

Circular No. 3 / 2019-2020Luxembourg, the 1st of April 2020

**Regarding: Scope of application of the AML Act for Lawyers
 (Article 2 (1) point 12 - Article 7 of the AML Law)**

Dear Colleagues,

The amended law of 12 November 2004 on the fight against money laundering and terrorist financing (the "AML Act") is applicable to lawyers when carrying out one of the activities restrictively listed in Article 2 (1) point 12 thereof.

It has been held, on the one hand, that lawyers only fall within the scope of application of the AML Act in the hypotheses restrictively listed therein (we will speak of activities "in the field")¹ and, on the other hand, that the exceptions to professional secrecy introduced by said law are strictly interpreted².

I. Activities of lawyers "in the field"

The purpose of this circular is to provide guidance on whether or not a lawyer's activity falls within the AML field.

These activities will be discussed in turn below.

- 1. Assistance to a client in the preparation or execution of transactions concerning:**
 - a. the purchase and sale of real estate or commercial enterprises;**
 - b. the management of funds, securities or other assets belonging to the client;**
 - c. opening or managing bank or savings accounts or portfolios;**
 - d. the organisation of contributions necessary for the incorporation, management or direction of companies;**
 - e. the constitution, domiciliation, management or direction of trusts, companies or similar structures.**

"Assistance" is to be understood as a legal support that the lawyer provides to his client in the context of the financial or real estate transactions mentioned.

¹ Pursuant to article 2 a (5) of Directive 91/308, lawyers are subject to the obligations laid down in that Directive and, in particular, to the obligations of information and cooperation imposed by Article 6(1) of that Directive, only in so far as they participate, in the manner specified in Article 2a(5), in certain transactions listed exhaustively in the latter provision (CJEU, 26 June 2007 in Case C-305/05, point 22). Please note that Directive 91/308 was repealed by Directive 2005/60/EC of 26 October 2005, which adopts its content while supplementing it.

² The fight against money laundering and the financing of terrorism, which have a clear impact on the development of organised crime, which poses a particular threat to society, is a legitimate objective of general interest. However, this objective cannot justify an unconditional or unlimited removal of the professional secrecy of lawyers, because for the reasons reiterated in B.6.1 to B.6.3, lawyers cannot be confused with the authorities responsible for investigating offences." (Ruling 10/2008 of the Belgian Constitutional Court of 23 January 2008, point B.8)

The following, for example, may be considered to fall within the scope of Article 2 (1) point 12 of the AML Law: advising, structuring, drafting or revising agreements or other documents relating thereto, assisting or representing the client on the occasion of:

- the acquisition or sale of a business;
- the acquisition or sale of securities;
- the sale or purchase of real estate, including in particular when it is held by companies;
- inheritance matters (involving a financial or real estate transaction);
- opening a bank account;
- the incorporation of a company, shareholders' agreements or other similar transactions.

Other examples of assistance are the following preparatory acts for a financial or real estate transaction:

- *Legal Opinions*

Although Legal Opinions are not intended as such to express legal advice, their issuance is very often a condition precedent to the performance of agreements.

- *Due Diligence Reports*

These reports constitute a set of checks carried out with a view to a transaction and therefore constitute a preparatory act closely linked to the completion of the transaction in question.

- Tax advice

In the context of tax structuring and rulings (as opposed to tax returns), tax advice will help structure the transaction, an analysis without which the transaction would not be possible from the viewpoint of tax law. This activity therefore falls within the scope of the law as it is closely linked to the financial or real estate transaction in question.

2. Intervention in the name and on behalf of the client during a financial or real estate transaction

This refers to the case where the lawyer does not act as mere legal adviser to his client, but acts in the name and on behalf of the latter, for example:

- when the lawyer acts on the special power of attorney of his client when appearing before a notary to buy or sell real estate, or to sign company deeds (incorporation, increase in share capital or any other modification of the articles of association, liquidation);
- when the lawyer represents his client in the framework of the division (of real estate or personal property) following a divorce or an inheritance;
- when the lawyer, in civil and commercial matters, is mandated to negotiate or sign a transaction intended to put an end to litigation proceedings, in addition when the mandate involves the collection on the lawyer's third-party account.

The lawyer must be particularly attentive if he has been called upon to deal with an issue that is a priori outside the scope of the situations referred to in Article 2(1) point 12 of the AML Act, which subsequently involves transactions that fall within the scope of the AML Act.

Finally, we should mention a recent judgment, including an appeal, of the Criminal Court of Luxembourg, according to which the mere fact that a lawyer receives funds in his **third-party** account in order to pay them to a third party constitutes the conclusion by the lawyer of a financial transaction in the name and for the account of his client. According to this case law, a lawyer who receives funds from his client or a third party in the framework of litigation proceedings and who is instructed by his client to make a certain use of them, falls within the scope of the AML Act, in all its provisions (knowledge of the client and origin of the funds, etc...) except as stated below concerning article 7 of the AML Act.

It is recommended that the lawyer, in the event of a payment to be transited through his third-party account in connection with legal proceedings, and if the funds in question do not come from his client, to check the identity of the principal and the consistency of the payment with the proceedings for which the lawyer is responsible.

3. Provision of one of the services of a serviced provided to companies and trusts

The services that a service provider may provide to a company or trust are listed in section 1(8) of the AML Act.

When a lawyer provides such services, in particular the domiciliation of companies, he will have to comply with the obligations of the AML Act.

4. Family Office activity

Within the meaning of the Law of 21 December 2012 on the activity of Family Offices, this means "providing, in a professional capacity, advice or services of a pecuniary nature to individuals, families or asset management entities belonging to individuals or families or of which they are founders or beneficiaries."

"Advice or services of a pecuniary nature" can be understood as all services intended to protect, preserve and develop the assets of a family such as: advice in asset organisation, asset planning, administrative or financial monitoring of an asset.

Lawyers carrying out the activity of Family Office are subject to the obligations of the AML Act. Although the intervention in the field of the lawyer may be one-off or even very brief (a consultation by videoconference - Skype type - is sufficient), the identification obligations must be implemented. It should also be understood that the different activities carried out by the lawyer for the same client, at the same time, under the same mandate, may fall on both sides of the line. This is the case of a lawyer instructed by a company wishing (i) to dismiss a manager and (ii) to change the composition of its management board.

II. Activities "in the field" but exempted from the reporting obligation under section 5 of the AML Act

The professional secrecy of lawyers, which has been repeatedly enshrined in the case law of the European Court of Human Rights, is essential to the proper functioning of justice and, beyond that, of democracy³.

To align the objectives of the fight against money laundering and terrorist financing with the respect for professional secrecy and the fundamental right to defence, Article 7 of the AML Act provides that certain activities carried out by the lawyer are exempted from the obligation of cooperation as set out in Article 5 of the AML Act.

Indeed, professional secrecy enshrines the relationship of trust that is established between the lawyer and his client and guarantees that the latter can freely confide in his lawyer, without fearing that the information thus exchanged will be disclosed.

Based on these principles, the lawyer will therefore not be subject to Article 5, paragraphs 1 and 1a of the AML Act, with regard to information received from or obtained about one of his clients at the time of:

- legal advice;
- the assessment of the client's legal situation;
- in the performance of his duties to defend or represent that client in or concerning legal proceedings, including advice on how to initiate or avoid proceedings, whether such information is received or obtained before, during or after such proceedings.

However, this exception does not affect the other obligations of the AML Act. It is important to note that the measures of due diligence, risk analysis and internal organisation apply in the cases referred to in Article 7 (1) of the AML Act, provided that the lawyer carries out an activity referred to in Article 2 (1) point 12. The general scope of application of the AML Act should therefore not be confused with the scope of application of the lawyer's obligation to report suspicion/cooperation.

³ Michaud v. France, judgment of 6 December 2012:

"11.8. It emerges therefrom while Article 8 protects the confidentiality of all "correspondence" between individuals, it gives greater protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are entrusted with a fundamental duty in a democratic society: the defence of litigants. However, a lawyer cannot perform this fundamental duty if he is not in a position to guarantee to those he is defending that their exchanges will remain confidential. It is the relationship of trust between them, which is essential for the performance of this duty, that is at stake. It also depends, indirectly but necessarily, on respect for the right to a fair trial, in particular in that it includes the right of any "accused" not to incriminate themselves.

119. The enhanced protection which Article 8 confers on the confidentiality of discussions between lawyers and their clients and the reasons on which it is based lead the Court to find that, viewed from that angle, the professional secrecy of lawyers - which, however, is primarily in the form of obligations incumbent on them - is specifically protected by that provision."

1. Exception of legal advice

Doctrine⁴ defines legal advice as *'consisting of providing, on a question submitted for the consultant's consideration, a personal opinion, sometimes advice, which provides the consulting party with elements for a decision, if necessary, in favour of his case'*.

It covers the reception of the client, the collection of information from the client or third parties, the examination and analysis of the case, legal research and the development of one or more solutions in favour of the client.

The legal advice provided by the lawyer therefore does not give rise to the reporting obligation under Article 5 of the AML Act, even if the consultation relates to matters covered by Article 2 (1) point 12 of the AML Act.

2. Exception of the assessment of the client's legal situation

The assessment of the legal situation⁵ is more of a theoretical rather than an advisory task and is characterised by the fact that a given situation and one or more legal rules coincide. However, it seems possible to say that the assessment of the legal situation is a necessary step in the consultation and advice provided by the lawyer.

Whatever definition is given, this activity of the lawyer is exempt from the reporting obligation under Article 5 of the AML Act, even if it relates to a transaction listed in Article 2 (1) point 12 of the AML Act.

3. Exception of the duty of defence or representation in legal proceedings

Lawyers are not subject to the obligation to report *"in the performance of their duties of defending or representing that client in or concerning legal proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings"* (Article 7(1) of the AML Act).

⁴ (Vocabulaire juridique Association Henri Capitant, sous la direction de G. Cornu, p. 226).

In France, the National Bar Council of Bars has defined legal advice as "a personalised intellectual service aimed at providing an opinion or advice on the application of a rule of law with a view, in particular, to a possible decision". Reiterated in the ECHR Michaud v. France judgment of 6 December 2012, this definition seems to be generally applicable.

The decision of the Belgian Constitutional Court of 23 January 2008 (decision 10/2008) also gave a definition of the activity of legal advice (point B.9.5). It "aims to inform the client about the state of the law applicable to his personal situation or to the transaction he is planning to carry out or to advise him on how to carry out the transaction within the legal framework. It is therefore intended to enable the client to avoid legal proceedings relating to this transaction."

⁵ This concept is directly inspired by Article 6 (3) of Directive 2001/97/EC and the preamble 17 of the latter. It should also be noted that Preamble 17 uses the terminology "assessment of the legal situation" and "legal advice" in the same paragraph, as if they were identical concepts. Although listed second in Article 7, the assessment of the legal situation seems to be partly covered by the concept of legal advice. Indeed, the concept of evaluation consists, on the basis of information provided by the client or a third party on a particular situation, of analysing that situation in relation to legal rules and, following legal reasoning, of determining which legal rules apply to the situation in question. In this sense, the assessment of the legal situation appears not to go as far as legal advice in the sense that the client will not get a tailor-made answer to his needs, but will receive an overview of the law in force in relation to a given situation.

This exception confirms the principle according to which *"the relationship of trust which must exist between lawyer and client can only be established and maintained if the litigant has the guarantee that what he entrusts to his lawyer will not be disclosed by the latter"* (judgment 10/2008, cited above, point B.7.9).

The terms used in Article 7 are very broad⁶. They also include advice on how to initiate or avoid proceedings. We also feel that this exception applies to any procedure, given the higher interests that the text is intended to protect (professional secrecy, right of defence, etc.). Insofar as it derives from the right to a fair trial enshrined in Article 6 ECHR, the concept of trial must be conceived in broad terms and apply to any procedure in which a lawyer assists a client, i.e., civil, criminal, administrative proceedings, including pre-litigation proceedings (as they are aimed at avoiding a procedure), mediation, arbitration, etc., basically whenever the lawyer acts in his most traditional activity, that of a defender.

On the other hand, if the lawyer goes beyond the scope of defence or representation in court (including in relation to the same client), he is again subject to the obligations of Article 5 of the AML Act, depending on the new circumstances.

For example, a tax adjustment is part of a pre-litigation procedure and is therefore not subject to the declaration obligation. But when the pre-litigation procedure is over, and the lawyer is instructed to arrange another transaction, this is outside the scope of the exception.

The lawyer must be vigilant in all circumstances, particularly in the field of litigation and arbitration. It is necessary to avoid the use of lawyers in "mock trials", orchestrated by the parties who, under the cover of a sham litigation procedure, will agree to sign a transaction and thus make financial settlements. There will be no surprises in terms of the lawyer's due diligence when the debtor party (often based in a jurisdiction that is deficient in AML matters) puts up little resistance and settles the sums claimed without any reluctance.

It is therefore necessary for the lawyer to always remain vigilant, even when a transaction appears, at first sight, not to fall within the scope of Article 2 (1) point 12 of the AML Act.

Finally, I must inform you that concrete examples of situations that lawyers may face will be provided by the Financial Intelligence Unit and published on the Bar's intranet.

Sincerely

For the Bar Council
François KREMER
President of the Bar

⁶ It should be noted that the law of 25 March 2020 has just added a third paragraph to Article 7: *"By way of derogation from Article 3, paragraph 6, sub-paragraph 6, a lawyer who suspects that a transaction relates to money laundering or terrorist financing and who may reasonably believe that in fulfilling his duty of due diligence he would alert the client, may choose not to carry out this procedure and send a suspicious transaction report to the Bar President on whose roll he is registered. In this case the Bar President shall verify compliance with the conditions laid down in paragraph ter and Article 2(ter), point 12. If so, he is required to transmit the suspicious transaction report to the FIU"*.