

PECUNIA NON OLET

Short Remarks On The New Italian Provisions Concerning Lawyers On Money Laundering

Italy enacted the Directive 2001/97/EC with the Decreto Legislativo n. 56 of 20 February 2004.

Such Statute extended the Anti Money Laundering duties to lawyers.

Such duties where not specified in detail and, attending to art. 8.4. of the Statute 56/2004, had to be regulated by a statutory instrument to be enacted within the deadline of 10 November 2004.

Attending to art. 8.5. of the Statute 56/2004, the duties towards lawyers were not effective until the entry into force of the above mentioned statutory instrument.

As far as lawyers were concerned the Statute 56/2004 was therefore an empty box.

This sort of legal construction can be regarded as artificial, but to try to avoid the conflict between the duty to inform the Anti Money Laundering authorities, on the one hand, and the duty of confidentiality and the attorney/client privilege, on the other hand, is like to try to square the circle. The breach of confidentiality is indeed a criminal offence in Italian Law punished by art. 380 Criminal Code (unfaithful conduct of the lawyer) and art. 622 Criminal Code (revelation of professional secrets).

In order (to try) to avoid this problem the Statutory Instrument - enacted with Decree of the Ministry of Economy of 3 February 2006 n. 141, in force since 22 April 2006 – stated that the disclosure of privileged informations to the Anti Money Laundering authorities it is not a breach of the professional secret and does not create any responsibility whatsoever of the lawyer (art. 9.3. of the Statutory Instrument 141/2006).

Attending to the hierarchy of the sources of law a statutory instrument cannot make an exception to a statutory rule (the criminal code is of course a statute). Therefore from the point of view of Italian Law the defence provided for by the statutory instrument is not effective, the duty of confidentiality and the attorney/client privilege are still untouched, and, as a consequence, lawyers do not have yet any effective duty to inform the Anti Money Laundering authorities.

It could be argued that the above mentioned defence is provided for in the very same Directive (art. 1.8. which modifies art. 9 of the Directive 91/308/EEC) and therefore the defence is effective. But, as far as I know, a Directive can be directly applied in the national legal system only if it was not enacted at all.

From the legal point of view, in my opinion, is impossible to solve the conflict between confidentiality and attorney client privilege, on the one hand, and duty to inform the authorities, on the other hand.

From a more general point of view such a conflict can be regarded as the expression of the conflict between authoritarianism and libertarianism, always present in every society, even the most democratic.

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