



The Law Society

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

Comments by the Law Society of England and Wales
February 2007

Introduction

The Law Society of England and Wales (Law Society), representing approximately 122,000 solicitors in England and Wales, makes the following comments on the Commission report on the impact of the 2nd money laundering directive on the legal profession.

The Law Society has viewed the response by the Council of Bars and Law Societies of Europe (CCBE) to the Commission report and broadly supports their response. However, there are a few issues which are particular to the UK experience which the Law Society wishes to address separately.

The Second Money Laundering Directive

The 2nd money laundering directive extended to the legal profession the obligations of conducting client due diligence measures and the reporting of suspicious transactions to the UK's FIU (formerly located in the National Crime Investigation Service, and now a part of the Serious Organised Crime Agency). This extension infringes upon the relationship of trust and confidentiality which has always existed between lawyers and their clients. This relationship of trust is considered essential to allow people to gain access to the law and to legal advice on their position under the law. Any infringement of that relationship has the potential to limit a client's willingness either to seek legal advice or to fully disclose their position which then limits the ability of the lawyer to provide full legal advice.

The obligations under the 2nd money laundering directive were imposed without the provision of any evidence to suggest that lawyers were unwittingly being used for money laundering purposes by criminals or that this was occurring in sufficiently

large numbers to warrant such a significant imposition on the lawyer-client relationship through mandated reporting, on the basis of a mere suspicion.

The Law Society has accepted that lawyers have some role to play in anti-money laundering measures and can properly be expected to report suspicious transactions, in certain circumstances. However it is essential that any such obligation is qualified in a way which fully protects the scope of legal professional privilege.

The 2nd money laundering directive provided that within three years of the directive entering into force, the Commission was to conduct an examination regarding the impact of the implementation of the directive on lawyers and other independent legal professionals.

In February 2005, at the instigation of the UK delegation, 44 European Bar leaders and representatives of 7 international legal bodies signed a statement expressing concern about the rush to adopt the 3rd money laundering directive, without having conducted the required examination.

As such the Law Society welcomes the review of the impact of the 2nd money laundering directive on the legal profession by the Commission.

The Report

Without prejudice to the above position, the Law Society makes the following observations about the report:

1. At paragraph 15(iii) the Commission notes that obtaining information on beneficial owners (in particular trusts) is not always easy, unless the client cooperates, and publicly available information exists. It appears to the Law Society that the Commission has not fully understood the problem in relation to beneficial ownership and trusts under UK law. There is a fundamental conceptual difficulty in conducting the client due diligence, because in many cases it is not possible to identify anyone as a "beneficial owner" of a trust.

Despite these observations, the 3rd money laundering directive requires even more detailed and extensive identification checks to be conducted on beneficial owners in trust situations. The Law Society has recently outlined its serious concerns about the definition of beneficial interest to the UK government and a copy of that letter is *enclosed* for you information.

2. At paragraph 16 the Commission outlines a number of practical examples of the difficulties in conducting client identity checks across national borders. At paragraph 17 the report concludes that the legal profession sees these difficulties as a waste of energy and goodwill. The report suggests that this may lead to a focus on formalistic procedures or a refusal of service, rather than to taking important steps to forestall criminal access to the financial system.

Legal practitioners in the UK often conduct business in an international context and the practical difficulties arising out of cross border identification issues brought about by differing national implementation or the rigidity of the directive requirements are a real source of frustration and extra expense to those practitioners. The focus on the formalistic procedure and refusal of service if that procedure is not satisfied is actually mandated by the directive and the UK regulations. These are the only options for forestalling criminal access to the financial system provided for by the directive and the UK regulations. No consideration has been given to how often legitimate access to the financial system in countries covered by the directive could be frustrated or denied because of these requirements.

3. With respect to the comments regarding the scope of legal professional privilege (at paragraphs 20 and 40) any suggestion that such privilege is or should be limited to litigation only is of great concern. Legal professional privilege has been enshrined in UK law for hundreds of years and is fundamental to the fair and proper conduct of our system of law. Where a directive prohibits certain conduct (such as money laundering) and Member States set significant penalties for such conduct (in the UK money laundering is punishable by up to 20 years imprisonment) the right of people to obtain confidential legal advice on whether they may have become involved in money laundering and what the consequences are, is imperative.
4. Further, in paragraphs 40 and 41, the Commission suggests that the low number of reports may be as a result of lawyers expansively interpreting legal professional privilege. It is also noted that following the decision in *Bowman v Fels*, the level of reporting in the UK also diminished. Despite the narrowing of the circumstances in which reports are required to be made in the UK, this country still has a significant number of suspicious activity reports compared to other Member States. The Law Society would caution against this being seen as a sign of greater success of the application of the directive in the UK than in other Member States.

The higher level of reporting may be as a result of greater awareness of obligations brought about by the education campaign undertaken by the Law Society, or it may be as a result of the significant criminal penalties for non-reporting. The success of the directive in the UK and the effect of its application to lawyers, is difficult to establish without a proper evaluation of the impact that the suspicious activity reports are having on money laundering in the UK.

5. On page 27 of the Commission report, it is noted that the Law Society has a dedicated helpline which provides detailed advice on money laundering. The dedicated money laundering helpline is no longer available. However, the Law Society continues to provide guidance to practitioners on money laundering via its ethics helpline and written guidance which is available on the Law society website.

The Way Forward

The Commission makes three recommendations at the conclusion of its report, namely that there should be:

1. improvement in the quality of national legislation implementing the anti-money laundering rules adopted at a European level;
2. increasing outreach and awareness efforts; and
3. exploring whether there are additional tools that can be used in facilitating compliance.

With respect to the first recommendation, the Law Society has taken a strong role in advocating for greater clarity in national legislation on behalf of its members and will continue to do so.

With respect to the second recommendation, the Law Society has already taken significant steps to educate its members on their requirements under money laundering legislation. The Law Society provides:

- detailed on-line written guidance notes to its members, which is the most comprehensive provided to a legal profession,
- assists in organising conferences with the national financial investigation unit to provide information for its members,
- has regular meetings across the UK,
- facilitates an e-forum for money laundering reporting officers, and
- provides a monthly e-newsletter on money laundering issues to around 8,000 subscribers.

The Law Society will continue in its endeavours to ensure that its members have up-to-date information on their obligations under money laundering legislation.

With respect to the final recommendation the Law Society agrees that greater publication of typologies and money laundering methodologies to practitioners and firms covered by the directive would be of assistance to our members.