

Lawyers and Money laundering

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Abstract

The European recommendations suggest that the lawyers are considered gatekeepers of money laundering, such persons who can contribute to the legalization of money acquired through illegal ways with their expertise in the area.

The Hungarian legislation concerning money laundering that can potentially affect lawyers raise serious constitutional concerns on several points.

It is increasingly common in the international legal practice, that a criminal proceeding is launched against a lawyer. These proceedings are often based on the assumption that the criminal defence lawyer has conducted money laundering by receiving his legal fee.

Keywords: money laundering, lawyers, criminal proceeding.

The involvement of the **lawyers** on the money-laundering¹ is always a “hot-topic” in the public opinion, legislation and the international legal literature² as well. A specific **tension** can be felt in a lawyer’s position³, on the one hand the client’s interest has to be represented –who is an actual or alleged perpetrator- , on the other hand this representation must be achieved within the framework of legality. Briefly below we take up some – our constitutional point of view – considered question in connection with the describing of the fight against the money laundering⁴ and the provisions for lawyers.

¹ Dennis Cox, *Handbook of Anti Money Laundering*, John Wiley & Sons, Ltd, Cornwall, 2014. p.6. “The idea of money laundering is simple in principle. The person who has received some form of ill-gotten gains will seek to ensure that they can use these funds without people realising that they are the result of inappropriate behaviour. To do this they will need to disguise the proceeds such that the original source of the proceeds is hidden and therefore the funds themselves appear to be legitimate. Given that it is often cash that needs to be disguised, the criminal will often seek out legitimate cash-based businesses to enable them to disguise the source of their illegitimate cash.”

² Ping He, *Lawyers, notaries, accountants and money laundering*, Journal of Money Laundering Control, Volume: 9 Issue 1, 2006 pp. 62-70; Marcelo Ruiz, *Lawyers and money laundering*, Journal of Money Laundering Control Volume: 7 Issue 3, 2004 pp. 272-274; Klaus Bernsmann, *Der Rechtsstaat wehrt sich gegen seine Verteidiger – Geldwäsche durch Strafverteidiger?* [The legal state defends itself against its defenders - money laundering by criminal defense lawyer] In: Festschrift für Klaus Lüderssen zum 70. Geburtstag am 2.Mai 2002, Nomos Verlagsgesellschaft, Baden-Baden, 2002, pp. 683-692.; Keppeler, Frank: *Geldwäsche durch Strafverteidiger* [Money Laundering by criminal defence lawyer] Deutsche Richterzeitung 2003/3, pp. 97-104.; Eugene R. Gaetke – Sarah N. Welling, *Money Laundering and Lawyers*, Syracuse Law Review Vol. 43 1992 pp. 1165-1245.

³ Matt Holger, *Strafverteidigerhonorar und Geldwäsche* [Criminal Defence Lawyer’s fee and Money Laundering] In: Festschrift für Pter Reiss am 4.Juni 2002, hrsg. von Ernst-Walter Hanack, Hans Hilger, Volkmar Mehle, Gunter Widmaier, Walter de Gruyter, Berlin, New York, 2002, p. 739.

⁴ A Lawyer’s Guide to Detecting and Preventing Money Laundering - A collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law

1. According to the Hungarian Criminal Code [in the following: HCC], it is realized a **qualified case** of money laundering⁵, when it is committed by an **attorney-at-law** [HCC Section 399 (4) section e) p.]. According to the Act XI of 1998 Section 13 (1) on Lawyers, any member of the bar association who has taken the **attorney's** oath may engage in legal practice (except the assistant attorneys). Obviously it does not based on this more serious qualification if the perpetrator **pauses** the advocacy action according to the Act XI of 1998 Section 17 (1), or if he not drills⁶ it according to the Act XI of 1998 Section 18 (3) or rather will be **suspended** according to the Act XI of 1998 Section 54 (1).⁷

Because of the phrasing of the law, it includes the **assistant attorneys** according to the Act XI of 1998 Section 84 (1) because he practices law on the basis of an employment relation created with an attorney or law firm; although he is not a member

Societies of Europe. October 2014. p. 4. " Money laundering involves three distinct stages: the placement stage, the layering stage, and the integration stage. The placement stage is the stage at which funds from illegal activity, or funds intended to support illegal activity, are first introduced into the financial system. The layering stage involves further disguising and distancing the illicit funds from their illegal source through the use of a series of parties and/or transactions designed to conceal the source of the illicit funds. The integration phase of money laundering results in the illicit funds being considered "laundered" and integrated into the financial system so that the criminal may expend "clean" funds."

⁵ Act C of 2012 on the Criminal Code Money Laundering "Section 339 (1) Any person who, in connection with an asset obtained from any punishable criminal offense committed by others: a) converts or transfers the asset in question, or performs any financial transaction or receives any financial service in connection with the thing in order to: aa) conceal or disguise the origin of the asset, or ab) frustrate the criminal proceedings conducted against the perpetrator of a punishable criminal offense committed by others; b) conceals or disguises the origin of the asset and any right attached to the asset or any changes in this right, or conceals or suppresses the place where the asset can be found; is guilty of a felony punishable by imprisonment between one to five years. (2) The penalty under Subsection (1) shall also be imposed upon any person who, in connection with an asset obtained from a punishable criminal offense committed by others: a) obtains the asset for himself or for a third person; b) safeguards, handles, uses or consumes the asset, or obtains other financial assets by way of or in exchange for the asset, or by using the consideration received for the asset; if being aware of the true origin of the asset at the time of commission. (3) The penalty under Subsection (1) shall also be imposed upon any person who, in order to conceal the true origin of an asset that was obtained from a punishable criminal offense committed by others: a) uses the asset in his business activities; b) performs any financial transaction or receives any financial service in connection with the asset. (4) The penalty shall be imprisonment between two to eight years if the money laundering specified under Subsections (1)-(3): a) is committed on a commercial scale; b) involves a particularly considerable or greater amount of money; c) is committed by an officer or employee of a financial institution, investment firm, commodities broker, investment fund manager, venture capital fund manager, exchange market, clearing house, central depository, body acting as a central counterparty, insurance company, reinsurance company or independent insurance intermediary, voluntary mutual insurance fund, private pension fund or an institution for occupational retirement provision, an organization engaged in the operation of gambling activities or a regulated real estate investment company; d) is committed by a public official; e) is committed by an attorney-at-law.(5) Any person who collaborates in the commission of money laundering as specified under Subsections (1)-(4) is guilty of misdemeanor punishable by imprisonment not exceeding two years."

⁶ Act XI of 1998 on Attorneys at Law "Section 17 (1) An attorney may suspend his practice - with the permission of the bar association. Suspension is for a minimum of three months. The bar association may refuse to permit suspension if the attorney has not properly provided for handing over or terminating his agencies and - if the person announcing the suspension employs assistant attorneys and articulated clerks - he has failed to make the arrangements stipulated in the Labor Code for the employee relations of assistant attorneys and articulated clerks."

⁷ László István Gál, *A pénzmosás* [The Money Laundering], KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004, pp. 99-100.

of the bar, but he falls below similar judgment with the lawyers. According to the Section 84 (1), the assistant attorney can practice the law solely by the employer with his assignment. Consequently, if the assistant attorney commits the money laundering based on attorneys assignment, but he is not aware of the crime, in that case the lawyer who gave the assignment – agree with László István Gál – will be an **indirect perpetrator**. According to the Act XI of 1998 Section 95 (1) on Lawyers, the articulated clerks don't belong to this group, because an articulated clerk is not a member of the bar association according to the 96 (2) section.

It can cause a **problem**, a crime is committed by only those person, who is a bar member, or it can happen without this “operating permit”?

Mihály Tóth⁸ and László István Gál⁹ have an opinion that the crime can be realized without this admission, because the main point is that “to be a lawyer” is a facilitating condition for the realization of the money laundering and not the actually registered bar membership. We think that this interpretation could be suitable for the further conversation, we should examine that it would be more appropriate to handle the statutory more formal, so to narrow the fact pattern for those who have bar membership.

The HCC Section 400 (2) controls the **reasons of the terminating of criminality**, its criminal policy reason that a greater interest connects to the uncovering of the unexplored or only partially explored acts, than the perpetrator's punishment. The exploration of the money laundering may results not only the returning of the damage caused by the basic crime, but it also prevents that the legalization of the material assets, which were acquired in a guilty way, ensure the financial background of the further new crimes. Nevertheless it is a question, if the lawyer committing the crime with the mandator, how realistic is this regulation?

2. In the former¹⁰ money laundering law (Act XXIV of 1994.) – commonly called “Brick law”- have not been set those provisions which are specialized for the lawyers. This was obviously regulated¹¹ in the new Act CXXXVI. of 2007 [in the following: AML], which is about the prevention and impeding of the money laundering and terrorism financing¹². The legislature regulated in the HCC Section 401 the misdemeanour of the failure of the **notification obligation in connection with money laundering**. This action can be called “bank money laundering”, although it affects now a much widely area. The background norm is the above-referred Pmt. law.

This law – despite some of the provisions which contains at the Hungarian Legislator's common standard “overfulfilment” elements and some controversial elements –

⁸ Mihály Tóth, *Gazdasági bűnözés és bűncselekmények* [Economic criminality and crimes], KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2002, p. 361.

⁹ Marco Arnone – Pier Carlo Padoan, *Anti-money laundering by international institutions: a preliminary assessment*, European Journal of Law and Economics, Volume: 26, Issue:3, 2008, pp. 361-386.

¹⁰ Judit Jacsó, *A pénzmosás elleni fellépés nemzetközi eszközei* [International], Magyar Jog 2000/6, pp. 545-549.

¹¹ Pál Sinku – László István Gál, *Dinamikus és statikus pénzmosás - egy új tényállás kritikai elemzése* [Dynamic and static money laundering - critical analysis of a new statement of facts], Magyar Jog 2008/3. pp. 129-133.

¹² László István Gál – Mihály Tóth, *The Fight against Money Laundering in Hungary*, Journal of Money Laundering Control 8 (2) 2004. pp. 186-189.

corresponds to the **international**¹³ and **European** recommendations and prescriptions¹⁴. It proceeds that the large amount movements, mobility, investments of the material essential and its consistent analysing organizations, which operate with the appropriate system and able to eliminate the indicators which allude to the commitment of a crime. The announcement of these are more important than the law and the obligation related to the **secrecy**.

On a more general level, given the present conditions, the social interest against the spreading **organized crime** may be more important than the relationship between the person who perform certain financial activities and his client, or the protection of the personal data.

The content of the lawyers activities can be found in the Act XI of 1998 Section 5 (1). According to this an **attorney** represents his client, provides the defense in criminal cases, provides legal counsel, prepares contracts, petitions and other documents, holds valuables deposited.¹⁵ The assistant attorney performs attorney's activities. According to some legal literature opinions – István László Gál¹⁶ – the articulated clerks perform attorney's activities too, however we do not share this interpretation. According to the Act XI of 1998 Section 13 (1) on Lawyers, any member of the bar association who has taken the attorney's oath may engage in legal practice (except the assistant attorneys). The articulated clerk does not have bar membership and legal qualification exam, so we consider unreasonable this broad interpretation of the legislation.

According to the AML 6-7. section, those people who perform legal activities have identification and reporting obligation, if they hold any money or valuables in custody or if they provide legal services in connection with the preparation and execution of the following transactions in accordance with the Act XI. of 1998 (1) of Section 5. (For example he assists in the preparation of real estate purchase contract.)

The lawyer can't be held accountable for the **obligations** described in AML, in such cases when he became aware of the data, fact or circumstances suggesting money laundering during a **criminal proceedings, defence** and representation in court in progress (not including representation in court of registry), or became aware during preparation, execution, or following execution related to the abovementioned

¹³ Camelia Șerban Morăreanu, *Money Laundering – an Economic Offence*, Journal of Knowledge Management, Economics and Information Technology, Issue 7, December 2011 pp. 1.4.

¹⁴ Peter Lewisch, *Money laundering laws as a political instrument: the social cost of arbitrary money laundering enforcement*, European Journal of Law and Economics, Volume: 26, Issue:3, 2008, p.409. "In the light of the aforementioned situation, it is no surprise that international covenants have developed (albeit under considerable pressure from their net beneficiaries) that obligate the signing parties to enact pertinent anti-money laundering legislation and to enforce it. Typically, these legal instruments have also required the signing states to provide for measures that allow seizure and confiscation of the proceeds of crime and disgorgement of gains."

¹⁵ Act XI of 1998 on Attorneys at Law "Section 5 (3) Attorneys may provide the following services in addition to those specified in Subsection (1): a) tax consultancy, b) social security consultancy, c) financial and other business consultancy, d) real estate agency, e) patent agency, f) activities authorized by legal regulation (with the exception of local government bylaw), g) mediator activities in mediation proceedings regulated in specific other legislation, and in criminal cases, h) converting the instrument of constitution of a company - that he has prepared - and the additional appendices of the company's application for registration (notification of amendments) into electronic format, i) services of accredited consultants for public contracts; j) notifier protection."

¹⁶ See: László István Gál, *A pénzmosás és a terrorizmusfinanszírozás az új magyar büntetőjogban* [Money laundering and financing terrorism in the new Hungarian criminal law], Belügyi Szemle 2013/6. pp. 26-32.

representation, defence and proceedings, including **legal consultancy** considered necessary for execution of above activities.

The European recommendations suggest that the lawyers are considered “gatekeepers” of money laundering, such persons who can contribute to the legalization of money acquired through illegal ways with their expertise in the area, which explains the overzealous approach of the legislature.

3. The Hungarian legislation concerning money laundering that can potentially affect lawyers raise serious **constitutional concerns** on several points, though the national legislature did no more than adopting the EU regulation into our national legal system. (Which is still does not mean that the EU regulations related to money laundering would stand the test of the European Court or the European Court of Human Rights)

According to Criminal Procedure Act XIX of 1998¹⁷ Section 5 (1): “The accused is entitled to legal protection” and “... the **defence** of such person can be carried out by a defence attorney during any stage of the procedure” [CPA Section 5 (3)], and “the defence attorney is obliged to use all means and manners of legal defence in protection of the accused in a timely manner” [CPA Section 50 (1) point b.)], and “inform the accused of his rights and any **legitimate means of defence**” [CPA Section 50 (1) point c.)].

Hence the abovementioned includes that in case the accused suggests a defence tactic that is not compliant with the law, the defence attorney should inform the accused of this circumstance. (However the defence lawyer can not be held accountable for, in case the accused resolves to such tactic despite the pre-notice).

According to Bar Act XI of 1998 “Section 8 (1) “Unless otherwise prescribed by law, an attorney is bound by confidentiality with regard to every fact and datum about which he gains knowledge in the course of carrying out his professional duties. This obligation is independent of the existence of the agency relation and continues to obtain after he has ceased to function as an attorney in the given matter,” also “during official investigation conducted at the lawyer, such lawyer can not reveal documents and data related to his client” and “the lawyer and his staff can not be questioned regarding such data and fact that was learned as a defence attorney”.

The justification of the Bar Act correctly lays down that the obligation of confidentiality is the rule of **guarantee** for the operation of the lawyer, and as such it is unlimited:

- It covers all the facts and data, which became aware during the performance of the lawyer’s profession

- Independent of the existence of a contract with the client, and the lawyer is obliged to act as such even if the contract with the client has not been realized or terminated.

- Independent from the operation of the lawyer, therefore remains in effect after the termination of the lawyer’s activities in this capacity.

The defence lawyer has an autonomous status during a criminal proceeding, his operational activities are independent from that of his defendant, therefore there is no such person that can relieve him from the obligation of confidentiality regarding facts and data learned during his mandate as defence attorney. (This rule prevents the

¹⁷ in the following: CPA

potential influence of the accused, due to which he would relieve the defence lawyer of his duties of confidentiality.) The law – in order to avoid legal uncertainty – also correctly extends this prohibition described in Bar Act Section 8.§ (3) to staff of lawyer.

The Operational Rules of The Hungarian Bar Association 1/1999 (III.22.) includes the followings on the ethical rules and expectations on the lawyer's profession:

- "The person under the confidential obligation shall keep such secret from any person" (point 4/3.)

- "The lawyer can not do a testimony regarding **the secrets of the defender**, and can not transfer documents containing such secrets to the authorities. Keeping the secrets of the defender is mandatory, irrespective of any statements made by such person ruling over such confidential information" (point 4/5.)

- "If the person ruling over the confidential information commences a legal proceeding against the lawyer before any authority or court, it will be deemed to consent that the person under confidential obligation can be relieved of this obligation to a certain extent that is necessary for his legal defence. However, the confidential obligation as a defence lawyer is not included in this rule" (point 4/5.)

4. The international literature puts substantial emphasis on the connection between defence fees and money laundering within the field of lawyer's money laundering. It is increasingly common in the international legal practice, that a criminal proceeding is launched against a lawyer. These proceedings are often based on the assumption that the **defence** (lawyer) has conducted money laundering by receiving his **legal fee**. It is common practice in Germany, that the Prosecutor's Office sends a "Letter of Warning"¹⁸ to the defence lawyer before the initiation of the criminal proceeding.

The various interpretations in mainstream literature differs in a sense, whether the receipt of legal fee should be exempt from this fact, or be limited to acts of direct intent. (The actual court practice varies. According to a German higher court - Hanseatic City Court of Appeals¹⁹ - opinion, the defence lawyer can not be held accountable for receiving legal fee despite aware of the fact it is from criminal activity, if none of the victims has needs that would be jeopardized by payment of such legal fee. By contrast, the ruling of the Second Criminal Council of the Federal Supreme Court states that if the defence lawyer accepts such legal fee that he is aware of being from a criminal activity, then the lawyer should be punished for money laundering.

In this essay concerning the relation of money laundering and lawyers, we have only highlighted some of the issues, however many other intriguing questions are yet to be answered. In our view, the Hungarian Bar Association has taken the necessary steps that are required for combating money laundering, among many actions created its Code of Conduct on prevention of money laundering in line with its legal obligation, which provides ample guarantee in order to combat this crime.

In our view, if the legislature would oblige the lawyer to report, it would reduce the defence options of the accused, which would seriously endanger the principle of "**equality of arms**". It is also problematic if the position of the defence lawyer is unstable from a legal perspective, as the Bar can and would relieve the defence lawyer from his position, due to suspicion or accusation, even if it is a severe crime. Utilizing

¹⁸ Holger, *op. cit.*, p. 740.

¹⁹ HansOLG Hamburg: *Keine Strafbarkeit wegen Geldwäsche bei Annahme eine Strafverteidigerhonoras* [No punishability by the acceptance of legal fee] Neue Juristische Wochenschrift 2000, p.673.

this trick, the investigators or prosecutors would easily be able to “remove” lawyers that are inconvenient for them, even if such lawyer performs his duties at a high standard. A “**friendly police dog**” can easily find illegal drug in the car of any defence lawyer. From this point onward, the defence lawyer finds himself in a difficult position from professional and ethical point of view, and the enforcement authorities instantly achieve a case that is “already won”.

The attention is called to three important rules of thumb to criminal defence lawyers: “Know your business”, “Know your customer” and “Know your employee”.²⁰

The defence attorney is the real guarantee of a constitutional state. *Audiat et altera pars*. The European legislators would do better to incorporate the opinions of the defence attorneys when creating regulations concerning them but without them, simply in the name of the battle against money laundering, as it is easy to cross the Rubicon between legality and injustice.

²⁰ Zéman Zoltán – Lukács János – Túróczi Imre, *A pénzmosás megjelenése a gazdaságban* [Appearance of money laundering in the economy], *Polgári Szemle* 2015/1-3.pp.105-107.