SUMMARY

Examine the integrity of lawyers, notaries and accountants. A legal study about the use of information to prevent misbehaviour in the real estate sector.

Introduction

This study was inspired by the risk of attorneys, civil-law notaries and accountants becoming involved in real estate crime, and the legal protection of the information relating to such involvement. The position of these professionals is a special one, because in their professional practices public interests are at stake. In order to secure these public interests, members of these professions have their own law-enforcement tools in place for the prevention and repression of violations of integrity. This study aims to provide insight into the way in which these tools can contribute to an integral approach of violations of integrity by attorneys, civil-law notaries and accountants in the real estate sector. The problem has been considered from the perspective of the legal options and bottlenecks for collecting and sharing information that may be helpful to this preventive and repressive approach. The key problem is defined as follows:

What information can be used for purposes of an administrative and disciplinary approach of violations of integrity by attorneys, civil-law notaries and accountants in the real estate sector, in order to secure the public interests that are at stake in their practices?

Public Interests

The public interests that are involved in the practice of attorneys have to do with the accessibility of the legal system and the administration of justice. Attorneys make it possible for persons seeking justice to start legal proceedings. They ensure that the interests of such persons are defended properly and that the relevant arguments are brought forward at the right time.

By providing their services, civil-law notaries serve legal certainty and the quality of legal transactions. Legal certainty is served by the evidentiary value that is attached to officially certified deeds, the reliability of public registers, and the protection of the interests of third parties which a civil-law notary has to take into account.
The public interests that are served by the work of accountants are related to the functioning of the capital markets. Citizens, institutions and the government may avail themselves of the auditing services that accountants provide when they prepare financial statements.

**Violations of Integrity**

For the purpose of this study, the concept of ‘integrity’ is regarded as behaviour in conformity with the written and unwritten rules of law standardizing the practice of a profession, or in more concrete terms, the absence of culpable involvement in the real estate sector. Such violations of integrity by attorneys, civil-law notaries and accountants have been the topic of various academic and government publications. These publications especially emphasize the risk of such violations occurring. Politicians too are convinced of the urgency of this problem.

The nature of the violations of integrity has to do with the special position held by these members of the professions and the nature of their activities. Their special position gives them certain powers that may enable them to engage in bad-faith practices in the real estate sector. For example, cases are known in which the attorney-client privilege or the professional status of the attorney or civil-law notary as a confidential advisor or expert have been abused. Powers that are specifically vested in the respective professions may also open opportunities for abuse, such as leading or putting pressure on witnesses (by attorneys), executing spurious deeds concerning real property or the incorporation of companies (by civil-law notaries), or auditing annual accounts (by accountants). In addition, the nature of the violations of integrity is connected to the nature of the work of these professionals. They may advise real estate criminals or criminal networks on how to commit offences or how to reveal such offences from the authorities. Cases are also known in which professionals assisted in the laundering of criminal money.

A violation of integrity may constitute a breach of a standard of criminal law and/or a breach of the standard of care to be observed by the professional. Standards of care are standards formulated in an open manner that are given further substance in the rules and regulations in place for each profession, and in case law. We should look at the substance that is given to the standards of care from the perspective of the special position held by professionals.

**Access to Information of Supervisory and Investigative Bodies**

Various supervisory bodies and investigative bodies – to be referred to as ‘enforcement bodies’ in this study – may collect information that provides insight into vio-
lations of integrity by members of the professions in the real estate sector. The way in which the exercise of powers by these bodies is standardized will depend on the type of body. Some of them are administrative authorities with supervisory powers: the General Council and Supervisory Councils of the Netherlands Bar Association, the Dean, the Board of the Royal Notarial Association, the president of the Notaries Disciplinary Board, the presidents of the accountants’ associations NIVRA or NOvAA, the tax inspector or tax collector, and the Minister of Security and Justice, who has the power to control legal entities. Others are supervisory bodies within the meaning of the Dutch Administrative Law Act: the Financial Supervision Office (BFT) and the Netherlands Authority for the Financial Markets (AFM). Finally, there are investigative bodies: the Public Prosecutor and the Fiscal Information and Investigation Service & Economic Investigation Service (FIOD-ECD). The above qualifications not only bear relevance to the powers these bodies have, but also to the question of when these powers may be exercised; unlike a criminal investigation, a supervisory action does not require the existence of a reasonable suspicion of guilt. This means that investigative bodies may only use their powers to access information in order to trace violations of integrity in the real estate sector if there is a suspicion that something is wrong. Since this condition does not apply to supervisory bodies, it is easier for them to ‘chance on’ violations of integrity.

A principle of general relevance for the access these bodies have to information is their obligation, in the performance of their duties, to comply with the principle of proportionality, the ban on détournement de pouvoir (misuse of power), and the requirement of due care. The possible ways of collecting information are further restricted by obligations of confidentiality, the right of non-disclosure, and – for attorneys – the legal privilege. Attention has also been paid to the restrictions that are implied by the right to remain silent and the principle of nemo tenetur – the ban on self-incrimination – pursuant to Article 6(2) of the European Convention on Human Rights.

Furthermore, the access to information of each individual enforcement body has been described. It is favourable for the availability of information to the enforcement body if the professional is obliged to cooperate, even more so if this obligation extends to confidential information. Such information may be helpful to understand the nature of the professional’s activities and the considerations he has made in the context of these activities. This understanding may grow considerably through substantial information about, for example, transactions made, payments effected via the professional, and advice he has given.

As regards the acts of the general council and supervisory councils of the Netherlands Bar Association and the Boards of NIVRA and NOvAA, there is no question of an obligation to cooperate, since there is no legal basis setting out such
an obligation. As regards the exercise of powers of the other enforcement bodies, the obligation to cooperate does exist, but there are different answers to the question of whether this obligation applies also in the case of confidential information. This depends on whether or not a right of non-disclosure has been granted; if it has, the disclosure of confidential information will not be allowed as a matter of principle.

An exception to this basic principle is made in circumstances where the importance of establishing the truth is considered to outweigh the importance of confidential information remaining secret. In certain circumstances, the legislator has already made a choice in this weighing of interests, and the right of non-disclosure must be overridden. This exception applies to civil-law notaries, who are obliged to disclose information about their client money account to the public prosecutor, the tax inspector or the tax collector, or to the FIOD-ECD. Besides the exceptions prescribed by law, the courts may also make exceptions to the right of non-disclosure in concrete cases, owing to special circumstances. When we look at relevant case law, the involvement of a member of the professions in real estate fraud could be a reason to make such an exception in some circumstances.

Preventative Administrative Enforcement: Granting of Professional Status

The decision to grant an applicant access to the professional practice of attorneys, civil-law notaries or accountants may be understood as the granting of a professional status. This admission to the professions, which is regulated by law, serves to guarantee the special position of these professions.

An investigation into the applicant’s integrity is part of the admission process. The tool mainly used for this purpose is the Certificate of Good Conduct (in Dutch: “VOG”). The other options will either apply only to applicants who have already practised the profession in the past, or will be based on the same sources of information as those that are checked in the investigation before granting a VOG, or will depend on the benevolence of the applicant to disclose all his information. Otherwise, it will depend on coincidence whether there is awareness of any facts or circumstances that justify the fear that the applicant will commit violations of integrity in the course of his profession.

In order to find out whether there are gaps in the investigation before granting a VOG, it has been examined whether the Dutch Public Administration Probity Screening Act – the Bibob Act – offers any interesting clues. Such clues have been found in the quantitative scope of the Bibob Act. This Act allows for the involvement of more sources of information in the integrity check. At present, there is no effective statutory ground to extend the use of sources for purposes of the professional status granting procedure. Another clue is offered by the broader range of
personnel involved in the investigation under the Bibob Act. The Bibob Act allows investigators to screen the business network of the applicant too, which may shed more light on the applicant’s possible involvement in real estate crime. From a quality perspective, the application of the Bibob Act is interesting because it may attach more weight to soft information.

**Repressive Enforcement: Disciplinary Law**

Disciplinary law has been established and set out in the laws governing the respective professions. It may be regarded as a kind of group law; an instrument that aims to preserve the honour and reputation of the professions. Disciplinary law also serves to enforce or reinforce the confidence the public must be able to place in the functioning of these professions. The above-mentioned aims may be clarified against the background of the public interests involved in the practice of the professions of attorney, civil-law notary and accountant. If they lose their honour or reputation, this will have a negative effect on the confidence of individuals and of society as a whole in their functioning. Having this confidence is an essential condition for the realization of the public interests that are served by a good practice of the professions.

In my discussion of the disciplinary court’s access to information, I have examined whether the enforcement bodies are authorized to disclose information – particularly confidential information – to the disciplinary court. Before this question can be answered, it must first be asked whether these bodies have access to the disciplinary court. While anyone can file a complaint about the work performed by an accountant, where the work of attorneys and civil-law notaries is concerned this power is reserved to stakeholders only.

As regards the question of what information the enforcement bodies may use to substantiate their complaint, it is important to mention that these bodies are subject to an obligation of confidentiality. A number of bodies – the internal bodies and the Financial Supervision Office – are governed by Section 2:5 of the Dutch Administrative Law Act. This section allows for exceptions to be made if the proper performance of the duties of the enforcement body so requires. The duties of the enforcement body may be determined on the basis of the statutory regulation from which the enforcement body derives its powers. Furthermore, it has been determined whether the presentation of a complaint to the disciplinary court is included in those official duties. We may conclude that Section 2:5 of the Dutch Administrative Law Act seems to preclude the disclosure of confidential information to the disciplinary court.
The other enforcement bodies are subject to a special regime of confidentiality. Of all these bodies, only AFM (the Authority for the Financial Markets) has the authority to provide information to the disciplinary court. However, the scope of this authority is limited, since AFM is unable to dispose of any information that is subject to the obligation of confidentiality of accountants.

Another relevant aspect for the disciplinary court’s access to information is whether the court can demand the surrender of information from an attorney, civil-law notary or accountant about whom a complaint is filed. There is no such authority in the disciplinary schemes. Since the members of the professions are not under any specific obligation to provide information, they will have to rely on their obligation of confidentiality as the occasion arises.

Legislator Must Make a Move

If the legislator decides to broaden the options of sharing information from the enforcement bodies for the benefit of the professional status granting procedure and/or the disciplinary procedure, the legislator will have to observe the limits set by higher law.

The requirement of the right to a fair trial, as set out in Article 6 (1) ECHR, must have been fulfilled. This implies that the professional must in principle be able to take cognizance of the information on grounds of which he was refused a professional status, or on which a disciplinary complaint was based, so that he may put up an adequate defence against such a complaint. This may have consequences for the options of sharing enforcement-related information, because not all information is allowed to be disclosed to the professional concerned. We may safely conclude that the use of such information will in general be frustrated by the right to prepare a defence. Nevertheless, the use of secret proof may be considered necessary under certain circumstances, for example with a view to the fundamental protection of another individual or of an important public interest, which would legitimize such use. However, developing workable criteria for this purpose seems to be a tough job.

In order to extend the options of sharing information for the benefit of the professional status granting procedure and the administration of disciplinary law, a specifically formulated formal legal ground is required under Section 10 of the Netherlands Constitution and Article 8 of the ECHR. In the light of Article 8 of the ECHR, when examining whether an extension measure is legally feasible, the review of proportionality will be the hardest nut to crack. Such a review implies a weighing of interests. On the one hand there is the interest of sharing enforcement-related information in order to prevent the problems of real estate crime. This interest may be substantiated by the information in Chapters 1 and 5, while the seriousness of
the problems may be stressed by the interests of having a well-functioning real estate sector and a good professional practice. On the other hand, there is the interest of the protection of the private lives of the professional and of his client, to whom the information relates.

In the weighing of these interests, a role is reserved for the special position these professionals hold because of their responsibility for the realization of certain public interests. An interesting contradiction appears here. On the one hand, these public interests will benefit if the problems are tackled, which cannot be done without using information that may reveal situations of abuse. On the other hand, the interests can only be protected if the provision of services by these professionals is characterized by confidentiality. From that perspective, the observance of reticence in sharing information about the professional practice is precisely important.

Furthermore, the outcome of the review of proportionality will depend on the preconditions of the measure concerned and on the concrete circumstances of the case. Several aspects that may be attached importance to in the weighing of interests are discussed in Chapter 11. It is not easy to give a general indication of how these interests will be weighed.