and terminate the relationship. As there is no longer any relationship between the lawyer and his client, there is also no need for the lawyer to tip the client off about the declaration of suspicion.

This must be the correct result. A lawyer who continued to act in these circumstances might be liable under criminal law as an accomplice. However, if he terminates the client relationship on suspicion of money-laundering, he should be protected from all the consequences, whether under the rules of professional conduct, in contract or otherwise. This is a valid area of concern given the fact that in one case (*Vaglietti v Barclays Bank plc* dated April 9, 2004) the Paris court of appeal (taking a very restrictive view of art L 562-8 of the Code monétaire et financier) held Barclays liable for damages after it ceased to act on a transaction.

It is to be hoped that the transposing legislation will ensure that protection is available for legal representatives who terminate client relationships in these circumstances.

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