

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 14 December 2006¹

1. Is it consistent with Community law and with the fundamental principles which it guarantees to impose on lawyers, as is provided for by Directive 2001/97 of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ 2001 L 344, p. 76), the obligation to inform the competent authorities of any fact of which they are aware which might be an indication of money laundering? The question which this case raises should lead the Court to consider one of the fundamental values of the States governed by the rule of law forming the European Union, lawyers' professional secrecy.² Although that value appears unquestionable, the legal rules governing its protection nevertheless remain uncertain and controversial. On what basis must that protection be granted? Is it permissible to derogate from it and in what circumstances? According to what criterion is the dividing line to be drawn, in practice, between that which is covered by secrecy and that which is not?

2. This Court will not be the first to raise those questions. Certain national courts both inside and outside the Union have been required to consider similar issues.³ In addition, the Court may profitably rely on some of its own precedents. Through its case-law, it has already upheld the principle of the confidentiality of written communications between a lawyer and his client⁴ and recognised the specific nature of the legal profession and the rules to which it is subject.⁵

I — Background to the case

3. For a proper understanding of the issues at stake in this case, I think it may be helpful,

1 — Original language: Portuguese.

2 — The protection of professional secrecy is expressly reiterated in Article 41 of the Charter of fundamental rights of the European Union, which enshrines 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'.

3 — It is thus worth citing, for example, the decision of the Supreme Court of British Columbia (Canada) of 20 November 2001. Being required to rule on whether legal advisers should be exempted from the obligation to report certain suspect financial transactions to the Financial Transactions and Reports Analysis Centre of Canada, it saw fit to make reference to the provisions of Directive 2001/97, which was then in its final phase of adoption.

4 — Case 155/79 *AM & S* [1982] ECR 1575. See, on this subject, the study by Vesterdorf, B., 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues', in *Fordham International Law Journal*, 2005, p. 1179.

5 — Case C-309/99 *Wouters and Others* [2002] ECR I-1577.

as a preliminary exercise, to retrace the history of the provision at issue and the circumstances in which it has been challenged.

A — *The Community context*

4. The term 'laundering' is said to have its origin in a practice which developed in the United States of America, whereby organised crime would acquire launderettes and car washes for the purpose of mixing their receipts from, among other things, alcohol smuggling during Prohibition with legally obtained profits. Although that origin is debated, the meaning of the term itself is not in doubt. Money laundering denotes a range of activities the purpose of which is to confer an appearance of legality on resources of criminal origin.

5. A phenomenon which embraces and even takes advantage of the liberalisation of world trade, laundering calls for a fight commensurate with its growth, in the form of international cooperation.⁶ In 1980, the Council of Europe adopted a recommenda-

tion on measures against the transfer and the safekeeping of illicit funds.⁷ Although only exhortatory in character, that text had the virtue of launching the international campaign against money laundering. On 19 December 1988, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted in Vienna.⁸ Under that convention, money laundering is to be established as a criminal offence and sanctions are to be imposed. In 1990, the Council of Europe adopted a Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.⁹ While deepening cooperation on a regional scale, that convention has the effect of widening the definition of the concept of laundering and of obliging signatory States to adopt punitive measures. At the same time, the Financial Action Task Force on Money Laundering ('the FATF'), an international body created on the initiative of the G7 in Paris in 1989 to devise and promote strategies for combating this scourge, was established. In 1990, the FATF published a set of 40 recommendations designed to serve as a basis for a coordinated campaign on an international scale.¹⁰

6. It was in that legislative context, already relatively crowded, that the European Com-

6 — See, to that effect, the fifth recital in the preamble to Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15).

7 — Council of Europe, Recommendation No. R (80) 10 on measures against the transfer and the safekeeping of funds of criminal origin, adopted on 27 June 1980.

8 — United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted by the Conference at its 6th plenary session on 19 December 1988.

9 — Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted at Strasbourg on 8 November 1990.

10 — FATE, *The 40 Recommendations*, 1990, revised in 1996 and 2003.

munity took the initiative of acting. It was a matter for it not only of participating in that international campaign, but also of protecting the integrity of the European single market.¹¹ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77) was thus adopted, by which the Community legislature lays down the principle of the prohibition of money laundering in the Community and requires the Member States to introduce a system of obligations concerning identification, information and prevention of suspicious transactions for the attention of credit and financial institutions.

7. The provision put in issue in this case is the result of an amendment made to Directive 91/308. Directive 2001/97 springs from the intention of the Community legislature to update Directive 91/308 in line with the conclusions of the Commission and the wishes expressed by the European Parliament and the Member States and, in the light of the experience built up over the first few years of its operation, to extend its coverage to new fields and activities. That resulted, inter alia, in a widening of the scope of the obligation to inform the responsible

authorities of any suspicions regarding money laundering, referred to in Article 6 of Directive 91/308, to include 'notaries and other independent legal professionals' in the performance of certain of their activities.

8. That widening, which is at the centre of this case, was the result of long discussion within various fora. In 1996, the FATE, revising its recommendations, asked the national authorities to widen the scope of measures to combat money laundering to financial activities carried out by non-financial professions. In 2001, the FATF reiterated that, in view of 'the increased use by criminals of professionals and other intermediaries to provide advice or otherwise assist in laundering criminal funds', it considered that 'the ... 40 Recommendations should be extended to cover certain categories of non-financial businesses and professions', including 'lawyers [and] notaries'.¹²

9. Such a recommendation could not remain extraneous to the Community framework. Directive 91/308 itself provided in Article 12 that 'Member States shall ensure that the provisions of this Directive are extended in whole or in part to professions and to categories of undertakings, other than the credit and financial institutions referred to in Article 1, which engage in activities which are particularly likely to be used for money-laundering purposes'. In addition, under

11 — See the Opinion of Advocate General Saggio in Case C-290/98 *Commission v Austria* [2000] ECR I-7835, point 3, which gave rise to the order of the President of the Court of 29 September 2000 in that case.

12 — FATF, *Annual Report 2000-2001*, 22 June 2001, pp. 16, 17 and 18.

Article 13 of that directive, a contact committee was set up under the aegis of the Commission, the function of which would be 'to examine whether a profession or a category of undertaking should be included in the scope of Article 12 where it has been established that such profession or category of undertaking has been used in a Member State for money laundering'.

dealers, auctioneers, casinos, bureaux de change (exchange offices), transporters of funds, notaries, accountants, advocates, tax advisors and auditors ... with a view to:

- fully or partially applying to them the rules contained therein or, if necessary,

- applying to them new rules taking account of the particular circumstances of these professions, and especially having full regard to their professional duty of discretion ...¹⁴

10. Following the first reports by the Commission on the implementation of the Directive, the European Parliament and the Council of the European Union adopted a position in favour of extending the reporting obligation in Article 6 of the Directive to persons and professions other than credit institutions.¹³ In March 1999, in its Resolution on the second Commission report, the Parliament expressly called upon the Commission to table a legislative proposal aimed at amending the Directive so as to provide for 'the inclusion in [the scope of] the Directive of professions at risk of being involved in money laundering or abused by money launderers, such as estate agents, art

11. It was on that basis that the Commission submitted its proposal for the amendment of the Directive, in July 1999.¹⁵ This requires Member States to ensure that the provisions laid down by the Directive are imposed on 'notaries and other independent legal professionals when assisting or representing clients' in respect of a certain number of commercial and financial activities. However, it also provides for a derogation of limited scope: Member States would not be obliged to impose the obligations to inform provided

13 — See, in particular, the Action plan to combat organised crime (adopted by the Council on 28 April 1997) (OJ 1997 C 251, p. 1, point 26(e)).

14 — Resolution on the 'Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive' (OJ 1999 C 175, pp. 39 to 42).

15 — Proposal for a European Parliament and Council Directive amending Council Directive 91/308 (COM(1999) 352 final of 14 July 1999).

for by the Directive on legal professionals ‘with regard to information they receive from a client in order to be able to represent him in legal proceedings’. However, that derogation ‘shall not cover any case in which there are grounds for suspecting that advice is being sought for the purpose of facilitating money laundering’.

12. That proposal was much debated. The wording finally adopted reflects the terms of that debate. In its opinion on the Commission proposal, the Parliament absolutely refused to accept that those obligations to inform should apply to independent lawyers or law firms or members of regulated legal professions not only when engaged for purposes of representation in legal proceedings but also when engaged to provide legal advice.¹⁶ That opinion therefore deviated from the proposal in two respects: firstly, by transforming the discretion afforded to Member States to provide for a derogation into an obligation to create such a derogation and, secondly, by widening the scope of the derogation from the context of representation in legal proceedings to the context of legal advice.

13. The common position adopted by the Council in November 2000 adopted a compromise solution.¹⁷ It is now proposed to word the provision at issue as follows:

‘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 advisers 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.’¹⁸

14. Although the derogation remains a mere discretion afforded to Member States, its scope is thus appreciably widened. In the Commission’s view, that position is not only compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’) but

16 — Opinion of the European Parliament of 5 July 2000 (OJ 2001 C 121, p. 133).

17 — Common Position (EC) No 5/2001 adopted by the Council on 30 November 2000 with a view to adopting a Directive of the European Parliament and of the Council amending Council Directive 91/308 (OJ 2001 C 36, p. 24).

18 — *Ibid.*, p. 28.

also consistent with the spirit of the amendments tabled by the Parliament.¹⁹ That was not, however, the view of the Parliament. In its Resolution on the common position adopted by the Council, while reproducing the wording of the common position on the scope of the derogation, it renewed its intention to transform the discretion allowing Member States to provide for a derogation into a provision binding on them.²⁰

15. The Commission adopted an ambiguous position on this question.²¹ On the one hand, 'given the need to ensure compatibility with the [ECHR]', it admits to having 'some sympathy for Parliament's wish to make it obligatory not to require the reporting of suspicions of money laundering formed on the basis of information obtained by lawyers and notaries when assisting their clients in legal proceedings or in ascertaining their position under the law'. However, on the

other hand, it 'does not accept ... that the same considerations apply generally in respect of the non-legal professions'. For that reason, the amendment proposed by the Parliament was rejected.

16. Since the Council had decided to follow the Commission on this point, a conciliation committee was set up. However, in the course of that conciliation, it became apparent, according to the Parliament, that 'the events of 11 September 2001 in the USA changed dramatically the point of view on the issue because from that date on the money laundering Directive was widely considered as part of the fight against terrorism'.²² In that new context, a compromise emerged, allowing the approval of the text by the Parliament by a large majority at third reading on 13 November 2001 and its approval by the Council on 19 November 2001.

17. The compromise takes the following form. The new Articles 2a and 6 of Directive 91/308 as amended by Directive 2001/97 ('the Directive') remain unchanged.

19 — Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and the Council amending Council Directive 91/308, of 12 January 2001 (SEC/2001/12).

20 — European Parliament legislative resolution of 5 April 2001 on the common position adopted by the Council (O) 2002 C 21 E, p. 305, amendment 22).

21 — Opinion of the Commission pursuant to Article 251(2)(c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/308, of 13 June 2001 (COM(2001) 330 final).

22 — Report of the European Parliament on the joint text approved by the Conciliation Committee for a European Parliament and Council directive amending Council Directive 91/308, of 5 November 2001 (PE-CONS 3654/2001 — C5-0496/2001 — 1999/0152(COD)).

18. Article 2a thus provides:

(iii) opening or management of bank, savings or securities accounts;

'Member States shall ensure that the obligations laid down in this Directive are imposed on the following institutions:

(iv) organisation of contributions necessary for the creation, operation or management of companies;

...

5. notaries and other independent legal professionals, when they participate, whether:

(v) creation, operation or management of trusts, companies or similar structures;

(a) by assisting in the planning or execution of transactions for their client concerning the

(b) or by acting on behalf of and for their client in any financial or real estate transaction.'

(i) buying and selling of real property or business entities;

19. As regards Article 6, it provides:

(ii) managing of client money, securities or other assets;

'1. Member States shall ensure that the institutions and persons subject to this Directive and their directors and employees

cooperate fully with the authorities responsible for combating money laundering:

(a) by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering;

(b) by furnishing those authorities, at their request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the authorities responsible for combating money laundering of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated by the institutions and persons in accordance with the procedures provided for in Article 11(1)(a) shall normally forward the information.

3. In the case of the notaries and independent legal professionals referred to in Article 2a(5), 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.'

20. On the other hand, conciliation resulted in the making of certain amendments to the wording of the recitals in the preamble to the Directive relating to the rules applicable to the legal professions. The 16th recital sets out the principle that 'notaries and independent legal professionals, as defined by the Member States, should be made subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those

legal professionals being misused for the purpose of laundering the proceeds of criminal activity'. However, the following recital adds that: '[h]owever, 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'.

21. Finally, it should be noted that Directive 91/308 was recently repealed by Directive 2005/60. The content of that directive reproduces without amendment the provisions put in issue in this case.²³

B — *The national context*

22. This case has its origin in two actions brought at the same time before the Cour d'arbitrage (Court of Arbitration), Belgium, one by the *Ordre des Barreaux Franco-*

phones et Germanophone (Association of the French-speaking and German-speaking Bars, 'the OBFG') and the *Ordre Français des Avocats du Barreau de Bruxelles* (French Bar Association of Brussels), the other by the *Ordre des Barreaux Flamands* (Association of Flemish Bars) and the *Ordre Néerlandais des Avocats de Bruxelles* (Dutch Bar Association of Brussels). Those actions seek the annulment of certain provisions of the *Loi du 12 janvier 2004 modifiant la Loi du 11 janvier 1993 relative à la Prévention de l'Utilisation du Système Financier aux fins du Blanchiment de Capitaux* (Law of 12 January 2004 amending the Law of 11 January 1993 on Prevention of the Use of the Financial System for the purpose of Money Laundering), the *Loi du 22 mars 1993 relative au Statut et au Contrôle des Établissements de Crédits* (Law of 22 March 1993 on the Status and Control of Credit Institutions), and the *Loi du 6 avril 1995 relative au Statut des Entreprises d'Investissement et à leur Contrôle, aux Intermédiaires Financiers et Conseillers en Placements* (Law of 6 April 1995 on the Status and Control of Investment Firms, Financial Intermediaries and Investment Advisors). The Council of the Bars and Law Societies of the European Union ('the CCBE'), the *Ordre des Avocats du Barreau de Liège* (Liège Bar Association) and the *Conseil de Ministres* (Council of Ministers) intervened in support of the applicants.

23. It should be pointed out that the purpose of the Law of 12 January 2004 is to transpose into the Belgian legal order Directive 2001/97 amending Directive 91/308. It therefore contains a new Article 2b, the wording of which is identical to Article 2a(5)

²³ — Articles 2 and 23(2).

of the Directive. In addition, taking advantage of the discretion afforded by the second subparagraph of Article 6(3) of the Directive, the law inserts in the Belgian legislation a new Article 14(a)(3), providing that 'the persons referred to in Article 2b shall not forward such information if it was received from or obtained 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'.

24. It is apparent from the order for reference that the applicants complain primarily that that law extends to lawyers the obligations laid down by the Law of 11 January 1993. In the applicants' view, such an extension infringes the principle of the professional secrecy and independence of lawyers, who are protected by the rights enshrined in the Constitution and in the ECHR. In its judgment, the Cour d'arbitrage establishes that, although professional secrecy is a 'fundamental element of the rights of defence', it may give way 'where necessity requires or where a conflict arises with a value judged to be superior', provided, however, that such waiver is justified by a compelling reason and is strictly proportionate.

25. However, account must be taken of the fact that the provisions at issue are the product of an extension imposed by the transposition of Directive 2001/97. Conse-

quently, the debate on the constitutionality of the Belgian law hinges on a question concerning the validity of the Community directive. That question, referred to the Court under Article 234 EC, is the following:

'Does Article 1(2) of Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering infringe the right to a fair trial such as is guaranteed by Article 6 of the ECHR, and, as a consequence, Article 6(2) EU, in so far as the new Article 2a(5) which it inserts into Directive 91/308/EEC requires the inclusion of independent legal professionals, without excluding the profession of lawyer, in the scope of application of this same directive, which, in substance, has the aim of imposing an obligation on persons or establishments covered by it to inform the authorities responsible for combating money laundering of any fact which might be an indication of such laundering (Article 6 of Directive 91/308/EEC, replaced by Article 1(5) of Directive 2001/97/EC)?'

II — The framework for the review of legality

26. In order to assess the validity of the provision at issue under Community law, the rule under which that provision must be reviewed must first be determined. In its

order for reference, the Cour d'arbitrage refers to Article 6 of the ECHR concerning the right to a fair trial and, in consequence, to Article 6(2) EU.

hearing within a reasonable time by an independent and impartial tribunal established by law. ...

27. It should be recalled that Article 6 EU is worded as follows:

...

'1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

3. Everyone charged with a criminal offence has the following minimum rights:

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

...

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...'

28. As regards Article 6 of the ECHR, it reads as follows:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public

29. However, certain parties to the proceedings suggest that the reference norms for the review should be widened. Firstly, the reference to Article 6 of the ECHR is too narrow, and the review of conformity of the provision at issue should be extended in the light, in particular, of the principle of lawyers' independence, the principle of professional secrecy, the duty to act in good faith, the

principle of the rights of defence (the right to legal representation in court and the privilege against self-incrimination) and the principle of proportionality. Secondly, the CCBE raises a question as to the appropriateness and validity of the legal bases of the Directive.

30. In the submission of those parties, the nature of the review of validity provided for in Article 234 EC permits such a widening. They base their view on the Court's case-law, according to which 'the jurisdiction of the Court to give preliminary rulings under Article 177 of the Treaty [234 EC] concerning the validity of acts of the Community institutions cannot be limited by the grounds on which the validity of those measures may be contested'.²⁴

31. That case-law cannot be questioned. However, it does not have the meaning attributed to it by those parties. By that statement, the Court does not establish that it has complete discretion to amend in substance the content of the question of validity raised by the referring court. It merely seeks to point out that, in that context, its review may be extended to all the legal grounds which delimit the scope of the review of legality provided for in Article 230 EC. Nevertheless, the principle remains

that the Court's review of the validity of a provision of Community law must take place 'within the context of the preliminary question' submitted to it.²⁵

32. The limit as described above may undoubtedly afford the Court some flexibility. The Court is always entitled to define the content of the question referred for a preliminary ruling in the light of the observations submitted by the parties to the main proceedings or as it appears from the statement of grounds in the order for reference.²⁶ Similarly, it must be acknowledged that the Court may examine of its own motion, outside the context of the question submitted, certain substantive defects.²⁷

33. In this case, however, I do not see any reason to request that the Court make use of that flexibility. In the case of two of the grounds of challenge put forward, the issue is clear. As regards the challenge concerning the legal basis of the Directive, it is of course outside the scope and meaning of the question submitted. The latter concerns only the consistency of certain of its provisions with the fundamental principles of the Community legal order and not the competence which the Community had to adopt it. As for the principle of proportionality, it

24 — See, in particular, Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 26.

25 — Joined Cases 50/82 to 58/82 *Dorca Marine and Others* [1982] ECR 3949, paragraph 13.

26 — Case 41/72 *Getreide Import* [1973] ECR 1, paragraph 2, and Joined Cases 103/77 and 145/77 *Royal Scholten-Honig* [1978] ECR 2037, paragraphs 16 and 17.

27 — Joined Cases 73/63 and 74/63 *Internationale Crediet- en Handelsvereniging* [1964] ECR 1, paragraph 28.

constitutes an element in the attainment and review of the fundamental rights guaranteed by the Community legal order. On that basis, it will in any event have to be taken into account in connection with the implementation of those rights. Consequently, there is no need to widen for that purpose the scope of the review requested by the referring court.

34. The situation is different in the case of the other principles invoked by the interveners. Although they are not without relevance in the context of the question submitted, it does not seem necessary to devote a separate analysis to them, simply because of limited means. Those principles can easily be grouped together under one of them, that of lawyers' professional secrecy. The latter is the most directly threatened by the obligation to inform provided for by the directive at issue. It was certainly the compatibility of that obligation to inform with the requirements of lawyers' professional secrecy that gave rise to the referring court's question.

35. It therefore seems to me to be sound methodology to ascertain first whether those requirements have the status of a general principle or fundamental right protected by the Community legal order. If that is the case, it may be considered that Article 6(2) EU provides sufficient resources to satisfy all the concerns expressed by the parties to the case.

III — The bases of the protection of lawyers' professional secrecy

36. If the reasoning of some of the interveners is followed, it may seem pointless to identify a specific source of law which enshrines lawyers' professional secrecy.²⁸ It is possible to find traces of it 'in all democracies' and in all eras: present in the Bible, it appears again in the writings of ancient history and from century to century. From that point of view, if lawyers' secrecy merits recognition in the Community legal order, that is quite simply because it has its roots in the very foundations of European society.

37. In addition, it is suggested that reference be made to the rules accepted by all the professional associations of lawyers in all the Member States. Secrecy is inherent in the very profession of lawyer. It is mentioned in all the codes of conduct, following the example of the Code of Conduct for European Lawyers adopted by the CCBE,²⁹ which provides in Article 2.3 concerning professional secrecy that 'it is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of

28 — Written observations submitted by the Ordre des barreaux francophones et germanophone and the Ordre français des avocats du barreau de Bruxelles, p. 22.

29 — This code was adopted on 28 October 1988 and last amended on 19 May 2006.

confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer'. The rule of professional secrecy is designed, from that point view, as an obligation of discretion forming part of the ethics of a profession.

38. In order to accept the requirement of Community protection, the Court's case-law cannot content itself either with a social axiom or with a professional rule. Existing and having to exist are two very different things. The Court undoubtedly cannot overlook the existence of a principle so elementary that it appears to be universally recognised. However, it does not follow from the fact that a rule appears to have a higher value in certain social or private orders that it must be enshrined as a general principle of Community law. It is still necessary to ascertain whether there is, in that order, an independent source which ensures its protection.

39. It is therefore permissible to raise the question as to the existence in this field of a tradition common to the Member States. As the Court pointed out in its judgment in *AM & S*, cited above, 'Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States'.³⁰ Comparative study of the laws of the Member States of Union shows clearly

that the professional secrecy of lawyers exists in the majority of those States with the rank of a fundamental principle and the status of a rule of public policy.³¹ The same study reveals, however, that the extent of and detailed rules for the protection of professional secrecy vary quite widely from one legal system to another. Consequently, although account must be taken of the different national laws and national court decisions in the interpretation to be given to the concept of lawyers' professional secrecy, it seems to me that, in view of the divergences and variations which affect the application of that principle in the legal systems of the Member States, it is necessary to turn instead to another source of protection.

40. According to settled case-law, the fundamental rights enshrined in the ECHR have 'special significance' in the Community legal order and form an integral part of the general principles of law the observance of which the Court ensures.³² It does not necessarily follow from this that the extent of protection of fundamental rights in the Community legal order is the same as that guaranteed by the ECHR. On the other hand, measures which are incompatible with observance of the human rights recognised by the latter are not acceptable in the Community.³³

31 — See, to that effect, point 182 of the Opinion of Advocate General Léger in *Wouters and Others*.

32 — See, in particular, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71.

33 — *Schmidberger*, paragraph 73.

30 — Paragraph 18 of *AM & S*.

41. However, although the ECHR does not refer expressly to lawyers' professional secrecy, it nevertheless contains provisions which are capable of guaranteeing its protection. The case-law of the European Court of Human Rights offers two different approaches in that regard. On the one hand, because of the context in which they are called to practise, lawyers' secrecy is connected, as the referring court explains, with the right to a fair trial. In the *Niemietz v. Germany* judgment, the European Court held that, where a lawyer is involved, an encroachment on professional secrecy 'may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6'.³⁴ Secrecy is the prerequisite for trust which promotes confidence and leads to the manifestation of truth and justice. However, on the other hand, since its purpose is to protect, it constitutes an essential component of the right to respect for private life.³⁵ In its *Foxley v. the United Kingdom* judgment, the European Court emphasises to that effect the importance, under Article 8 of the ECHR, of the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client.³⁶ Secrecy protects the citizen from indiscreet disclosures which might damage his integrity and reputation.

42. The Court of Justice cannot overlook such case-law. It has had occasion to point

out that it is required to take into account the case-law of the European Court of Human Rights when interpreting the fundamental rights.³⁷ It is therefore possible to regard the right to a fair trial and the right to respect for private life as the twofold basis for the protection of lawyers' professional secrecy in the Community legal order.

43. In theory, the choice of one of those two bases is not immaterial. It should be noted that attaching the protection of secrecy to one or other of those rights may serve to vary the extent of that protection. Basing secrecy on the right to a fair trial amounts, by implication, to limiting its application to the contentious, judicial and quasi-judicial context. That was the choice made by the Court in the *AM & S* case. The result of that choice was that written communications were to be protected, in the circumstances of that case, only 'for the purposes and in the interests of the ... rights of defence'.³⁸ Opting, on the other hand, for the right to respect for private life means, a priori, extending the protection to all confidences entrusted by the client to the professional, irrespective of the context in which that relationship takes place.

44. However, at this stage of the analysis, such a choice does not seem to me to be

34 — Eur. Court HR, *Niemietz v. Germany* judgment of 16 December 1992, § 37.

35 — See, by analogy, in regard to medical confidentiality, Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23.

36 — Eur. Court HR, *Foxley v. the United Kingdom* judgment of 20 September 2000, § 44; see also the *Kopp v. Switzerland* judgment of 25 March 1998.

37 — Case C-301/04 P *Commission v SGL Carbon* [2006] ECR I-5915, paragraph 43.

38 — Paragraph 21 of *AM & S*.

relevant. On the contrary, upholding the twofold basis has the advantage of meeting all the concerns of the interveners. The protection of lawyers' professional secrecy is a principle with two aspects, one procedural, drawn from the fundamental right to a fair trial, the other substantive, drawn from the fundamental right to respect for private life. It is easy to attach the rights of the defence, the right to legal assistance and the privilege against self-incrimination to its procedural basis.³⁹ The requirements which correspond to its substantive basis are 'that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of *independent* legal advice to all those in need of it'⁴⁰ and the correlative duty of the lawyer to act in good faith towards his client. The principle of secrecy originates in the specific nature itself of the profession of lawyer.

45. If the principles of lawyers' independence, the rights of the defence or the right to silence are undermined by the obligation to inform contained in the provision of Community law at issue, that is first and foremost because they are covered by the principle of lawyers' professional secrecy. In this case, the question is therefore whether the obligation to inform imposed by the directive at issue on lawyers in the European

Union infringes that principle, protected as such by the fundamental principles of the Community legal order.

46. If, following that analysis, it is appropriate to recognise the existence of a principle of lawyers' professional secrecy in Community law, it should not, however, be inferred from this that it is an absolute prerogative conferred as such on the legal profession.

IV — The limits of protection of lawyers' professional secrecy

47. With regard to the right to protection of the confidentiality of communications between a lawyer and his client, Advocate General Warner was already noting in the *AM & S* case that 'it is a right that the laws of civilised countries generally recognise, a right not lightly to be denied, but not one so entrenched that, in the Community, the Council could never legislate to override or modify it'.⁴¹ The same most certainly holds true for the protection of professional secrecy, as is demonstrated moreover by an examination of the relevant legislation in all the Member States of the Community. It is possible that professional secrecy may give way to overriding requirements in the public interest in certain specific circumstances.

39 — See Article 47 of the Charter of fundamental rights of the European Union, codifying the case-law of the Court of Justice on the rights relating to access to justice; Case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraph 35.

40 — Paragraph 18 of *AM & S* (emphasis added).

41 — Opinion of Advocate General Warner in *AM & S*, at ECR 16-37.

Consequently, the provision put in issue in this case cannot be held to be invalid on the sole ground that it imposes certain restrictions on lawyers' professional secrecy. It is yet to be established that the restrictions thus imposed comply with the rules governing limitations of the rights on which lawyers' professional secrecy is based in Community law. Where they affect the guarantee of rights protected by the Community legal order, such restrictions must be strictly regulated and justified.

tion cannot in itself constitute a sufficient legal basis for the creation of rights capable of being directly invoked by individuals, it is nevertheless not without effect as a criterion for the interpretation of the instruments protecting the rights mentioned in Article 6(2) EU. From that perspective, that charter may have a dual function. In the first place, it may create the presumption of the existence of a right which will then require confirmation of its existence either in the constitutional traditions common to the Member States or in the provisions of the ECHR. In the second place, where a right is identified as a fundamental right protected by the Community legal order, the Charter provides a particularly useful instrument for determining the content, scope and meaning to be given to that right. It should be pointed out, moreover, that the provisions of the Charter, the drafting of which is based on a wide process of discussion at European level, correspond in large part to a codification of the Court's case-law.

48. In order to examine the justification for the limitations called in question by the applicants, I propose to use the framework for analysis set out in the Charter of fundamental rights of the European Union. As the Court has had occasion to state, even though that charter 'is not a legally binding instrument', its principal aim, 'as is apparent from its preamble, is to reaffirm "rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights"'.⁴² It is clear from that passage that, although the charter in ques-

49. In that context, it is for the Court to satisfy itself, firstly, that the limits introduced by the provision at issue of the Directive do not restrict the protection of lawyers' secrecy in such a way or to such an extent that its very substance is affected and, secondly, that those limits pursue an objective of general

⁴² — Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 38.

interest recognised by the Union and are proportionate to that objective.⁴³

A — Does the provision at issue affect the substance of lawyers' professional secrecy?

50. Protecting the substance of a fundamental right is, in effect, either ensuring the protection of that right which is most compatible with the substance of other fundamental rights, or determining the circumstances and conditions in which that right merits enhanced protection.

51. The whole difficulty in this case is knowing the circumstances and conditions in which lawyers' professional secrecy cannot be limited. Indeed, this is the point on which the parties' interpretations differ most significantly.

52. On the one hand, the Commission takes the view that the substance of lawyers'

secrecy lies entirely in the 'contentious' field. For it to be possible to accept that such secrecy enjoys protection, a link with proceedings must be established. It is only in the context of a trial, or at least of proceedings of a judicial or quasi-judicial nature, that secrecy merits protection. Indeed, that is how the Court's judgment in *AM & S* should be interpreted, that is to say, as requiring 'a relationship' to proceedings of a contentious nature. From that point of view, by limiting the protection of lawyers' secrecy to the contentious context, the directive does not incur any criticism.

53. Taking the opposite view, the parties representing the bar associations submit that the secrecy rule is inseparable from the lawyer's profession on which it confers special status and dignity. In any event, lawyers should be the sole judge of the limits which may be placed on it. Restricting the scope of secrecy to one of their activities is both contrary to fundamental principles and impossible to operate in practice, since those activities are both complex and indivisible. From that point of view, it is clear that, by requiring the betrayal of secrets in some of the activities carried out by lawyers, the Directive has the effect of infringing fundamental rights.

54. Those two interpretations, which are irreconcilable, do however have one point of agreement which must be taken as a

⁴³ — Article 52(1) of the Charter of fundamental rights of the European Union provides that '[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

starting point. All the parties agree that the rationale for lawyers' professional secrecy lies in a relationship of trust between lawyer and client.⁴⁴ Preserving such a relationship is, in actual fact, useful in two respects. It is useful, first, to the client, the holder of the secret, who can thus be confident that he is placing it in the hands of a trusted third party, his lawyer. But it is also useful to society as a whole, in so far as, by promoting knowledge of the law and the exercise of the rights of the defence, it contributes to the sound administration of justice and the manifestation of truth. Nevertheless, that relationship is fragile. It must be able to take place in a protected context. What is important in this case is therefore to establish carefully the limits of that context. It cannot be too narrow, so as not to destroy the conditions for a genuine relationship of trust between a lawyer and his client. On the other hand, however, it must not be too broad, at the risk of turning secrecy into a mere attribute of the profession of lawyer. Professional secrecy cannot be the property of lawyers. It should, rather, be regarded as a value and as a responsibility. In the words of Lord Denning, the privilege which stems from that secrecy 'is not the privilege of the lawyer but of his client'.⁴⁵ That privilege has meaning only if it serves the interests of justice and respect for law. It is entrusted to the lawyer solely in his capacity as an agent of justice.

55. It is, moreover, a point which, in this case, cannot be disputed. All the parties

agree on the fact that professional secrecy must enjoy enhanced protection in the context of performing the duties of representing and defending a client. In that context, as pointed out by Advocate General Léger in his Opinion in *Wouters and Others*, 'lawyers occupy a central position in the administration of justice as intermediaries between the public and the courts'.⁴⁶ It is therefore no coincidence that they are described by the Court as 'assisting' and 'collaborating in the administration of justice'.⁴⁷

56. The dispute therefore focuses on whether such protection merits extension beyond the strict framework of the needs of representation and defence and how far it should be extended. In that regard, it must be observed that the situation prevailing in the legislation of the various Member States is contradictory.

57. The directive at issue seems, *prima facie*, to adopt an intermediate position. During the examination of the proposal for the directive submitted by the Commission, the Parliament had sought to extend the derogation expressly to the activity of providing legal advice. As has already been noted, that proposal was not accepted. In the second subparagraph of Article 6(3), the directive adopted provides merely that lawyers are to be exempt from any obligation to inform not

44 — Opinion of Advocate General Léger in *Wouters and Others*, point 182.

45 — Lord Denning, *The Due Process of Law*, Butterworths, London, 1980, p. 29.

46 — Point 174 of the Advocate General's Opinion.

47 — Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 14, and *AM & S*, paragraph 24.

only when ‘performing their task of defending or representing that client in, or concerning ... proceedings’ but also ‘in the course of ascertaining the legal position for their client’. This latter phrase lends itself to interpretation. That is, moreover, shown by the divergent state of the national laws which have transposed that provision.⁴⁸

58. For the purpose of answering the question concerning validity submitted by the referring court, the meaning of that concept must first be clarified.

1. The concept of ‘ascertaining the legal position for a client’

59. In the Commission’s view, the interpretation of this concept is, in any event, irrelevant for the purpose of determining the validity of the Directive. Since lawyers’ professional secrecy affects, in principle, only their judicial or quasi-judicial activities, it is sufficient to observe that the Directive

48 — Many Member States have transposed the terms of the Directive literally. Some Member States have chosen to refer expressly to the activity of providing legal advice in their transposition: that is the case in German law (Paragraph 11(3), first sentence, of the Geldwäschekämpfungsgesetz), in French law (Article 562-2-1 of the Monetary and Financial Code), in Greek law (Article 2a(1)(β) of Law 2331/1995, as amended by Article 4 of Law 3424/2005) and in United Kingdom law (Proceeds of Crime Act 2002, Section 330(6) and (10)). Finally, there are States which have sought to exclude the activity of providing legal advice unconnected with judicial proceedings from the scope of the derogation provided for in the second subparagraph of Article 6(3) of the Directive: that is the case in Finland (Rahanpesulaki, Article 3(18)) and Poland (Article 11(5) of the Law of 16 November 2000, as amended by the Law of 5 March 2004).

exempts such activities from any obligation to inform. In other words, even if the activity of ascertaining a legal position were subject to a reporting obligation, the Directive would have to be regarded as being valid. The bar associations represented at the hearing submit, on the contrary, that professional secrecy also covers the activity of advice. They therefore propose the adoption of a broad interpretation of the concept of ascertaining the legal position for the client. If it is held that the provision at issue does not include the concept of advice, it must be regarded as invalid.

60. In my opinion, the principle of professional secrecy covers, as maintained by the intervening bar associations, the provision of legal advice. The reason for this is twofold and is based both on considerations of principle and on practical considerations. In principle, account must be taken of ‘the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation’.⁴⁹ A representative and defence counsel, any lawyer also has an essential duty of assistance and advice. He thereby ensures not only access to justice but also access to the law. However, this latter guarantee is no less precious than the former in a complex society such as European society. The facility for any citizen to be able to obtain independent legal advice for the purpose of ascertaining the state of the law governing his particular situation is an essential guarantee

49 — Opinion of Advocate General Slynn in *AM & S*, p. 1654.

of the State governed by the rule of law. In those circumstances, the pact of trust which is guaranteed by the protection of secrecy merits extension to the context of the relationship of legal assistance and advice.⁵⁰ Such extension is consistent, moreover, with the development of the Court's case-law. In the judgment in *AM & S*, it expressly drew attention to the importance for clients of being able to access independent legal advice and legal assistance.⁵¹

61. In practice, and in any event, it appears difficult to distinguish, in the context of the performance of the task incumbent on a legal professional, between the time spent on advice and the time spent on representation. If it were necessary to draw such a distinction whenever required by the pursuit of the objectives of the Directive, there is no doubt that the relationship of trust existing between the professional and his client would be liable to suffer because of it.

62. It follows from that analysis that the enhanced protection enjoyed by lawyers' professional secrecy must be extended to the tasks of legal representation, defence, assistance and advice. Consequently, I suggest that it be held that no obligation to inform linked to the fight against money

laundering can be imposed on lawyers in the sphere of those tasks. Any interference of that kind should be regarded as affecting the substance of the rights protected by the Community legal order.

63. Is the wording used by the provision at issue of the directive in question in this case compatible with such an analysis? It should be recalled that the Court has consistently held that, 'when the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty'.⁵² In this case, it seems to me that the concept of 'ascertaining the legal position for a client' used by the directive can easily be construed as including that of legal advice. Such a reading is consistent with respect for fundamental rights and for the principles of a State governed by the rule of law, which are protected by the Community legal order. It is moreover consistent with the wording of the 17th recital in the preamble to the Directive, which provides that, in principle, 'legal advice remains subject to the obligation of professional secrecy'. I therefore propose to interpret the second subparagraph of Article 6(3) of the Directive as meaning that it exempts lawyers engaging in the provision of legal advice from any obligation to inform.

50 — *Ibid.*, p. 1655.

51 — Paragraphs 18 and 21 of *AM & S*.

52 — Case 218/82 *Commission v Council* [1983] ECR 4063, paragraph 15, and Case C-135/93 *Spain v Commission* [1995] ECR I-1651, paragraph 37.

64. It nevertheless remains to be established that the provisions of the Directive are in all respects consistent with that interpretation. The bar associations maintain that, by making the activities mentioned in Article 2a(5) subject to an obligation to inform, the Directive infringes the principle of professional secrecy as interpreted above. They are of the opinion that, in all his activities, a lawyer is required to carry out an analysis and ascertainment of the legal position of his client. In those circumstances, it would not be appropriate to exclude the protection of secrecy in the context of those activities.

65. It must be acknowledged that a distinction between lawyers' activities of a legal nature and their 'extra-legal' activities may be difficult to draw in practice. However, it does not seem to me impossible to design a clear criterion for separating cases in which a lawyer, acting 'as a lawyer', enjoys the protection of professional secrecy from cases in which that protection does not need to be applied. Moreover, it is only on that condition, in my opinion, that the balance between the requirement of protection of the trust existing between a lawyer and his client and the requirement of protection of the general interests of society can be safeguarded with due observance of the rights guaranteed by the Community legal order. In my view it is also difficult to justify an extension of lawyers' professional secrecy on the sole basis of a difficulty of a practical nature and regardless of the fact that the legal profession nowadays takes on activities which go well beyond its specific tasks of representation and advice.

2. The criterion for distinguishing activity protected by professional secrecy

66. At the hearing held before the Court, the interveners proposed various distinguishing criteria. The Council suggested taking as a basis the practical nature of the reportable activity. It submits, secondly, in its written observations, that account should be taken of the criterion of lawyers' active participation in the execution of the transactions concerned. That was also the view taken by the Parliament at the hearing: it would be perfectly possible to distinguish between advisory activity and participation for and on behalf of a client. For its part, the Italian Government maintains that only advice provided on an independent basis is worthy of protection.

67. Faced with those analyses, the bar associations represented at the hearing conceded that the activities referred to in Article 2a(5) were amenable to being regarded as separate. While it is true that the agency activities referred to under (b) have the effect of nullifying any difference between the lawyer's interests and those of his client, to the extent of depriving the former of his independence, the same is not true of the assistance activities referred to under (a), which require respect for the lawyer's independence.

68. It is therefore apparent that the initially opposite positions of the various parties to the dispute have moved closer together. A consensus seems to have emerged on the

idea that it is appropriate to limit professional secrecy to the area of competence which is specific to lawyers. It therefore follows that the divergence of views has been circumscribed.

69. In my opinion, it would be dangerous to seek to draw distinctions on the basis of the degree of involvement of the lawyer in the transaction in question. It is not clear to me in what respect an assistance activity merits special protection more than an agency activity if it is not demonstrated that that activity is performed completely independently. What is more important than the activity carried out is the manner in which that activity is carried out.

70. There can be no doubt that, in any case in which he becomes involved, a lawyer may be required to ascertain the legal position of his client. However, that ascertainment can take different directions. It is one thing to set out the legal framework and implications of the proposed transaction, but another to conduct an ascertainment with a view to choosing the best strategy in the interests of the client for the purpose of carrying out an economic or commercial activity or transaction. If the purpose of the ascertainment is merely to help the client organise his activities 'in compliance with the law' and subject his objectives to the rules of law,⁵³ it must be regarded as advice and exempted from any obligation to inform, irrespective of

the context in which it is provided. On the other hand, if the main purpose of the ascertainment is to execute or plan a commercial or financial transaction and is subject to the client's instructions with a view to identifying, in particular, the economically most favourable solution, the lawyer is no longer acting in any capacity other than that of a 'business agent' who places his powers totally in the service of a non-legal activity, and there is no need for the application of professional secrecy. In the first case, it can be said that the lawyer is acting in the interests of his client but also in the interests of the law. In the second, only the interests of the client prevail. In that case, the lawyer is not acting as an independent lawyer but is in a position identical to that of a financial adviser or corporate lawyer.

71. It should be agreed however that the distinction between those two types of situation is itself difficult to determine. A determination of general scope such as that requested from the Court in this case cannot resolve all the practical difficulties which such a determination is likely to create. The best the Court can do in that case is to provide all the elements of interpretation at its disposal in order to guide the application of the legislation by the competent national authorities. It should be noted moreover that a similar approach has been adopted by other

⁵³ — Opinion of Advocate General Léger in *Wouters and Others*, point 174.

courts without giving rise to particular problems of application. In those cases, those courts require a case-by-case analysis of the capacity in which the lawyer is acting.⁵⁴

they are interpreted as excluding any obligation to inform in the context of lawyers' activities of representation and providing legal advice. It will, in particular, be necessary to exempt from such obligation the advice given in order to help the client organise his activities 'in compliance with the law'.

72. In view of the fundamental nature of the protection of lawyers' professional secrecy, it is fair to presume that a lawyer is acting in his specific capacity as a counsel or defence counsel. It is only if it is apparent that he has been employed for a task which compromises his independence that it will be appropriate to consider that he can be made subject to the obligation to inform provided for by the Directive. That assessment will have to be made on a case-by-case basis, under the guarantee of a judicial review.

74. It is not enough to acknowledge that, apart from those cases in which any obligation to inform is excluded, limitations may be placed on lawyers' professional secrecy. It must also be considered whether those limitations pursue a legitimate objective of general interest and whether they are proportionate to the pursuit of that objective.

3. Interim conclusion

73. The whole of the foregoing analysis has revealed nothing to invalidate Articles 2a(5) and 6 of Directive 91/308 as amended by Directive 2001/97, provided however that

B — Do the limits placed on the protection of lawyers' secrecy pursue an objective of general interest?

⁵⁴ — To that effect, see judgments from United States case-law: In re Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1225 (11th Cir. 1987); *United States v. Davis*, 636 F.2d at 1043; *United States v. Horvath*, 731 F.2d 557, 561 (8th Cir. 1984); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); see also judgment 87/1997 of the Italian Constitutional Court of 8 April 1997 (GURI of 16 April 1997) and judgment of the House of Lords: *Three Rivers District Council and Others v. Governor and Company of the Bank of England*, [2004] UKHL 48. In the latter judgment, Lord Scott of Foscote stated, moreover: 'There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege'.

75. There is only one party which, before the Court, appears to doubt the legitimacy of the aim pursued by the directive at issue. In the view of the *Ordre des avocats du barreau de Liège*, secrecy can give way only to higher interests connected with the protection of human life.

76. That position is unfounded. In the first place, it seem perfectly possible to me that requirements unconnected with the preservation of human life may constitute legitimate aims capable of justifying restrictions on professional secrecy. In the second place, the fight against money laundering can be seen as an objective worthy of being pursued by the Community.

77. It is evident from the first recital in the preamble to Directive 91/308 that the latter is aimed at preventing the use of credit and financial institutions to launder proceeds from criminal activities from seriously jeopardising confidence in the financial system and affecting the trust of the public in that system as a whole. It is true that money laundering could, potentially, have a destructive effect on the economic, political and social systems of the Member States. To seek to extend that objective to legal professionals does not seem illegitimate once it is realised that they are likely to carry out a number of very diverse activities which extend far beyond the powers of providing legal advice and representation alone. Against that background, the risk arises that lawyers could become, following the example of other professions, 'gatekeepers' enabling launderers to achieve their illegal objectives.

78. In those circumstances, the objective of combating money laundering may be

regarded as an objective of general interest which justifies the waiver of lawyers' secrecy provided that such waiver does not affect the context of the lawyer's core activities as defined above. Finally, it remains to be established that the restrictions thus provided for do in fact comply with the principle of proportionality.

C — Do the limitations of the protection of lawyers' secrecy comply with the principle of proportionality?

79. Under the principle of proportionality, limitations on lawyers' secrecy may be introduced only if they are necessary. In this case the CCBE and the OFBG dispute the necessity of the obligation to inform. They observe that the objective pursued could be achieved by means less detrimental to secrecy, such as procedures leading to disciplinary and criminal penalties. In addition, the fact that other professionals participating in transactions involving risk are subject to that reporting obligation is a sufficient guarantee of achievement of the aim pursued.

80. That line of argument is not convincing. Firstly, it is established that the procedures

described do not fulfil the same function as the obligation to inform. The former concern only the punishment of illegal conduct whereas the obligation to inform is aimed solely at warning the competent authorities of facts which might be an indication of money laundering without the originator of the report being implicated in the commission of the illegal acts. In so far as they pursue different aims, those two means cannot be equated for the purpose of combating money laundering. Secondly, the fact that other operators are subject to that same obligation does not in any way prejudice the need to make legal professionals subject to it as well, where they prove to be directly involved in risky transactions. Consequently, it can be accepted that a provision providing for the application of such an obligation to legal professionals may be necessary in the context of an organised campaign against money laundering.

81. The fact remains that lawyers' secrecy is a fundamental principle which directly affects the right to a fair trial and the right to respect for private life. Consequently, it can be interfered with only in exceptional

circumstances and subject to the application of appropriate and sufficient safeguards against abuses.⁵⁵

82. It must, in that regard, be pointed out that the obligation at issue is coupled with certain safeguards which take account of the specific nature of the legal profession. The Directive provides, to that end, for two types of safeguard. Firstly, under the first subparagraph of Article 6(3), Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the event of a report. That body has, as it were, a filtering and supervisory function, so that lawyers' duty of professional discretion vis-à-vis their clients can be preserved. Secondly, the Directive provides in Article 8 that Member States have discretion not to impose on lawyers the prohibition on disclosing to their clients the fact that information has been transmitted to the responsible authorities in accordance with the Directive. That enables the relationship of trust and good faith towards clients to be safeguarded, which is the prerequisite for the practice of the legal profession. Those safeguards may be regarded as appropriate and effective for the purpose of protecting the integrity of the relationship between lawyers and their clients.

⁵⁵ — See, by analogy, Eur. Court HR, *Erdem v. Germany* judgment of 5 July 2001, § 65.

V — Conclusion

83. In the light of the foregoing considerations, I suggest that the Court answer as follows the question submitted by the Cour d'arbitrage:

Articles 2a(5) and 6 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, are valid provided that they are interpreted, in accordance with the 17th recital in the preamble to that directive and in observance of the fundamental right to protection of lawyers' professional secrecy, as meaning that there must be exemptions from any obligation to report information obtained before, during or after judicial proceedings or in the course of providing legal advice.