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Court Seeks ECJ Ruling on Scope of Money-Laundering Directive

by Marc Quaghebeur

In a July 13 decision (case 126/2005, not yet published), Belgium's Court of Arbitration has asked the European Court of Justice for a preliminary ruling concerning the compatibility of the extension of the EU money-laundering directive to lawyers with the fundamental right to a fair trial.

Constitutional Court

The Court of Arbitration, Belgium's constitutional court, has exclusive jurisdiction to review laws for compliance with the Belgian Constitution (articles 8 through 32, 170, 172, and 191), as well as the division of powers between federal and local authorities.

It was created in 1980 when the unitary Belgian state developed into a federal state. Its initial mission was to supervise the observance of the constitutional division of powers between the state, the communities, and the regions.¹ The Court of Arbitration has been in office for nearly 20 years, and the federal government has proposed changing its name to Constitutional Court.²

¹These are the Flemish-, French-, and German-speaking communities and the Flemish, Brussels, and Walloon regions. The difference between communities and regions relates to their respective competencies. The communities have competence over cultural, educational, health, and sport and youth issues, whereas the regions have competence over economic issues: town and country planning, the environment, agriculture, housing, public works, transportation, regional aspects of the economic policy, foreign trade, employment policy, and so on.

²Doc. Parl. Chambre, 51, 1728/001.

A case can be brought before the Court by any authority designated by statute, any person who has a justifiable interest, or by any tribunal, by way of preliminary question.

It is on that basis that the Federation of French- and German-Speaking Bar Associations, together with the French-speaking Brussels Bar Association and the Council of Flemish Bar Associations, filed an action to revoke the Law of January 12, 2004, which modified the Law of January 11, 1993, (as it applies to lawyers) for the prevention of the use of the financial system for purposes of money laundering and the financing of terrorism. The Council of Bars and Law Societies of Europe (CCBE)³ has also joined in the case.

Relevant Provisions

The Law of January 12, 2004, implemented Directive 2001/97/EC amending Council Directive 91/308/EEC on preventing the use of the financial system to launder money. In practice it extended the provisions of the Law of January 11, 1993, to lawyers when they assist their clients in the planning or execution of transactions concerning:

³The CCBE is the officially recognized representative organization for the legal profession in the European Union and the European Economic Area. It is incorporated in Belgium as an international nonprofit association. The CCBE liaises between the bar associations and law societies of the EU and EEA member states, and represents approximately 700,000 lawyers.

- the buying and selling of real property or business entities;
- the management of client money, securities, or other assets;
- the opening or management of bank, savings, or securities accounts;
- the organization of contributions necessary for the creation, operation, or management of companies; and
- the creation, operation, or management of trusts, companies, or similar structures.

Also, the provisions of the Law of January 11, 1993, apply to lawyers when they act on behalf of, and for, their client in any financial or real estate transaction (article 2 *ter*).

In practice the law imposes a due diligence obligation on lawyers; they must identify clients⁴ and their agents and verify their identities by means of a supporting document, a copy of which must be made on paper or by electronic means:

- when they establish business relations that will make them regular clients;
- when the client wants to perform a single transaction or a set of transactions for an amount of €10,000 or less, and there is a suspicion of money laundering or financing of terrorism; or
- when they have doubts about the veracity or adequacy of an existing client's identification data.

Moreover, they must observe constant diligence regarding the business relationship and carefully examine the performed transactions to ensure that they are consistent with the knowledge they have of their clients, of their clients' commercial activities and risk profiles, and when necessary, the origin of the funds. If a lawyer cannot satisfy that double due-diligence obligation, he must refrain from entering into, or stop, the business relationship. However, it is up to the lawyer to decide whether there are grounds to inform the Financial Intelligence Processing Unit (FIPU) (article 4).

Lawyers are required to inform the president of their bar association immediately if, in the exercise of the activities enumerated above, they learn of facts they know or suspect to be linked to money laundering or terrorism (article 14 *bis*, section 3). The president of the bar association then verifies whether the conditions for information reporting have been met, and immediately sends the informa-

tion to the FIPU, which may demand additional information that it deems useful for the investigation of that particular case.

However, neither the lawyer nor the president of the applicable bar association is required to transmit such information to the FIPU if it was received from a client or obtained on a client in the course of ascertaining the client's legal position or defending or representing the client in (or concerning) judicial proceedings (including advice on instituting or avoiding proceedings), whether the information is received or obtained before, during, or after those proceedings.

Whenever the procedure via the president of the bar association cannot be followed, lawyers must personally transmit information to the FIPU. In any event, they may never inform the client concerned, or third parties, that information has been transmitted to the FIPU or that a money-laundering investigation is in progress.

Arguments

The main objection to the Law of January 11, 1993, is that extending its application impairs lawyers' privileges of confidentiality and independence, which are essential to the right to a fair trial and the right to a proper defense under articles 10 and 11 of the Belgian Constitution, article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and article 6(2) of the EC Treaty.

Decision

The Court confirmed that the law of January 12, 2004, implements Directive 2001/97/EC, which imposes on the Belgian legislature an obligation to extend the money-laundering law to lawyers. However, the European Parliament, like the Belgian legislature, must respect the fundamental rights of the defendant and the right to a fair trial. The Court conceded it is not competent to decide on the compatibility of the directive with the general principle of the rights of the defendant that binds the European Parliament. Consequently, it referred the following question to the ECJ:

Does article 1(2) of Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering violate the right to a fair trial guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and, therefore, article 6 [section] 2 of the Treaty on European Union, in as far as the new article 2 *bis* (5) which it inserts in Directive 91/308/EEC, includes independent legal professionals in the application of the

⁴The identification must cover the identity of the client and the object and presumed nature of the business relationship.

directive, without excluding the profession of lawyers, where the purpose of the directive is to impose an obligation on the individuals and institutions to inform the authorities responsible for combating money laundering of any fact that might be an indication of money laundering (article 6 of Directive 91/308/EEG

as replaced by article 1(5)) of Directive 2001/97/EG? ◆

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