



# LAWYERS' LIABILITY IN NON-JUDICIAL COUNSELLING

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LAWYERS' LIABILITY  
IN NON-JUDICIAL COUNSELING

1. Liability towards clients
2. Liability towards third parties
3. Liability in criminal and administrative law

*In this presentation we will consider  
mostly the third case*

LAWYERS' LIABILITY  
IN NON-JUDICIAL COUNSELING

- **Liability towards clients**
  - Widely regulated by retainer
  - Professional diligence rule
  - Self-insurance
  - Jurisprudence mostly in cases of judicial negligence (form of acts, deadlines, ignorance of law)

LAWYERS' LIABILITY  
IN NON-JUDICIAL COUNSELING

- **Liability towards third parties**

- Liability for erroneous advice given to clients and used by third parties (for banks see the English case *Hedley Byrne v. Heller*, 1963; or, in general, § 675, para. 2, BGB ("A person who gives another person advice or a recommendation, notwithstanding the responsibility that arises from a contractual relationship, a tort or another statutory provision, is not obliged to pay compensation for the damage arising from following the advice or the recommendation").
- Liability for third parties who should have benefited from correct action and instead have been damaged (English case: *White v. Jones*, 1995)
- In general, pure economic loss

LAWYERS' LIABILITY  
IN NON-JUDICIAL COUNSELING

- **Criminal liability**
  - Most common case: role of lawyer in pre-insolvency procedures and complicity in criminal bankruptcy
  - Consultancy in fraud schemes: difficult distinction between aiding and abetting and simply giving legal advice (case by case distinction)

LAWYERS' LIABILITY  
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- **Quasi-criminal liability**  
(administrative sanctions)
  - Obligations under anti-laundering law (Directive 2001/97/EC)
  - Obligations under financial markets law (Directive 2003/6/EC)

LAWYERS' LIABILITY  
IN NON-JUDICIAL COUNSELING

- Role of lawyers and the risk of money laundering (1)

**Recital 17 of Directive 2001/97:** “Where independent members of professions providing legal advice which are legally recognised and controlled, such as **lawyers**, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or **in the course of ascertaining the legal position for a client**. Thus, **legal advice remains subject to the obligation of professional secrecy** unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.”

LAWYERS' LIABILITY  
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- Role of lawyers and the risk of money laundering (2)

**Article 6 of Directive 2001/97:** “In the case of the notaries and **independent legal professionals**, 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”.

LAWYERS' LIABILITY  
IN NON-JUDICIAL COUNSELING

- **'Market Abuse' Directive (2003/6/EC)(1)**
  - Is a lawyer liable if he provides to a regulatory authority incorrect financial information which he has received from his client?
  - According to the Italian Corte di Cassazione (30.9.2009, n. 20935): YES

LAWYERS' LIABILITY  
IN NON-JUDICIAL COUNSELING

- **‘Market Abuse’ Directive (2003/6/EC) (2)**

Linguistical discrepancies between versions of article 14 of the Directive:

- English/German/Spanish version:

“Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with”

LAWYERS' LIABILITY  
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- **'Market Abuse' Directive (2003/6/EC) (3)**

- **French/Italian version:** “Les États membres veillent à ce que, conformément à leur législation nationale, des mesures administratives appropriées puissent être prises ou des sanctions administratives appliquées à l'encontre des personnes responsables d'une violation des dispositions arrêtées en application de la présente directive.”

- **Differences**

English version: Who are the “**persons responsible**”? “Market operators”, *i.e.* managers, directors, senior executives (**not** lawyers)

French version: the “**personnes responsables**” are those who have committed the offence (anybody, **including** lawyers)

LAWYERS' LIABILITY  
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- Sarbanes-Oxley Act (USA – 2002)

§ 307 (*Rules of Professional Responsibility for Attorneys*): SEC “shall issue rules, in the public interest and for the protection of investors, setting forth **minimum standards of professional conduct for attorneys** appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

- (1) requiring an attorney **to report** evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, **to the chief legal counsel** or the chief executive officer of the company (or the equivalent thereof); and
- (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney **to report the evidence to the audit committee** of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors”.

LAWYERS' LIABILITY  
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- **Role of professional secret (1)**

If lawyer cannot rely on professional secret as a justification, he must or expose his client or abandon him

- In anti-laundering Directive protection of professional secrecy is explicitly mentioned (Recital 17)
- In market abuse Directive no mention

LAWYERS' LIABILITY  
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- **Role of professional secret (2)**
- European Convention on Human Rights (ECHR): professional secret generally based on article 6. See *Niemetz v. Germany* (§ 37), *Wieser v. Austria* (§ 65)
- However no specific cases decided by ECtHR

LAWYERS' LIABILITY  
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- **Role of professional secret (3)**

Is the legal profession privileged according to national constitutional traditions ?

Privilege is only for defence in judicial proceedings, where public role in the administration of justice is clear?

Or can it be extended also to non-judicial counseling? (see *Upjohn Co. v. US* – 1981; CFIEU case *Akzo Nobel Chemicals Ltd. v. Commission* – 2007, excluding in-house lawyers)