

Anti-money laundering, the Court of Justice of the European Communities and national jurisdictions

I. Summarized historical review

1. On 27 June 1980, the Council of Europe issued a number of anti-money laundering recommendations destined to the financial sector, amongst which the 'know your customer' rule.

The Basel Committee on Banking Supervision issued the Prevention of criminal use of the banking system for the purpose of money-laundering Declaration on 12 December 1988.

On 20 December 1988, the United Nations adopted the Vienna Convention, first international act inviting countries to incriminate money laundering, although in the limited matter of narcotics.

The Council of Europe's 8 November 1990 Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime deems liable for punishment money-laundering linked to any criminal offense that created said proceed. Its definition of money-laundering will be used in almost all international acts.

During the G-7 meeting held in Paris in July 1989, the Financial Action Task Force (FAFT and GAFI, in French) was created. On 7 February 1990, the FAFT issued forty recommendations for a preventive approach on crime proceeds.

This led to the 10 June 1991 Council's 91/308/EEC Directive on prevention of the use of the financial system for the purpose of money laundering¹.

In June 1996, the FAFT reviewed its forty recommendations. In its 9th recommendation, it requested from national authorities to enlarge the application scope of anti-money laundering measures to financial activities bearing a commercial nature performed by non financial companies or professions. The European Commission's Contact Committee also extended this recommendation to casinos, high value goods merchants, legal professionals advising or intervening in financial matters, and to accountancy professionals².

2. All of this conducted to Directive 2001/97/EC of the Parliament and Council of 4 December 2001 amending Directive 91/308/EEC³. This directive includes lawyers in its scope, notwithstanding the

¹ Official Journal L 166 of 28.06.1991, p. 77.

² The part that lawyers can take in complex laundering operations was listed in the 1st February 2001 Report on Money Laundering Typologies (2000-2001) (www.fatf-gafi.org/dataoecd/29/36/34038090.pdf). Lawyers are referred to as 'gatekeepers': as links in a long and often international process, they can open, sometimes unwittingly, the doors of functions which enable criminals to move, invest and protect crime proceeds. Such is the case upon the setting of companies or the creation of legal structures involving international and complex structures behind which the launderer disappears, in countries offering rudimentary company legislation, trust or anonymous shareholding and a particularly strong banking secrecy. J.P. BUYLE and O. CREPLET (*L'extension aux avocats par la directive européenne du 4 décembre 2001 de la réglementation préventive du blanchiment de capitaux*, in *Droit bancaire et financier*, Brussels, Larcier, 2004, p. 472) have rightfully stressed that no serious statistical study regarding the role of lawyers in money-laundering exists. Note 34 reads as follow (free translation): "When examining the 8 activity reports rendered by the belgian division for treatment of financial information [CTIF], one notices very few money laundering cases involving lawyers. The only known cases in Europe are extremely rare".

³ Official Journal L 344 of 28.12.2001, p. 76 to 81.

protests and remarks of national and local bars, and the CCBE's campaign towards the Commission at first, then the members of the European Parliament⁴.

The European parliament had initially modified the Commission's suggestions as regard lawyers, which had necessitated new discussions between the Parliament and the Commission.

The 11 September 2001 events occurred which were used, firstly in the United-States, as a way to restrain a number of freedoms and fundamental rights, under the banner of a 'crusade against international terrorism and its financing' in the *Patriot Act*⁵.

In the new worldwide conception of *law and order*, Directive 2001/97/CE was finally adopted.

3. One must stress that, in doing so, Europe distinguished itself.

The numerous chapters of the long battle led by the Canadian Bar Association and the Federation of Law Societies of Canada against the subjection of lawyers to the legislation due to enter into force on 8 November 2001 exceeds the scope of this article. Let us merely recall that numerous proceedings instituted in various provinces of this large country have led to the adjournment of the law and that on 28 March 2003, the Canadian Government decided to rescind its application to lawyers. The Canadian Government edited new rules of identification of clients further to the 26 December 2006 Proceeds of Crime (Money Laundering) and Terrorist Financing Act, which is due to come into force on 30 December 2008 at the latest. It contains the measures that lawyers must undertake and the evidence they must keep in the event of a control on their clients' identity. On 20 March 2008, the Canadian Bar issued a ruling on clients' identification requirements and identity verification. The Canadian Bar enjoys active contacts with the government. Beforehand, the Federation had issued a *no-cash rule* which is accepted by all Canadian bars and forbids lawyers to receive in cash an amount exceeding 7,500.00 CAD (which is less than the amount foreseen by the public authorities).

Canadian lawyers rightfully believe that by adopting new ethical rules they will avoid a law that is incompatible with the profession.

It is also a path that was successfully undertaken by our Japanese and American colleagues (US National Money Laundering Strategy 2007, TAX-NEWS.com. - http://www.tax-news.com/asp/story/US_National_Money_Laundering_Strategy_Publ.), which are not subject to any legal obligation to denounce money-laundering suspicion.

This is what should have happened in Europe if the Commission, then the Ministers Council and the European Parliament had abided to the FATF recommendations rather than issuing rules that are ambiguous and potentially dangerous to freedom, and which led to the decisions hereafter commented.

⁴ Declaration of 14 and 15 November 1997 against all possible violation of lawyers' professional secrecy duty. Any denunciation obligation is deemed incompatible with the lawyer's specific role in a rule of law State. See R. Devloo, *De meldingsplicht bij fraude na de wet van 10 augustus 1998*, R.W., 1998-1999, 1195. Actions have been undertaken and are also pursued with the FATF, on a worldwide basis. See for example the common resolution of lawyers relating to anti-money laundering signed on 3 April 2003 by representatives of United-States, Europe, Japan and Canada bars, requesting FATF "to remove any reference to lawyers in the revision to the Forty Recommendations", until several elements related to professional secrecy have been achieved (www.ccbe.eu/fileadmin/user_upload/NTCdocument/signed_statement_0301_1183723072.pdf).

⁵ E.J. KRAULAND ET T.H. CRIBBES, *The attorney-client privilege in the United States. An age-old principle under modern pressures*, in *Le secret professionnel de l'avocat dans un contexte européen*, op. cit., p. 93.

II. The 4 December 2001 Parliament and Council's Directive 2001/97/EC amending Directive 91/308/EEC

4. Article 2a of the directive foresees that :

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

[...]

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

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

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

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

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

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

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

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

5. Article 6 reads as follows:

“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.”

6. Two preambles of the directive must be quoted. The 16th preamble states the rule according to which “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”. Preamble 17, on the other hand, stipulates that “however, where independent members of professions providing legal advice which are legally recognized 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**⁶ unless the legal counselor 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”.

7. The Belgian Law of 12 January 2004, which transposes this Directive⁷ in the Belgian legal system, enacts a new article *2ter* which is the duplication of article 2a, point 5. Furthermore, on the grounds of article 6, 3), 2nd par. of the directive, this law institutes a new article 14*bis*, par. 3, according to which: “persons mentioned under article *2ter* will not communicate such information if it has been received from one of their clients or obtained about one of their clients when examining the legal situation of this client or whilst performing their duty to defend or represent this client during legal proceedings or regarding such proceeding, including advise related to the institution or the avoidance of legal proceedings, whether this information be received or obtained prior to, during or after these proceedings”.

III. Prejudicial question raised by the Belgian Constitutional Court

8. Belgian bars⁸, joined by the CCBE, have submitted various legal arguments based on Belgian law to the Constitutional Court⁹. Belgian Law being the duplication of the directive, the question of its conformity with the Constitution and international acts such as the European Convention on Human Rights was immediately raised¹⁰. That is why the claimants asked, as they had done in their writ, that the Court of Justice of the European Communities be seized with a prejudicial question on the possible violation by article 1, 2) of the 04 December Directive 2001/97/CE of article 6 of the ECHR and article 6 § 2 of the European Union Treaty^{11 12}.

⁶ Emphasis added.

⁷ For completion's sake, we must add that Directive 91/308 was abrogated and replaced by Directive 2005/60 which entirely restates its content as far as the articles examined herein are concerned.

⁸ i.e. the French- and German-speaking bar (OBFG), the Flemish-speaking bar (OVB), the two Brussels bar and the Liège Bar.

⁹ Named at the time 'Cour d'Arbitrage'.

¹⁰ According to the Court of Justice, primacy of community law is undisputable (C.J.C.E., nr. 6/64, *Costa v/ Enel*, 15 July 1964, *Rec.*, 1964, p. 1143) even over national constitutions (C.J.C.E., nr. 9/65, *San Michele*, 22 June 1965, *Rec.* 1967, p. 1125). The validity of community acts may only be appreciated with regards to community law (C.J.C.E., nr. 11/70, *Internationale Handelsgesellschaft*, 17 December 1970, *Rec.*, 1970, p. 1125, preamble 3; K. LENAERTS and P. VAN NUFFEL, *Europees recht in hoofdlijnen*, 2003, Anvers/Apeldoorn, Maklu, p. 596, and following; P. WOUTERS, “Grondwet en Europese Unie”, *T.B.P.*, 1999, p. 314, and following). This rule applies to community law itself but also to derived community law which, as in the matter at hand, (faithfully) transposes directives. Although constitutional courts within the EU have a duty to lodge prejudicial question, the Austrian and Belgian Courts are the only ones to have raised a mere 8 prejudicial questions. At the time it lodged its prejudicial question, the (then named) 'Cour d'Arbitrage' had not yet ruled on the primacy matter.

¹¹ By application of article 234, par. 1, b) of the Treaty instituting the European Community. Par. 3 foresees that national jurisdictions whose rulings cannot be appealed must ask a prejudicial question whenever one of the parties requests it. See also *Cilfit v/ Ministère de la Santé d'Italie*, C.J.C.E., nr. 283/81, 6 October 1982, *Rec.*, 1982, p. 3415. Article 6, par. 2, of the Union Treaty stipulates that the European Union must abide to fundamental rights protected, a.o., by the ECHR.

In its 13 July 2005 ruling, the Court granted this requested and asked the following prejudicial question on the grounds of article 234, par. 3, EC: “Does Article 1(2) of Directive 2001/97 of the European Parliament and Council dated 4 December 2001, modifying Directive 91/308/EEC of the Council on prevention of the use of the financial system for the purpose of money laundering infringe the right to a fair trial which 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 inserted into Directive 91/308/EEC requires the inclusion of members of independent legal professions, not excluding the profession of lawyer, in the scope of that directive, which in essence has the aim of imposing on the persons and institutions targeted by it an obligation to inform the authorities responsible for combating money laundering of any fact which might be an indication of such money laundering (Article 6 of Directive 91/308/EEC, replaced by Article 1(5) of Directive 2001/97/EC)?”

IV. Opinion of Advocate General Poiares Maduro¹³

9. This opinion is of the utmost interest: after having invited the Court to limit the scope of its decision to the question asked and, hence, to the conformity of the challenged legislation with article 6 of the ECHR, the Advocate General proceeds to an in-depth analysis of the basis upon which stands the protection of lawyers’ professional secrecy.

The fundamental rights promulgated by the ECHR form an integral part of the general principles of law the observance of which the Court ensures¹⁴, and measures which are incompatible with human rights observance cannot be tolerated in the Community.

“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’. 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. In its *Foxley v. the United*

¹² According to the European Court for Human Rights caselaw, a conformity appraisal with regard to the Convention may also be undertaken when a national clause is literally derived from a Directive (ECHR, *Cantoni v. France*, 15 November 1996, § 30; obs. SPIELMANN, *Rev. Trim. Dr.b.*, 1997, p. 685). Thus, the Community’s undertakings may not be equally submitted to the ECHR as it is not a party to the Convention. The Strasbourg Court does not exclude the transfer of competence to international bodies such as the Community, as long as the rights protected by ECHR are ‘recognised’. However such transfer does not waive the Member States’ liability (ECHR, *Matthews v. United-Kingdom*, 18 February 1999, §32-33; ECHR, *Bosphorus v. Ireland*, 30 June 2005). The last *Bosphorus* Judgment was criticized by the ‘Cour d’Arbitrage’ President, Mr. Melchior, as it presumed that a Member State summoned to appear before the Court by transposing community legislation, it applies the ECHR. Mr. Melchior rightfully points that a general and abstract presumption of conformity of community law to the Convention induces the absence of effective control that Member States abide to the Convention, even if such presumption may not be waived in the event of obvious violation of the rule (M. Melchior, “L’arrêt *Bosphorus c. Irlande*”, *Rev. Fac. Dr. Liège*, 2006, p. 253-254; according to the author, the European Convention for Human Rights is not subordinated to community law. The EU Member States must comply with the Convention and are thus subject to the Strasbourg Court’s control, whenever the transposition of a directive is at stake and these Member States must apply community law in accordance with article 10 of the Treaty).

¹³ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005C0305:EN:HTML>

¹⁴ See the ruling of 12 June 2003, *Schmidberger*, C-112/00, p. I-5659, par. 71.

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. Secrecy protects the citizen from indiscreet disclosures which might damage his integrity and reputation.”

10. This double basis confirms, in the advocate general’s view, that the protection of professional secrecy is a principle of Community law, with a twofold basis, one which is procedural with regard to the fundamental right of fair trial, the other which is substantial with regard to the fundamental right to respect for private life.

It is not however an ‘absolute prerogative’. Exceptions may be foreseen, as long as they are strictly regulated and justified. Detailed considerations follow and one will notice that the advocate general considers, together with the claimants, that offering legal services is covered by the principle of professional secrecy, that establishing a list of the non-legal activities of a lawyer is a difficult task and that “... 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” (par. 72)

V. The 26 June 2007 Judgment of the Court of Justice

11. Although the claimants attempted to lead the Court of Justice to render a decision on larger grounds (including, amongst others, article 8 of the ECHR, principle of lawyers’ independence, the principle of professional secrecy, the duty to act in good faith and impartially, the principle of the rights of defense (the right to legal representation in court and the privilege against self-incrimination) and the principle of proportionality), path that the General Advocate refused to take¹⁵, the Court strictly limited its examination to the prejudicial question¹⁶.

The 26 June 2007 Judgment of the Court (Grand Chamber), nr. C-305/05¹⁷ was perceived as pointless measure. The fact that, in accordance with the prejudicial question, it was merely a matter of violation of article 6 ECHR came as a surprise even to those who believed that lawyers’ professional secrecy had been respected in the directive.

The Court of Justice may have wished to preserve the Belgian Constitutional Court’s independence¹⁸. This analysis can be drawn from par. 27 and 28 of the Judgment in which the Court, on the one hand, acknowledges the ambiguity of article 6(3), par. 2 of the directive (relating to the exceptions foreseen for lawyers) and, on the other hand, shows the way to solve such difficulty by adopting a conciliating if not creative interpretation:

¹⁵ Nr. 29-35, referring to the H. v/ J. Judgment, 28 October 1982, Dorca Marine, a.o., 50/82 to 58/82, Rec., 3949, par. 13; and to the judgments showing a certain flexibility on behalf of the Court : Judgment 10/1/1973, Getreide Import, 41/72, Rec., 1, par. 2 and 25 October 1978, Royal Scholten-Honig, 103/77 and 145/77, Rec., 2037, par. 16 and 17; and 18 February 1964, Internationale Crediet- en Handelsvereniging, 73/63 and 74/63, Rec., 3, par. 28.

¹⁶ Probably because it had jurisdiction on the grounds of a question of validity and not of interpretation; in some cases, the Court indeed considered it had jurisdiction over questions that had not been referred and went from a question of interpretation to a question of validity, and vice-versa. This is, however, a faculty the Court is free to use or not. See J. PERTEN, Cour de justice, renvoi préjudiciel en interprétation et en appréciation de validité, *JurisClassieur Europe*, folder 361, p. 12 and 13.

¹⁷ CJEC, 26 June 2007 Judgment, nr. C-305/05, *JOCE C 199* of 25.8.2007, p. 6.

¹⁸ The Court of Justice’s reluctance to interfere with the jurisdiction of members States’ constitutionnal Courts was highlighted by A. ALLEN, Judge at the Constitutionnal Court, “Les relations entre la Cour de justice des Communautés européennes et les Cours constitutionnelles des Etats membres”, in *Liber amicorum Paul Martens, L’humanisme dans la résolution des conflits. Utopie ou réalité ?*, 2007, De Boeck & Larcier, Brussels, p. 696.

“27. It must first be observed that the second subparagraph of Article 6(3) of Directive 91/308 may lend itself to several interpretations, and consequently the precise extent of the obligations of information and cooperation incumbent on lawyers is not entirely unambiguous.

28. On that point, the Court has consistently held that, if 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 EC Treaty rather than to the interpretation which leads to its being incompatible with the Treaty (see 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). Member States must not only interpret their national law in a manner consistent with Community law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law (Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87).”

In its 23 January 2008 Judgment (B.7.5), the Belgian Court of Justice duplicates par. 28. The Belgian Court follows the path lead by the Court of Justice.

VI. The 23 January 2008 Judgment of the Belgian Constitutional Court

12. A decision was swiftly rendered by the Constitutional Court.

Judgment nr. 10/2008 of 23 January 2008, hereafter summarized, was rightfully seen as a victory by the bar¹⁹. This decision essentially rules on the following issues.

1°) The Constitutional Court decided that lawyers’ professional secrecy covers all information learned during the performance of essential professional activities, including in matters for which the law foresees a denunciation obligation. Lawyers “essential activities” covers the “assistance to the client and defending the client in judicial proceedings” as well as “giving legal advice, even regardless of any judicial proceedings”.

In these cases, the lawyer is not submitted to any denunciation obligation. Whenever the lawyer performs one of the activities mentioned under article 2^{ter}, outside of the scope of his mission of assistance, representation in court or legal advice, he can be under the obligation to communicate to the authorities the information received or obtained. The Court rules that the litigious clauses of the 12 January 2004 Law ‘do not cause a disproportionate offense to the principle of lawyers’ professional secrecy’, as long as they are interpreted in the manner indicated by the Court.

2°) The argument submitted against article 31 of the law (ban on tipping-off or ban imposed on lawyers and presidents of the bar to inform the client or third-parties that the information was communicated to CTIF) related to a non-mandatory obligation that Member States hence did not have to transpose (Ireland and Austria did not proceed thereto; but this non-mandatory character disappeared in the third anti-laundersing directive 2005/60/EC of 26 October 2005).

The Court dismissed the argument based on the independence of the lawyer and the trust between the lawyer and his client (and articles 10 and 11 of the Constitution, combined with articles 6, 7 and 8 of ECHR). It considered that the measure was not disproportionate ‘taking into account the

¹⁹ F. ABU DALU, “A qui perd gagne”, *J.L.M.B.*, 2008, p. 195 ; P. LAMBERT, Répression du blanchiment de capitaux et atteinte aux droits fondamentaux (en marge des arrêts de la Cour de justice des Communautés européennes du 26 juin 2007 et de la Cour constitutionnelle belge du 23 janvier 2008), *Rev. trim. dr. b.*, 2008, nr. 74, p. 611 and following.

limited scope of application of the obligation imposed on lawyers to communicate information to the authorities' (B.13.5)²⁰.

A contrario, this means that if the Belgian legislator was to extend its scope of application further to the third directive, the objection of lack of proportionality could be raised again.

Furthermore, the Court drafts recommendations: "If a lawyer advises a client against performing or participating in illegal money-laundering or terrorism financing activities and realizes the failure of such approach, he must, **in the event he finds himself in a situation where he is submitted to a communication obligation**²¹, send all information he holds to the president of his bar, which in turn will revert to the public authorities. In that case, the lawyer cannot pursue his intervention in favor of the client and must terminate their relationship. On the other hand, if the lawyer ascertains he has persuaded his client to renounce to illegal activities, the underlying trust between the lawyer and his client is preserved as, in such case, no information relating to the client will be handed to the division for treatment of financial information" (B.13.5).

3°) The Belgian bars disputed article 27 of the 12 January 2004 law as it enabled public authorities to bypass the president of bars and to request any additional information directly from the lawyers.

The Court considers the president of the bar's intervention to be an "essential safeguard, for lawyers as well as for clients, which ensures that professional secrecy will only be challenged in the cases strictly foreseen by law". The president of bar's role as a 'filter' is thus deemed mandatory, whether at the first stage of the initial denunciation or at a later stage for the additional information, 'in order to avoid any violation to the fundamental defense rights'; the president of the bar must 'verify that the legal conditions set for the obligation to communicate are met and, should he assess that it is not the case, he must refrain from handing any information he has received'.

4°) Finally, Belgian bars also criticized article 30, 2° of the challenged law for enabling any employee or representative of lawyers to proceed personally to the communication of information to the CTIF in the event the ordinary proceedings cannot be followed (i.e. communication by the lawyer to his president of the bar).

The Constitutional Court decides that "nothing can justify that a third-party to the relationship shared by a lawyer with his client be authorized to send information about this client to public authorities. Furthermore, employees may have no legal qualification or knowledge and one does not see how they would be able to verify if the lawyer they work for or represent falls under the scope of the standards set by the law".

This section of the law is annulled as it unjustifiably violates professional secrecy.

VII. The French 'Conseil d'Etat' judgment of 10 April 2008²²

13. The National Bar Council, the 'Conférence des bâtonniers de France et d'outre-mer', the Supreme Court and 'Conseil d'Etat' lawyers' bar, the Paris bar and the CCBE challenged the 26 June 2006 Decree nr. 2006-736 relating to anti-money laundering and modifying the Financial and Monetary

²⁰ The only part of the decision where the Court refers to the argument based on article 8 ECHR (respect for private life) hence does not respond to this argument.

²¹ Emphasis added in order to illustrate the fact that the Court refers to a situation in which there is an obligation to denounce and the lawyer cannot be exonerated therefrom on the grounds that he would be representing his client in legal proceedings or render legal advice.

²² The entire judgment may be found on: http://www.conseil-etat.fr/cc/jurisprd/index_ac_ld0807.shtml

Code. Some of this Decree's articles specified the conditions according to which lawyers must abide to anti-money laundering obligations foreseen by the 4 December 2001 Directive and the French transposition law of 11 February 2004.

14. Claimants firstly challenged the validity of the 4 December 2001 Directive with regards to articles 6 and 8 ECHR. According to the 'Conseil d'Etat', the Directive does not violate article 6 ECHR as the possibility to exonerate lawyers from the obligations foreseen whenever they perform their defense and legal representation missions must be interpreted as an obligation. The solution is identical to that of the Belgian Constitutional Court of 26 June 2007.

The Conseil d'Etat considers that, regarding lawyers' legal advice mission, the Directive does not violate article 8 ECHR. The Court's ruling in the abovementioned judgment, relating to defense and legal representation can be applied to the legal advice mission. The Directive does specify that lawyers cannot be exonerated from the obligations it foresees whenever the lawyer takes part to money-laundering activities, whenever the advice is rendered in view to proceed to money-laundering and whenever the lawyer knows that his client requests legal advice in view to pursue money-laundering. But the Conseil d'Etat decided that this limited violation of professional secrecy, in the limited scope of legal advising, is justified in consideration of the general interest linked to the war against money-laundering and that, hence, it is not contrary to the right to respect for private life foreseen by article 8 ECHR.

15. The bars also challenged the 11 February 2004 Law nr. 2004-130 modifying the status of a number of judicial or legal professions, judicial experts, intellectual property advisors and public auctions experts. They considered that the legal clauses of the Monetary and Financial Code implementing the 4 December 2001 Directive were incompatible with said Directive and with the ECHR. The legislator was blamed for not having anticipated that in the matter of legal advising and legal representation, lawyers' professional secrecy would be opposable to the information requests of the TRACFIN division, cases foreseen in the directive excepted.

According to the French Conseil d'Etat, the Monetary and Financial Code must be interpreted as authorizing such opposability in case of an information request as well as in case of suspicion declaration. On this issue as well, the French legislator has thus rigorously transposed the 4 December 2001 Directive which, in turn, and as interpreted by the Conseil d'Etat does not violate the rights granted by ECHR.

16. Finally, the bars disputed the 26 June 2006 Decree relating to anti-money laundering and modifying the Financial and Monetary Code which, according to them, violated legal clauses of said Code.

The Conseil d'Etat partially granted this motion to the claimants and annulled the litigious decree on two issues: article R562-2-2 of the Financial and Monetary Code is annulled, according to which lawyers were under the obligation to answer directly to the TRACFIN information requests without providing for a 'filter' (such as the President of the Conseil d'Etat and Supreme Court bar, the president of the bar to which the lawyer is affiliated or the President of the society to which the 'avoué' is affiliated).

The Conseil d'Etat considers that the Financial and Monetary Code implied that such a filter be organized, in case of suspicion declaration as well as in case of an answer to information requests.

VIII. The Belgian Constitutional Court Judgment of 10 July 2008

17. The OVB (Dutch-speaking bars association), the OBFG (French and German-speaking bars association) and the Liège bar requested from the Constitutional Court the annulment of article 14*quinquies* inserted on 27 April 2007 in the Belgian 11 January 1993 Law, at least insofar as it was applicable to lawyers. This article reads as follows:

“Article 14 *quinquies*. — When legal and natural persons referred to in articles 2, 2*bis* and 2*ter* suspect that a fact or operation may be linked to the laundering of organized and serious tax fraud proceeds, using complex mechanisms or international processes, they inform the division for treatment of financial information thereof, [this obligation applies] also as soon as they detect [the existence of] at least one of the indicators determined by the King by a Royal Decree to be debated by the Council of Ministers.

With regards to legal and natural persons referred to in article 2*ter*, the information referred to in this article is to be communicated in accordance with article 14*bis*, §3”.

18. The Constitutional Court confirmed its previous case-law and dismissed the requests, under the reserve that article 2*ter* of the 11 January 2003 Law to which article 14*quinquies* refers to, be interpreted in the following manner:

“The information known to a lawyer further to the performance of his profession’s essential activities, even in the matters enumerated in article 2*ter*, i.e. defending or representing the client in legal proceedings and legal advising, even aside of any legal proceedings, are covered by professional secrecy and cannot be brought to the attention of public authorities” and

“The lawyer may only be submitted to the obligation to communicate information to public authorities whenever he performs activities, in a matter enumerated in the abovementioned article 2*ter* which goes beyond the scope of his specific mission of defending or representing the client in legal proceedings and legal advising.”

IX. The conciliatory interpretation method of three ‘European’ judgments

19. The three judgments apply the conciliatory interpretation method: there is no unconstitutionality if and as long as the (French or Belgian) law is interpreted as commanded by the Constitutional Court and the ‘Conseil d’Etat’.

Actually, what was at stake was not only the laws, as they are the exact transposition of the directive. According to the European Court of Human Rights, a literal duplication of a directive does not validate a law, nor does it exonerate the Member State appearing before the Court because of such law²³. Furthermore, according to articles 6, § 2, et 46, d) of the European Union Treaty, in case of conflict of interpretation over the rights granted by the ECHR, the latter must prevail. The Court of Justice thus finds itself in the exact same position as any national Court having to apply the Convention in its domestic legal system²⁴.

Whereas it is correct that Italian and German Constitutional Courts have admitted, and even commanded, that the Court of Justice assume the protection of fundamental rights²⁵ and that

²³ See footnote 22.

²⁴ A. ALEN, *op. cit.*, p.705, nr. 1; M. WATHELET and S. VAN RAEPENBUSCH, "Rapport de la Cour de justice des Communautés européennes", *in* : M. MELCHIOR, A. ALEN et F. MEERSSCHAUT (éd.), *Les relations entre les Cours constitutionnelles et les autres juridictions nationales, y compris l'interférence en cette matière, de l'action des juridictions européennes*, Rapports de la XII^e Conférence des Cours constitutionnelles européennes, 2005, Bruges, Vanden Broele, T. I, p. 155, nr. 26.

²⁵ J.-V. LOUIS, *L'ordre juridique communautaire, Persp. Eur.*, 5th ed., p. 134 and following; J.-V. LOUIS, *L'effet direct et la primauté du droit communautaire*, *in* *Commentaires Mégret*, vol. 10, p.566 to 572.

various national supreme Courts do defer prejudicial questions on the conformity of some directives with ECHR, one can only observe that the Court of Justice makes moderate use of such competence. In the matter at hand, under the consideration that it was seized by a prejudicial question of validity appraisal, it dismissed the arguments other than those grounded on article 6 ECHR, although some parties had requested the examination thereof. The Court knew that said arguments would be deferred to the national Constitutional Court.

One must hence remark that the Court of Justice's will was to let the Constitutional Court rule independently, in a matter where it is not the Court of Justice's opinion that would prove relevant but indeed that of the ECHR. And in a matter where depending on their nationalistic (or not) approach of constitutionalism, the Union's Constitutional Courts commonly grant the decisive influence on the respect of fundamental rights to their domestic Constitution²⁶.

The Court realized it must ensure the protection of fundamental rights, as described by the Member States' constitutions and international conventions²⁷, or else its case law on the community law primacy would not be accepted by the member States' Constitutional Courts.

20. The Belgian Constitutional Court, as the French Conseil d'Etat, anchored its decision in a community framework.

In its first judgment, the Belgian Court obviously referred to the Court of Justice's answer to the prejudicial question and specified that "all arguments would be appreciated taking into account the Court of Justice's decision" (B.5.3.).

With reference to par. 27 of the Court of Justice's Judgment, in which it is emphasized that article 6, par. 3 of the Directive may be interpreted in several ways, "in such a way that the exact scope of the information and cooperation obligations imposed on lawyers is unclear", the Constitutional Court remarks that it must thus "unequivocally define the range that must be given to the disputed articles" (B.7.4).

The Constitutional Court also refers to par. 28 of the Court of Justice's decision, which reiterates that it is up to "the member States not only to interpret their national law in conformity with community law but also to ensure that the acts of derived law are not interpreted in a manner which violates the fundamental rights protected by the community legal order or the other general principles of community law" (B.7.5.).

Reference is also made to the part of the prejudicial ruling that "recalls the requirements of art. 6 ECHR and lawyers professional secrecy principle which relates to the requirements of the right to a fair trial" (B.7.6.). These requirements are comforted by references to the Court of Justice AM & S Judgment of 18 May 1982 (B.7.6.) and the First instance Tribunal's Akzo Nobel Chemicals Judgment of 17 September 2007 (B.7.8.).

With regards to the terms "whenever they examine a client's legal position", reference is made to Preamble 17 of the Directive²⁸ and to Advocate General Poireres Maduro's conclusions (B.9.4.).

²⁶ A. ALEN, *op. cit.*, p. 702 and 711. In his conclusion, the author remarks that "4. The rule of primacy of the community law does not ignore the 'constitutional traditions common to member States' (art. 6, par. 2 of the EU Treaty) which may refer to the primacy of constitution in the domestic legal system, at least insofar as it relates to essential elements thereof. The respect for supreme principles, values and fundamental constitutional rights by community law can be seen as a reserve in several Constitutional Courts' caselaw".

²⁷ 13 December 1979 Judgment, Hauer, par. 14 et 15, 18 June 1991 Judgment, ERT and 22 October 2002 Judgment Roquette; see also K. LENAERTS and P. VAN NUFFEL, *Constitutional Law of the European Union*, *Sweet & Maxwell*, p. 539 and following.

Concerning the scope of intervention of the president of the bar, the Constitutional Court once again refers to the Directive and its Preamble 20 which foresees the intervention of a self-regulatory body “in order to take proper account of these professionals’ duty of discretion owed to their clients” (B.14.2.).

The Constitutional Court consolidates its decision on community grounds and its ruling is, in that respect, more ‘European’ than ‘Belgian’.

21. By referring to the 19 February 2002 Wouters & Co Judgment²⁹, the Constitutional Court stresses the fact that the Court of Justice itself emphasized that “in the absence of specific community rules, each Member State is, supposedly, free to rule on the manner the profession of lawyer should be performed on its territory, that rules may hence substantially vary from one member State to another and that, in a country where a lawyer enjoys independence towards public authorities, other operators and third-parties, he must “furnish guarantees that all steps taken in a case are taken in the sole interest of the client” (par. 102) and that a member State may “consider that the lawyer [must] defend his client independently and in the observance of strict professional secrecy” (par. 105)” (B.7.7).

Indeed, this motive leads us from Community Law to Belgian Law and to the constant Belgian Constitutional Court case law on the specificities of the lawyer. However the Wouters Judgment is of Community range and one could not imagine on the EU territory that a country would not guarantee the lawyers independence towards public authorities, other operators and third-parties.

X. European significance of these judgments

22. These three judgments bear a European significance of huge importance.

On 14 March 2008, CCBE commented the first (and unanimously approved³⁰) judgment: “It follows from the ruling of the ECJ on 26 June 2007 and from the decision of the Belgian constitutional court of 23 January 2008 that the reporting and cooperation obligations imposed on lawyers cannot infringe their independence nor the professional secrecy to which they are subject. The independence of a lawyer and professional secrecy are part of the fundamental rights and general principles of Community law, and Member States cannot breach them³¹.” Furthermore, in its interpretative note, under recommendation 16, FATF had stressed that the regulations could not violate lawyers’ professional secrecy.

23. Indeed, one could deplore that the Constitutional Court did not seize the opportunity to emphasize the bar’s independence, as the Canadian and Polish Supreme Courts did³².

²⁸ Preamble 17 is the following: “(...) 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 counselor 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”.

²⁹ CJCE, 19 February 2002, Wouters & co. v. the Netherlands, *Jur.*, 2002, I, 1577 ; *R.W.*, 2002-2003, p. 674 ; *J.T.D.E.*, 2002, p. 223; *J.L.M.B.*, 2002, p. 444.

³⁰ See www.ccbe.eu : ccbe-info n° 20/2008.

³¹ The Belgian Constitutional Court recalls the principles set by the AM&S Judgment, the Wouters Judgment and the AKZO Nobel Judgment.

³² Polish Constitutional Court, 2 July 2007 Judgment, 72/7/A/2007. The Court decides, a.o., that the Polish Constitution also grants respect to professional secrecy to the person wanting to become client of a lawyer (8.6). It makes use of the same conciliatory interpretation method as the Belgian Constitutional Court (p.37-38, 11.4) but does not interpret the wording “providing legal assistance in the evaluation of a client’s legal situation”.

One could also regret the fact that Advocate General Poiares Maduro's argument, according to which article 8 ECHR is a second ground to lawyers professional secrecy, was not mentioned.

These arguments were and will be invoked in other proceedings, a.o. when individual cases of denunciation of a client by a lawyer will be submitted to the European Court for Human Rights. Challenging an *in abstracto* regulation is very different from examining said regulation's application to a concrete matter, in the light of human rights.

Both kinds of litigation bear their own technique but together they may achieve a same goal: strengthening the essential safeguard offered by lawyer's professional secrecy to the citizens protection.

24. These judgments are a substantial contribution to lawyers 'Community learning'. They bring many awaited clarifications and draw multiple conclusions for all member States' bars.
25. They are a reminder to the European legislator that he must respect fundamental rights, including lawyers' professional secrecy. Logically, this should lead to a revision of directives insofar as lawyers are concerned, in a way always suggested by CCBE. It would be best to have valid texts with clear concepts but unfortunately it is not yet the case. As for national legislators, they must also be reminded that there is no use in duplicating directives and that they must transpose them in a manner that respects fundamental rights³³. It is obvious that this judgment holds essential indications for the transposition laws to come, especially those related to the third anti-money laundering directive of 26 October 2005 (2005/06/CE).
26. The French and Belgian judgments indeed apply in their countries of origin. Are they however purposeless for the Community? We do not think so if one bears in mind the Community learning, Advocate General Poiares Maduro's conclusions and the prejudicial judgment of 26 June 2007.

Under Belgian or French Law, lessons to be learned from these judgments are essential as they confirm or consolidate general rules relating to the bar and interpret and apply the anti-money laundering legislation. When examining the Belgian Constitutional Court's judgment 10/2008 of 23 January 2008, whose motivation is the most elaborate, the conclusions to be drawn in Belgian and Community law are the following:

1°) the Constitutional Court confirms the value and interpretation of **professional secrecy**, as defended by Belgian bars. Professional secrecy is even presented as a constitutional principle as the Court decides "that lawyers' professional secrecy is a general principle which contributes to the protection of fundamental rights" (B.7.10.). There is no doubt, according to the Advocate General and the Court of Justice that it is indeed a **fundamental principle of Community Law**.

Exceptions to professional secrecy are of strict interpretation (B.7.10.). There cannot be any "unconditional or unlimited suppression" of this secrecy which does not only exist in the framework of legal proceedings (before, during or after said proceedings) but also entirely covers legal advice. Such is the situation in Belgium and also in the Community if one refers to Advocate General's conclusions.

2°) A large definition of **legal advice** is given: "to inform the client on the current state of law that applies to his personal situation or to the operation he undertakes to launch or to advise him on the way to proceed to such operation legally" (B.9.5). This is also, substantially, Advocate General Poiares Maduro's opinion who refers to the directive's preambles. Said preambles are unequivocal

³³ The consequences to be drawn by this judgment under Community Law, as for the Polish, French and even Canadian rulings, will not be addressed in this article which only relates to Belgian Law.

contrary to the unfortunate wording in the articles of the directive, duplicated in several transposition laws (“to evaluate the legal position”).

3°) The Belgian Court follows the Supreme Court’s case law according to which a distinction must be made between **lawyers’ essential activities** and activities which do not fall in the scope of lawyers specific legal defense, representation in legal proceedings and legal advice (B.9.6.). The same distinction can be found in the Advocate General’s conclusions although it is worded in a less fortunate manner as lawyers’ legal activities and ‘extra-legal’ activities.

4°) The Constitutional Court acknowledges that the **bar president** plays a part of “essential safeguard” for lawyers as well as for clients (B.14.2.). He is not merely an intermediary as he must verify that “legal application standards” are met. The Court emphasizes his central, unique and constitutional role. His intervention “is conceived as a ‘filter’ between lawyers and judicial authorities, to avoid any violation of defense fundamental rights”. Even when the CTIF asks additional questions, they must be answered via the bar president (B.15.3.). The French Conseil d’Etat issued a similar decision: the intervention of the profession’ self-regulatory body is essential to safeguard the validity of a legislation which would otherwise prove null.

In that respect, the Court of Justice did not decide anything in its intermediate judgment and Advocate General Poiares Maduro merely mentions the possibility left to member States to appoint an appropriate self-regulatory body to whom denunciations can be done, as one of the two guarantees that the limitation of lawyers’ professional secrecy would respect the proportionality principle. Does that imply that in the event such possibility is not used by a member State, the proportionality principle would not be respected? Although this does not clearly appear from the judgment, the answer must be positive.

XI. Conclusion

27. What conclusion may be drawn from these convergent decisions?

Firstly, that Community acts are ill-conceived and ill-drafted and that a full review proves necessary. They do not even offer the possibility of coordination or harmonization attempts, all national situations currently being extremely different. A complete review however seems illusory at short notice.

Nonetheless, immediate conclusions appear: countries which have not introduced in their national legal system the obligation to denounce any suspicion to the profession’ self-regulatory body and who do not acknowledge the exception of representation in legal proceedings or legal advice (in other words, those who have not considered as an obligation the possibilities foreseen by the directive) violate the fundamental Community Law principle of professional secrecy, established by articles 6 and 8 ECHR, and these violations must be deferred to competent jurisdictions by lawyers or bars.

As for the countries which have transposed the directive together with its exceptions, their laws must be interpreted in a ‘conciliatory’ manner.

28. The activities foreseen by article 2^{ter} and which may be subject to a suspicion denunciation remain to be defined. Then one will have to appreciate the scope of the legal advice exception, in the framework of ‘mixed’ acts and missions. Indeed even the largest definition given by the Court to legal advice may lead to practical difficulties.

“The aimed target”, as we referred to in a previous article, “is not to jeopardize the practice of legal profession with its necessary trust relationship. The advice exception remains throughout the file at hand and for all opinion matters, including conciliation and negotiations. Money-laundering suspicion or certainty may indeed appear for the first time although the lawyer has already been working on the file for a while (e.g. when creating a new company). The advice exception may be opposed in such case. Legal advice rendered during preparation or execution of financial or real estate operations, or power of attorneys granted in such framework, constitute a non-denunciation motive and do not able the lawyer to communicate suspicion or proof of laundering to the bar president, nor of course to the Department”³⁴.

Advising implies examining the client’s accounting situation, e.g. in view to appreciate his financial situation, reconversion and stabilization measures, bankruptcy or winding-up arrangements, reports to the auditors on pending proceedings and potential liabilities for the annual accounts, facilitating the sale of the business and the drafting of agreements that this may imply, share purchase agreements in view of the company’s sale or a merger, advising on potential liabilities or rights the client may invoke, facilitating negotiations for working or concession agreements, drafting of legal documents such as a sale agreement or a commercial lease. This shows the very rare circumstances in which a lawyer may be obliged to denounce a client.

29. It is however possible that a lawyer does not give any occasional legal advice to a client and thus that a client appoints a lawyer not in view to receive legal advice but as a financial intermediary or “actor in the financial system”³⁵.

The *House of Lords* in the famous *Three Rivers District Council*³⁶ matter ruled that the *Court of Appeal* had wrongfully declined the legal privilege³⁷ to documents, correspondence and reports drawn by the Bank of England’ solicitors and employees as preparation for an answer awaited by an independent investigator. (Judge J. Bingham), appointed by the Finance Minister to enquire on the Bank’s compliance to legal control obligations, in the framework of the BCCI Bank bankruptcy of July 1991.

The Lords rejected the narrow conception of legal privilege for legal advice and granted the protection to all the communications at hand, all internal notes and memorandums. They referred to a precedent ‘*Balabel v. Air India*’ (1988) in which it was ruled that “... *legal advice is not confined to telling the client the law ; it must include advice as to what should prudently and sensibly be done in the relevant legal context*”. This text echoes in the definition of legal advice given by the Constitutional Court (B.9.5.)³⁸.

The point was to decide “*whether the lawyers are being asked qua lawyers to provide legal advice*”³⁹.

³⁴ G.-A. DAL and J. STEVENS, *op. cit.*, nr. 27.

³⁵ A. MASSET, *op. cit.*, p. 174.

³⁶ House of Lords, Opinions of the Lords of Appeal for judgement in the cause *Three Rivers District Council and Others v. Governor and Company of the Bank of England* (2004), UK HL 48, 11 November 2004; <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>.

³⁷ i.e. professional secrecy protection.

³⁸ Opinion Lord SCOTT OF FOSCOTE, *op. cit.*, n° 38-45, referring to *Balabel v. Air India* [1988] 1 Ch. 317, 330.

³⁹ Opinion Lord RODGER OF EARLSFERRY, *op. cit.*, n° 58. He writes: “When, however, the [bank] consulted the lawyers in Freshfields, and through them counsel, about the presentation of their evidence to the enquiry, it was not seeking their comments and assistance as bankers, accountants, rhetoricians or anything else: it was seeking their comments and assistance as lawyers professing expertise in this field. Either expressly or impliedly, the [bank] was asking them to put on legal spectacles when reading, considering and commenting the drafts. In other words it was asking them to consider, as lawyers, how the Banks' evidence could be most effectively presented to Bingham ... What matters is that the [bank] was instructing the lawyers in Freshfields to carry out a function which necessarily involved the use of their legal skills if it was to be performed properly” (nr. 60).

The Lords once again referred to *Balabel v. Air India* and, more specifically, to the following: “*In my judgement, therefore, the test is whether the communication or other document was made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. ... Where information is passed by the solicitor or client to the other as part of the continuum aimed to keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as 'please advise me what I should do'. But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice.*”⁴⁰

30. Continuity in contacts and communication is naturally the *quod plerumque fit* of matters in which lawyers intervene. Lawyers cannot question, at every step of the file, whether they are rendering an advice or if they have received information in view to render legal advice. As for the client, he does not have to expressly request a legal opinion. It is the lawyer’s duty to render it spontaneously⁴¹.

One should not establish a distinction between legal advice and the preparation and undertaking of material actions. There is no border between the legal situation evaluation phase, negotiation, drafting of an agreement or deal or the organization that must be put in place, and their execution. At every step, the lawyer will give a ‘legal lighting’ on the situation he is examining, as well as on the one preceding or the one to follow. That is precisely why the client appoints him⁴².

31. One does not dare to think about the multiple difficulties this kind of legislation will continue to raise: what about a long-term relationship with a client, a continued service with changing aspects, various nature interventions (legal proceedings, advising, material)? What about international matters, collaboration with foreign colleagues, cooperation or partnership with colleagues submitted to other rules and maybe different case law⁴³? What about the intervention of a Belgian lawyer abroad or of a foreign colleague in Belgium?

⁴⁰ Opinion Lord CARSWELL, *op. cit.*, nr. 111, which, under nr. 87, refers to English and Commonwealth case law according to which legal privilege must be considered as a fundamental constitutional principle, “a fundamental condition on which the administration of justice as a whole rests” (Lord TAYLOR OF GOSFORTH, *in R.v.Derby Magistrates Court, ex parte B* (1996) AC 487, 509) and “a fundamental human right long established in the common law” (Lord HOFFMANN *in R. (Morgan Grenfell & Co. Ltd.) v. Special Commission of Income Tax* [2003] 1 AC 563.7).

⁴¹ “The lawyer cannot wait passively for his client’s eventual instructions and must take the initiative to draw his attention *motu proprio* on obstacles, legal obligations or formalities to undertake”, Liège, 22 December 1998, *J.L.M.B.*, 2000, p. 242. See also: Bruxelles, 2 April 2004, *J.T.*, 2005, p. 163; civ. Charleroi, 29 March 1988, *J.T.*, 1989, p. 79. Lord CARSWELL (*ib.*) also refers to an opinion in the *Nederlandse Reassurantie Groep Holding nv v. Bacon & Woodrow Holding matter* [1995] 1 All ER 976 : “that all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client”.

⁴² It is also rightfully that BANNIER et FANOY recommend : « Als er ten minste redelijke twijfel bestaat, moet het beroep op het verschoningsrecht worden gehonoreerd” (F.A.W. BANNIER et N.A.M.E.C. FANNOY, *op. cit.*, p. 178).

⁴³ According to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*Official Journal L 001 , 04/01/2003 P. 0001 – 0025*), investigations undertaken by the Commission and competition authorities may be split in two phases: a) collecting and b) exchange and use of information. Collecting may be undertaken by national authorities (eventually at the benefit of another national entity or the Commission) or by the Commission. In all these cases, collecting the information must be proceeded to in accordance with article 22 of the Regulation and the national law of the performing authority. For example, information collected in Belgium by Belgian state agents will have to abide to Belgian professional secrecy, whether they are collected for Belgium, for the account of a foreign competition authority or the European Commission. (*C.J.C.E. Judgment AM & S of 18 May 1993 nr. 155/79, Rec.*, 1575, and First Instance Tribunal’s Judgment AKZO Nobel of 17 September 2007, T125/03 and

This demonstrates, if necessary, that the drafting of professional rules, which one must call for, must first intervene at a national level but in a European perspective and thus be pursued simultaneously in the Community.

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T253/03. See B. VESTERDORF, Les principes communs en matière de secret professionnel des avocats sous l'angle du droit communautaire, *U.A.E. Journal*, Nov-Dec. 2004, p. 62.