

“Be careful what you say. Anything you say can and will be used against you”

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Considering the Luxembourg Court's Decision from June 26th, 2007 with regard to the application of the provisions of the Directive no. 91/308/CEE on the preventing of the use of the financial system for the purpose of money laundering, it seems that any lawyer should welcome his or her client with the above message, paraphrasing the famous Miranda Warning (“You have the right to remain silent. Anything you say can and will be used against you in a court of law.”).

A few months ago it was just a rumor that caused anxiety, controversies and debates in the world of the European lawyers, but now it became a certitude – as the Luxembourg Court decided – the lawyers are compelled to disclose any information given by their clients if there are subjective suspicions that the information regard a transaction that has or seems to have a connection with money laundering.

It all started with the second directive regarding the money laundering (Directive 2001/97/CE) which modified the Directive 91/308/CEE, by extending the application of the latter on the independent legal professionals, including the lawyers.

The ambiguous text of the directive with regard to its applicability to the lawyers has created real difficulties with regard to its transposition in the European States' legislation, as a comparative study made in six Member States, published in December 2006 by City of London shows.

In all the European States the ambiguous text of the directive and the difficulties created by the matchlessly transposition in the internal legislations has created some major problems related to the carrying on of the current activity of the members of the independent legal professionals in all these countries.

The danger anticipated by the transposition of the ambiguous text of the directive with regard to the statute of the independent legal professionals in any society, has created an unanimous trend among the independent professionals from all over Europe, the majority's opinion being that, with regard to the lawyers, the directive cannot and should not be applied in the same conditions with other professionals.

All these were materialized in the application submitted by the Belgian Bars with the European Court of Justice from Luxembourg, by which the Bars asked the Court to answer to the following preliminary question – is the right to a fair trial provided by article 6 from the European Convention of Human Rights breached by the comprising of the lawyers in the application sphere of the persons compelled to observe the provisions of the second directive regarding on money laundering?

The Court's decision is clear: “the obligation to report information to the authorities responsible for the prevention of money laundering stipulated in article 6 paragraph 1 from the second directive on money laundering, considering also

the provisions of article 3 paragraph 3, do not breach the right to a fair trial as guaranteed by article 6 of ECHR and by article 6 paragraph 2 from the EU Treaty”.

Despite the fact that the independent legal professionals from all over Europe waited impatiently a clear solution from the Court with regard to the limits of the application of this Directive to the independent professionals, the Decision of the Grand Chamber of the Court from June 26th 2007 is a disappointment from this point of view.

The grounds held by the Court in the quoted decision are nothing else but the directive's provisions, the one that created so many debates and so many problems in practice.

The Court held in the decision that, with regard to the lawyers, the directive outlines two directions for the application of the obligation to report information: (i) the lawyers have this obligation only in the measure that they assist their clients with regard to the transactions that are limitative enumerated by the Directive and (ii) the Member States are not obliged to impose to the lawyers the obligation to report information received from the client in the course of ascertaining the legal position for a client or during the judicial proceedings, inclusively in the case of providing legal advice with regard to the initiating or the avoidance of judicial proceedings, regardless of these information are obtained

before, during or after such a procedure.

Given that the Court itself admitted, through the same decision, that “the second paragraph (from the ones cited above – *our note*) can be subject to more interpretations, so that the precise dimension of the lawyers' obligation to report information is ambiguous”, a clarifying interpretation of these legal texts would have been more than adequate.

Essential questions related to the practicing of the profession remained without an answer: who is entitled to decide where the assessment of the client's legal position starts and where it ends, in order to determine if the lawyer has or hasn't the obligation to report information?, what the “judicial proceedings” means, given that the internal legislations of the member states allow a diversity of alternative procedures for solving a potential litigation (see the case of Italy)? In other words, when does the lawyer have the obligation to report to the competent authorities the information received from the client?

The consequences of maintaining such an ambiguity are not hard to predict. Firstly, a multitude of reports will be filed with the competent authorities with regard to operations subjectively appreciated by the lawyer as having a suspicious nature. Briefly – there are premises that everything the client discloses to the lawyer will be further reported to the authorities with attributions

in the money laundering field.

Knowing these premises, the client himself will be reticent in revealing information to the lawyer, therefore one of the pillars of the relationship lawyer – client, the trust, risks to collapse.

Under these circumstances, we wonder: if the client loses confidence in his confessor, how will the lawyer be able to defend his interests and to fulfill his mission?

In order to illustrate the consequences mentioned above, we will analyze in a few words the Romanian practice regarding the Directive's provisions and the way in which this Directive affects the lawyer – client relationship, but also raises questions with regard to the credibility of the profession.

In Romania, the provisions of the Directive regarding the transactions for which the lawyers have the obligation to report information, and also those regarding the exemption of the lawyers from this obligation in the case of the information received from the client during the ascertaining of the legal position of the client or during the representation of the respective client in or in relation with judicial proceedings were literally taken over in the Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for the institution of measures for the prevention and fighting against the terrorist financing.

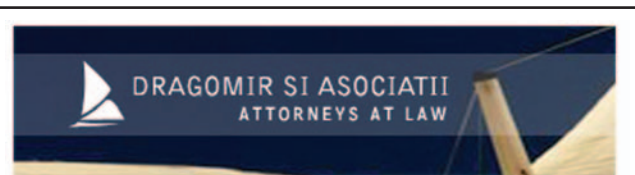
The ambiguity of the text copied from the Directive, the lack of a credible interpretation and the absence of a European coherent practice led to the occurrence of some aberrant situations in the practice, having as a consequence “the harassment of the lawyers”.

A concrete example in this respect is the obligation imposed to the lawyers by the criminal investigation authorities to testify against their own clients with regard to the information that they acknowledged previously to the conclusion of the legal services agreement for the criminal file in which the respective client is a part, even if those information were obtained on the basis of other legal services agreements. The basic principles of exercising the profession – the professional secret, the loyalty towards the client are systematically ignored. This practice, which we appreciate as clearly abusive, leads inevitably to the breach of the client's rights. We wonder rhetorically, what client will reveal open hearted to its own lawyer all the details of a case, when he is fully aware that, in the future, there is a real risk that the lawyer will turn into its denunciator?

Although, normally, such a dangerous practice should be sanctioned, the criminal investigation authorities have immediately embraced the decision of the Luxembourg Court, which, without bringing any clarification with regard to the limit of the lawyer's obligation to report information, is an additional

argument for the above-mentioned criminal investigation authorities to continue their abusive practices. Starting with the day of the judgment's delivery, the Court's decision is constantly invoked by the respective criminal investigation authorities as an argument for such practices. Moreover, the comparative study drafted by City of London mentioned above shows that the practice of the Romanian criminal investigation authorities is not singular, but can also be found in the practice of other countries, such as Greece.

All these entitle us to draw the attention to the problem mentioned above, while we wonder: is the legal profession in danger? Are the pillars that sustain it – trust, confidentiality, equidistance, loyalty towards the client – eroding? Is it necessary to warn the client, before initiating any relation, in the same way as the American policemen warn the crime suspects before arresting them, with a discouraging warning – “Be careful what you say. Anything you say can and will be used against you.”? ■



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