PUBLIC LAW

Money Laundering by Defence Counsel – The Decision of the Federal Constitutional Court

By Anne Bussenius[*]

A. Introduction - The Discussion During the Last Years

Ever since the incorporation of § 261, the offence of money laundering, into the Strafgesetzbuch (StGB - German Penal Code), the application of this statute to defence counsel has been discussed controversially.[1] The debate stems from the extensive range of the statute, which calls not only for punishment of people who, for example, committed clandestine acts in order to conceal the criminal origin of a "dirty" object, but also from section 2, which addresses those who simply procured objects deriving from any prior crime enumerated in the money laundering offence. For defence counsel the risk of making themselves liable for prosecution is extraordinarily high. Since it is the nature of their profession that they deal with the accused and receive payment for their work, they are more likely to come in contact with and receive "dirty" money than most other people. The threat is intensified by § 261 sec. 5 StGB, a special rule on the mens rea requirement. According to this section, the money laundering offence does not necessarily require the person to know about or act with contingent intent as to the incriminated origin of the object. Instead, it is sufficient if he or she does not realise the origin, even though it was obvious, and thus acts grossly negligently concerning the incrimination of the object. Therefore, § 261 Abs. 5 StGB poses a serious threat to defence counsels since they obtain facts about their clients in order to fascilitate defence, which then may lead to the allegation that they should have realised the criminal origins of the money they received as a fee.

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[1] *See* reference in BVerfG NJW 2004, S. 1305, 1306 and BUSSENIUS, GELDWÄSCHE UND STRAFVERTEIDIGERHONORAR (2004).

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German criminal law scholars largely agree that this situation causes a number of serious problems for both counsel and accused.[2] A major threat to the defence is seen in the measures prosecutors are allowed to take against counsel who is suspected of having committed money laundering by accepting dirty money from a client. In this situation the StPO (Criminal Procedure Code) can justify searches, seizures and the surveillance of telecommunication in counsel´s office.[3] According to critics of the money laundering offence, the mere threat of such actions renders open attorney-client conversations impossible, and therefore obstructs the counsel from completing his or her work and severely strains the relationship between counsel and clients.[4]

Furthermore, critics fear that any trust between the two parties might be lost if the counsel himself starts to doubt his clients´ ability to pay fees with "clean" money during the course of the defence. In such a situation the money laundering offence would force the counsel to completely resign or continue his or her work as an appointed counsel if he wants to avoid conflicts with the penal code. But the possibility of an appointment as counsel is not considered as an appropriate option to solve such a situation. For one, not all accused are entitled to an appointed counsel,[5] and second, an appointed counsel is paid by the state which grants low fees. Given this situation a counsel may not be willing to fully investigate his client and his actions since this might force counsel either to lay down the defence or, alternatively, continue as an appointed counsel. Similarly, the accused may feel the need to not be open with counsel as the accused might risk loosing him.

Moreover, the risk of committing a crime by accepting payment for his work may lead a counsel to turn away a potential client who seems to be determined to pay the fee with dirty money (e.g. because he is obviously wealthy, but jobless and accused of a lucrative crime) right from the beginning. Thus, the money laundering offence makes it extremely difficult for such a person to find willing counsel.[6]

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[2] *See* Bernsmann, Strafverteidiger (StV) 2000, 40, 41; Nestler, StV 2000, 641; Müther, Jura 2001, 318, 320; Gräfin von Galen, StV 2000, 575; Hefendehl, *in* Festschrift für Roxin, 145; Wohlers, StV 2001, 420.

[3] *See* §§ 97, 100a, 102 StPO.

[4] Bernsmann, StV 2000, 40, 41; OLG Hamburg, Neue Juristische Wochenschrift 2000, 673, 677; Müther, Jura 2001, 318, 320; Gotzens & Schneider, Zeitschrift für Wirtschafts- und Steuerstrafrecht (wistra) 2002, 121, 125.

[5] The StPO conveys such a claim against serious charges (§ 140 Abs. 1), when the Courts finds the collaboration of a counsel necessary because of the difficulty of the case (§ 140 Abs. 2 1. Alt.) and in cases of obvious inability of the accused to defend himself (§ 149 Abs. 2 2. Alt.).

[6] OLG Hamburg NJW 2000, 673, 676-677; Barton, StV 1993, 156, 158; Hartung, Anwaltsblatt (AnwBl) 1994, 440; Gräfin von Galen, StV 2000, 575, 581; Wohlers, StV 2001, 420, 426.

Since both the right of every person to choose counsel and counsel's right to occupational freedom are constitutionally guaranteed,[7] the consequences of the statute on money laundering brings up the question whether the application of the money laundering offence on the payment of defence counsel is compatible with the constitution.[8] Furthermore, some critics have expressed doubt as to whether the punishment of defence counsels will actually promote the purposes the legislature had in mind – that is, the fight against organized crime, the protection of the judiciary, and the protection of the objects of legal protection already injured by the prior offence[9] - when it introduced the offence of money laundering to the StGB.

Both objections lead the OLG Hamburg (Supreme Court of Hamburg) to the conclusion in 1999 that the money laundering offence is not applicable to counsel who accepts dirty money as a fee. It decided that the statute infringes on the accused's right to chose counsel as well as the occupational freedom of the counsel, and it pointed out that the infringements are not justified because applying the offence to such actions of the counsel does not significantly help to reach the goals of the money laundering statute.[10]

In spite of the arguments against the punishment of defence counsels the BGH (The Federal Supreme Court) decided in 2000 that the money laundering offence is fully applicable to their actions.[11] The Court stressed that the threats to the defence did not violate the constitutional rights of either counsels or accused. In its decision, the BGH ruled that the money laundering offence did not strain the defence as severely as the supporters of an exemption in favour of defence counsels claimed. As the possibility of searches, seizures and surveillances of telecommunication was bound to a suspicion against the counsel, it did not threaten the relationship between counsel and clients significantly.[12] Moreover, the counsel always had the possibility to ask for an appointment by the Court.[13]

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[7] The occupational freedom (*Berufsfreiheit)* is guaranteed in Art. 12 Abs. 1 *Grundgesetz* (GG - Basic law). The free choice of the counsel is protected in Art. 2 Abs. 1 GG in connection with the principle of due course of law, BVerfG NJW 2004, 1305, 1308.

[8] See the references in BUSSENIUS, *supra* note 1, at 64.

[9] *See* BT-Drs. 12/989, 27; BT-Drs. 12/3533, 12 f.

[10] NJW 2000, 673.

[11] BGHSt 47, 68.

[12] *Id. at*. 78.

[13] *Id.*

As to the argument that the money laundering offence § 261 Abs. 2 StGB touched the constitutionally guaranteed occupational freedom, the Court referred to previously issued restraining judgements of the BVerfG, which hold that a statute can only violate this right if it intends or at least has the tendency to regulate a profession.[14] Since the money laundering offence aims at everybody who comes in contact with incriminated objects, the BGH decided that the statute lacks this tendency and does not infringe the occupational freedom of defence counsel.[15] Furthermore, the Court contradicted the reasoning of the OLG Hamburg that the money laundering offence violates the right of the accused to choose counsel freely. It claimed that the right to choose counsel does not grant the right to pay the chosen counsel with illegally acquired money.[16] A prerequisite to the right to choose counsel was the ability to pay the fee for the advocate; and if an accused was unable to do so, he still had the right to claim an appointed counsel.[17] An accused who only possessed illegally obtained valuable goods should be treated in the same way as one who was destitute. And since the rights of a destitute accused are considered to be maintained through the possibility of being defended by an appointed counsel, the BGH concluded that the same must apply to an accused in the possession of illegally obtained goods.[18] Additionally, the Court argued that defence by an appointed counsel was no defence of minor quality and therefore protected the rights of the accused in a suitable way.[19]

B. The Decision of the Federal Constitutional Court

The BVerfG recently contradicted the BGH in its long awaited decision and decided that the offence of money laundering can only be applied to defence counsel who knowingly accept dirty money as a fee.[20] Therefore, counsel who negligently fail to realize the incrimination of the money or act with contingent intent concerning the origin of the money are not to be punished.

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[14] *See* BVerfGE 13, 181 (186); BVerfGE 47, 1 (21) and the references in SACHS & TETTINGER, GRUNDGESETZ (2003), Art. 12, 317.

[15] BGHSt 47, 68 (73).

[16] *Id.* at 75.

[17] *Id.*

[18] *Id.* at 75. In the same sense Schaefer & Wittig, NJW 2000, 1387; Burger & Peglau, wistra 2000, 1387; Reichert, Neue Zeitschrift für Strafrecht (NStZ) 2000, 316; Katholnigg, NJW 2001, 2041; Grüner & Wasserburg, Goltdammer´s Archiv (GA) 2000, 430, 437.

[19] BGHSt 47, 68, 75.

[20] BVerfG NJW 2004, 1305.

In its ruling, the Court emphasized the importance of defence as part of proper criminal procedure as stated by the rule of law and stressed that the free choice of counsel and the trusting relationship between counsel and accused are indispensable prerequisites to an effective defence.[21] Moreover, the BVerfG estimated the consequences of the money laundering offence for the defence to be much graver than the BGH thought and consequently argued that the application of the statute to defence counsel infringes the constitutionally guaranteed rights to counsel[22]. The statute could keep counsel from practicing his or her profession in an economically appropriate way and therefore touch the occupational freedom which also protects the right of counsel to work as a chosen counsel (paid by the client).[23]

The BVerfG also held that the money laundering offence prevented counsel from defending clients adequately. If counsel was forced to keep in mind his or her own interests, that is, not being accused of money laundering, he or she would not be able to fulfil the responsibility assigned by the constitution, that is, the responsibility to observe the clients´ interests.[24] Furthermore, the Court estimated that the risk of counsel becoming the object of investigations was a serious threat to the defence. In combination with the excessive range of the money laundering offence, the procedural rights of the investigation officials may endanger the mutual trust between counsel and client.[25] The consequences of the offence regarding counsel´s "right and the duty" to confidentiality, which is seen as the indispensable basis of counsel´s profession are also cause of concern. If the money laundering offence were applicable to counsel's actions without any restriction, the client could not fully rely on the discretion of his counsel any more as the counsel might be compromised to reveal his client´s secrets in order to protect himself against prosecution.[26] With regard to sections 9 and 10 of the money laundering offence such revelations could become quite attractive for counsel who accepted dirty money as a fee. The statutes grant impunity or mitigation of the sentence for money launderers who bring a charge against themselves or co-operate with the prosecution officials, that is, reveal their knowledge about their own actions and those of the people who illegally gained the dirty objects. In this context, the BVerfG decided that a counsel who makes use of these statues is not punishable for his violation of confidentiality pur-

[21] *Id.* at 1308.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1309.

[25] *Id.*

[26] *Id.* at 1310.

suant to § 203 Abs. 1 Nr. 3 StGB[27], which only shows that the money laundering offence does pose a serious threat to the mutual trust between counsel and client if it were fully applied to the counsel´s actions.

In addition, the BVerfG also contradicted the assertion of the BGH that counsels had sufficient means to solve any problems caused by the money laundering offence just by asking for appointment as appointed counsel. In contrast to the BGH the BVerfG underlined the differences between chosen counsels and appointed counsels as to their payment and their dependency on the Court. While the fees of an appointed counsel are strictly regulated at a fairly low level – critics claim that they do not even cover the costs of the defence[28] - the fees of a chosen counsel are freely negotiable. And while a chosen counsel works on the basis of a contract with his client, and is thus completely independent from the Court, an appointed counsel is appointed by the Court and has to go on with the defence as long as this appointment is not revoked. Because of these differences regarding both dependency on the Courts´ decisions and fees, the BVerfG concluded that the possibility to continue the defence as appointed counsel could not make up for the loss of freedom caused by the money laundering offence.[29]

Consequently, the BVerfG decided that the infringement of the right to occupational freedom was not constitutionally justified, that is, not suitable, necessary, and adequate to reach the aims of the money laundering offence. While the Court admitted that in general the offence serves important interests of society and is - in principle - necessary to fight organized crime efficiently, it stressed that the statute is inadequate as far as it renders counsel accepting dirty money as a fee punishable. The threat of punishment for such an action does not promote the aims of the legislature significantly but rather causes serious harm to the defence.[30]

Nonetheless, the BVerfG made clear that the constitution does not require or even allow a full exemption of defence counsels obtaining dirty money from the offence of money laundering as it had been requested by parts of the criminal law science.[31] Neither the occupational freedom nor the right to choose counsel freely calls for the

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[27] *Id.* at 1309; *see also* the criticism by Mühlbauer, Höchstrichterliche Rechtsprechung – Strafrecht (HRRS) 4/2004, 133, 135.

[28] *See* BARTON, MINDESTSTANDARDS DER VERTEIDIGUNG 256 (1994); HOMBRECHER, GELDWÄSCHE (§ 261 STGB) DURCH STRAFVERTEIDIGER? 65 (2001).

[29] BVerfG NJW 2004, 1305, 1310.

[30] *Id.* at 1311.

[31] *See* the references in BUSSENIUS, *supra* note 1, at 128.

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exemption of counsel who knowingly obtained dirty money and thus abused his role as defence counsel.[32] Such an exemption would lead the public to doubt the integrity of defence counsel and would weaken the profession in the long term.[33]

As to the methodical inadmissibility of a complete exemption in favour of defence counsel, the BVerfG first pointed to the wording of § 261 Abs. 2 StGB whose requirements undoubtedly are fulfilled by counsel taking incriminated money from his or her client.[34] Then the Court stated that neither the penal code system nor the genesis of § 261 StGB call for a defence counsel exception.[35] The fact that § 261 StGB is not mentioned in § 138 a I Nr. 3 StPO - a statute which allows the exclusion of defence counsels suspected of similarly structured offences like § 258 StGB (obstruction of criminal execution) or § 259 StGB (concealment of stolen goods) - did not prove that the legislature wanted to exclude the application of the money laundering offence to defence counsels.[36] On the contrary, the legislature thoughtfully decided against the introduction of exemptions for certain discussable cases because it did not want to weaken the fight on organized crime.[37] In the following, the possibility of a teleological reduction of the second section of the money laundering offence as it has been discussed within the literature[38] is denied by the BVerfG because of the "vagueness of the objects maybe protected by § 261 StGB."[39]

As to its decision that the violation of the right to occupational freedom can be avoided by interpreting the mens rea requirement in accordance with the constitution, the BVerfG first claimed that the wording of the money laundering offence does not present an obstacle to such a solution. The offence does not describe the preconditions of intent, but leaves it to the penal Courts and the literature to determine them.[40] The Court´s argument regarding the claim that the genesis of § 261 StGB does not argue against a narrowing interpretation of the mens rea requirements of the offence in the special case of defence counsels reads as follows. When

[32] BVerfG NJW 2004, 1305 (1311).

[33] *Id.*

[34] *Id.* at 1306.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 1307.

[38] *See* the references in BUSSENIUS, *supra* note 1, at 128.

[39] BVerfG NJW 2004, 1305 (1307).

[40] *Id.* at 1311.

the legislature consciously decided against the incorporation of exceptional regulations concerning actions of minor significance it did not regard the constitutional problems arising from applying the money laundering offence to defence counsel sufficiently.[41] And since the legislature would have presumably been willing to restrict the money laundering offence in favour of defence counsel - if it had adequately discussed and thus realised the dangers the norm causes for the constitutionally protected right to occupational freedom and for the institution of defence as such - a restrictive interpretation according to the constitution was possible.[42]

The ruling to restrict the mens rea requirement of the offence is followed by reflections on its practical consequences. The BVerfG first stressed the prosecution's responsibility to keep the constitutionally guaranteed rights of counsel and the accused in mind when determining whether counsel is to be suspected of money laundering.[43] Furthermore, the suspicion that counsel consciously obtained incriminated objects could not simply be justified with the fact that the client being defended as a chosen counsel is suspected of a crime listed in the money laundering offence,[44] but rather required concrete grounds for the assumption of the counsel´s bad faith.[45] As possible indicators of defence counsel´s intent the BVerfG mentions the extraordinary size of a fee or the way it was paid.[46] Besides, the prosecution is asked to use its means of investigation cautiously and to consider that investigations against counsel do not only violate his or her occupational freedom but also possibly infringe the client´s right to be defended by a defence counsel.[47]

Finally, the BVerfG addressed the penal Courts and underlined their responsibility to consider the special role of the defence counsel - especially when determining the facts and considering the evidence for counsel´s knowledge that the accepted money derived from a crime enumerated in the offence of money laundering.[48] Like in other situations in which a counsel is possibly punishable for an action related to his profession,[49] the consideration of the evidence has to meet specific criteria that

[41] *Id.* at 1312.

[42] *Id.* at 1311.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] See BGHSt 38, 345 (350); BGHSt 46, 36 (43); BGHSt 46, 53 (58).

are still to be laid down precisely by the penal Courts taking into account the influence of the right to occupational freedom.[50]

C. Reception of the Decision and Comment

Though praised by German defence counsel,[51] the decision raises the question whether it really does prevent the risks posed to the defence by the money laundering offence.[52] The restriction of the mens rea requirement has already been discussed among scholars during the last years.[53] Critics have rejected the solution now favoured by the BVerfG because they claim that it cannot protect the defence against highly disturbing investigative means such as searches or surveillances of telecommunication adequately, as the suspicion that a counsel knew of the incrimination of the money can be easily established.[54] Though the BVerfG emphasized that such a suspicion can only be based on concrete facts, the arguments brought forward by critics remain valid because the Court does not provide convincing criteria. The claim that an extraordinarily high fee may indicate the knowledge of the counsel about the money's origin is not entirely persuasive – why should a counsel who receives a lot of dirty money know more about its origin than one who gets little, especially since he is not obliged to question his client? In Addition, it raises a new question. What is an appropriate fee for a defence counsel?[55]

Furthermore, the appeal directed to the penal Courts and prosecutions to consider the right to occupational freedom of the defence counsels does not provide clear guidelines, but naturally remains vague.

The decision against a full exemption of defence counsels is apparently guided by the assumption that defence counsel does wrong if he or she knowingly accepts money his or her client gained by means of a criminal act. But with regard to the negative impact of possible investigations against counsel on the defence, which is repeatedly underlined by the BVerfG itself, this fact does not necessarily indicate

[50] BVerfG NJW 2004, 1305 (1312).

[51] *See* Bundesrechtsanwaltskammer – Mitteilungen (BRAK-Mittl.) 3/2004, 126.

[52] *See* Mühlbauer, HRRS 4/2004, 132 (139).

[53] See Matt, GA 2002, 137, 145; Grüner/Wasserburg, GA 2000, 430, 433; Bernsmann, StV 2000, 40, 42; Ambos, Juristenzeitung (JZ) 2002, 70, 76; BUSSENIUS, *supra* note 1, at 132.

[54] *See only* Bernsmann, StV 2000, 40, 42; Ambos, JZ 2002, 70, 76; *supra* note 1, at 132.

[55] *See* Mühlbauer, HRRS 4/2004, 132, 140.

that counsel who commits such an action should be punished.[56] Therefore, the arguments of the BVerfG against a full exemption of defence counsel from being criminalized for the receiving contaminated fees, which would have granted reliable protection against infringements, are not entirely convincing.[57] When the Court stated that a teleological reduction of the objective requirements of the money laundering offence is impossible because of the "vagueness of the objects maybe protected by § 261 StGB,"[58] it effectively claimed that a teleological reduction is inadmissible just when it is most needed – that is, when a statute is put so vaguely that its application causes problems.[59] This argument is even more surprising as the remaining means of interpretation, the wording and genesis of the money laundering offence, do not entirely support the solution favoured by the BVerfG. When the Court claimed that a complete exemption of defence counsel would contradict the wording of the offence, the same holds true for a restriction of its mens rea requirement. According to § 261 section 5 StGB, intent concerning the origin of the incriminated object is explicitly not required and exemptions in favour of defence counsel are obviously missing. The explanations concerning the genesis of the statute are equally inconsistent. In the context of the question whether the legislature wanted to exclude defence counsel who receive contaminated objects as fee completely from the money laundering offence, the Court just argued that the legislature decided against the incorporation of exceptions from the general ban on money laundering.[60] However, the BVerfG was much more generous as to the possibility of interpreting the legislature's requests when justifying the restriction of the mens rea requirement. In this context, the Court effectively referred to a hypothetical will when it claimed that the restriction on the internal side of the offence was admissible because the legislature would have regarded the counsel´s rights in an adequate way had it realized the consequences of the money laundering offence on the counsel´s right to occupational freedom.[61] With this way of interpreting the legislature´s will it would have been just as possible to justify a complete exception in favour of defence counsel - especially as a key remaining argument in favour of the restriction of them mens rea requirements is not fully convincing either. When the Court argues that a full exemption would allow counsel to undermine the aims

[56] As to the possibility of civil charges of the victim of the client´s crime against a defence counsel, *see* BUSSENIUS, *supra* note 1, at 144-165.

[57] Critical also Mühlbauer HRRS 4/2004, 132, 136.

[58] BVerfG NJW 2004, 1305 (1307).

[59] *See* the criticism of Mühlbauer, HRRS 2/2004, 132, 138.

[60] BGH NJW 2004, 1305 (1307).

[61] *Id.* at 1311.

of the legislator by pretending – possible according to arrangements with their clients – that they received the contaminated object as fee[62] it does not consider the statute of § 261 section 1 StGB which is usually applicable to such actions.[63]

In spite of these inconsistencies, the decision repeatedly underlines the defence counsel´s importance to the criminal process and the rule of law. These numerous forceful assertions in favour of an unspoiled defence put a certain weight on the appeals to the prosecution and the Courts to use their remaining power to prosecute and punish defence counsels for money laundering carefully. If the Courts and the prosecution were really to recognize the importance of the constitutional rights of the defence counsel, and were to observe them adequately, the dangers posed by the money laundering offence to citizens suspected of a crime should be reduced significantly.

[62] *Id*.

[63] Mühlbauer, HRRS 4/2004, 132, 140.