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GENERAL CONSIDERATIONS ON MONEY LAUNDERING

Theoretical article

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Abstract

Lawyers are not immune to committing offences and the provisions of criminal law apply to them accordingly. The criminal liability of lawyers represents a natural aspect in the rule of law. Lawyers involved as defendants in criminal cases do not benefit from any special status or privileges compared to other defendants. In the international context of the fight against money laundering, the community law has submitted the profession of lawyer to two obligations concerning vigilance and denouncement. The assimilation of lawyer's profession to financial or non-regulated professions entails the deformation of rules and principles specific to lawyers, as well as discussing the bases of any democratic society: the professional secrecy of lawyers and their independence.

After being tried by the Court of Justice of the European Union and several national courts, including the Constitutional Court of Belgium and the Conseil d'Etat in France, the compatibility of so-called "anti money laundering" directives with fundamental rights has been through the review of its implementation in France, a new appreciation, also positive, with reservations of interpretation is given by the judgment rendered by the European Court of Human Rights in Grand Chamber hereafter annotated. This judgment checks Article 8 of the European Convention on Human Rights, and not Article 6 (the Conseil d'État refused to ask a question to the Court justice), it has a particular interest not only for the substantive issues which were judged but also by the fact that in this case it relies on the non-rebuttable nature of the presumption of conformity of the secondary legislation of the European Union with the standards of the European Convention on Human Rights, derived from the case-law called "Bosphorus" of the Strasbourg Court (European Court of Human Rights, 30 June 2005, Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, no. 45036/96). Referring to this decision, the French Government posited that France had observed the demands imposed by the Convention, for it had transposed the European directives concerning the money laundering phenomenon. Lawyers' obligation of declaring any money laundering suspicions concerning their clients does not affect disproportionately the professional secrecy. In the litigation Michaud v. France, The European Court of Human Rights (ECHR) declared that Article 8 of the convention (on the observation of private life) had not been violated. The file in question refers to lawyers' obligation of declaring any suspicions concerning potential illicit activities conducted by their clients, within the fight against money laundering. The plaintiff posited that the obligation resulted from the transposing of European directives into the French law would be in conflict with Article 8 of the Convention, which protects the confidentiality of the relationship between a lawyer and his/her client. ECHR determined that the principle of equivalent protection was out of discussion, and it underlined the importance of the relationship between a lawyer and his/her client, based on confidentiality and on the preservation of professional secrecy. At the same time, the European Court decided that the obligation of reporting any suspicion has the legitimate purpose of preventing illegal actions, with the purpose of fighting against all types of money laundering and other similar activities. Additionally, the Court appreciated that the lawyer's obligation of reporting suspicions – as stipulated in the French law – does not interfere disproportionately with the preservation of professional secrecy, considering that the second obligation is not limited when the lawyer defends his/her client. Furthermore, the law introduces a filter through which the lawyer will not communicate his/her suspicions directly to the administration, but only to his/her Bar. The Michaud Decision consolidates the true value of professional secrecy of lawyers, as well as its fundamental necessity (Compernolle, J., 2013). The first European Directive is dated 10 June 1991 and it states the obligation of vigilance from the part of financial institutions and of insurance companies regarding the identification of clients and the preservation of data for at least five years after the end of contractual relations. It also mentions the obligation of informing on all facts susceptible of being considered capital laundering offences. Through the Directive of 4 December 2001, lawyers were also included within the scope of the first aforementioned Directive. Therefore, the Directive of 4 December 2001 features a genetic aberration, because it fails to consider the regulation of lawyer's profession and it mistakes the status of lawyers with that of other non-regulated professions or of professions with a very different status. In this context, European Bars opposed to the Directive of 4 December 2001 through a petition sent to the European Parliament. Despite all efforts, a new Directive was issued on 26 October 2005, which consolidated the obligations stipulated in the preceding directives: the Bar has the obligation of transmitting the statements received from lawyers to competent authorities; lawyers must fulfil the particular regarding the identification of clients and of their beneficiaries; investigations must be made available to authorities for five years; there is no more possibility of informing the client on the matter. The European lawyer is now in the middle of a conflict of interests between his/her client and the State. In practice, when a lawyer assists a client, he/she must do so by observing the rule of law. If the lawyer offers consultancy for money laundering activities, he/she no longer acts in his/her capacity as a lawyer, but as a delinquent. Through the nature of the profession, lawyers have the obligation of being vigilant, because they should not be misled into committing an offence without being aware of it. This vigilance obligation is intrinsic to the obligations of the lawyer, reason for which there was no need for a European Directive in this sense. In his/her fight against money laundering, a lawyer must be vigilant and he/she must refuse to partake in suspicious operations. When a lawyer represents a client in his/her capacity of proxy, he/she acts as a banker; hence, he/she does not have the possibility of opposing to the execution of an operation. At the same time, he/she does not have the information obligation regulated by the European Directive. In this context, he/she does not advise, but only represents (Vatier, B., 2007). In

France, the European Directive 2001/97/EC of 4 December 2001 on prevention of the use of the financial system for the purpose of money laundering was transposed into the French law through the Law of 11 February 2004 and through the Decree of 26 June 2006. The European Directive 2005/60/EC – adopted on 26 October 2005 – states (just like the preceding one) that it applies only to certain activities susceptible of being accomplished by lawyers. The vigilance obligation conceived as an obligation of assessing the identity of his/her client is almost anodyne because it is a sine qua non condition of the lawyer's observance of the rules within the conflict of interests (Wickers, T., 2007). The double obligation – of being vigilant and of declaring any suspicion of money laundering – was introduced for lawyers in the French law through Ordinance 104 of 30 January 2009, which modified the Fiscal code according to Directive 2005/60/EC. Lawyers communicate their suspicions concerning the commission of an offence first to the dean of their Bar. The dean determines whether the information should be transmitted to competent bodies for investigating money laundering (Michaud, P., 2013). The money laundering offence is mentioned in the French Penal code under the Article 324-1; it is considered a complex offence that involves the previous existence of a felony or of another act criminalized by the penal law. Moreover, this offence must not be imputed to the author of the original offence (Larguier, J. et al., 2013). On 4 May 2011, the French penal court sentenced a lawyer for aggravated money laundering because he made use of his profession to the end of accessing certain amounts of money blocked by the investigating judge (Cutajar, C., 2011).

In Romania, according to Law no. 656/2002 on the prevention and sanctioning of money laundering, as well as for setting up measures for preventing and combating terrorism financing (published in The Official Gazette, Part I no. 904 of 12 December 2002), money laundering is defined as follows.: " a) the conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of property or of assisting any person who is involved in the committing of such activity to evade the prosecution, trial and punishment execution; b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity; c) the acquisition, possession or use of property, knowing, that such property is derived from any criminal activity" (Toader, T., 2014). This law was modified successively by the following legislative documents: Law no. 39/2003; Law no. 230/2005; Emergency Government Ordinance no. 135/2005 approved by Law no. 36/2006; Law no. 405/2006; Law no. 306/2007; Emergency Government Ordinance no. 53/2008; Law no. 330/2009; Emergency Government Ordinance no. 26/2010. Furthermore, it was completed by the provisions of the Criminal Procedure Code and of the Penal Code, as well as by provisions of other special laws in the field of organized crime and corruption. Law no. 656/ 7 December 2002 on the prevention and sanctioning of money laundering, as well as for setting up measures for preventing and combating terrorism financing transposed into the Romanian legislation the provisions of Directive 2005/60/EC of the European Parliament and of the Council published in the Official Journal of the European Union, series L, no. 309 of 25 Nov. 2005, and Art. 2 of Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis. Art. 5 of the above-cited Law states that lawyers and other persons who exercise liberal professions have no obligation to report to the Office the information they receive or obtain from one of their customers during the process of determining the customer's legal status or during its defending or representation in certain legal procedures or in connection with therewith, including while providing consultancy with respect to the initiation of certain legal procedures, according to the law, regardless of whether such information has been received or obtained before, during, or after the closure of the procedures. In the case of such persons, the reports are forwarded to the persons designated by the leading structures of the independent legal profession, which have the obligation to transmit them to the Office within three days from reception, at most. The attempt of convincing a client not to conduct an illegal activity or business does not constitute a violation of the obligations that persons mentioned under Art. 10**, letter** f) must observe. Using the received information in personal interest by the employees of the Office and by persons referred to under Art. 10 f) is forbidden. In the fight for reforming the justice system, lawyers remained unprotected and exposed to criminal risks. The New Penal Code brought a series of substantial modifications to the lawyers' role during the criminal prosecution phase, but it also makes them vulnerable, through ambiguous provisions. The definition of lawyer-client privilege concept is limited by the application of special provisions special, for instance Article 139 of the new Code of Criminal Procedure, according to which technical surveillance is possible for money laundering,

money laundering: The relationship between a counsel and a person assisted or represented by them may be subject to electronic surveillance only when there is information that the counsel perpetrates or prepares the commission of any of the offenses listed under paragraph (2). If during or after the performance of such measure it results that the activities of electronic surveillance also targeted the relations between the counsel and the suspect or defendant defended by the former, the evidence obtained this way may not be used in a criminal proceeding, and shall be destroyed forthwith by the prosecutor. The impediment is represented by the activity or legal character of lawyers' activity, because a lawyer can easily become a suspect in the sense of the same Penal Code.

In Belgium, the European Directive on preventing money laundering was implemented by introducing relevant provisions in the Belgian law on money laundering and fighting terrorism (11 January 1993). To the extent that they expressly provide for it, the provisions of this law are also applicable to lawyers when they assist their client in the planning or execution of transactions concerning the following: buying and selling of real property or business entities; managing of client money, securities or other assets; opening or management of bank, savings or securities accounts; organization of contributions necessary for the creation, operation or management of companies; creation, operation or management of trusts, companies or similar structures; or when they act on behalf of and for their client in any financial or real estate transaction. In all of these situations, upon learning of suspect transactions, lawyers are obliged to immediately inform the Financial Intelligence Processing Unit (Cellule de traitement des informations financières – CTIF), the administrative body that deals with the processing and transmission of information for fighting money laundering. The specific obligations of reporting to the CTIF following the restrictive measures imposed by the EU regulations based on Article 215 of the TFEU and the decisions adopted within the common foreign and security policy are fully applied. In order to protect professional secrecy, lawyers do not transmit reports directly to the FIU, but to the Chairman of the Bar of which the lawyer is a member, who acts as a "filter" which protects professional privilege of the lawyer (Decision Michaud vs. France no. 12323/11, 6 December 2012). For lawyers members of a local Bar based in Flanders, the Flemish Bars Council published guidelines to observe when lawyers deal with suspect financial transactions while exercising their profession. Without prejudice to the powers of the judicial authorities, CTIF-CFI is responsible for receiving and analysing the information reported. CTIF-CFI may request, not only from the institutions and individuals specified by the law, but also from the President of the bar association, the police services, the administrative services of the State, the trustees in and temporary administrators of a bankruptcy and the judicial authorities, any additional information it deems useful for accomplishing its mission, within the time period it determines. CTIF-CFI also has access to the National Register of Natural Persons. In addition, it may carry out on-site visits to consult documents that belong to the institutions or individuals specified by the law or that are in their possession, and that are useful for accomplishing its legal assignment. CTIF-CFI may request information from the institutions and individuals or to consult the documents on-site. Based on the information received and analyzed, CTIF will forward information to the Public Prosecutor's Office concerning the so-called high-risk files, for prosecution
(http://www.ctifcfi.be/website/index.php?lang=en).
The prosecutor may choose one of the following options: to commence criminal prosecution, to order an additional investigation or not to commence criminal prosecution. The main guidelines concerning criminal prosecution policies (including for money laundering) nationwide are provided by the Board of Prosecutors General of Belgium ("*College van Procureurs – Generaal van België – Collège des Procureurs généraux de Belgique*"), but they are not usually made public. Therefore, it is impossible to make observations on the matter. I do mention that each local prosecutor benefits from a high level of autonomy when it comes to commencing criminal prosecution (against lawyers) for money laundering. Considering that Belgium has eleven local Prosecutor's Offices that apply differently the criminal prosecution for money laundering and that the legal justice system of Belgium does not have a tradition of communicating the way in which cases are pursued, it is practically impossible to assess the criminal prosecution practice against lawyers, for charges of money laundering. Concerning the fees paid to lawyers, especially for defence in criminal cases, they are also included within the aforementioned provisions related to combating money laundering. In Belgium, the alleged victim of an offence may formulate a specific type of complaint ("*klacht met burgerlijke partijstelling*" or "*plainte avec constitution de partie civile*"). This type of complaint forces the criminal prosecution authorities to open a criminal investigation against the suspect (even though, in the opinion of authorities, the victim's complaint is obviously without grounds). There have been reports of cases where parties within civil cases abuse this system to access to accounting information of opposing parties, in order to delay the outcome of a civil cause, etc. The Belgian legislator should wonder whether and to what extent such a system should be

maintained. Furthermore, for practical reasons, lawyers should have the possibility of getting a copy of the criminal file during the criminal investigation (see chapter 1: currently, lawyers may only *consult* the criminal file during a criminal investigation, but they may not have a *copy* of it; lawyers have the right of obtaining copies only after setting a date for the trial). More generally, the Belgian Code of Criminal Procedure ("*Wetboek van Strafvordering*" or "*Code d'instruction criminelle*") dates since 1808 and it is practically outdated, considering the need of a modern criminal justice policy in 2014. The hundreds of amendments brought Code of Criminal Procedure in the last two centuries have turned it into a very unpractical code, prone to numerous procedural errors. A new Code of Criminal Procedure, suitable for the 20th century, is of outmost necessity. The new Belgian government (in function since October 2014) announced the intention of reconsidering criminal procedure in Belgium.

In Germany, the EU Directive on money laundering was transposed by the German the Money Laundering Act (GwG) and by criminalizing the offence of money laundering under Article 261 of the Criminal Code. The Money Laundering Act has been applicable since 15 August 2002 to lawyers, too, insofar as they are involved in the following operations: buying and selling real estate and business enterprises; administration of money, securities, stocks and shares or other assets; founding, running or administrating business enterprises; founding, running or administrating trust companies, companies or similar structures; conducting financial or real state transactions in the name of an account for a client. According to Section 2 paragraph 1 of the Money Laundering Act, the lawyer is obliged to identify his/her contractual partner only when concluding the contract. Irrespective of any contractual relation, upon receiving money, securities, stocks and shares amounting to more than € 15,000, identification becomes necessary since the preparation stage. Section 6 of the anti-money laundering law regulates an additional obligation of identification in suspicious cases. Certain clues that appear repeatedly concerning a person (e.g., the client provides incorrect information or he/she refuses to provide the information necessary for service provision) or the nature of the operation (e.g., the client's company seems to be a ghost company) justifies the lawyer's obligation of reporting the contractual partner to the Federal Bar, according to Section 11 the Money Laundering Act. The obligations provided by the Money Laundering Act are doubled by Article 261 of the Penal Code (see above). Concerning the compatibility between legal provisions and professional secrecy, it was concluded that, on principle, professional secrecy has a general character and that it applies to all information transmitted within the mandate report. For solving the issue, it was necessary to exempt from the reporting obligation the fundamental aspects of a lawyer's activity, such as trial management, defence measures, etc. Furthermore, in practice, there is a reduced risk of such cases, because a lawyer who assists a client for committing an offence is always found guilty as accessory. If such a case should get to the Constitutional Court, and if the client should have to deal frequently with violations of professional secrecy, one cannot exclude the possibility of confirming the existence of such a case. Indeed, there are very few such cases, but they are notorious, such as European Kings Club. In this case, the lawyer received a fee that represented a percentage of "infected" money. For this reason, it is impossible to call this a practice or a "current exercise". However, such cases are handled the same way as against "regular defendants".

In Ireland, the Directive in regards to combating money laundering was fully implemented in jurisdiction. It represents a heavy burden for the profession, in terms of both conformity costs and danger for client-lawyer privilege. There are no special provisions for lawyers, which may exceptionally allow their incrimination or derogation. Lawyers are criminally prosecuted, sentenced and sent to prison for violating professional privilege, following offences such as taking clients' money or forging documents to obtain certain benefits.

In Hungary, *the EU Directive on prevention of the use of the financial system for the purpose of money laundering* was transposed in the national legislation through Law CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing. In conformity with the provisions of the Law on combating of money laundering, the lawyer is not allowed to waive his/her privilege when fulfilling the obligations stated in the abovementioned Law, which contains a lawful exception concerning the obligation of observing professional secrecy. The obligation of informing authorities on any data or information suggesting money laundering and terrorist acts financing applies to lawyers who hold any money or valuables in custody or provide legal services in connection with the preparation and execution of the following transactions: buying or selling any participation (share) in a business association or other economic operator; founding, operating or dissolving a business association (Moneyval, 2010). In Hungary, such notifications are recorded only 2-3 times/year, but they all turn out to be without grounds. In certain situations, the fee accepted by a lawyer for defending a person accused of illegal activities may be subject to the legislation concerning money laundering, but this is

not a rule. If a lawyer accepts to receive an amount in cash in custody, of which he knows it was obtained by committing an offence, then this lawyer will be charged with money laundering based on the criminal legislation in effect.

The Czech Republic implemented the Directive on money laundering through Law no. 253/2008 Rec., on selected measures against legitimisation of proceeds of crime and financing of terrorism, in the version of subsequent provisions (http://www.coe.int/t/dghl/monitoring/moneyval/National_legislation/CZE_AMLCFT2008.pdf). Concerning lawyer-client privilege in relation to legal assistance, the lawful obligations of lawyers do not fully coincide with lawyers' professional secrecy. According to Article 2 of this law, the lawyer only has obligations in relation to the managing of client assets, such as money, securities, business shares, or any other assets, including representation of the client or acting on their account. Any suspicious transaction report shall be made by a lawyer to the Czech Bar, which forwards the information toward competent State bodies, after an assessment by control bodies. This regulation fully observes lawyer's privilege. Since the law came into force, only four lawyers were charged with legalizing incomes representing criminal property. However, thus far, no final decision was pronounced in any of these cases.

In Luxemburg, the Directive was transposed through the Law of 12 November 2004. According to the jurisprudence of the European Court of Human Rights in Strasbourg, (Decision Michaud vs. France of 06 December 2012) it was considered that the professional secrecy of lawyers is not violated, insofar as the identification requirement meets the legal provisions (http://www.legilux.public.lu/leg/a/archives/2004/0183/2004A27661.html). Thus far, only one lawyer was criminally convicted for money laundering.

In Portugal, Law no. 25/2008 of 5 June 2008 applied nationwide the directives discussed, including requirements concerning programs of preventive measures, including by law firms (http://www.bportugal.pt/en-US/Supervisao/SupervisaoPrudencial/BranqueamentoCapitaisFinanciamentoTerrorismo/Documents/Law25_2008_EN.pdf). The Portuguese legal framework is comprehensive and exhaustive in terms of regulating lawyers' activities, especially through the horizontal rules within the Penal Code and the specific rules applicable to the profession, consecrated in the Portuguese Bar Association's Statute.

Unlike other countries, Poland applied without delay all the provisions of directives on combating money laundering, which generated many controversies among Polish lawyers, for instance regarding the broad definition of a "suspicious transaction". Though the rules stated in the law may generate certain concerns regarding the possible violation of legal professional privilege rule, it appears that such concerns may be related to the less probable cases where lawyers, for instance, act as financial institutions (i.e. they operate the transactions personally). Furthermore, even though lawyers, legal advisers and foreign lawyers have the obligation of registering transactions when they provide legal assistance only in the cases mentioned under letters a) – e), the rule established under Article 11 of the law protects professional secrecy by excluding these professional categories (except for legal auditors and legal consultants) from the obligation of reporting to the General Inspector. Directive 2005/60/EC of 26 October 2005 was applied through the Law of 16 November 2000 on counteracting money laundering and terrorism financing (http://www.bankersacademy.com/resources/free-tutorials/344-aml-poland). In addition, the implementation introduced several modifications of the Law of Polish Bar Association. The general rule on legal professional privilege (Article 6 the Law of Polish Bar Association) added an exception, which states that this rule does not prejudice the information obligations provided by the law. According to the law, the General Inspector for Financial Information is the authority which obtains, processes and analyzes the information obtained from "obligated institutions". This notion refers to lawyers, legal advisers, notaries, foreign lawyers, expert auditors and active tax advisers. The judgment of the Polish Constitutional Tribunal of 2 July 2007 (Case no K 41/05) found that the provisions under Articles 11, 13a and 16 are in agreement with the constitutional freedoms – such as the protection of freedom and protection of secrecy of correspondence – insofar as the application of these provisions does not concern situations when the "obligated institutions" providing legal assistance determine the legal situation of a client or they provide other services related to a legal procedure.

The issue here is determining whether the exemption from denouncement obligation concerns only defence and legal assistance or legal consultancy in all jurisdictional procedures to the same extent. Actually, the terms used in the directives are prone to interpretation, such as paragraph 27 within the decision of the Justice Court (26 June 2007). The traditional mission of the lawyer has a trichotomic valence: advising, defending and representing a client in an adequate manner. Therefore, the said client would be deprived of his/her rights ensured under Article 6 of ECHR if the lawyer – during a legal procedure or while preparing it – were forced to co-operate with public authorities, by communicating them information obtained during legal consultations

provided within said procedures. The Romanian criminal legislation needs improving, in order to protect the honest professionals, by regulating far more clearly the concepts of good faith and the connection with the activity of advising, defending and representing, and in order to protect the client from the unveiling of classified information by the lawyer. The conclusion is that the regulations and the statute of the profession must include proper protection mechanisms for lawyers, for preventing a violation of the right to a fair trial. It should also be taken into account that there are narrow limits of interpreting the ECHR and ECJ jurisprudence, which restrict significantly the leeway of public authorities.

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