

CARPA (Fund for Lawyers' Financial Payments) - a means of self-regulation for lawyers and a tool in the fight against money laundering



Many lawyers will be faced with a money-laundering problem during their professional careers.

The CARPAs have an established role in the prevention of and fight against money laundering.

A brief insight into some of the problems faced by the implementation of the European Directive of 26 October 2005 on the fight against money laundering and terrorist financing, applicable to lawyers under Articles L 561-1 and L 562-2-1 of the French Monetary and Financial Code, following the judgment handed down by the *Conseil d'Etat* on 10 April 2008.



A European Directive that is not designed for lawyers

The implementation of the European Directive of 26 October 2005, replacing the Directive of 2 December 2001, has created many problems, as the method adopted for the prevention of money laundering, which also applies to lawyers, was taken directly from the first directive of 10 June 1991, which only applied to financial institutions.

The application of this method, designed with financial institutions in mind, to lawyers has produced a conflict with legal professional privilege.

In its decision of 10 April 2008, the *Conseil d'Etat* has restated that, both in their activities connected to judicial proceedings and when providing legal advice, lawyers cannot be required to report suspicious transactions.

The anti-money laundering and counter terrorist financing regulations applicable to lawyers:

- Do not change a lawyer's obligation to effect due diligence in all cases. In fact, lawyers are required, as was already the case under the professional regulations governing lawyers, to obtain the precise identity of their clients and information about the precise economic nature of the transaction on which the lawyer is advising.
- However, legal professional privilege is binding in both of the main fields of a lawyer's work (court assistance and representation and provision of legal advice) and therefore the handling of funds using CARPA accounts, which can only be used in connection with the above activities, is not covered by the regulations applicable to financial institutions.

CARPA accounts are treated as pooled accounts within the meaning of Article 11-2 b) of the Directive of 26 October 2005.

Accordingly, there is no threat to legal professional privilege in France provided that the funds received by lawyers in their traditional fields of work are transferred to a CARPA account.

With legal professional privilege being maintained in this way, it is the regulatory authorities of each Bar that are responsible for ensuring that lawyers comply with the requirements for the fight against money laundering and terrorist financing.

Under the provisions of Article 17(13) of French Act No. 71-1130 of 31 December 1971, as amended by the French Order of 30 January 2009, the role of the *Conseils de l'Ordre* (lawyer regulatory body) is to:

"Ensure that lawyers comply with their anti-money laundering and counter terrorist financing obligations provided for in the first chapter of section VI of book V of the French Monetary and Financial Code and to obtain copies of the compliance documents for these obligations, in accordance with the conditions specified in the French Decree adopted after submission to the Conseil d'Etat".

Under Article 8 of the French Regulation of 5 July 1996, the CARPAs are required to check transactions carried out by lawyers, as regards the origin of the credited funds, the identity of the beneficiary of the payments and in particular the proof of the link between the financial payments made by lawyers and the court or legal acts carried out by the lawyers as part of their professional duties.

Lawyers therefore need to have an extensive knowledge of their obligations.

Also, the *Conseils de l'Ordre* need to set up the required procedures to meet their legal requirements.

Lawyers are not bankers



This is an important point to remember and is the reaction of many lawyers to the anti-money laundering legislation.

In fact, the European legislation applicable to lawyers is modelled on banking legislation, but it is clear that the two professions operate in very different situations.

Banks enter into a contract with their customers, which by its very nature is valid and lawful. Opening a bank account and carrying out banking transactions on behalf of their customers is by definition a lawful activity.

Where, within this lawful framework, a transaction appears suspicious, it is logical that the banks, which are merely acting as passive agents, are bound by specific public policy obligations, such as due diligence obligations and a requirement to report suspicious transactions.

Lawyers are in a completely different position. There is no core contract between lawyers and their clients similar to the contract existing between banks and their customers.

Lawyers enter into specific contracts with their clients, on a case by case basis. Lawyers cannot accept a case if they have doubts about its lawfulness. In such cases, the lawyer would face prosecution for assistance in the commission of a money laundering offence by supplying the means to commit the offence.

Banks and lawyers are not in the same boat

Whereas banks are bound by their original contract, the position of lawyers is very different as they may refuse a case at any time, whilst at the same time having a duty to warn their clients. Lawyers cannot provide advice in connection with a money laundering transaction.

It is therefore clear that lawyers must always examine the legal basis of the transactions that they are requested to handle, to ensure that there is no risk that the advice they will need to give will lead to them committing an offence.

In this respect, the regulations applicable to lawyers, modelled on the existing banking regulations, are completely unsuitable.

There is a major difference between the fight against money laundering and the resulting specific anti-money laundering obligations on the one hand and the actual offence of money laundering itself.

Lawyers can face direct prosecution for the commission of an offence of money laundering, while banks cannot.

In the event that a lawyer is suspicious about a transaction, it is unthinkable that the lawyer would carry out the transaction and merely report its suspicious nature.

Legal professional privilege

The *Conseil d'Etat* clearly specified, in its judgment of 10 April 2008, the limits of the obligations imposed on lawyers, who, where in doubt, should dissuade their clients from carrying out the relevant transaction.

Legal professional privilege is in fact an essential part of a lawyer's role to provide legal advice to clients.

This point is noted in the submissions of AG Maduro. Legal professional privilege should protect lawyers both when providing legal advice and when defending clients. These two areas are one and the same, as is stated in Article 66-5 of French Act No. 71-1130 of 31 December 1971.

Whether a lawyer is advising clients or defending clients, his duties arise from the same type of agreement: a contract for the provision of independent services.

Lawyers assist the judge in its decision-making role when defending clients and assist clients in their decision-making process when providing legal advice.

Lawyers, in their capacity as an independent service provider, cannot assume any obligations to report suspicious transactions as this would involve lawyers assisting the commission of a money laundering offence by supplying the means to carry out the transaction.

Lawyers and trust work

The issue is more complex where lawyers act as trustees, as authorised under Article 27 of French Act No. 71-1130 of 31 December 1971.

In this situation, lawyers are passive agents. Where the trust agreement is valid and its basis is lawful, certain acts carried out in performance of the trust could give rise to suspicions, placing lawyers in the same position as bankers. Here, there is no reason why suspicious transactions should not be reported, as legal professional privilege should not apply where lawyers are merely carrying out instructions received by the client.

CARPA is not a bank



The CARPAs are responsible for managing and checking financial payment transactions carried out in relation to the provision of legal advice by lawyers or activities connected to judicial proceedings, whilst upholding legal professional privilege. Accordingly, transactions carried out through a lawyer cannot give rise to the reporting of a suspicious transaction.

Therefore, lawyers must themselves be part of the fight against money laundering by ensuring that they are not involved in any money laundering transactions.

The judgment of the *Conseil d'Etat* of 10 April 2008 and Article 11 of the European Directive of 26 October 2005 lead to the conclusion that the CARPA accounts are protected by legal professional privilege, which means that the CARPAs are not required to report any suspicious transactions, as these are treated in accordance with the provisions of Article 8 of the French Regulation of 5 July 1996.

Thus, the presidents of the *Conseils de l'Ordre* and the presidents of the CARPA need to ensure that the necessary procedures are implemented to fight money laundering through financial payments received by lawyers.

They can fulfil their roles through prevention measures and lawyer information campaigns, but should also use the relevant technical and IT resources to enable them to freeze and reject any transactions that appear unlawful, to ensure that lawyers are not found to have assisted in a money laundering transaction, even unknowingly.

The very nature of a lawyer's duties is such that due diligence is mandatory, firstly to ensure there is no conflict of interest, and secondly to avoid any involvement in the commission of a criminal offence and to ensure that the advice given is not used for transactions that go against the lawyer's oath.

These due diligence obligations therefore require, as a natural part of a lawyer's duties and notwithstanding the specific regulations under the French Monetary and Finance Code, that lawyers always have precise information about a client's identity, the beneficiary of the transaction and the economic basis of the transaction.

As the CARPAs are not required to report suspicious transactions, it is important that the banks respect the legislation applicable to them.

In this way, the roles of the relevant bodies in the normal functioning of a democracy and a Constitutional State are respected.

Regulatory provisions designed for lawyers



Article 241 of French Decree No. 91-1197 of 27 November 1991

"No withdrawals from the account referred to in Article 240-1 shall be made without the prior control of the CARPA, performed according to the procedures defined in the regulation mentioned in Article 241-1."

"No payment of lawyers' fees shall be made without the client's prior written consent."

Article 241-1 of French Decree No. 91-1197 of 27 November 1991

"A regulation of the French Minister of Justice, issued after submission to the National Bar Council, shall lay down the rules governing deposits and the handling of funds, bills or assets referred to in the ninth paragraph of Article 53 of the aforementioned French Act of 31 December 1971".

Article 8 of the French Regulation of 5 July 1996

"The CARPA must be able to control, in particular for the transactions referred to in Article 241 of the aforesaid French Decree No. 91-1197 of 27 November 1991:

- 1.** *The banking and accounting position of case sub-accounts;*
- 2.** *The description and nature of the cases;*
- 3.** *The origin of the funds deposited in the case sub-accounts;*
- 4.** *The identity of the beneficiaries of the payments;*
- 5.** *The cases for which the amounts credited exceed the limit of the insurance guaranteeing the representation of the funds;*
- 6.** *The proof of the link between the lawyers' financial payments and the legal or judicial acts performed by them in their professional practice;*
- 7.** *The absence of any transactions in a case sub-account."*