# Anti-Money Laundering Legislation: Implementation of the FATF Forty Recommendations in the European Union

Colin Tyre QC*

## Introduction

In common with most other jurisdictions throughout the world, the anti-money laundering legislation of the member states of the European Union has its foundation in the Forty Recommendations by the Financial Action Task Force ("FATF") issued originally in 1990 and revised from time to time.[1] This paper is in two parts. In Part 1, the implementation of the Forty Recommendations at Community[2] level is outlined, together with an account of the challenges brought in certain national courts and in the European Court of Justice to the compatibility of national transposing legislation with Community law principles. In Part 2, the anti-money laundering rules of the United Kingdom, which go beyond what was required either in implementation of the relevant EU Directives or in compliance with the Forty Recommendations, are examined in more detail.[3]

## Part 1: Implementation of the Forty Recommendations in the European Union

### I Legislative background

(i) *Implementation at Community law level*

There is no region in the world that has been more conscientious about implementing the FATF Recommendations than the European Union. On each occasion

---

*Advocate of the Scottish Bar; Past President 2007 of the Council of Bars and Law Societies of Europe.

1. For a detailed account of the origins and purpose of FATF and of the production and revision of the Forty Recommendations, see Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk Based Approach for Transactional Lawyers,* 43 Real Prop. Tr. & Est. L. J. 607 (2009).

2. The European Union was established by the Treaty of Maastricht in 1993. It consists of three "pillars", namely (i) the European Community (which itself was an amalgamation of three existing communities including what was previously known as the European Economic Community); (ii) the Common Foreign Security Policy; and (iii) Justice and Home Affairs. The second and third pillars are implemented by inter-governmental procedures. The expression "Community law" refers to the law of the European Community (the first pillar) which is made and applied by the European institutions, i.e. the Council, the Commission, the Parliament and the Court of Justice.

3. This article is based upon two papers delivered by the author at a conference of The International Academy of Estate and Trust Law in Cartagena, Colombia on 28 April 2009, revised and updated to take account of subsequent developments.

when FATF has issued or revised its recommendations, the EU institutions have reacted speedily by adopting a Directive giving full effect to the latest version. This is perhaps not surprising since some European member states have been major driving forces behind FATF.

So, for example, following the issue of the original Forty Recommendations by FATF in 1990, the European Council adopted its First Anti-Money Laundering Directive on 10 June 1991,[4] applying to credit and financial institutions. When FATF revised its Recommendations in 1996 to extend their scope to what has become known in FATF-speak as "designated non-financial businesses and professions", this extension was reflected in the Council's Second Anti-Money Laundering Directive on 28 December 2001.[5]

Thus lawyers were brought within the scope of the European Directives, and in particular within the obligation[6] to make suspicious activity reports to national anti-money laundering authorities. The exception to the reporting obligation contained in FATF Recommendation 16 for circumstances where lawyers are subject to professional secrecy or legal professional privilege found its way into the Directive in Article 6(3), and since the wording of this article has formed the basis of the subsequent court proceedings, it is worth setting it out in full:

> "In the case of the notaries and independent legal professionals referred to in Article 2a(5), Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed of the facts referred to in paragraph 1(a) and in such case shall lay down the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering.
>
> Member States shall not be obliged to apply the obligations laid down in paragraph 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."

---

4. Official Journal L 166 of 28 June 1991, p 77.

5. Official Journal L 344 of 28 December 2001, p 76. The Second Directive took the form of amendments to the First Directive. Among those amendments it inserted a new Article 2a in the First Directive, obliging Member States to ensure that the obligations laid down in the Directive were imposed on, among others, notaries and other independent legal professionals when they assist in the planning or execution of any of a list of activities which effectively reproduces the list in FATF Recommendation 12(d).

6. In Article 6(1) of the First Directive, as amended by the Second Directive, giving effect to FATF Recommendations 13-16.

The extension of this obligation to lawyers, and in the terms set out above, was strongly resisted by the European legal profession, but the mood of governments following the events of 11 September 2001 was such that this resistance found little public or political support.

The process of legislative implementation has since continued. In 2003 FATF made amendments to its Recommendations, and these amendments were swiftly followed by the adoption by the European Parliament and Council of the Third Anti-Money Laundering Directive of 26 October 2005.[7] Once again changes were made that were of considerable significance to lawyers, including the following:

- Extension of the scope of the Directive to include money to be used to finance terrorist activities.[8]
- Adoption of the risk-based approach to customer due diligence, including the introduction of simplified customer due diligence for low-risk clients, where money laundering checks need not be made,[9] and enhanced due diligence in situations regarded as giving rise to high risk of money laundering activity: where there is no face to face contact with the client, cross-border banking relationships, and the new category of "politically exposed persons" residing abroad.[10]
- Detailed provisions concerning the verification of the identity of the "beneficial owner" who controls the customer.[11]
- The prohibition on tipping off the client was made compulsory for lawyers and notaries.

An Implementing Measures Directive of 1 August 2006,[12] which was due to be transposed into domestic legislation by the end of 2007, includes details of people to be regarded as politically exposed persons and of the types of clients who may be regarded as posing a low risk and therefore subject only to simplified due diligence.

---

7. Official Journal L 309 of 25 November 2005, p 15.
8. Article 1.
9. Article 11.
10. Article 13.
11. Articles 3(6) and 8(1)(b). It is interesting to note that whereas FATF Recommendation 5 requires financial institutions and others to "verify the identity of the customer and beneficial owner" before establishing a relationship or conducting transactions for occasional customers, the Directive in this instance contains a less rigid and more pragmatic requirement (in Article 8(1)) (a) to verify the customer's identity and (b) to identify (where applicable) the beneficial owner and to take risk-based and adequate measures to verify the beneficial owner's identity so that the institution or other person has sufficient information to understand the ownership and control structure of the customer. If Recommendation 5 had been in such terms, much of the time spent trying to find wording which was acceptable to both sides for FATF's 2008 Guidance for the Legal Profession on the Risk-Based Approach could have been saved.
12. Official Journal L 214 of 4 August 2006, p 29.

(ii) *Transposition at national level*

In terms of the European Treaty of Union, member states are obliged, within specified time limits, to implement directives by national measures, which may or may not simply reproduce the terms of the directive itself. The First and Second Directives have been fully implemented in all member states. The European Commission announced in October 2008 that it intended to refer Belgium, Ireland, Spain and Sweden to the European Court of Justice for non-transposition of the Third Directive, and a further possible reference of France and Poland was announced by the Commission in December 2008. Since then, transposition has been effected in France, Ireland and Sweden and is in progress in most of the other states mentioned.

**II Court Challenges to National Transposing Legislation**

National measures transposing the Anti-Money Laundering Directives have been challenged in Belgium and in France, on the ground that they contravene rights conferred by the European Convention on Human Rights (ECHR).[13] To date, all of the challenges have concerned measures transposing the *Second* Directive—i.e. the 2001 Directive which extended reporting obligations to lawyers. The Belgian case has been heard by the Belgian Constitutional Court and by the European Court of Justice; the French case has been heard by the Conseil d'Etat. Both have produced helpful guidance as to the limitations on the reporting obligation, but have left some questions unanswered.

*European Court of Justice Judgment in the Belgian challenge*

In Belgium, the initial challenge took the form of an application by the Belgian Bars in what is now the Belgian Constitutional Court to have the Belgian national law transposing the Second Directive partially annulled as regards, among others, the articles referring to reporting obligations and the prohibition of tipping-off. The Bars contended that these requirements infringed the right of a person to a fair trial, guaranteed by Article 6 of the ECHR. In July 2005, the Court referred a question regarding the Second Directive itself to the European Court of Justice for a preliminary ruling. Ten parties, including the Council of Bars and Law Societies of Europe (CCBE), were allowed to intervene in the case.

The challenge under Article 6 was based around respect for the rights of a defendant and, in particular, the right to legal assistance and the right not to incriminate oneself. Taking the CCBE's arguments as representative, it was contended that these rights were infringed by the reporting obligation: the first because the client is likely to be deprived of the services of the lawyer after he has reported his suspicions, and the second because the client is condemned by virtue of information given by him to his legal adviser. The CCBE, in its submissions, invited the

13. Article 6(2) of the Treaty of Union requires member states to respect fundamental rights protected by the European Convention on Human Rights.

court also to examine the reporting obligation against a wider range of fundamental rights guaranteed by the Treaty of Union:

- the principle of independence of the lawyer;
- the principle of confidentiality;
- the right to respect for private life under Article 8 of the ECHR; and
- the Community law principle of proportionality.

In its judgment,[14] the Court confined itself to addressing the alleged infringement of the right to a fair trial under Article 6 and ruled that there was no such infringement. In arriving at this conclusion, however, the Court acknowledged[15] that the wording of Article 6(3) of the Directive (set out above) was open to more than one interpretation, and emphasised that it should be given the interpretation that renders it consistent with the EC Treaty rather than one that makes it incompatible. On this basis, the Court interpreted Article 6(3) as exempting lawyers from the reporting obligation whenever the lawyer acting in connection with one of the transactions giving rise to the obligations finds himself called upon to give assistance in defending or representing the client in court, or to give advice "as to the manner of instituting or avoiding judicial proceedings". Thus interpreted, the Court held that as Article 6 of ECHR presupposed a link with judicial proceedings, the Directive was compliant with the Convention.

The Court's decision left open a number of questions. Firstly, as already noted, the Court declined to address the other possible infringements raised in the parties' submissions. Secondly, no clear guidance was given on what is meant by giving "advice on instituting or avoiding proceedings", an expression which could have a narrow or wide scope. Some of these questions have been addressed in later court judgments. One point that is, however, clear from the Court's decision is that the option apparently left open to member states by Article 6(3) to decide *not* to exempt lawyers from the reporting obligation with regard to privileged information could not be exercised without breaching the Convention. To that extent, at least, the judgment provided a helpful restriction on the power of member states to override professional secrecy and legal privilege.

*Judgment of the Belgian Constitutional Court*

When the case came back to the Belgian Constitutional Court to apply the judgment of the European Court of Justice, the Bars invited the court to consider the legitimacy of the reporting obligation from a broader perspective than simply the right to a fair trial, and proposed a second reference. The Belgian court declined to make a second reference but delivered a judgment[16] giving a broad interpretation to the phrase "advice on instituting or avoiding proceedings" and

14. Case C-305/05, 26 June 2007.
15. Paragraph 28 of the Judgment.
16. Judgment no 10/2008, 23 January 2008.

confirming that the exemption from the reporting obligation could apply to advice given otherwise than in connection with any proceedings at all. For example, legal advice given to a client on his personal circumstances in relation to a transaction that he is contemplating, or on the best way of undertaking it, could be regarded as advice on avoiding proceedings.[17] The reporting obligation would not then apply. On the basis of this broad interpretation of the exception, the court again held that the national transposing legislation did not infringe fundamental rights. But in view of the interpretation adopted by the Court, what might appear to have been a defeat for the Bars was in fact regarded as a major success.

*The Challenge in the French Courts*

In the meantime, a parallel challenge to the legitimacy of a national transposing measure had been raised in the French administrative court, the Conseil d'Etat. This challenge was based upon both Article 6 and Article 8 of the ECHR.

The Conseil d'Etat reached the same decision as the Belgian Constitutional Court.[18] It found that no distinction could be drawn between representation in legal proceedings on the one hand and legal advice on the other. Information obtained by a lawyer in the course of assessing the legal position of the client was held not to be subject to the reporting requirement. As the Commissaire du Gouvernement[19] observed:

> "Only a very artificial distinction can be made between work conducted strictly within the context of litigation and work done in a purely advisory capacity. In practice, time spent giving advice to the client often runs into the time spent representing him and all of it must be covered by professional confidentiality, at the risk of undermining the trust that is essential to lawyer-client relations."

**III The Implications of the Court Challenges**

It remains to consider what significance these Court decisions have in European member states other than those in which the actions were raised. Before addressing the issues upon which different views may prevail, it is worth summarising certain matters which seem clear.

Firstly, it should not be forgotten that lawyers only come within the scope of the Directives when acting on behalf of or assisting clients in certain types of transaction, mirroring FATF's Recommendation 12. These are:

- financial and real estate transactions;
- buying and selling real property or business entities;
- managing client money, securities or other assets;

17. See the judgment of the Belgian Constitutional Court at paragraphs B.9.5 and B.9.6.

18. Decision of 10 April 2008.

19. I.e. the reporting judge whose conclusions are usually adopted by the Conseil d'Etat. Translation from French by the CCBE.

- opening or managing bank, savings or securities accounts;
- organising contributions necessary for the creation, operation or management of companies; and
- creation, operation or management of trusts, companies or similar structures.

Any other work is not within the scope of the Directive at all.

Secondly, the exemption for legal proceedings and legal advices applies only to the suspicious activity reporting requirement. It does not apply to other measures imposed upon lawyers by national measures transposing the Directive, such as customer due diligence. In accordance with the approach of the Third Directive, lawyers are obliged to carry out due diligence whenever any of the activities listed above is contemplated, and in so doing they must apply the risk-based approach now favoured by FATF.

Thirdly, and very importantly, the exception from the reporting requirement for information obtained in the course of representing a client or advising on the client's legal position does *not* apply where the lawyer is participating in money laundering activities, or providing advice to facilitate money laundering, or where the lawyer knows that the client is seeking legal advice for money laundering purposes. This is clear from the recitals to the Directives[20] and is emphasised in all of the court decisions discussed above. In such cases, the policy justification for protection of confidentiality is quite properly overridden by the public interest in preventing money laundering and terrorist activity.

But what else can be taken from the case law on the validity of the Second Directive? The interesting question is the extent to which information obtained by a lawyer for the purpose of giving legal advice unconnected with current or anticipated court proceedings is excluded from the reporting requirement. Both the Belgian Constitutional Court and the French Conseil d'Etat considered that the exclusion should have a broad application. These decisions find support in the wording of the Recital 17 to the Second Directive which refers to exemption for information obtained "in the course of ascertaining the legal position for a client". But they are obviously not binding on the courts of other member states. Are other jurisdictions likely to arrive at the same conclusion?

It is important here to note the difference between the civil law concept of professional secrecy on the one hand and the common law concept of legal professional privilege on the other. Professional secrecy is an obligation imposed upon lawyers by public law, and was described by the Advocate-General in the Belgian ECJ reference as "a general principle which contributes to the protection of fundamental rights". Legal professional privilege, in contrast, is often seen as a rule of evidence which renders inadmissible information provided by a client to a lawyer and advice provided by a lawyer to a client. In practical terms, one significant difference is that privilege may be waived by the client whereas professional secrecy may not. But do the differences between the

20. Now Recital 20 to the Third Directive.

concepts mean that a different result would be likely to be arrived at if the same matter were litigated before the courts of, say, England and Wales, or Scotland, or Ireland?

On this point there are conflicting views. One school of thought regards the decisions of the Belgian and French courts as rooted in the concept of professional secrecy. According to this view, it is the sanctity of professional secrecy in relation to all contact between lawyers and clients that requires the Directives to be interpreted in such a way as to exclude from the reporting requirement all legal advice. It cannot be said that legal professional privilege carries the same sanctity: it can, after all, be waived. On this view, the Belgian and French decisions might be disregarded by a court in a jurisdiction that did not recognise the concept of professional secrecy, with a more restricted interpretation being given to the notion of "ascertaining the legal position for the client".

The contrary view is that the decisions of the French and Belgian courts relate entirely to the wording of the Directive, read in such a manner as to ensure conformity with the client's fundamental rights under Articles 6 and 8 of the European Convention on Human Rights, so that no distinction need be drawn between jurisdictions recognising professional secrecy and those which do not. On this view, the same result ought to be achieved throughout the Community.

Perhaps the answer lies in the extent to which a national court will, in a specific case as opposed to a generic challenge, hold that the public interest in prevention of criminal activity overrides the right to respect for private life that is protected by the lawyer's obligation of confidentiality. It seems likely that we will have to await the outcome of such specific cases in order to receive a definitive answer. The problem for the legal profession is that the specific case may well turn out to be the criminal prosecution of a lawyer for alleged breach of a reporting obligation, in circumstances in which he has taken the view that his obligations of confidentiality precluded reporting. Until then, the scope of the reporting obligation will remain uncertain throughout the Community, particularly in those jurisdictions whose client confidentiality rules are based upon legal professional privilege.

## Part 2: Implementation of the Forty Recommendations in the United Kingdom

### I Transposition of the Directives

The United Kingdom has been at the forefront in enacting anti-money laundering legislation, having had laws in force to counter terrorist financing even before the adoption by the European Community of the First Anti-Money Laundering Directive in 1991. This enthusiasm on the part of the UK Government for imposition of anti-money laundering regulation continued with the transposition of the Second Directive which, as discussed above, required member states to extend their anti-money laundering legislation, including the obligation to report suspicious activity, to lawyers.

The Act in question was the Proceeds of Crime Act 2002, and the structural approach taken in this statute has caused difficulties to a profession willing to play an appropriate role in combating money laundering and terrorist financing. The difficulties have arisen from a number of features of the implementation in the United Kingdom of the Second Directive, of which the following were the most significant:

(i) *Over-Implementation ("Gold-Plating")*

The first problem was that the UK went further in the 2002 Act than it was required to do by the terms of the First and Second Directives. (This is colloquially known as "gold-plating" the Directives.)

Firstly, the UK legislation applies to the proceeds of any conduct that constitutes a criminal offence in the UK (or would do if it occurred there), regardless of seriousness.[21] Even the most minor of offences in relation to social security benefit fraud or tax evasion will trigger all of the obligations under the Act. In contrast, the Directives are only required to be applied to the proceeds of involvement in the commission of "serious crimes".[22]

Secondly, under the structure of the UK legislation, money laundering can extend beyond intentional conduct. This too is a departure from the Directive, which defines money laundering as certain types of conduct such as transferring or acquiring property derived from criminal activity, but only *when committed intentionally*.[23] According to the UK definition, "money laundering" includes being concerned in an arrangement that you merely *suspect* (not know, or believe) may facilitate the acquisition or retention of criminal property by someone else.[24] For example, a solicitor[25] can become a money launderer if he carries out a transaction for a client using funds that the solicitor suspects may not have been declared for tax purposes. The legislation includes a procedure whereby the solicitor may apply to the authorities for consent to proceed with a transaction, but without informing the client that he has applied. This is the "consent" regime which is central to the UK legislation, and which is discussed further below.

Thirdly, the UK legislation adopts the confrontational approach of bringing together all activities categorised as offences—such as transferring the proceeds of crime, acquiring them, using them, facilitating a transaction in them, failing to make a suspicious activity disclosure, and so on, and then deals with matters such as legal privilege by way of exception. A solicitor who carries out work for a

21. Proceeds of Crime Act 2002, section 340(2),(3).

22. *E.g.*, drug trafficking, participation in organised crime, serious fraud, corruption and offences punishable by imprisonment for at least six months: see now article 3(5) of the Third Directive.

23. *Id.* at article 1(2).

24. Proceeds of Crime Act 2002, section 328(1).

25. The professional title "solicitor" is used here rather than the generic term "lawyer" because, for reasons explained below, it is now rarely the case that a barrister—or, in Scotland, an advocate—requires to make a suspicious activity disclosure.

person whom he suspects of tax evasion is himself an "alleged offender"[26] unless the circumstances are covered by legal professional privilege.

Finally, any infringement of the anti-money laundering legislation, including failure to make a suspicious activity report or tipping-off a client, was made a *criminal* offence—again more than was required by the Directives or by FATF.

The aggregate effect of these features of the regime has been to encourage solicitors to make a huge number of defensive reports and consent applications, in order to ensure that they do not unwittingly commit a criminal offence by "facilitating" money laundering.[27]

(ii) *Confrontational approach*

The other major difficulty with the regime introduced by the Proceeds of Crime Act 2002 was that it presupposed that a confrontational attitude was needed to force the financial and professional sectors to make reports to the financial intelligence unit, which at that time was the National Criminal Intelligence Service (NCIS). Use of expressions such as "the alleged offender" in the legislation only served to emphasise this attitude and during the first few years of reporting there was little or no dialogue between NCIS and the organisations making suspicious activity reports. The consequence was a feeling on the part of those making reports, including solicitors, that they were being put to a great deal of wasted time and expense for no benefit to anyone.

These and other problems led in 2005 to responsibility for administration of the reporting system being transferred to a new agency, the Serious Organised Crime Agency (SOCA)[28] and also to a review of the operation of the system by the chair of SOCA, Sir Stephen Lander, with a view to reforming it. Among the recommendations made in the Lander report were improved dialogue with those making reports, and the acceptance by SOCA of responsibility for producing guidance on how the regime should operate.

## II The Test Case: *Bowman v Fels*

By 2004, the number of worthless suspicious activity reports was getting out of hand, and practitioners and authorities alike were looking for guidance on what did or did not need to be reported. An opportunity of obtaining judicial guidance arose with the case of *Bowman v Fels*.[29] In the course of a litigation to determine the

---

26. *Id*. at sections 327-330 and 340(3).

27. In the year to 30 September 2009, there were 13,618 applications for consent of which 3,040 (22.3%) were from solicitors and 4 from barristers (Serious Organised Crime Agency: The Suspicious Activity Reports Regime Annual Report 2009, Annex C: *see* http://www.soca.gov.uk/news/151-suspicious-activity-reports-regime-annual-report-2009). The total number of suspicious activity reports from all sources made to SOCA in the year to 30 September 2009 was 228,834 (ibid, Annex B).

28. Created following the terrorist bombings in London in July 2005.

29. [2005] 1 WLR 3083; [2005] EWCA Civ 226.

respective beneficial interests in a house of a man (M) and a woman (W) who had previously lived together there, and shortly before the case was due to go to trial, W's solicitors became suspicious that M had reclaimed through his business account value added tax paid on goods used for work on the couple's house, i.e. for private purposes. If true, this would constitute tax evasion. The solicitors took the view that even though M was not their client, they could not safely continue to act for W in the litigation without consent from NCIS. They sought and obtained a postponement of the trial, without giving any advance warning to their client or to M's solicitors and without explaining why afterwards (though M's solicitors guessed correctly). Eventually NCIS gave consent. In the meantime a different judge had set aside the order postponing the trial, and W appealed to the Court of Appeal against this order.

The Court of Appeal took advantage of the appeal (though by now the action had been settled) to examine thoroughly the extent of the reporting obligation.[30] As a matter of statutory interpretation, the court rejected the argument that lawyers representing clients in a litigation become "concerned . . . in an arrangement" to facilitate money laundering. More importantly, as a matter of policy, the court considered that it would be an infringement of the principle of lawyer-client confidentiality, which is itself recognised in the recitals to the European Directives, if information received in the ordinary course of legal proceedings could trigger an obligation to report. The court concluded that the UK legislation was not intended to cover or affect the ordinary conduct of litigation by legal professionals. Common sense thus prevailed.[31]

On receipt of this judgment, the legal profession in the UK heaved a collective sigh of relief. The number of suspicious activity reports and applications for consent dropped by half, but still remained far above levels in other jurisdictions. The judgment of the Court of Appeal contains much encouraging material in relation to the overriding importance of legal advice privilege as well as litigation privilege, except, of course, where the legal advisor is himself implicated in the money laundering activity.

## III The Current Position

*Transposition of Directives*

The United Kingdom has now passed legislation transposing the Third Anti-Money Laundering Directive and the Implementing Measures Directive. Most of the transposing provisions are to be found in the Money Laundering Regulations

---

30. In the Court of Appeal proceedings, the (English) Bar Council and Law Society intervened to argue that there was no reporting obligation in these circumstances. NCIS intervened to argue that there was.

31. In certain respects the rationale of the court's judgment is not entirely satisfactory. For a detailed critique, see Atrill & Barden, "Legal Privilege and Mandatory Disclosure under the Proceeds of Crime Act 2002", [2006] Lloyd's Maritime and Commercial Law Quarterly 11.

2007, which came into force on 15 December 2007. In contrast to previous legislation, the 2007 Regulations closely follow the wording of the Directive and do not attempt to gold-plate it as was done with the previous Directives. Financial institutions and the professional sector are therefore now obliged to adopt the risk-based approach to customer due diligence.

In late 2009 the UK Treasury conducted a consultation exercise on practical difficulties experienced in operating the 2007 Regulations, but it is understood that (despite lobbying by the Law Society of England and Wales) no structural legislative changes are planned for the time being.

*Practical Application*

The core of the UK system in practice is the "consent" regime, which enables—and, in practice, obliges—practitioners to seek consent from SOCA to proceed with a transaction whenever they suspect that any funds or property concerned in the transaction may constitute the benefit of any form of criminal conduct. Such consent must be sought without tipping off the client that it is being sought. The practical difficulties created can be easily appreciated. The client may wonder why his solicitor appears to be doing nothing in the course of a transaction and why, if asked, the solicitor will not explain the reason for the delay. It is obviously critical to the sensible operation of business that the delay should be minimised, and much progress has been made in this regard. The average time for obtaining clearance from SOCA has been reduced to around three days, but this average figure conceals a wider range of response times. In around 40-50% of applications for consent, the matter is dealt with by SOCA alone and the response time is likely to be very short: one day or less. In cases where the matter has to be referred by SOCA to another institution, such as HM Revenue & Customs, the response time can be longer. Practitioners have evolved means of mitigating the problem of keeping the client in the dark: for example, the Law Society of Scotland recommends the insertion of a clause in client engagement letters warning that "delays" may occur in completion of transactions where, e.g., there is a last-minute change of instruction, or a third party source of funds, or a late change of party to a transaction (such as a different lender). Otherwise there is likely to be a period during which the solicitor has to make excuses for delay while awaiting clearance to proceed. The same problem can arise where the solicitor suspects that a delay is due to a consent application having been made in respect of the other party to the transaction: as a result of legislative changes made in 2007,[32] the solicitor risks being guilty of tipping off if he explains this to his own client.

Another difficulty arises out of the need to identify "beneficial owners" of clients such as companies and trusts. The UK legislation[33] has followed the ap-

32. Proceeds of Crime Act 2002, section 333A(3), inserted by the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), regulation 4.

33. Money Laundering Regulations 2007, regulation 6.

proach of the Third Directive, rather than the impractical requirement of the FATF Recommendations that would require ownership to be traced to the bitter end, but has still required adaptation to fit the Directive to the peculiarities of the common law institution of trusts. For example, the Regulations provide that an individual is not a beneficial owner merely because he or she is one of a group of beneficiaries who could, if they wished, agree unanimously to terminate or vary the trust. Persons whose consent is required to advance capital are also excluded. These sensible provisions, which were inserted in response to lobbying from trust practitioners, do not wholly eliminate unproductive work in tracing individuals falling within the definition and, in this regard as in others, practitioners must apply a degree of judgment despite the risk of criminal proceedings if their judgment turns out to be flawed. An excessive number of levels of ownership (three or more) without encountering a physical person might reasonably be regarded as grounds for suspicion, and practitioners are advised to be wary of explanations offered for over-complicated structures, such as the need to protect a celebrity from media attention.

*The Scope of Legal Professional Privilege*

Inevitably, tensions will arise between the reporting obligation (or application for consent to proceed with a transaction) on the one hand and client confidentiality on the other. In addition to the usual legal professional privilege, which is not (and could not be) overridden by anti-money laundering legislation, a professional legal adviser is exempted by statute from the duty to disclose information if it was given to him unless it was given for the purpose of furthering a criminal purpose.[34]

- by a client of his in connection with the giving of advice to the client;
- by a person seeking legal advice from him; or
- by a person in connection with current or contemplated legal proceedings;

But neither the general principle of legal professional privilege nor the specific statutory exemption absolves the solicitor entirely of the duty of disclosure, or of the risk of criminal proceedings against him if he fails to seek consent from SOCA when he ought to have done so. The matter that creates his suspicion may have come to his attention otherwise than by the client seeking advice from him. In such circumstances, although the communication may have been confidential, the information will still be reportable.[35]

The criminal purpose exception to legal professional privilege must also be kept firmly in mind. Communications which take place in order to obtain advice with the intention of carrying out an offence are not privileged. Worse still, where a legal adviser carries out a transaction which itself forms part of the criminal

34. Proceeds of Crime Act 2002, section 330(10) and (11).

35. Unless the wider interpretation of the decisions in the Belgian and French challenges to the reporting obligation (discussed above) turns out to be the correct one.

activity, not only are communications not privileged but the adviser himself commits the principal offence. For a solicitor who merely suspects that a transaction might be for money laundering purposes, the position is difficult. He finds himself caught between a breach of professional duty if he discloses and the commission of a criminal offence if he does not. In such circumstances, if the client is not willing to waive privilege and permit a report to be made, the only possible course may be to withdraw from acting.

## IV Conclusions

Compliance with the statutory anti-money laundering regime has imposed a heavy burden on the legal profession in the UK. That burden is to some extent inevitable if the UK is to fulfill its obligation to participate in countering global criminal and terrorist activity. However, practitioners remain of the view that it has been aggravated by the manner in which the Government has implemented its obligations. No one suggests that lawyers who knowingly lend themselves to the facilitation of money laundering should be treated more leniently than others who do likewise. The present regime, however, remains open to the criticisms that it is unnecessarily complex and risks criminalising normal business activity and technical errors committed unwittingly by practitioners. Unfortunately, the Government is not yet persuaded that a radical overhaul of the statutory regime is required in order to meet these criticisms.