

## **Unofficial translation**

### **of the KNB comments to the REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing**

Dear Madam/Sir,

The Royal Netherlands Notarial Organisation (KNB) would like to take the opportunity to respond to the report of the European Commission to the European Parliament and the Council on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

The KNB endorses the general objective and purport of the anti-money laundering regulations. However, at the same time it wishes to call for prevention of an unreasonable increase in costs and promotion of the clarity of the rules to be applied. In particular, it would like to raise the following points for attention in relation to this consultation:

1. Customer due diligence (CDD) measures
2. Professional confidence of the civil-law notary
3. Equality of third countries

#### *Item 1. CDD measures*

Generally speaking, the KNB supports a risk-based approach in the implementation of the anti-money laundering regulations. This enables the administrative costs to be limited as far as possible. A flexible approach is also preferable with regard to client investigations. For example, situations where there is no personal contact with the client need not automatically mean that there is a high risk. The KNB calls here for an approach based on the Financial Action Task Force (FATF) reforms, where the types of factors to be taken into account are considered and at the same time it is acknowledged that risks vary and that factors should not be considered in isolation.

The investigation of politically exposed persons (PEPs) is difficult to perform. It is risk-oriented, but reliable information on PEPs is hard to come by. Furthermore, the definition of a PEP is too broad: it is not possible to identify the family members and close associates of a PEP in all cases. The PEP definition is based on a match between the place of residence and nationality. On the basis of the purpose of the legislation and its enforceability, a match with the country where the job is performed could be considered.

The threshold of 25% for ultimate beneficial owners should not be lowered. The study by Deloitte showed that a considerable number of interested parties do not support a reduction in the limit. It was felt that lowering the threshold would not provide any significant benefits, but would increase the compliance costs and the administrative costs. As no indications were received that it is necessary to lower the threshold, the KNB requests that the limit of 25% be maintained. If there is no ultimate beneficial owner, a connection is sought with the natural person who exercises control by other means. It is unclear and uncertain who should be deemed to rank first in the hierarchy. A clear criterion is required for this.

#### *Item 2. Professional confidentiality of the civil-law notary*

The professional confidentiality of the civil-law notary is regulated in Article 22 of the Notaries Act: *'Unless otherwise provided by or pursuant to the law, the civil-law notary is required to maintain the confidentiality of all information of which he or she takes cognizance as such on the grounds of his or her work.'*

Article 23(2) of the Directive includes an exception for civil-law notaries, among others, *'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.'* This exemption has been adopted in Dutch law almost literally.

Extensive talks were conducted on the realisation of the exemption at the time between the (professional organisations of the) practitioners of the liberal professions and the Dutch legislators. This led to the following note (Parliamentary Records II, 2007-2008, 31238, No. 3, pgs. 15-16): 'In the light of the background of the existing confidentiality provisions for lawyers and civil-law notaries, the phrase "ascertaining the legal position of a client" should, albeit restrictively, be interpreted as follows: an opportunity must be given to ascertain which services are required of a (junior) civil-law notary or lawyer or tax consultant. For a lawyer or tax consultant, this is important in order to be able to determine whether the required service is or is not requested in connection with any legal proceedings. For a civil-law notary, a fact-finding point is necessary in order to ascertain whether, in that case, the requested service is the most appropriate for the client. In order to be able to determine adequately which service is involved, in any event a fact-finding meeting with the client is necessary, which must take place in confidence in all cases. This ensures that every client can, without constraint, provide all information that is of relevant in order to determine whether legal aid is requested in connection with any legal proceedings or whether services are required that do or do not fall within the scope of this Bill. This initial meeting will be sufficient to obtain an insight into the client's motives. To the extent that it later becomes clear that this involves work as referred to in Article 1(1a11°), 1(1a12°) and 1(1a13°) that do not bear any relationship to any legal proceedings, this involves service provision subject to the rules of this Bill. This means that the lawyer, (junior) civil-law notary or tax consultant must in that case suspend the actual provision of the service until such time that he/she can identify the client in compliance with the provisions of Section 2'.

The exemption is therefore explicitly not limited to a 'court proceedings exemption'. The exemption is broader and is necessary in order to secure the confidentiality position of the civil-law notary in legal processes. As a party subject to professional confidentiality, the civil-law notary has the same confidential function as a lawyer and must be able to realise this confidential function in relation to his or her clients. The initial or fact-finding meeting, which is not subject to the obligations of the Anti-Money Laundering and Anti-Terrorist Financing Act (WWFT), serves that purpose. This exemption, which applies in a context that bears no relation to legal proceedings, must be upheld in the review of the Directive. The fact that the obligations contained in the Directive and further to that, in the Dutch WWFT apply for parties subject to professional confidentiality such as civil-law notaries only when they advise their clients in the preparation or implementation of certain specifically defined transactions is not sufficient. With these transactions, too, an exemption must apply for the initial or fact-finding meeting. This exemption is of essential importance to the maintenance of the civil-law notary's professional confidentiality position.

#### *Item 3. Equality of third countries*

The question of whether the new Directive should include an equality regulation and a procedure for drawing up lists of equal countries must be considered. It is not desirable that there should be confusion regarding the question of whether countries are subject to the lighter CDD measures. The preparation of a list is proposed.

Finally, the focus on the increase in the number of reports of unusual transactions is reported. The principle should lie more on securing the quality of the reports and investigations into the number of reports that lead to (successful) prosecution.

Apart from the foregoing, the process exemption must obviously remain secured in every sense, so that the right to fair process remains protected in all applicable situations by means of clear regulations. The KNB can only endorse the need for this.

On behalf of the Royal Netherlands Notarial Organisation

C. Heck-Vink, legal advisor  
8 June 2012