Summary

1. Reasons for this research

This research deals with the way in which disciplinary law is used for the enforcement of the duty to report within the framework of the legislation concerning money laundering in the Netherlands. The Netherlands has implemented the duties resulting from the so-called money laundering directives via specific statutes. Within the framework of these statutes on liberal professions an obligation is lead (but of course also on many others) to report unusual transactions (within the statutory framework and when specific conditions are met). As far as the enforcement of this duty to report is concerned for the so-called liberal professions that are submitted to disciplinary law an exception has been made. This was to prevent that both disciplinary law and administrative law would apply. For the legal professions (attorneys and notaries) and accountants the compliance with the regulations following from the money laundering statutes is enforced via disciplinary law. When hence the public authority (BFT) suspects that a violation has taken place it will in principle not apply criminal law or administrative law, but rely on disciplinary law. The public authority hence follows the possibilities that exist within the profession to apply disciplinary law.

At the occasion of earlier research concerning problems of integrity within those professions questions have been raised concerning the effectiveness of disciplinary law. The question was also raised whether disciplinary law is an effective instrument to enforce obligations resulting from the money laundry statutes. The research hence deals with the effectiveness of disciplinary law as an instrument to enforce these obligations.

2. Problem definition

The goal of this research hence follows logically from the reasons for the research which have just been sketched and can be summarized as follows: the goal of the research is to examine whether with a system of partial disciplinary enforcement as applied to liberal professions (attorneys, notaries and accountants) an effective enforcement can be reached. This goal has been translated in the following problem definition: to what extent does disciplinary law to enforce obligations resulting from the money laundry statutes provide sufficient incentives to guarantee an effective compliance with these obligations?

In order to be able to answer this problem definition it is necessary to examine what the assumptions were that were underlying the choice for this particular enforcement mechanism. It is also necessary to examine how the disciplinary enforcement takes place in practice and which costs are in involved in this enforcement. Specific attention will be paid to the role of the organizations involved in disciplinary enforcement and to potential problems that may arise at the occasion of this enforcement.

3. Research questions

From this central problem definition five research questions can be deducted:

1. Can in principle with the current system of partial disciplinary enforcement for attorneys, notaries and accountants an effective enforcement of the legislative duties be guaranteed?
2. How does disciplinary enforcement of these obligations take place in practice?

3. To what extent does the disciplinary enforcement take place as this was meant and is specified in the statute?
4. Which problems do arise in the disciplinary enforcement of the statute?
5. What are the costs for applying disciplinary law in this case to attorneys, notaries and accountants?

4. Method

The research has been executed in four phases. In a first phase a theoretical perspective was followed. This theoretical perspective addressed the effectiveness of disciplinary law as enforcement mechanism for the statutory duty to report. This allowed answering research question 1 and allowed to explain which the assumptions were on which the legislator based its policy choice. This theoretical part also allowed answering research question 3 by explaining what the precise idea of the legislator was by largely relying on an enforcement of the duty to report for notaries, attorneys and accountants via disciplinary law. This first phase also used and economic approach to point at potential strength and weaknesses of enforcement through disciplinary law and also provided an economic perspective on effective enforcement generally.

This theoretical perspective hence allowed to reconstruct the policy ideas behind the choice for a disciplinary enforcement and also allowed to answer the theoretical part of research question 2. This related to sketching the scope of application of the applicable statute. The phrase “theoretical framework” should hence be interpreted broadly. It hence entails not only a research into the policy theory, but also more traditional legal research into the structure, background and contents of the relevant regulation.

In a second phase empirical material was gathered to provide an insight into the functioning of disciplinary enforcement in practice. This related first to collecting a variety of quantitative data, such as these appeared *inter alia* from annual reports of the Financial Intelligence Unit. In a third phase experiences and problems concerning disciplinary enforcement were sketched. The discussions in that respect in professional journals were sketched, but also various interviews were held with representatives from the three professions involved, with public authorities, members of disciplinary boards, the public ministry and various enforcers.

In a fourth and final phase the material was analyzed.

5. Policy assumptions

As was indicated in a first phase it was attempted to analyze the assumptions that were underlying the particular policy choice. This concerned of course especially the choice to use disciplinary law to enforce the duty to report in the money laundering statute. Various assumptions were apparently (at least implicitly) underlying the legislative choice:

1. The reason to choose for a disciplinary enforcement of the statutory obligations in case of attorneys, notaries and accountants follows from the idea that:
    a. These obligations form part of the regular exercise of the profession and
    b. The core tasks of these legal professionals (notaries and attorneys) where the duty of secrecy applies can be easily distinguished from the tasks where the statutory regime applies.

2. The disciplinary authorities are better able than an administrative agency or the criminal court to make the complicated balance between on the one hand the duty of secrecy and on the other hand the obligation to report following from the statute.
3. The disciplinary authorities will apply disciplinary law as soon as a violation of a norm is of such a nature that, irrespective of other sanctions, an enforcement is indicated.
4. Disciplinary enforcement is not less effective than enforcement through administrative law.
    a. There is a reasonable probability that an attorney, notary or accountant who does not comply with the obligations resulting from the money laundering statute will be held accountable for his behavior through disciplinary law.
    b. Disciplinary enforcement and sanctioning constitute an adequate alternative for administrative enforcement and administrative sanctioning.
5. There are no serious problems of delineation to determine what does and what does not fall under disciplinary law. As a result of this the administrative agency has a clear view of the cases in which a disciplinary sanctioning cannot take place.

6. Self regulation and disciplinary law

In a next phase a lot of attention was paid to the use of disciplinary law in the enforcement of the duty to report. This analysis used a law and economics and criminological perspective to sketch strength and weaknesses of disciplinary law. On the basis of this theoretical analysis indicators were developed showing under which conditions disciplinary law could be considered an effective instrument to enforce the duty to report. This resulted in six criteria (indicators) which could play a role in judging the effectiveness of disciplinary law:

1. Can interested third parties have an easy access to disciplinary law?
2. Can a complaint be brought directly to a disciplinary board or is there a first preliminary screening?
3. Who are members of the disciplinary board? Are in the disciplinary board in addition to professionals also others (like professional judges) involved in order to guarantee independence and quality of decisions of the disciplinary boards?
4. Which are the sanctions that can be used by the disciplinary board?
5. Are the sanctions which are imposed also systematically made public?
6. Are there, in addition to disciplinary law, also other sanctions possible?

These questions and indicators resulted, as was shown, from the economic and criminological research.

In a next phase the disciplinary law in the Netherlands with respect to the professions at stake (accountants, attorneys and notaries) was examined, whereby specific attention was paid to the indicators just mentioned. An important point to mention is that this theoretical research was executed to an important extent in 2008 (extending into 2009) as a result of which disciplinary law was sketched as it was applicable at that moment. However, disciplinary law in the Netherlands is in full evolution and for example as far as the accountants are concerned a new disciplinary law has entered into force on 1 May. This has been mentioned in the report, but these changes could of course not been taken into account in the research for the simple reason that it would be preliminary to judge the effectiveness of these changes now that there has not been any practical experience with those yet.

The six indicators sketched above were summarized into four parameters. When these are applied to the disciplinary law applicable to the professions at stake the results can be summarized as follows:

Criterion	Attorney	Notary	Accountant
Duty to complain?	No limitation (requirement of self interest?)	No limitation	No limitation
Preliminary screening	President of bar council first examines case	President of disciplinary board first examines case	No preliminary screening
Independance of disciplinary board	Disciplinary board: president = judge. In appeal: president + 3/5 judges	Disciplinary board: president judge. Appeal: court of appeals	Disciplinary board: president judge. Appeal: professional judges
Sanctions	• Warning. • Reprimand • Suspension of max. 1 year • Withdrawel • Publication of the last 3 measures	• Warning • Reprimand • Suspension of max. 6 months • Withdrawel • Publication of the first 2 measures	• Warning • Reprimand • Suspension of max. 6 months • Withdrawel • Publication

7. Empirics

From the empirical research it follows that especially attorneys are critical and negative towards the obligations following from the money laundering legislation. They consider this as an important infringement of their duty to secrecy. Notaries seem more convinced of the necessity of measures aiming at the protection of the integrity of trade. Also accountants seem to recognize the importance of the regulation and, so they argue, loyally comply with it. All three professions argue that the precise scope of the obligations resulting from the money laundry statute and more particularly the duty to report are unclear.

An important point which also clearly followed from the empirical analysis is that the use of disciplinary law to enforce the duty to report is a great exception. The quantitative analysis showed that of the total number of reports of unusual transactions in the Netherlands only 1% of those was done by liberal professionals. However, those represent 28% of the total amount of reports. That is largely due to the reports by notaries who are often involved in transaction concerning real estate. It also appeared that enforcement mechanisms are in general only seldom applied, because it is rare that a complaint is formulated to a disciplinary board. Nevertheless on the basis of the interviews a good impression could be obtained of some of the problems that have appeared in the enforcement through disciplinary law. These problems relate *inter alia* to:

1. uncertainty concerning and dissatisfaction with the duty to report;
2. the fact that compliance with the duty to report costs a lot of time and work;
3. the duty to secrecy limits the accessibility of files of attorneys and notaries;

4. the fact that especially with notaries and attorneys a screening function is fulfilled by the presidents of the local councils as a result of which it is possible that not all cases end up with the disciplinary board;
5. disciplinary procedures take too long;
6. the sanctions imposed under disciplinary law are (generally, not specifically for the violation of the duty to report) considered as (too) light;
7. there was uncertainty concerning the question whether the imposition of a fine would increase the effectiveness of disciplinary law;
8. the costs of disciplinary law do not seem to constitute an important restraint; the costs of compliance with the duty to report were, however, considered as high.

8. Responses to the research questions

As far as the enforcement of disciplinary law in practice is concerned (question 2) we again have to stress that the use of disciplinary law to enforce obligations under the money laundering statute is quantatively an exception. This is related to the conclusion from the empirical part that not much can be expected from self regulation and enforcement through disciplinary law when within the profession the norms and the corresponding duties are unclear or debated. Not only is there uncertainty concerning the intervention through disciplinary law, also the speed and the stringency of the sanctions are questionable. The empirical research indicates that the disciplinary procedures take a lot of time. If one examines the sanctions which are generally applied by disciplinary boards non-compliance with the duties resulting from the money laundering legislation do not seem to be considered as very serious infringements by the boards. Boards generally impose reputational sanctions and there is no reason to assume that in case of a violation of duties with respect to money laundering the sanctions would be more stringent.

When these results are related to research question 3 the conclusion is clear that the way in which the enforcement through disciplinary law takes place in practice does not correspond with the goals and expectations that the legislator (at least implicitly) had. This is partially due to the fact that the legislator may have funded its policy on assumptions which could not be substantiated. However, the fact that practice is different than the expectations of the legislator is not only due to a too optimistic perspective by the policy-maker, but also to problems in legal practice. That answers research question 4 with respect to the problems in the practical enforcement. The most important of those are the administrative workload (Involved in reporting), for limited access to files, a screening of cases, the expertise of the disciplinary board, the length of the procedure and the sanctions applied. Hence, this also answers the last research question: the costs involved in the application of disciplinary procedures are apparently not the main problem in enforcement practice.

9. Suggestions for policy

Finally the research formulated a few suggestions in order to improve the enforcement practice:

1. Differentiate where possible between the professions;
2. Improve the regulation concerning the scope of the duty to report or at least the information in that respect;
3. Consider further research concerning the relationship between the duty to report on the one hand and the duty to secrecy on the other hand.

It may be clear that these suggestions are the logical consequence of the points which were considered as problems in enforcement practice. Paying attention to these aspects may hence increase the effectiveness of enforcement.