Belgian lawyers and their reporting obligations :

A dangerous minefield or a walk in the park?

Jorgen Van Laer
Lawyer
Studio Legale Advocaten
Antwerp Belgium

Introduction

Since January 11th 1993 Belgium has a preventive law regarding money laundering. This law has been updated by the law of January 18th 2010[1]. Directive 2005/60/Ec has been implemented by this update.

Lawyers working in Belgium have been subject to preventive money laundering legislation since January 12th 2004[2]. Before, only other professions had reporting obligations. The reasons for this will be explained further on.

In this contribution I will assess how Belgian authorities have implemented the Ec Directive 2005/60 in their already existing legislation.

Mainly, I will focus on the differences/nuances between the law of January 18th 2010 and the directive.

Furthermore it is my aspiration to present you a current state of affairs.

The distinction between preventive and repressive money laundering laws in Belgium

The repressive money laundering laws contain the general penal restrictions. Obviously lawyers are not specifically stamped in those regulations[3]. Repressive money laundering only concerns lawyers who are suspected of being an offender or accomplice by money laundering activities.

[1] BS 26 januari 2010, can be downloaded on www.ctif-cfi.be.(hereinafter also referred to as "the law")
[2] BS 23 januari 2004, 4352: J. STEVENS en G.-A. DAL. Advocaten onder de witwaspreventiewet: een gevaarlijke ontsporing, RW, 2003-04, 1441; Les avocats et la prévention du blanchiment de capitaux: une dangereuse dérive. JT, 2004, 485; J. STEVENS. "Over verklikken en witwassen", Ad Rem 2004/1. 24
[3] Article 505 Sw.

This essay only focuses on the obligations of lawyers have under preventive money laundering legislation, reporting obligations, client screening and identification duties.

The main obligations subsequent to the law of January 18th 2010

A dutiful implementation of Ec Directive 2005/60

Striking when reviewing both Belgian law and the Ec Directive is the fact that the Belgian legislator adopted many articles and definitions used in the Ec Directive identically.

For example: definition of money laundering in the law of January 18th 2010[4] has a very close resemblance to the definition used in article 1.2.(a) Ec Directive.

This may be explained by the fact that the Belgian legislator was one of the last to implement the Directive.

The Directive was scheduled to be implemented on the 15th of December 2007[5].

Although most of the Member States failed to meet this deadline, Belgium was fairly late by implementing in 2010.

Taking over the definitions and obligations almost identically made sure that the European Commission was satisfied with the implementation. Therefore, Belgium was not referred to the European Court of Justice over an inadequate implementation of the Directive by the European Commission.

France and Poland however were referred for not laying down effective, proportionate and dissuasive penalties in national law as required[6].

It is safe to say that Belgium does meet the EU requirements in this case.

Activities in the scope of the law

When executing certain activities lawyers must be careful and always check their obligations regarding money laundering.

Article 3,5 (a) of the law is almost identical to article 2.3.(b) Ec Directive and stipulates that lawyers must be attentive when:

" 1°) buying and selling of real property or business entities;

[4] Article 5 law of January 11th 1993 as altered by the law of January 18th 2010
[5] Article 45 Ec Directive 2005/60
[6] http://www.anti-moneylaundering.org/EuropeanChart.aspx

2°) managing of client money, securities or other assets;

3°) opening or management of bank, savings or securities accounts;

4°) organization of contributions necessary for the creation, operation or management of companies;

5°) creation, operation or management of trusts, companies, fiduciaries or similar structures;"

There is one addition in the law compared to the Directive.

According to article 3,5(b) of the law Belgian lawyers must also be attentive when making a financial or real estate transaction for and in name of their clients[7].

Seen the content of the first five provisions under article 3,5 (b) this addition seems redundant but actually it just originates from the old law without having been deleted[8].

Confidentiality constitutionally protected

No other contributions or additions were made by the Belgian legislation.

This is anything but surprising. The law that made lawyers subject to obligations concerning reporting money laundering was highly criticized by several Bar organizations.

The Bars showed themselves very worried about the strain relation between the professional confidentiality and a reporting obligation.

Therefore, these Bars brought action against the Belgium Government over the 2004 law.

The law was revised by the Belgian Constitutional Court which stated that the law did fail to meet the constitutional requirements[9].

The Court considered that, should legal representation be effective, a confidential relationship between lawyer and client is a necessity for legal representation to be effective[10].

Thus is implicated that confidentiality is a part of the fundamental rights for those who seek legal aid.

Also, experts pointed out that there lies great danger in the fact that people cannot fully trust their lawyer when seeking legal advice.

They might be discouraged to contact lawyers when seeking advice regarding unusual or innovative concepts[11].

[7] Article 3,5(b) law of January 11th 1993 as altered by the law of January 18th 2010
[8] Old article 2ter law of January 11th 1993; STEVENS en DAL, o.c., 1446.
[9] Grondwettelijk Hof Arrest nr. 10/2008 van 23 januari 2008, http://www.const-court.be/
[10] Grondwettelijk Hof Arrest nr. 10/2008 van 23 januari 2008, B7.1 and B7.2, Page 18-19, http://www.const-court.be/
[11] J. STEVENS and G. DAL, "Het arrest van het Grondwettelijk Hof van 23 januari 2008 en de preventie van het witwassen: de Ordes halen hun gelijk", RW, 2008-09, 91;

If a client fears to contact a lawyer out of concern of being reported, this will certainly not benefit the rights of his defense

This can never have been the objective of this legislation.

Only in exceptional circumstances and if inevitable this confidentiality can be abolished[12].

This limited the Belgian legislator in making any additions to the Directive when implementing it in 2010.

Furthermore the Constitutional Court gave a stern warning to the Belgian Government that the implementation of supra national legislation must not be a formality. It is the duty of the legislator to review whether the Ec Directive is in accordance with the fundamental principles of Belgian law[13].

Not the core business

The trigger activities summed up in article 3,5 (a) of the law are financial transactions, transactions concerning real estate or transactions concerning company structures .

This implies that the core business of practicing law is excluded from every responsibility regarding reporting money laundering[14].

Only when the lawyer performs these trigger tasks close to financial management he is obliged to review whether he has an obligation to report.

But even in case of activities summed up in article 3,5 (a) of the law the lawyer remains protected most of the time.

The implementation of article 23 Ec Directive 2005/60

Article 23 stipulates:

"Member States shall not be obliged to apply the obligations laid down in Article 22(1) to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings."

[12] Grondwettelijk Hof Arrest nr. 10/2008 van 23 januari 2008, B7.10, Page 21, http://www.const-court.be/
[13] J. STEVENS and G. DAL, "Het arrest van het Grondwettelijk Hof van 23 januari 2008 en de preventie van het witwassen: de Ordes halen hun gelijk", RW, 2008-09, 105;
[14] F.DERUYCK describes the core business of the Belgian lawyer as counseling, reconcile and pleading F. Deruyck, "De preventieve en repressieve witwaswetgeving" in *"Vlaamse Conferentie bij de balie van Antwerpen,* Geboeid door het strafrecht. De advocaat en de strafrechtspleging*,"* Brussel, Larcier, 2011, 30.

This principle has also been implemented by the Belgian legislator.

Article 26 §2 of the law stipulates that *in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings* lawyers are prohibited to share this information with authorities.

There is an exception according to Belgian law: when lawyers themselves participate actively in money laundering or activities concerning financing terrorism.

This exception is quite useless since no lawyer involved in such activities will report *himself* to the authorities.

More important is the fact that both the Ec Directive 2005/60 and Belgian law not only protect the legal representation in proceedings but also when providing legal advice.

It all comes down to the interpretation of the phrase *"ascertaining the legal position for their client"* used in both the Ec Directive 2005/60 and Belgian law.

Already in 2008, this issue was clarified by the Constitutional Court[15].

The Court interprets article 3,5° of the law in such way that advice does not have to be accompanied by a procedure to exclude the lawyer from reporting obligations.

It refers in its decision to the decision of the European Court of Justice AM &S of May 18th 1982[16].

In that decision the Court acknowledged that every legal aid seeking citizen must have the possibility to consult a lawyer in all freedom to get independent legal advice.

The broad interpretation by the Constitutional Court and the law respecting those boundaries severely limit the chances that a Belgian lawyer must report.

Due diligence

Article 7 of the law is almost identical to the obligations described in article 7 Ec Directive 2005/60.

Belgian law is more strict though. Under the Directive the reporting obligation exists when carrying out a transaction amounting to 15.000 €. Belgian law limits this to 10.000 € (art. 7 §1,2°of the law).

The other obligations are the same as under the Directive.

[15] Grondwettelijk Hof Arrest nr. 10/2008 van 23 januari 2008, B7.6, Page 20, http://www.const-court.be/
[16] *Jur.*, 1982, P 1575

Summarized it comes down to this:

Lawyers have to take measurements to adequately identify clients by official documents.

- In case of individuals the exact name, date of birth and place of birth have to be verified.
- A copy of the official documents proving this identity must be kept (art. 7 alinea 3 of the law).
- Companies, trusts and other legal constructions must provide their name, identity of directors and such more (art. 7 alinea 3 of the law).
- Information about the purpose of the transaction has to be asked (art. 7 alinea 5 of the law).
- When a suspicion of money laundering for the purpose of financing terrorism arises a reporting duty exists (art. 7 §1lid1, 2, 3° of the law).
- When there is doubt about the faithfulness of the given information (art. 7 §1lid1, 2, 4° of the law) a reporting duty exists as well.

Other professionals are prohibited to engage in a professional relationship with clients who make it impossible to meet the necessary identification standards (art. 7 § 4 of the law).

Lawyers are excluded from this prohibition and are allowed to accept these clients (art. 7 §5 of the law).

Large companies must appoint compliance officers (article 18§2 of the law).

This compliance officer must check up written reports of colleagues that report unusual or suspicious transactions or facts (art. 14 of the law).

Whom to report to when obtaining information about money laundering?

The Belgian institution responsible for combatting money laundering is the competent Belgian authority to report to[17].

The Belgian legislator however chose to designate an appropriate self-regulatory body of the profession to be informed in the first instance, as suggested by article 23 Ec Directive 2005/60 .

The chairman of the Bar, called Stafhouder or Bâtonnier, must be informed upfront whenever a lawyer has the intention to report.

The Constitutional Court has acknowledged the Chairman as an extra guarantee to protect client confidentiality[18].

It is the chairman's decision to decide whether a report should be made.

[17] www.ctif-cfi.be.
[18] Grondwettelijk Hof Arrest nr. 10/2008 van 23 januari 2008, B14.2, Page , http://www.const-court.be/

His benchmark is once more article 3,5 (a) of the law which describes the trigger activities and also whether the lawyer is ascertaining the legal position for his client or performing his task of defending or representing that client as stated in article 26 § 3alinea 2 of the law.

The chairman is not just a gateway but has an active role in checking these parameters.

If in his opinion the lawyer must not report, he will forbid the lawyer in doing so[19].

This important role for the chairman shields our confidentiality and makes it one of the safest in the world.

When the chairman does make a report, he ensures the follow up offurther questions asked by the CFI.

Immunity

Any lawyer who makes a report in good faith gets immunity of criminal, civil and disciplinary persecution[20].

We let aside the possibility that a lawyer is actually involved in criminal activities. In that case he is not very likely to report at all.

And furthermore, when a lawyer would make a report to save himself, it will not take great effort to prove his lack of good faith.

Good faith of the lawyer is a condition of article 32 of the law in order to benefit the immunity.

Conclusion

The fact that lawyer/client confidentiality is so well protected in Belgium and that the Constitutional Court has acknowledged confidentiality is one of our most fundamental rights has great influence on the interpretation and implementation of Ec Directive 2005/60.

Therefore, only when a lawyer performs a trigger activity without representing or advising the client he has to bear preventive money laundering regulations in mind.

Only in those circumstances, he must assess whether he should or should not report. Complying with the law requires more administration (e.g. towards client identification) but protects our profession adequately and will not cause even more sleepless nights for the Belgian lawyer.

[19] Article 326, alinea 3 law of January 11th 1993 as altered by the law of January 18th 2010
[20] Article 32 law of January 11th 1993 as altered by the law of January 18th 2010