ECBA WORKING GROUP ON ANTI-MONEY LAUNDERING LEGISLATION

Evaluation of Michaud v. France (ECHR)

On 6 December 2012, the European Court of Human Rights reached a verdict in relation to the application of Mr Michaud against the French State. In the meantime, the verdict became final on 6 March 2013.

Mr Michaud is a French national and, more importantly, a lawyer. He attacked provisions of the French Monetary and Financial Code in relation to the obligations imposed on lawyers in the field of money laundering, as well as the judgment of the "Conseil d'Etat" of 10 April 2008.

The main argument of Mr Michaud related to the violation of the professional secrecy (lawyer-client confidentiality) by the obligations to report which are imposed on lawyers as a result of the implementation of the Directives of 1991, 2001 and 2004. He claims that the obligation to report cannot be reconciled with this professional confidentiality and therefore, articles 6, 7 and 8 of the European Convention on Human Rights has been violated.

The ECHR ruled that no violation could be found in the French laws / decisions implementing the European Directives.

More interestingly, the ECHR elaborated its "Bosphorus doctrine" set forward in its 2005 judgment. However not directly of interest for the money laundering discussion, the importance of this decision should not go underestimated.

The "Bosphorus doctrine" of the ECHR mainly confirmed that the conformity of European law with the European Convention should not be investigated, due to the existence of an equivalent protection. Since the EU explicitly referred to the applicability from and respect for the principles set forward in the European Convention, the ECHR should not investigate these laws. Any EU citizen could for example lodge an appeal before the European Court of Justice, which offers a protection which is equal, at least equivalent, to the protection the ECHR provides.

However, in the case of Mr Michaud, the ECHR redefines this doctrine, referring to the fact that the Michaud case is different from the one leading to the Bosphorus judgment, for the following reasons:

- In the Bosphorus case, the ECHR dealt with a EU Regulation, which is of immediate effect in the Member States and the Member State (in this case Ireland) has no discretionary powers to

add, change or influence the provisions of a Regulation. It could not be justified to convict a Member State that transferred a part of its powers to an international body which imposes certain legislations with immediate effect. Furthermore, an appeal before the ECJ is possible, while this court will apply the same principles from the European Convention. The protection of the citizens is therefore guaranteed.

In the Michaud case, the European legislation consisted of European Directives, which need implementation by the Member States. Due to this discretionary power by the Member States, there remains a margin for discrepancy between the Member States' regulations to implement the Directives. Therefore, the European legislation has but an indirect effect in the national jurisdictions and the equivalent protection does not suffice.

- In the Bosphorus case, the Regulation had already been investigated by the ECJ, whereas the "Conseil d'Etat" in the Michaud case refused to pose a question to the ECJ and get a preliminary ruling on the subject.

As far as the regulations in relation to the obligations imposed to lawyers were concerned, Mr Michaud argued that the legislation remained too vague as to when lawyers have an obligation to report, since the provisions mention this needs to be done if "suspicions" arise concerning the activities of their clients, without further clarification as to what needs to be seen as "suspicions".

The ECHR found no violation of article 8 of the European Convention and did not accept the argument that the legislation lacked "foreseeability". One of the main reasons for the ECHR to deny the application, was the scope of the legislation. The law is foreseeable because it is addressed to lawyers, who should be able to interpret the obligations imposed.

However this decision might be criticized for this last reasoning, it probably was correct to reconfirm that the professional confidentiality and obligation to report can be reconciled with the rights to a fair trial and privacy.

Declaring a law foreseeable because it is addressed to lawyers may be questionable. It places an immense burden upon the lawyer, who – according to the ECHR – clearly should not only know everything about the law, but as well everything that the law doesn't say. Does this allow the legislative bodies to disregard the "qualitative requirements" of legislation when the legislation envisages lawyers? Could it not be argued that this is a massive discrimination towards lawyers, tolerated and confirmed by the ECHR?

The Michaud judgment of the ECHR therefore is a more than important decision with regard to the money laundering legislation. It confirms that both the Directives and the legal translations by the French State are clear enough as far as the wording "suspicions" is being used.

Furthermore, the obligation to report itself does not affect the professional confidentiality in a lawyer – client relationship. This decision will be criticized by some, but deserves some credit as well.
Given the scope of the Directive and the limited list of activities for which the obligation to report might arise with a lawyer, one should avoid jumping to conclusions too quickly. Do lawyers really need to report their clients on a frequent basis and therefore breach the trust they have when entering the lawyer's office, providing him with privileged and sensitive information?

Of course they don't. The Directive is very clear and exempts lawyers when they enter into a relationship to exercise their "core business", which is to defend and assist clients in the context of legal proceedings, which includes avoiding legal proceedings.

Only a limited list of activities could lead to an obligation to report, which can only be applauded, since it serves multiple purposes:

- A client can redirect himself when he seeks a legal opinion in relation to certain transactions. If the advice of the lawyer is negative and the client wants to continue, it is essential that the lawyer does not risk a prosecution for money laundering.
- The "escape" of reporting is therefore very useful. If on the other hand the client decides to leave the path that was chosen and takes a legal alternative, there is no obligation to report.
- The negative advice itself also does not lead to an obligation to report, since it can be interpreted as a service to avoid legal proceedings (prosecution). If the lawyer and client part ways after a negative advice, with the lawyer being in the blind whether the (ex-)client continues his activities against the advice, there is no obligation to report.

What to do with the position of the client, who steps into the lawyer's office and expects in good faith that none of the information shared with his lawyer will leave the office?

This issue is also rather easily to be addressed by informing the client beforehand and providing him with general terms and conditions with reference to the anti-money laundering legislation. Before the client provides any information, the lawyer should inform him about his professional confidentiality, with the exceptions imposed due to the anti-money laundering legislation.

Whereas the Directive does not allow a lawyer to inform a client that he will report, it does not affect the possibility for a lawyer to inform his client that under very specific conditions (art. 2 Directive) he might have an obligation to report, namely if he participates for and on behalf of the client in a financial or real estate transaction or assists the client in the preparation or execution of transactions relating to (1) the buying and selling of real-estate or goodwill, (2) the management of funds, securities or other assets belonging to the client, (3) the opening of current accounts, savings accounts or securities accounts, (4) the organization of the contributions required to create companies, (5) the formation,

administration or management of companies or (6) the formation, administration or management of trusts or similar structure, only when “suspicions” arise in relation to the transactions.

Afterwards, it is up to the client to decide whether he wants to go into business with the lawyer, knowing that he might report him to the authorities. This can hardly be seen as a “betrayal” by the client and breach of his professional confidentiality.

It should be obvious that every aforementioned activity is suspicious if the client cannot give a reasonable explanation in relation to the origin of the funds used for the transaction. In such cases, a lawyer should be grateful to be offered an escape out of such transactions, rather than getting involved and being seen as an accomplice in a later stage. Better safe than sorry, right?

As far as the “suspicions” are concerned, shouldn’t any lawyer be able to assess that a client showing up with “a bag of money” to purchase a real-estate is suspicious and it is better not to be involved in such transactions where the origin of the funds remains unclear?

What might be needed to get a clearer image how the obligation to report should be interpreted, are cases against lawyers (allegedly) violating their obligations under the money laundering legislation. Case against lawyers for breaching their professional confidentiality after reporting might help too.

As long as it remains unclear whether lawyers are indeed in danger because of these regulations, it would be a shame to further (or totally) exempt them from any obligation to report, while it is in everyone’s interest that money laundering and the abuse of the financial system for the purposes of terrorism is prevented as much as possible.

Any lawyers volunteering to get prosecuted for breaching their obligation to report, please rise!

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