PROHIBITION OF DISCLOSURE OF SUSPICIOUS TRANSACTIONS IN THE DEFENCE OF THE ANTI-MONEY LAUNDERING (AML) OBLIGATED PARTIES IN CIVIL OR MERCANTILE PROCEDURES: CONFLICT OF OBLIGATIONS

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When, for example, a party to a contract is sued for its anticipated unilateral termination owing to breach of AML obligations of the other party, lawyers, who may have to defend the terminating party, are sometimes faced with the following dilemma:

- Whether to use every legitimate means at their disposal to fulfill the duty to defend their clients with the required zealousness and diligence (as per article 42 General Regulations of the Spanish Bar –EGAE-), including production at Court of the suspicious transaction report (STR) filed by our clients (defendants) with the Executive Service for the Prevention of Money Laundering and Financing of Terrorism (SEPBLAC) by the Form F-19;
- or, on the contrary, to refrain from disclosing to the Civil or Mercantile Court that their clients have submitted such Form F-19 to SEPBLAC.

This situation occurs frequently in Court proceedings resulting in a clear conflict of obligations:

- the absolute prohibition of disclosure (by the defendant's lawyer) to any third party that a STR has been filed with SEPBLAC, including notice to the interested party –i.e., the other side in litigation— (article 24 of Act 10/2010 of 28 April for the Prevention of Money Laundering and Financing of Terrorism –LPBC), and confidentiality obligations imposed on persons receiving information from the Commission for the Prevention of Money Laundering and Monetary Offences or its support bodies (article 49 of same Act), conflicts with

- the fundamental rights for the effective judicial protection of litigants as per article 118 of the Spanish Constitution (CE) and the right of defence (article 24 CE) and the subsequent obligation of the lawyer to defend his client (the lawyer could not disclose at the trial that his client had to file the STR although that was good for his defence).

If, in the above example, our client has been sued for the anticipated unilateral termination of a contract and his lawyer decided to provide Form F-19 for his defence, we would run the risk of being sanctioned because despite the fact of the prohibition of disclosure imposed on persons covered by LPBC (article 24 LPBC), the disclosure by the lawyer in Court proceedings –do not forget that the prohibition is set forth in absolute terms— would make the lawyer co-author of the administrative offence, described as a

very serious offence (article 51.1.c LPBC), with a minimum fine of Euros150,000, without prejudice to other penalties provided for in article 56 LPBC for such offenders.

The reason for such a sanction is none other than an attempt to prevent the person instituting the lawsuit from being aware that Form F-19 may have led to an investigation and that, ultimately, that person may adopt measures which lead to frustrating money laundering prevention measures thus frustrating the repression of money laundering or financing of terrorism.

If we decided to not provide Form F-19, in the above example, we would not only run the risk to lose the lawsuit for our client, but also face the possibility of being sued for professional negligence for not having defended our client in the terms of article 42 EGAE.

It is true that in certain lawsuits instituted by payment institutions (PI) against banks, the banks had previously cancelled their accounts alleging failure of these PI to fulfill the obligations imposed in the LPBC. The corresponding Form F-19 was provided in these procedures with no consequences at all. Moreover, some Spanish Courts because of Form F-19 being submitted by a bank at the preliminary hearing, decided to close and shelve the Court proceedings without resolving at all the merits of the complaint.

Several strategies to defend our clients –which would have to be analyzed case by case— should be considered for the example described:

1. State and prove the non-fulfillment that led to an anticipated contractual termination, without producing at Court Form F-19 because disclosure is prohibited thereby avoiding a possible sanction from the regulatory body, and transferring to the claimant (*i.e.*, the other party at Court) the *onus probandi*: Claimant will have to prove that it notified the suspicious transaction, not our client.

2. Use all means of legitimate defence, including the submission of Form F-19 by way of evidence of the previous breach of contract by the claimant. In the event that SEPBLAC commences an administrative disciplinary file, it would have to be argued that the action was taken on the basis of article 24 CE reconciling in the best possible way with the object and purpose of the LPBC. One could argue both the non-enforceability of a different behavior such as the non-existence of unlawfulness, since defendant (*i.e.*, the party who has submitted the Form F-19 at Court through its lawyer) would have acted in the legitimate exercise of a right (the right of proper defence and effective judicial protection), holding to that end that only what was necessary for civil defence was revealed, and even allege that there was no fraud or negligence giving rise to the imposition of administrative sanctions.

3. Claiming generically the existence of the suspect communication without the submission of Form F-19 and requesting the Court *ex officio* to collect the relevant information from the SEPBLAC.

4. Request the civil or commercial Court to raise a question of unconstitutionality since the prohibition to disclose suspicious communications would be an attempt to preclude exercise of constitutional rights. Likewise that prohibition would also be an attempt to undermine the lawyer's obligation to defend his client with all means of evidence at his disposal, with the stay of proceedings pending resolution of the issue, if the said question were raised by the Court.

On the other hand, we must remember the close link between LPBC's regulations with the legislation on personal data protection (LOPD). Article 32.5 LPBC rules that the security measures applicable to the reporting requirements of Chapter III of the LPBC are a high level, so it will be important to consider it when formulating procedural or material exceptions in the defence of our client since in many cases Form F-19 contain third parties' personal data that cannot be produced in civil or commercial proceedings without their consent. Furthermore, the judgment of the Chamber of the Contentious-Administrative of the *Audiencia Nacional*, dated 10 November 2000, requires that the recipient of such data be the Court in the exercise of its functions assigned; therefore the assignment of data is only possible when data are intended for the Court and the Court has demanded or requested such data in the performance of its duties; these duties can only originate in the relevant statutory empowerment which civil and mercantile courts lack, according to LPBC (article 49 LPBC).

In conclusion, anyone who communicates in good faith the contractual termination of a business relationship based on the suspicion of money laundering, has the difficult task of deciding the best possible defence strategy in the event that the clients are sued, notwithstanding the risks of the law firm arising from conflicting legal obligations described above. Casuistry is important, so the risk the legally bound party assumes has to be examined on a case-by-case basis.

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