CONSEIL D'ETAT
statuant
au contentieux

REPUBLIQUE FRANCAISE

Nos 296845,29690

AU NOM DU PEUPLE FRANCAIS

CONSEIL NATIONAL
DES BARREAUX et al

Le Conseil d'Etat statuant au contentieux
(Section du Contentieux)

COUNCIL OF BARS AND LAW
SOCIETIES OF EUROPE

Ms Aurélie Bretonneau
Rapporteur

On the report by the 6th *sous-section*
of the *section du contentieux*

Mr Mattias GUYOMAR,
Commissaire du gouvernement

Session of 28 March 2008
Reading of 10 April 2008

(…)

As to the relevant applicable law

Whereas Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 has amended Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering in order *inter alia* to extend the obligations of the Directive concerning customer identification, record keeping and reporting of suspicious transactions to certain activities and professions; it has included within its scope of application notaries and independent legal professionals when participating in certain transactions: to that end it has inserted in the Directive of 10 June 1991 an article 2a, which provides 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"; article 6 of the Directive, in the revised version, provides that "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 (...); 3. (...) 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"; lastly, under the terms of recital 17 of the Directive: "(…) 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";

Whereas the law of 11 February 2004 amending the status of certain legal professions, judicial experts, experts in industrial property and experts in auctions was intended *inter alia* to transpose the Directive of 4 December 2001; the purpose of the contested provisions of the Decree of 26 June was to lay down the legal conditions under which members of professions falling within the scope of application of the Directive of 4 December 2001 and the transposing Act of 11 February 2004 are required to fulfil their obligations in the fight against money laundering;

On the legal framework of the case

Whereas the applicants maintain that the Directive of 4 December 2001 and the Act of 11 February 2004 designed to transpose the Directive violate articles 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms, as well as general principles of Community law;

Whereas, in the first place, it follows both from article 6(2) of the Treaty on European Union and from the case law of the Court of Justice of the European Communities, notably in its judgement of 15 October 2002, that in the Community legal system the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms are protected as general principles of Community law; an administrative court, faced with a claim that a Directive is in violation of the European Convention on Human Rights, must accordingly determine whether the Directive is compatible with the fundamental rights guaranteed by these provisions; in the absence of serious doubt the court must reject the submission, or if it does not, request a preliminary ruling from the Court of Justice of the European Communities, on the terms provided for by article 234 of the Treaty establishing the European Community;

Whereas, in the second place, when it is claimed before the administrative court that a law transposing a Directive is itself incompatible with a fundamental right guaranteed by the European Convention on Human Rights and Fundamental Freedoms and protected as a general principle of Community law, the administrative court must first ensure that the law transposes the provisions of the directive accurately; if it does, the submission based on violation of this basic law by the transposing law can only be assessed through the procedure for monitoring the Directive itself, as described above;

On submissions calling into question the validity of the Directive of 4 December 2001

Whereas it follows from the interpretation of the Directive of 4 December 2001 in the judgement of 26 June 2007 on "Ordre des barreaux francophones et germanophones et autres", delivered by the Court of Justice of the European Communities in response to a request for a preliminary ruling from the Belgian Court of Arbitration, that the provisions of article 6 thereof, which as stated allow Member States not to impose the stipulated information and cooperation requirements on lawyers in certain cases, must be regarded, in the light of recital 17 of the Directive and in the interests of providing an interpretation compatible with the fundamental rights guaranteed by the European Convention on

Human Rights and Fundamental Freedoms, as ruling out the possibility of imposing such obligations on them in the cases referred to;

Whereas, in the first place, it follows from the judgement delivered by the Court of Justice of the European Communities that the Directive, as interpreted, does not violate the principle of the right to a fair trial, guaranteed by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to the extent that it does not impose the reporting and cooperation requirement in the case of information received or obtained by lawyers in the context of judicial proceedings;

Whereas, in the second place, while the Court of Justice of the European Communities, which was only asked to rule on the validity of the Directive in the light of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, did not give an explicit ruling with respect to information received or obtained by a lawyer in the course of ascertaining the legal position for a client, it follows from the interpretation given of the Directive that this too must, in the light of recital 17, be excluded from the scope of the information and cooperation requirement, except where 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; it follows, taking account of the general interest in countering money laundering, that a submission must be rejected if it is based on the view that the Directive, inasmuch as the duty of ascertaining the legal position for a client is interpreted in this way, would represent an excessive infringement of the fundamental right to professional confidentiality, as protected by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that there may be interference by a public authority with the exercise of the right to private and family life such as is necessary in the interests of public safety or for the prevention of disorder or crime;

Whereas lastly the claim that the Directive would leave it to Member States to determine the level of protection to be given to information held by lawyers must be rejected, given the way in which the text should be interpreted; the fact that the Directive does not define the notion of "judicial" procedure cannot be seen to entail a violation of the principle of legal security, given that the Directive has had recourse, as it must, to a notion that may be applicable to all the different legal systems of the member states; lastly, there is little point in the applicants' invoking the Charter of Fundamental Rights of the European Union, since it is devoid of legal force under current legal conditions;

Whereas it follows from the foregoing, and without there being any need to request a preliminary ruling from the Court of Justice of the European Communities, that submissions calling into question the validity of the Directive of 4 December 2001 must be rejected;

On submissions related to the law of 11 February 2004:

Whereas, in the first place, the law of 11 February 2004 introduced an article L. 562-2-1 on conditions governing the reporting of suspicions by the persons listed in paragraph 12 of article 562-l, ie notaries, bailiffs, receivers and court-appointed administrators, as well as advocates of the Conseil d'Etat and of the Cour de Cassation, and counsel of the Courts of Appeal; under the terms of article L. 562-2-1, these persons are required to report suspicions as stipulated in article L. 562-2 "when in the context of their professional activity, they execute for and on behalf of their customers any financial or real-property transaction or when they participate by assisting their customers with the preparation or execution of transactions relating to: 1. the buying and selling of real property or business concerns; 2. the management of funds, securities or other assets belonging to the customer; 3. the opening of bank current accounts, savings accounts or securities accounts; 4. the organisation of the contributions required to create companies; 5. the formation, administration or management of companies; 6. the formation, administration or management of foreign-law trusts or any similar structure"; under the terms of the same article however these persons are not required to report suspicions "when the information was received from one of their clients, or obtained on one of them, within the framework of a legal consultation, unless it took place for money-laundering purposes, or if such persons proceed

therewith knowing that their client wished to obtain legal advice for money-laundering purposes, or when they provide their professional services in the interest of that client in connection with judicial proceedings, whether that information was received or obtained before, during or after those proceedings, including advice given in relation to the means of initiating or avoiding such proceedings"; lastly, article L. 562-2 provides that, in derogation from ordinary law, advocates of the Conseil d'Etat and of the Cour de Cassation, and legal counsel of the Courts of Appeal send their declarations, as applicable, to the President of the Order of Advocates of the Conseil d'Etat and of the Cour de Cassation, to the president of the order to which the advocate belongs or to the president of the professional body to which the counsel belongs. Those authorities forward the declarations sent to them by the advocate or the counsel to the TRACFIN agency, unless they consider that the suspicion of money laundering is unfounded"; in all these respects the law of 11 February has accurately transposed the provisions of the Directive of 4 December 2001;

Whereas, in the second place, in order to define the scope of application of Book V, Section VI, Chapter III of the Monetary and Financial Code, which covers due diligence requirements, the law refers to the persons referred to in article L. 562-1 of the same code; the provisions of paragraph 12 of this article mention "Notaries, bailiffs, receivers and court-appointed administrators, as well as advocates of the Conseil d'Etat and of the Court of Cassation, and counsel of the Courts of Appeal, as determined in Article L. 562-2-1"; if all the relevant legal provisions are taken together, it follows that the persons referred to in paragraph 12 of article L. 562-1 are only subject to the due diligence requirements stipulated in Chapter III within the limits and conditions set forth in article L. 561-2-1, cited above, except in cases where the person in question was involved in money laundering, the legal advice was given for money-laundering purposes, or the person knew that the client wished to obtain legal advice for money-laundering purposes; therefore, as regards the due diligence requirements, the law has accurately transposed the provisions of the directive;

Whereas it follows from the foregoing that the submissions claiming that the law of 11 February 2004 are incompatible with the fundamental rights guaranteed by the provisions of articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms must be rejected;

On submissions contesting the decree of 26 June 2006

With respect to article R. 562-2 of the Monetary and Financial Code

Whereas under the terms of the third paragraph of article R. 562-2 of the Monetary and Financial Code reworded in line with the contested decree: "Subject to the provisions of the second paragraph of article R. 562-2-2, notaries, bailiffs, receivers and court-appointed administrators, advocates of the Conseil d'Etat and the Court of Cassation, counsel of the Courts of Appeal and court-appointed auctioneers are individually required to report to the TRACFIN agency at its request and to obtain receipts, whatever the manner in which they conduct their professional practice"; it follows however from the provisions of article L. 562-1, as interpreted above, that the persons referred to in paragraph 12 of the article are only subject to the reporting and the other due diligence requirements within the conditions set forth in paragraphs 8 and 9 of article L. 562-2-1 within the conditions laid down in paragraphs 8 and 9 of article L. 562-2-1, which provides that information submitted by the persons concerned to the TRACFIN agency is to be filtered, as appropriate, through the President of the Order of Advocates of the Conseil d'Etat and of the Cour de Cassation, the president of the order to which the advocate belongs or the president of the professional body to which the counsel belongs; it follows that the applicants are justified in maintaining that the contested decree, by requiring direct contacts between the parties concerned and the TRACFIN agency when the parties comply with requests for information from the latter, violates the provisions of the law and must to that extent be annulled;

With respect to article R. 563-3 of the Monetary and Financial Code

Whereas by virtue of article R. 563·3 of the Monetary and Financial Code, worded in line with the contested decree, it is up to the financial institutions and persons mentioned in article L. 562-1 to adopt internal procedures designed to meet the requirement to combat money laundering and the funding of terrorism, as well as internal monitoring systems designed to ensure compliance with these procedures; while the second paragraph of the same article provides that these procedures "are defined, as appropriate, either by decree issued by the competent minister or by professional regulations approved by the competent minister, or by a general regulation issued by the Financial Markets Authority", the provisions served only one purpose and could have only one legal effect: to make adoption of the provisions in question subject to the regulations defined by the laws governing the general organisation of the profession in question; consequently, the claim that article R. 563-3 would make the Minister competent to approve the internal procedures lawyers are required to introduce for the purposes of combating money laundering and the funding of terrorism must be rejected;

With respect to article R. 563-4 of the Monetary and Financial Code

Whereas under the terms of article R. 563-4 of the Monetary and Financial Code: "The persons referred to in 12 of Article L. 562-1 shall only apply the provisions of this chapter when, in the context of their non-judicial activity, they execute for and on behalf of their customers any financial or real-property transaction or when they participate by assisting their customers with the preparation or execution of transactions relating to: (1) The buying and selling of real property or business concerns; (2) The management of funds, securities or other assets belonging to the customer; (3) The opening of bank current accounts, savings accounts or securities accounts; (4) Organisation of the contributions required to create companies; (5) The formation, administration or management of companies; (6) The formation, administration or management of foreign-law trusts or any similar structure";

Whereas the applicants claim that, by failing to provide for any exemptions from the requirement laid down in Chapter III that persons referred to in paragraph 12 of article L. 562-1 should report information they have in their possession or have received in the context of legal counselling, except where the person concerned is involved in money laundering activity, where the legal advice is given for the purpose of money laundering and where the person acts in the knowledge that their clients wish to obtain legal advice for that purpose, article R. 563-4, introduced by III of article 2(III) of the contested decree, is illegal;

Whereas, as stated above, the law has subjected the persons referred to in paragraph 12 of article L. 562-1 to the due diligence requirements laid down in Chapter III only within the limits of the aforementioned article L. 562-2-1; by simply recapitulating the exemptions provided for in the context of legal proceedings without mentioning those relating to legal counselling, article R. 563-4 has misrepresented the scope of application of the law; to that extent the applicants are justified in asking for its annulment;

On the conclusions regarding the application of the provisions of article L. 761-1 of the code of Administrative Justice presented by the Council of Bars and Law Societies of Europe

Whereas there are grounds, in the circumstances, for applying these provisions and ordering the State to pay the Council of Bars and Law Societies of Europe the sum of 4000 euros in expenses incurred and not included in the costs;

DECIDES

Article.1: The statement by the *Chambre nationale des avoués près les cours d'appel* in support of appeal No 296845 is admitted.

Article 2: Article 1 of the decree of 26 June 2006 on combating money laundering, amending the Monetary and Financial Code, is annulled insofar as it provides, under paragraph III of article R. 562-2 of this Code, for direct contacts between the persons listed in point 12 of Article L562-1 and the TRACFIN agency in the event of these persons' furnishing information at the latter's request

Article 3: Part III of article 2 of the decree of 26 June 2006 on combating money laundering, which amends the Monetary and Financial Code by introducing an article R. 563-4 recapitulating the obligations imposed by Chapter III on the persons listed in paragraph 12 of article L. 562-1, is annulled insofar as it does not refer to the exemptions applying in the case of information in the possession of or received by these persons in the context of legal counselling.

Article 4: The State will pay the Council of Bars and Law Societies of Europe the sum of 4,000 euros, in accordance with article L. 761-1 of the Administrative Justice Code.

Article 5: The remainder of the form of order sought in the applications is rejected.

Article 6: This decision shall be notified to the *CONSEIL NATIONAL DES BARREAUX, the CONFERENCE DES BATONNIERS DE FRANCE ET D'OUTRE-MER,* the *ORDRE DES AVOCATS AU CONSEIL D'ETAT ET A LA COUR DE CASSATION,* the *ORDRE DES AVOCATS DE PARIS,* the Council of Bars and Law Societies of Europe, the *Chambre nationale des avoués près les cours d'appel*, the Prime Minister, the Minster of Finance, Industry and Employment, and the *Garde des Sceaux*, Minister of Justice. Copies shall be sent to the Minister of the Interior, Overseas Affairs and *Collectivités territoriales* and to the Minister for Health, Youth, Sport and Associative Life.

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No 296845
Conseil National des Barreaux et al

No 296907
Council of Bars and Law Societies of Europe

Rapporteur: Aurélie Bretonneau

Section du Contentieux

Session of 28 March 2008
Reading of 10 April 2008

CONCLUSIONS
by
Mattias GUYOMAR,
Commissaire du gouvernement

To what extent and by what means are you required to check that a Community Directive and the national rulings, legislation and decrees used to transpose it are in compliance with an international convention? This is the first question raised by the appeals before us.

Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 has amended Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering in such a way as *inter alia* to extend the obligations it lays down with respect to identifying clients, keeping data and reporting suspicious transactions to activities and professions that are vulnerable to money laundering.

Under a compromise between the position contained in the Commission proposal and the position of Parliament, the scope of application of the Directive extends to notaries and independent legal professionals when they are involved in certain transactions. To that end, an article 2a has been added to the Directive of 10 June 1991, stipulating that "Member States shall ensure that the obligations laid down in this Directive are imposed on the following institutions [...] and on the following legal or natural persons acting in the exercise of their professional activities: [...] 5. notaries and other independent legal professionals, when they participate, whether (a) by assisting in the planning or execution of transactions fort 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".

The Directive imposes two obligations on the institutions and persons listed in article 2a: a customer identification requirement (article 3) and cooperation requirements (article 6). Under the terms of this article, as amended: "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." The cooperation requirement is therefore twofold: the institutions and persons in question must (i) volunteer information to the body responsible for combating money laundering and (ii) reply to requests for information from this body.

The Directive was transposed by an amendment to the Monetary and Financial Code, introduced by the law of 11 February 2004, which reformed the status of certain legal professions, legal experts, experts in industrial property and experts in auctioneering.

For its application the Act refers to a Decree of 26 June on combating money laundering, which amended the regulatory part of the Monetary and Financial Code.

Today you are asked to rule on two appeals against certain provisions of this decree, whose purpose is to lay down the conditions under which members of professions falling within the scope of application of the Directive of 4 December 2001 and the transposing Act of 11 February 2004 are required to fulfil their obligations in the fight against money laundering. These appeals have been lodged by the *Conseil national des barreaux*, the *Conférence des bâtonniers de France et d'outre-mer*, the *Ordre des avocats au Conseil d'Etat et à la Cour de cassation* and the *Ordre des avocats de Paris* as well as the Council of Bars and Law Societies of Europe, all of which have an interest in taking action. You will treat them as joined cases and rule on them by a single decision.

La *Chambre nationale des avoués près les cours d'appel* is making a statement in support of appeal No 296845. You will allow it on the grounds that the Chamber has an interest in having the contested decree annulled.

The applicants raise three sets of grounds, each addressing a separate point: (i) the validity of the Directive of 4 December 2001, (ii) the conformity of the Act of 11 February 2004 with Community law, and (iii) the legality of the decree of 26 June 2006.

We shall examine each one in turn.

The first set raises a far-reaching theoretical question in that the applicants maintain that the Directive violates articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. You must therefore define – for the first time to the best of our knowledge[1] – your procedures for monitoring compliance of a Community Directive with other international conventions.

We are in no doubt that the submissions raise serious practical questions. Admittedly, in the light of your case law it is not for the *Conseil d'Etat statuant au contentieux* to determine whether the provisions of an international commitment are justified or whether such a commitment is more or less valid than others entered into by France (8 July 2002 *Commune de Porta* p. 260). But, as we have already had occasion to demonstrate to you, secondary Community law calls for special treatment.

When you were called upon to define your procedures for monitoring the constitutionality of a decree with the Directive it served to transpose in your ruling on *Société Arcelor Atlantique and Lorraine* (Assembly 8 February 2007 p.55), you considered all the implications, both of the act in question – a Community Directive – and of the citation standard which was held to be violated – our national constitution.

Today you might be tempted to reach a conclusion inspired by the judgement on *Bosphorus Hava Yolalri turizm ve ticaret anonim sirketi v Ireland* (Grand Chamber 30 June 2005 no 45036/98), in which the European Court of Human Rights, in an application against Ireland relating to a national measure to implement a Community regulation, recognised "a rebuttable presumption of conformity [with the European Convention] in favour of the Community". You might point to the (theoretical) autonomy of the two European legal systems and the role that must be assumed by national jurisdictions in ensuring observance of rights guaranteed by international agreements, given that the Court of Strasbourg has a

[1] The question has not been settled in your case law (see *inter alia* 13 October 2003 *Mutuelle générale des employés et cadres,* which reserves the question with the words "at all events").

subsidiary monitoring role. The fact that the latter is not competent to monitor secondary Community legislation directly does not prevent it from gaining indirect knowledge of it through national implementation measures. In its judgement on *Cantoni v France* of 15 November 1996, the Court clearly stated that the fact that French legislation to modify the Public Health Code was based almost word for word on a Community Directive did not remove it from the ambit of the Convention (§ 30). Given that national laws to implement secondary Community law are subject to monitoring by the European Court to ensure conformity, you may be tempted to reconcile any conflicting rulings[2] within the framework of the Convention in order to avoid any condemnation of France.

This is not what we are proposing. We believe that submissions based on violation of the European Convention of Human Rights by a directive should be reviewed in the same way as those based on violation of original Community law or general principles of Community law and should therefore be conducted in the framework of the *Foto-Frost* case law of 22 October 1987, which recognised that the Court of Justice had exclusive competence to declare a Community law invalid.

Four sets of considerations militate in favour of this approach.

The first of these has to do with the nature of the contested act, for it involves making an assessment of the validity of a Community Directive in the framework of an objection of illegality. It is therefore appropriate to apply the instrument provided for in article 234 (formerly article 177)[3] of the treaty establishing the European Community. As Advocate General Mancini explained in the conclusions to the Foto-Frost affair: "[...] acts passed by institutions must be applied uniformly across the whole of Community territory. This principle serves a dual purpose: to guarantee legal certainty and [...] to ensure legal cohesion across the Community."

The second set has to do with the function of the Court of Justice. According to established case law "the jurisdiction of the Court of Justice to give preliminary rulings … 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" (see *Racke*16 June 1998 *inter alia*). Since such jurisdiction extends to all grounds capable of invalidating those measures, the Court is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law (12 December 1972 *International Fruit Company*).

The third set of considerations addresses the particular nature of the provisions that have allegedly been violated: European Convention on Human Rights article 6, on the right to a fair trial, and article 8, on the right to respect for private and family life. Where rights are guaranteed by the European Convention of Human Rights, there seems little point in maintaining residual power to monitor the constitutionality of a transposing decree – as provided for in your Arcelor case law – in order to maintain the full effect of constitutional provisions with no equivalent in the Community legal system.

For according to established case law, fundamental rights are an integral part of the general principles of Community law guaranteed by the Court and the European Convention of Human Rights is of particular

[2] In its judgement on *Matthews* of 18 February 1991, the Court condemned the United Kingdom for failing in its obligations under article 3 of protocol No 1, whereas exclusion from the right to vote stemmed directly from the application of Community regulations.

[3] Under the terms of this article: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

a) the interpretation of this Treaty,

b) the validity and interpretation of acts of the institutions of the Community and of the ECB,

c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice".

importance in this respect (see *inter alia* 18 June 1991 *ERT* or 22 October 2002 *Roquette Frères*). The principles derived from this case law have been reaffirmed in the preamble to the Single European Act and subsequently in the Treaty on European Union. Under the terms of article 6 *(previously article F)*: "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. 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 [...]." (15 October 2002 *Limburgse Vinyl Maatschappij*).

Compliance with the European Convention is therefore required of the Community by virtue of the general principles of Community law. Having been incorporated into Community law, the convention is now the main substantive source of fundamental rights. As Advocate General Philippe Léger explains in the conclusions to the judgement on *European Parliament v Council of European Union* of 30 May 2006, "[...] respect for fundamental rights is an integral part of the general principles of law it safeguards... In this respect, it looks to the constitutional traditions common to the Member States and to international treaties on the protection of human rights, on which the Member States have collaborated or which they have signed, in particular the European Convention on Human Rights." Measures that are incompatible with the fundamental rights recognised and guaranteed by the constitutions of those States may not therefore find acceptance in the Community. These Principles are included in article 6, paragraph 2, TEU." It follows that in the final resort it is the responsibility of the Court of Justice to reconcile treaty obligations with the need to safeguard fundamental rights in the Community (see *inter alia* 12 June 2003*Schmidberger).*

Fourthly and lastly, a solution of this kind would satisfy the desire for sound administration of justice in Europe. The interconnected provisions derived from the Community and the Convention represent the new horizon both for European jurisdictions (Court of Luxemburg and Court of Strasbourg) and for national courts. To those who fear that the multiplicity of sources and the large number of judges responsible for applying the law will reduce legal security, we would contend that this state of affairs actually enriches the rule of law[4], which is threatened more by monopolies – systems of law that becomes fossilised or judges who make arbitrary rulings – than anything else. But the normative system now arising calls for proper organisation: the convergence or complementarity of legal systems must entail cooperation between jurisdictions. In this situation nothing would be worse than to turn your own jurisdiction into an instrument to be pitted against others, instead of attempting to combine them.

Admittedly, it does not necessarily follow from the inclusion in the corpus of Community law of laws guaranteed by the European Convention that "the degree of protection given to fundamental rights under the Community legal system coincides with that afforded by the ECHR"[5]. But we would point out that the case law of the Court of Justice, like that of the European Court is clearly moving towards convergence[6]. Even at a time when interpretation of the Convention by the Court of Strasbourg is devoid of any constraining power[7], the Court of Luxemburg says that it must take account of the European Court's case law in its interpretation of fundamental rights (see *SGL Carbon AG*, 29 June 2006 *inter alia)* [8]. Its case law shows that Convention law is being adopted more and more by the Community court, which often has no hesitation in applying the Convention directly without working on the basis of general principles (see for example *Rechnungshof v Österreichischer Rundfunk* and other cases).

[4] Applying the principle of the rule of law, the Court of Justice describes the European Community as "a community of law".
[5] Conclusions of Advocate General Maduro on the judgement of 26 June 2007.
[6] In the words of Jean-Paul Costa: "The two Europes of the judges are complying with the principle of parallel convergence" Dalloz 2007.
[7] While the European convention is a substantial safeguard of fundamental right in the Community, it is only applied through Community law, which serves as the medium for its application.
[8] The Court has even applied the aforementioned *Matthews* judgement by the European Court in a judgement on *Kingdom of Spain v United Kingdom* of 12 September 2006.

For its part the Court of Strasbourg[9], in light of the *Bosphorus* case law, which was derived from a preliminary interpretation by the Court of Justice recognising that a contested Community regulation was in compliance with the Convention[10] (for a recent illustration, see the decision on inadmissibility taken on 10 October 2006), pronounced a "presumption of Convention compliance" based on the concept of "equivalent protection"[11]: "If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation." (§ 26). The Court clearly affirms its competence to monitor national acts designed to implement Community law applied in the absence of any discretionary power on the part of national authorities. But, "conscious of the risk of seeing members of the European Community and Union torn between their obligations under the ECHR and their Community obligations, the Court has favoured moves to reconcile the two European systems in order to safeguard fundamental rights through the principle of equivalent protection. This choice implies that its monitoring shall be minimum, in accordance with the manifest deficiency criterion"[12].

The repercussions of the case law are reinforced by a clearly stated political resolve. At the 117th meeting of the Council of Europe's Committee of Ministers on 10 and 11 May 2007, the Council of Europe and the European Union signed a Memorandum of Understanding to develop their relationship "notably (in) the promotion and protection of pluralistic democracy, the respect for human rights and fundamental freedoms, (and) the rule of law."[13]

In this context, it seems both appropriate (in terms of case law policy) and necessary (in terms of the rationale of the treaties) to monitor the conformity of directives with the Convention within the framework provided by the Foto-Frost case law. The prospects opened up by the Treaty of Lisbon[14], signed on 13 December 2007, the recognition that the Charter of Fundamental Rights of 7 December 2000 has the same legal force as the treaties[15], and the EU's accession to the European Convention on Human Rights in the TEU[16] would appear to justify such a step[17]. For it must be borne in mind that

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[9] Which sometimes refers directly to judgements of the CJEC (see for example *Stec and others v United Kingdom*,12 April 2006).

[10] In this case, the alleged violation of the European Convention was not related to the Irish state's discretion but its compliance with legal obligations flowing from Community law.

[11] As explained by Professor Sudre, in his comments in the JCP (28 September 2005 1760).

[12] Joël Andriantsimbazovina in "La Cour de Strasbourg, gardienne des droits de l'homme dans l'Union européenne" RFDA 2006 p.

[13] Under the terms of article 9 of the memorandum. Article 10 states that "The Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe".

[14] On this point see "Les droits fondamentaux dans le Traité de Lisbonne" Denys Simon Europe No 2 February 2008, particularly the sections on opting out by the UK and Poland.

[15] Even though the Charter does not yet constitute a binding legal instrument, it is clear from the Court's case law that it is not devoid of all effect as a yardstick for the interpretation of instruments designed to safeguard the rights referred to in article 6, paragraph 2, EU (eg *Parlement v Conseil* of 27 June 2006).

[16] It should be made clear however that the decision concluding the agreement on accession by the EU to the European Convention will only enter into force once it has been unanimously approved by member states in accordance with each one's constitutional provisions.

[17] Article 1 of the Treaty of Lisbon replaces article 6 of the TEU with the following:
"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions of Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." It should be added that declaration 21 annexed to the final act of the conference stipulates that "The Charter

article 52, paragraph 3 of the Charter stipulates: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

If a claim of invalidity has been lodged, you will be performing no more or less than your full role in the light of Community and Convention rulings by monitoring the compliance of a directive with rights guaranteed by the European Convention and, in the event of serious doubt, leaving any decision on its invalidity up to the Court of Justice.

We would point out, in support of this solution, that these monitoring procedures have already been adopted by the Constitutional Court of Belgium and the Court of Justice, precisely in respect of the Directive of 4 December 2001.

Appeals had been made to the Court of Arbitration of Belgium against the law of 12 January 2004 transposing the Directive of 1991 as modified by the Directive of 2001 into the Belgian legal system. This law had been contested in the light of several higher rulings. On the basis of the *Foto-Frost* case law and in accordance with article 234 of the treaty, the Court of Arbitration applied to the Court of Luxembourg for a preliminary ruling on the validity of the Directive in light of article 6 of the European Convention. In its Grand Chamber judgement of 26 June 2007 on *"Ordre des barreaux francophones et germanophones et autres"*, the Court of Justice replied that the information and cooperation requirements provided for in the Directive did not violate the right to a fair trial as guaranteed by Article 6 of the ECHR and Article 6(2) TEU[18]. The Court of Arbitration (now the Constitutional Court) set forth the conclusions in its judgement of 23 January 2008, to which we shall return later.

If you agree that it is appropriate to determine the compliance of a directive with the Convention under the procedure provided for in article 234 TEU and the conditions defined by the *Foto-Frost* case law, you will be following the Constitutional Court of Belgium directly down the path to cooperation between European jurisdictions, which we regard as the essential condition for the proper resolution of any conflicts between rulings.

We would invite you as of now to apply this theoretical monitoring framework in examining, as requested by the applicants, the validity of the 2001 Directive in light of articles 6 and 8 of the European Convention.

As we have already said, the Court of Justice has already decided, in a referral from the Court of Arbitration of Belgium, upon the compliance of the Directive with article 6 of the ECHR on the right to a fair trial. Its response shall determine yours. For the Court considers that its preliminary rulings are applicable to all jurisdictions responsible for applying Community law, whether in interpreting a Community act (*Da Costa*, 27 March 1963) or determining its validity (13 May 1981 *International Chemical Corporation*, 13 May 1981[19]). As François Séners explains in his conclusions to your decision on *Société De Groot en Slot Allium B. V. et al* (Assemblée 11 December 2006)[20]: "these rulings in principle are important additions, recognised by all national jurisdictions, to the *aquis communautaire*".

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of fundamental rights, legally binding, shall confirm 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."

[18] In its judgment, the Court stated "… fundamental rights form an integral part of the general principles of law whose observance the Court ensures. […] Thus the right to a fair trial, which derives inter alia from Article 6 of the ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU" (§29).

[19] In this case it is rules that, in the context of a request for a preliminary ruling, a judgement by the court establishing that an act is invalid, even though it is only directly addressed to the judge who referred it to the Court, is sufficient reason for any other judge to regard the same act as invalid for the purposes of reaching a decision. But such a ruling does not deprive jurisdictions of the power to determine whether there are grounds for a further request.

[20] Marking the abandonment of your decision on *ONIC* (Section 26 July 1985 p. 233).

You have applied such preliminary rulings on cases referred to the Court by other jurisdictions (11 December 1987 *Danielou* p. 409; 20 January 1988 *Aubin* p. 20; 24 September 1990 *Boisdet* p. 250). Moreover, in the aforementioned decision of 11 December 2006, you clearly demonstrated that interpretations of the Community Treaty and acts, which the Court is competent to give under article 234 (a) and (b) of the EC treaty, are binding on you in all cases.

What did the Court rule in its judgement of 26 June 2007?

The question was whether the obligations incumbent upon lawyers in the fight against money laundering, constituted an infringement of article 6 of the ECHR, given that these obligations violated the principle of professional confidentiality.

Article 6 of the 1991 Directive, as amended in the 2001 Directive provides that: "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. [...]", but paragraph 3 also provides that "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." Furthermore, recital 17 states that "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".

There may therefore be an apparent contradiction between the *ipso jure* exemptions enjoyed by lawyers if they are involved in judicial proceedings or if they are giving legal advice, as stipulated in recital 17, and the discretion given to member states under article 6(3) – echoing the recital – to allow these two series of exceptions. The Court highlights this point, saying that the article "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." (§27), before pointing out 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 …" (§ 28).

However, "Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations," opines the Court (§32), before pointing out that "as soon as the lawyer acting in connection with a transaction as referred to in Article 2a(5) of Directive 91/308 is called upon for assistance in defending the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt, by virtue of the second subparagraph of Article 6(3) of the Directive, from the obligations laid down in Article 6(1), regardless of whether the information has been received or obtained before, during or after the proceedings" and concluding that "an exemption of that kind safeguards the right of the client to a fair trial" (§ 34).

The Court has therefore interpreted article 6(3) in the light of recital 17 and ruled that member states must observe the exemptions provided for in respect of judicial proceedings in accordance with the principle of professional confidentiality. As Chantal Cutajar has observed: "by making compliance of

the instrument with article 6 of the ECRH conditional upon application of this discretionary power, the CJEC has made this provision mandatory."[21] This is the interpretation proposed for adoption by Advocate General Maduro. In his conclusions he said that in his opinion the analysis had "not revealed anything that would invalidate article 2a.5 and 6 of Directive 91/308 as modified by Directive 2001/97, provided that these provisions were interpreted as ruling out any obligation by lawyers to furnish information obtained in the course of representing their clients" (§73).

According to some commentaries[22], the Court had been able to recognise the Directive by employing the "reserve subject to interpretation" device. For our part we see it rather as an illustration of the "conforming interpretation". Chroniclers of Community law, writing in AJDA[23], have noted that "the Court has followed the usual practice of putting forward the interpretation of the Community text most in line with the objectives pursued by Community law and therefore most in compliance with the fundamental rights safeguarded by the Community's system of law [...] There can be no doubt that it has been able to validate the Directive by adopting a "conforming interpretation".

According to the interpretation adopted by the CJEC of the Directive of 4 December 2001 (in its judgement of 26 June 2007), the provisions of article 6, allowing states to exempt lawyers from the information and cooperation requirements where information has been obtained or received in the course of defending or representing a client, must be regarded, both in the light of recital 17 of the Directive and in the interests of having an interpretation of the text that complies with fundamental rights, as an exclusion from such obligations. You will accordingly rule out any submissions based on the assumption that the Directive is in violation of the principle of a right to a fair trial, as the Directive does not violate the right to professional secrecy in the context of judicial proceedings.

The Directive is also contested on the grounds that it fails to comply with article 8 of the European Convention, concerning the right to privacy. As Advocate General Maduro explains in his aforementioned conclusions: "the protection of a lawyer's professional confidentiality rests on two principles: one is procedural, being derived from the fundamental right to a fair trial, the other is substantive, stemming from the fundamental right to privacy. At the procedural level we might add the rights to defence, the right to legal assistance and the right not to incriminate oneself. At the substantive level there is a corresponding requirement that every litigant should be perfectly free to consult a lawyer – it being the latter's professional responsibility to give legal opinions to all those in need of them – and, conversely, that the lawyer should be loyal to his client."

The validity of the Directive must be assessed in the light of both article 6 of the ECHR, as regards the professional confidentiality of lawyers in the context of their judicial activity, and article 8, as regards their advisory work. The case law of the Court of Strasbourg shows that the professional confidentiality of lawyers is an essential component of the right to privacy and is protected as such (see *inter alia* ECHR 16 December 1992 *Niemetz v Germany* concerning the search of a lawyer's office; 25 March 1998 *Kopp v Switzerland*, 20 September 2000 *Foxley v United Kingdom* or 18 July 2006 *Chadimova v Czech Republic* concerning correspondence between a lawyer and his client). The case law of the Court of Justice gives much the same impression. In its judgement on *AM & S Europe Limited v Commission* of 18 May 1982, the Court found that "confidentiality serves the requirement, the importance of which is recognised in all of the member states, 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" (§ 18).

[21] In "Les enseignements de l'arrêt de la CJCE du 26 juin 2007" – La semaine juridique Entreprise et Affaires No 38, 20 September 2007.
[22] In particular "Précisions sur les activités donnant lieu à déclaration de soupçons par les avocats" by Olivier Cachard in La semaine juridique Edition générale No 30 25 July 2007.
[23] AJDA 2007 p. 2248 E. Broussy, F. Donnat and C. Lambert. See also Denys Simon "Lutte contre le blanchiment et secret professionnel de avocats" in Europe No 8 August 2007.

professional confidentiality is essential to the legal profession, in all areas of its activity[24]. Article 66-5 of the law of 31 December 1971 as modified provides that: "In all matters, whether in the domain of counselling or defence, advice given to or intended for a client, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues (with the exception of correspondence marked 'official'), notes of interviews and, more generally, all the items of the file, are covered by professional confidentiality". This principle is clearly reflected in your case law. You have ruled that all correspondence between a lawyer and his client, and in particular legal advice drafted by the lawyer for the client are covered by professional confidentiality (Assemblée 27 May 2005 *Commune d'Yvetot* et *Département de l'Essonne* p. 941). Only a very artificial distinction can be made between work conducted strictly within the context of litigation and work done in a purely advisory capacity. In practice, time spent giving advice to the client often runs into the time spent representing him and all of it must be covered by professional confidentiality, at the risk of undermining the trust that is essential to lawyer-client relations.

In his conclusions, Advocate General Machudo invited the Court of Justice to rule on the validity of the Directive, taking account of the twofold basis of professional confidentiality as it applied to lawyers. But the Court, which was only called upon to address the validity of the Directive in the light of the article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, did not give an explicit ruling regarding information obtained by a lawyer in the course of ascertaining the legal position for their client. As Denys Simon explains in the aforementioned article: "the Court bluntly overruled its Advocate General, displaying an unwonted attachment to the idea that the national judge was competent to determine the scope of the questions raised".

The point was therefore not settled by the judgement of 26 June 2007 and it is up to you to rule for the first time on the compliance of the Directive with article 8 of the European Convention.

It cannot be denied that the contested Directive violates the principle of professional confidentiality by imposing information and cooperation requirements on lawyers whenever they operate outside a judicial framework. Compliance with article 8 of the ECHR requires that such infringement serve a legitimate purpose and be in proportion to the goal pursued. We believe, for reasons similar to those adduced by Advocate General Maduro, that these two conditions are fulfilled.

As Lord Denning has pointed out, professional confidentiality is the privilege of the client, not the lawyer[25]. Observance thereof is one of the most fundamental guarantees of the rule of law.

That is why the principle of confidentiality most be applied without exception in the context of judicial proceedings (it should be borne in mind that article 6 of the ECHR provides for procedural rights without allowing for the possibility of exceptions). In a non-judicial context on the other hand, secrecy may to some extent give way to other imperatives of general interest (it should be borne in mind that article 8 of the ECHR provides that there may be interference by a public authority with the exercise of the right to private and family life such as is necessary in the interests of public safety or for the prevention of disorder or crime. We feel that the general interest in countering money laundering, whose effects may be detrimental to economic and financial systems, is legitimate justification for infringement of the principle of professional confidentiality as it applies to lawyers in a non-judicial context[26].

Are the infringements provided for by the contested Directive in proportion to the goal pursued?

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[24] Here again we quote the conclusions of Advocate General Maduro: "It is an essential function of every lawyer to represent and defend his client and also to aid and counsel him. In this way he guarantees him access not only to justice but also to the law. The latter is no less precious than the former in a society as complex as our own."

[25] In "The due process of law" 1980 quoted in Maduro's conclusions.

[26] On this point, Advocate General Maduro stated that the wish to extend this provision to lawyers seemed legitimate given the likelihood that the latter exercised a wide range of activities going far beyond merely advising and representing their clients in a judicial context. In this situation there was a risk that lawyers, like members of other professions, might become "gatekeepers", enabling money launderers to achieve their illicit ends.

We think so for three sets of reasons.

The first of these has to do with the cases in which the Directive provides that the information and cooperation requirements shall apply to lawyers: first, where they assist in the planning or execution of financial or real-estate transactions; and second, where they act on behalf of and for their client in any financial or real estate transaction. In these cases the lawyer acts as a kind of commercial agent charged with finding the most favourable economic solution for his client. Advocate General Maduro points out that he is in exactly the same situation as a company's financial or legal advisor. We deduce from this that the lawyer is not acting in his essential capacity in such cases.

The second set of reasons has to do with the exemption provided by article 6(3) of the Directive, which applies, in the case of the aforementioned transactions, to "information they receive from one of their clients, in the course of ascertaining the legal position for their client". We feel that the notion of "ascertaining the legal position for their client" must be understood in the light of recital 17 of the Directive. Two important points emerge: first, this activity encompasses that of giving legal advice, which is expressly referred to in the recital (this is the position of Advocate General Maduro); second, the Directive provides for an exception to this exception. So even in cases where legal counselling is being given, the right to professional confidentiality must be waived if "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". We have no hesitation in accepting that these three exceptions to the exemption, covering as they do cases of aiding and abetting that are punishable by law, are justified.

The last series of reasons has to do with the way in which the Directive is to be interpreted. Given that recital 17 establishes the principle that the exemption from the reporting requirement applies where information is obtained either before, during or after judicial proceedings and in the course of ascertaining the legal position for a client, article 6 must clearly be seen as offering lawyers exactly the same protection whether they are acting in the context of judicial activity or ascertaining the legal position for a client. In other words, the Directive requires that lawyers be exempted from any reporting requirement when giving legal advice. Here again we concur with the conclusions of Advocate General Maduro, who interprets article 6(3)2 of the Directive as exempting lawyers who are providing legal advice from any obligation to furnish information (§63).

This being the case, and in the light of our interpretation of the provisions, any submissions based on the view that the Directive, in so far as it concerns the lawyers' duty to ascertain the legal position for a client, represents an excessive infringement of professional confidentiality as protected by article 8 of the ECHR must be ruled out.

You may be reluctant to accept our assessment on this point and prefer to refer the question to the Court of Justice for a preliminary ruling. But, as we have told you, the latter has not given an explicit ruling on the validity of the Directive of 2001 in the light of article 8 of the ECHR.

At first sight there would appear to be grounds for a reference for a preliminary ruling. There are two strong arguments in favour of such a step. The first is related to the interpretation of the Directive we are asking you to adopt, one that would place it in compliance with the Convention. The interpretation could amount to something like a "reserve subject to interpretation", a device well-known both to you and to the constitutional court. However, such a device is part of an assessment procedure and amounts to no more than an implicit acknowledgement of invalidity. In resorting to it you would risk encroaching upon the jurisdiction of the Court of Justice, which has exclusive competence to declare a Community act invalid. The second argument is based on the need to ensure that Community law is applied uniformly throughout the European Union zone. It cannot be ruled out that a "reserve subject to interpretation" issued by a national jurisdiction, being unlikely to be adopted and quite likely to be rejected by the jurisdiction of other member states, might well compromise the unity of the Community legal system.

We would also point out that the Court of Justice recently reaffirmed its *Foto-Frost* case law in a restrictive sense (Grand Chamber 6 December 2005 *Gaston Schul Douane expéditeur BV*). Rejecting the

proposal by Advocate General Colomer, the Court judged that article 234 EC required a national court against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation.[27].

On reflection, these arguments need not delay us any further and we would urge you to rule out the submissions based on the infringement of article 8 of the ECHR without referring the matter for a preliminary ruling. To convince you of the merits of our proposal we shall put forward three sets of considerations.

The first of these echoes what we have already said about the judgement of 26 June 2007. Our interpretation of the 2001 Directive is of the "conforming interpretation" rather than the "reserve subject to interpretation" kind. In no way therefore does it amount to an acknowledgement of invalidity. It is an established fact that the Court of Justice allows national jurisdictions more leeway in interpreting Community acts than in deciding upon their validity. This is perfectly logical given the need for legal cohesion in the European Union, for an interpretation of Community law implies that the national jurisdiction still intends to apply it, whereas a ruling of invalidity blocks any such application. Advocate General Mancini drew this distinction in his conclusions on the *Foto-Frost* judgement. Recognising that an interpretation may be aberrant or contrary to one made in other national jurisdictions, he replied that, in acting in this way rather than ruling an act invalid[28], a judge would not come into conflict with the actual substance of the rule sanctioned by article 189 (new article 249) of the treaty. Ruling out grounds based on invalidity in favour of a conforming interpretation amounts to nothing if not an interpretation. We shall be returning to this point with reference to the *CILFIT* case law (6 October 1982, case 283/81).

And we would point out the Court itself encourages member countries and their jurisdictions to resort to the device of the conforming interpretation. It says it is the responsibility of member countries, when transposing the aforementioned Directives, to adopt an interpretation of the latter that enables them to maintain the right balance between the different fundamental rights protected by the Community's legal system. Then, when applying measures to transpose these Directives, authorities and jurisdictions of member countries are required, not only to interpret their national law in a way that conforms with the said Directives, but also to take care not to adopt an interpretation of the latter that would clash with the said fundamental rights or other general principles of Community law, such as the principle of proportionality (in this connection see the judgements of 6 November 2003 *Lindqvist*, point 87; 26 June 2007 *Ordre des barreaux francophones et germanophone*, point 28; or 29 January 2008 *Promusicae*, point 68 – also delivered in the Grand Chamber). You are clearly empowered to adopt a conforming interpretation.

The second set of considerations refers to the different responsibilities of the member states' jurisdictions and of the Court of Justice.

Not resorting to the preliminary ruling procedure, as we recommend, does not entail a shift in responsibilities. We feel that it is a sign of the resolve you must show in taking full responsibility for Community law, as is incumbent upon a national court.

We referred above to the *Cilfit* case law, according to which there are no grounds for a reference where the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. In the present case, the interpretation we are asking you to accept does not raise any serious difficulties in light of the judgement of 26 June 2007.

[27] The Court explained that the "requirement of uniformity (was) particularly vital where the validity of a Community act (was) in question" (§ 21).

[28] He writes that a judge in a member state who widens the scope of his jurisdiction to the point of ruling a Community provision invalid introduces a factor into the system that tends towards its disintegration.

If we see fit to state that it is clear from the Directive that article 6 thereof requires that lawyers be exempted from the reporting requirements when giving judicial advice, the first reason – as we have already said – is that our interpretation is in line with the one offered by Advocate General Maduro.

The second reason is that, if they are to be coherent, the arrangements established by the Directive require that the activity of lawyers be regarded as indivisible as far as the right to professional confidentiality is concerned. By spelling out that a lawyer is to be exempted from his obligations, "regardless of whether the information has been received or obtained before, during or after the (judicial) proceedings" (§ 34), the Court has, in a roundabout but decisive way, recognised that giving a client legal advice and representing him in judicial proceedings are part of the same process[29].

The third reason is that such an interpretation arises inevitably from the grounds for the judgement of 26 June 2007. By interpreting article 6 of the Directive in the light of recital 17 in respect of judicial procedure, the Court clearly invites you to do the same in respect of the judicial consultations referred to in the same article. The Court thus highlights that "the significance of that exemption is highlighted by recital 17 of Directive 2001/97", adding that "the same recital underlines the fact that such an exemption implies that legal advice remains covered by professional confidentiality" except in the three cases we have already referred to (§24). By accepting our interpretation you will be subscribing to the very arguments employed by the Court of Justice.

Last of all, our position is further reinforced by considerations relating to the sound administration of justice in the European Union.

The approach we are asking you to adopt is in line with the spirit of cooperation between European jurisdictions: between the Conseil d'Etat and the Court of Justice first of all, for you will not be going beyond your remit if, in line with the judgement of 26 June 2007, you merely establish the validity of the contested Directive. But such cooperation is also needed between national jurisdictions. We would point out that the aforementioned *Cilfit* judgement specified one condition (never subsequently referred to), according to which a national jurisdiction, in interpreting a Community ruling, must be convinced that the same evidence would be received in the same way by the jurisdictions of other member states. You must ensure that Community law is applied uniformly. Uniform application may well stem from the *res judicata* by the Court of Luxembourg, but we also believe that the unity of the ruling and its interpretation can be achieved through dialogue between national jurisdictions. Now, we would point out that the interpretation we subscribe to is precisely the same as that of the Belgian Constitutional Court in its judgement of 23 January 2008. Having cited recital 17 of the Directive and the conclusions of the Advocate General, the judgement rules that "information known by a lawyer when exercising the essential missions of his profession [...] namely representing and defending a client in court and giving legal advice even outside legal proceedings remain covered by legal privilege and should not be disclosed to authorities" (B.9.6). The procedure put in place under article 234 of the treaty is not sufficient to guarantee the cohesion of the Community legal system. Such cohesion also depends on dialogue between judges and rapprochement in respect of their case law.

Sound administration of justice militates in favour of economy of procedure. Given that in the context of the loyal cooperation we have just described, you can rule out the objection that the Directive of 2001 is invalid, we feel that it would be as well to settle the dispute without delay, in view of the sensitive nature of the question concerned. The matter is all the more urgent as drafting work is now underway on texts to transpose the Directive of 26 October 2005, which repeals the Directive of 1991 while maintaining its essential features, and the time limit for transposition expired on 15 December 2007.

The other submissions based on the invalidity of the Directive will not keep you long. Bearing in mind the interpretation we have just presented, you will rule out the submission that the Directive would leave it up to member states to decide upon the level of protection to be given to information held by lawyers.

[29] The chroniclers of Community case law, cited above, seem to mean that the culpable silence of a lawyer who knows about money-laundering activities through his non-judicial activity will be dealt with, under the terms of article 6, by the introduction of a procedure before a court.

The absence of a definition of the notion of "judicial" procedure should not be regarded as vitiating the Directive by reason of violation of the principle of legal security. The legislator is bound to resort to a notion that can be applied to the different legal systems of the member states provided that it is not ambiguous, which it is not in this instance. Lastly there is no point in invoking the Charter of Fundamental Rights of the European Union, which is devoid of legal force under current conditions.

If you agree with us, you will rule out submissions that contest the validity of the Directive of 4 December 2001, without having to ask the Court of justice of the European Communities for a preliminary ruling.

We now come to submissions based on the alleged incompliance of the law of 11 February 2004 with articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

When monitoring compliance of this law with the convention you must bear in mind that the law is supposed to transpose the provisions of a directive accurately and unconditionally[30] and also that the validity of this Directive in the light of the Convention has been contested. In this situation, you are required to determine (i) whether the Directive transposed by the law is in compliance with the applicable rules and principles which it allegedly violates, and if so (ii) whether the law faithfully transposes the dispositions of the Directive.

Now that we have finished the first monitoring phase, we can pass straight to the second. At this stage of our argument we should point out that, in this case, to be in compliance with the Directive of 1991 modified by the Directive of 2001, the law of 2004 must transpose it correctly and in its entirety. In view of their content, which relates to the obligations on lawyers and the limits of professional secrecy, the rules laid down by the Directive do indeed fall entirely within the ambit of the law.

As we have already emphasised, professional confidentiality is essential to the work of a lawyer. In their book "Règles de la profession d'avocat", Henri Ader and André Damien write that "it enables the client to place his trust in his adviser and defender" and that "lawyer/client confidentiality is a guarantee both for the client, who is assured that his representative will in no circumstances reveal information confided to him, and for the lawyer and client, who know that a third party, particularly the state and the prosecuting authorities, will not have access to whatever has been said in secret".

Judicial case law[31] used to draw a distinction between the exercise of the right to defence, which was protected by secrecy, and other activities, which were not. The intervention of the legislator has made this distinction obsolete. Article 66-5 of the law of 31 December 1971 as modified (cited above) provides that "In all matters, whether in the domain of counselling or defence, advice given to or intended for a client, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues (with the exception of correspondence marked 'official'), notes of interviews and, more generally, all the items of the file, are covered by professional secrecy".

Violation of professional confidentiality is punishable by criminal sanctions. Article 226-13 of the penal code provides that "the disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000". And article 226-14 of the same code stipulates that "Article 226-13 is not applicable to cases where the law demands or authorises the disclosure of the secret" The full implications are to be found in the case law of the Cour de cassation: "the confidentiality requirement [...], which guarantees the trust needed in the exercise of certain professions or certain jobs, applies to lawyers [...] except where the law provides otherwise and, subject to this proviso, is general and absolute". (1ère civ. 6 April 2004).

[30] It would have been different if the Directive had left member states room for manœuvre, of which the legislator might have taken advantage.
[31] On secrecy see the landmark judgement of 24 May 1862 (Cass. Crim.).

Other relevant texts confirm these requirements. Article 4 of the decree of 12 July 2005 on the professional ethics of the legal profession provides that "the lawyer should not disclose information on any matter where such disclosure contravenes professional confidentiality". Article 2.1 of the RIN (French National lawyers Code of Conduct) stipulates that "the client must be able to confide in the lawyer. The professional confidentiality of the lawyer is a requirement of public policy. It is universal, absolute and unlimited in time. Except where strictly necessary for his own defence before any court and in cases where declarations or revelations are provided for or authorised by the law, the lawyer shall not disclose information on any matter where such disclosure contravenes professional confidentiality".

Given that only the law can relieve lawyers of the professional confidentiality requirement, the definition of the obligations incumbent upon them in countering money laundering, together with the exemptions from these obligations, is a matter for the law insofar as the definition sets limits to the field of activities covered by professional confidentiality.

Let us attempt to check whether the law has transposed the Directive of 2001 correctly and fully. Such a check requires us to outline the difference between the approach taken in the Directive and the one adopted for the Monetary and Financial Code.

The Directive of 1991 distinguishes between (i) the requirement to identify clients and keep data (article 3) and (ii) the requirement to cooperate with the authorities by informing them, on their own initiative, of suspicious transactions (article 6.1a) and furnishing them, at their request, with all necessary information (article 6.1b). The Monetary and Financial Code, for its part, draws a different distinction. Chapter II of Section VI of Book V is devoted exclusively to the furnishing of information on suspicious sums of money or operations. Chapter III addresses other due diligence requirements, namely identification of clients, keeping of information and complying with requests for information. We should point out that article L. 562-4 of the Monetary and Financial Code provides that the reports mentioned in article L. 562-2 be made to "a department placed under the authority of the Minister for the Economy" ie the TRACFIN agency.

The law of 11 February 2004 was amended by the government for the purpose of transposing the Directive of 4 December 2001. Records of parliamentary business show that the legislator intended to comply strictly with the Directive he was transposing. The Garde des Sceaux presented the amendment as follows: "We had to reconcile professional confidentiality with the obligations imposed upon us by the transposition. Without depriving the Directive of all practical effectiveness, we had to make the most of the flexibility it offered member states to establish a special regime for lawyers [...] with respect to the scope of the reporting requirement and the terms and conditions governing it." (Assemblée Nationale 2nd session of 6 January 2004).

As regards Chapter II, the law of 11 February 2004 a new paragraph was added to article L. 562-1, which specifies the establishments and persons to which the requirement to report suspicious activity applies. This new paragraph 12 listed "notaries, bailiffs, receivers and court-appointed administrators, as well as advocates of the Conseil d'Etat and of the Cour de Cassation, and counsel of the Courts of Appeal". As to conditions governing the reporting of suspicions, the article refers to article L. 562-2-1. Under the terms of the latter, these persons are required to report suspicions as stipulated in article L. 562-2 "when in the context of their professional activity, they execute for and on behalf of their customers any financial or real-property transaction or when they participate by assisting their customers with the preparation or execution of transactions relating to: 1. the buying and selling of real property or business concerns; 2. the management of funds, securities or other assets belonging to the customer; 3. the opening of bank current accounts, savings accounts or securities accounts; 4. the organisation of the contributions required to create companies; 5. the formation, administration or management of companies; 6. the formation, administration or management of foreign-law trusts or any similar structure". However, the second paragraph of the same article provides that these persons are not required to report suspicions "when the information was received from one of their clients, or obtained on one of them, within the framework of a legal consultation, unless it took place for money-laundering purposes, or if such persons proceed therewith knowing that their client wished to obtain legal advice for money-laundering purposes, or when they provide their professional services in the interest of that client

in connection with judicial proceedings, whether that information was received or obtained before, during or after those proceedings." Lastly, it should be pointed out the third paragraph of article L. 562-2 provides that in derogation from ordinary law, "advocates of the Conseil d'Etat and of the Cour de Cassation, and legal counsel of the Courts of Appeal send their declarations, as applicable, to the President of the Order of Advocates of the Conseil d'Etat and of the Cour de Cassation, to the president of the order to which the advocate belongs or to the president of the professional body which the counsel belongs to. Those authorities send the declarations sent to them by the advocate or the counsel to the [TRACFIN agency], unless they consider that the suspicion of money laundering is unfounded". This final point is the transposition of the entitlement granted under article 6(3) of the Directive of 1991 as modified, which provides that "In the case of notaries and independent legal professionals, 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) [ie facts that might be an indication of money laundering] and in such case shall lay down the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering."

Thus in all these respects, the law of 11 February 2004 exactly transposes the provisions of the Directive of 4 December 2001.

As to chapter III, the law of 11 February 2004 merely extends the due diligence requirements referred to therein to the persons listed in article L. 562-1 of the same code without explicitly providing for the exceptions and the screening mechanism included in Chapter II. The applicants claim that this omission means that the law is not in compliance with the Convention.

We agree with them on this point: if the law of 2004 were to be interpreted as not including the guarantees provided by the Directive of 2001 along with the reporting requirements, the law would be flawed in two ways: it would not be in conformity with the Directive it was supposed to transpose and it would be in violation of articles 6 and 8 of the ECHR. But this is not how we are asking you to interpret the law.

For we believe that, by virtue of a double textual reference, the persons referred to in paragraph 12 of article L. 562-1 are only subject to the due diligence requirements provided for in chapter III within the limits and conditions laid down for the application of Chapter II.

To define the scope of application of Book V, Section VI, Chapter III of the Monetary and Financial Code, which covers due diligence requirements, the law refers in each of the relevant articles to the persons referred to in article L. 562-1 of the same code. Now, as we have just said, paragraph 12 of this article mentions "Notaries, bailiffs, receivers and court-appointed administrators, as well as advocates of the Conseil d'Etat and of the Court of Cassation, and counsel of the Courts of Appeal, as determined in Article L. 562-2-1" And article L. 562-2-1 contains the restrictive definition of transactions to which the reporting requirement applies, the exemptions in the case of legal counselling or involvement in judicial proceedings, and the institution of intermediation by the President of the National Bar Chamber or the President of the National Chamber of Legal Counsel. Taken in combination, all these legal provisions show that the legislator intended that the guarantees applying explicitly to Chapter II would also be made to apply, implicitly but necessarily, to Chapter III.

You might be reluctant to adopt such a constructive interpretation of the "silence of the law", consisting as it does in admitting that the references to article L. 562-1, whose purpose is to define the scope of application *ratione personae of* Chapter III, also define its scope of application *ratione materiae*, as a result of their being relayed on to article L. 562-2-1.

Three sets of reasons enable us to overcome any reluctance.

The first has to do with your professional duties, which require you whenever possible to favour an interpretation of the law that ensures respect for the hierarchy of rulings. You are familiar with the device of agreeing to an act subject to a given interpretation (see for example Section 3 July 1998 *Bitouzet* p.288). Faced with a literal interpretation of the law, which inevitably leads you to acknowledge

that it fails to comply either with the Directive of 2001 or with the European Convention of Human Rights, and an interpretation based on consideration of a combination of provisions, which enables you to clear the law of any non-compliance, you must choose the latter.

The second has to do with the wishes of the legislator. Records of parliamentary business testify to the importance attached to the task of transposing the Directive of 2001 accurately (see *inter alia* Report no 157 by Mr Lecerf to the Senate). But it also reveals that Parliament was mainly concerned to define the conditions governing the reporting of suspicious activity, seeking a balanced solution that would increase powers to counter money laundering while preserving the "unique character of professional confidentiality as applied to lawyers" (Ms Barèges, rapporteur at the Assemblée Nationale, 2nd session of 6 January 2004). The question of due diligence was rightly considered to be secondary to that of reporting suspicious activity, which was the main focus of the law, and was not addressed separately. It is therefore in keeping with the intentions of the legislator to take all the provisions together and to interpret the law in such a way that the guarantees it has endeavoured to defined apply in the case of all reporting requirements.

The third has to do with the rationale underpinning the process of countering money laundering. The only point of the due diligence requirements is to enable the persons subject to them to report suspicious transactions to TRACFIN, whether on their own initiative or at the agency's request.

The provisions of article L. 563-3 of the Monetary and Financial Code accordingly provide for cases where a transaction does not in itself raise any suspicions. A transaction is considered to be suspicious if it satisfies three objective criteria defined by the article: the scale of the transaction (more than 150,000 euros), unusual complexity and absence of any apparent economic justification. Where all three criteria are met, the institution or person concerned must conduct an individual review of the matter, which will reinforce or negate any suspicion that would justify submission of a report to TRACFIN (on this point see Section 25 July 2007 *Société Dubus*).

Moreover, with respect to disciplinary matters, your statement "Should the checks required under article L. 563-3 fail to establish that the amounts are derived from a legal source, the financial institution, which cannot therefore discount the possibility that these amounts may be derived from drug trafficking or organised crime, must report the transaction as stipulated in article L. 562-2," expressly recognises that "due diligence" involves reporting any suspicious transactions. The Banking Commission has applied the provisions of the Monetary and Financial Code to the letter (31 March 2004 *Société Nextup SA* p. 594, 596 and 853).

If the law is not interpreted as we propose, it will not only be in violation of the Convention but will also be incoherent. The due diligence requirements will be imposed on lawyers without any restriction. If however this diligence is observed and suspicions are aroused, it will only be possible to report to TRACFIN in the particular cases referred to in Chapter II. The overall rationale of the provisions, as well as the purpose they are intended to serve, requires that the due diligence requirements apply to lawyers within the same limits and under the same conditions as the requirement to report suspicious transactions.

If you accept our interpretation, you will admit that the law has accurately transposed the provisions of the Directive as far as the due diligence requirements are concerned and conclude that submissions based on the view that the law of 11 February 2004 is incompatible with articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms must be rejected.

We must now examine the specific arguments against the contested provisions of the decree of 26 June 2006. The applicants are asking for the annulment of just three articles of the Monetary and Financial Code which have been introduced by the contested decree.

Let us begin with article R. 563-3 of the Monetary and Financial Code, which presents no difficulty. This article provides, in the wording derived from the contested decree, that it is up to the financial institutions and persons mentioned in article L. 562-1 to adopt "internal procedures appropriate to their

activity which are designed to meet the requirement to counter money laundering and funding of terrorism [...] as well as internal monitoring systems designed to ensure compliance with these procedures". The second paragraph of the same article provides that these procedures "are defined, as appropriate, either by decree issued by the competent minister or by professional regulations approved by the competent minister, or by a general regulation issued by the AMF (financial markets authority)." It is claimed that this article violates the principles underpinning the independence of lawyers and their freedom to organise their professional activity by making the Minister of Justice competent to approve the internal procedures lawyers must introduce for the purpose of countering money laundering and the funding of terrorism. You will reject this claim: the contested provisions serve only one purpose and could have only one legal effect: to make the provisions in question subject to the same regulations as govern the general organisation of the profession in question. In the case of the legal profession, no regulation confers any such power of approval on the Minister of Justice.

Let us move on to article R. 562-2 of the Monetary and Financial Code. Under the terms of the third paragraph of this article, reworded in line with the contested decree: "Subject to the provisions of the second paragraph of article R. 562-2-2, Notaries, bailiffs, receivers and court-appointed administrators, advocates of the Conseil d'Etat and the Court of Cassation, counsel of the Courts of Appeal and court-appointed auctioneers are individually required to report to the TRACFIN agency at its request and to obtain receipts, whatever the manner in which they conduct their professional practice".

It is claimed that this article, inasmuch as it requires the professionals concerned to respond individually to requests for information from the TRACFIN agency, violates the provisions of article L. 562-2-1 of the Monetary and Financial Code, which rules out any direct contact between the reporting lawyer and the agency established under the terms of article L. 562-4. In defence of the article, the Minister of Finance maintains that the contested provisions relating to requests for information by TRACFIN do not violate article L. 562-2-1, which only applies to reports of suspicions.

But this interpretation does not hold up in light of the interpretation we have just offered of the legal provisions of the Monetary and Financial Code. Given that (i) the provisions of article L. 562-1, as we have interpreted them, provide that the persons referred to in paragraph 12 of the article are only subject to the reporting and the other due diligence requirements within the conditions set forth in paragraphs 8 and 9 of article L. 562-2-1 and (ii) the article provides that information submitted by the persons concerned to the TRACFIN agency is to be filtered, as appropriate, through the president of the order to which the advocate belongs or the president of the professional body to which the counsel belongs, the contested dispositions violate the law by requiring direct contacts between the parties concerned and the TRACFIN agency, when the parties comply with requests for information from the latter.

We would like to add two clarifications.

On this point the law of 11 February has gone beyond the provisions of the 2001 Directive, which, as we have seen, envisaged no more than a form of intermediation for the reporting of suspicious activity. There is nothing to prevent such an arrangement. We would further point out that article 23 of the Directive of 26 October 2005 authorises member states to designate self-regulatory bodies to which reports should be made in response to requests for information. In this respect French law has anticipated developments in Community legislation. We might add, although it is not relevant to the case in point, that article 23 of the 2005 Directive has left this body without any filtering function and limited its role to that of forwarding information.

We also believe that the use of an intermediary body would provide an important guarantee of lawyers' professional confidentiality and that there is therefore no justification for the asymmetrical arrangement provided for by the contested provisions. We feel that the involvement of the president of the order or professional body is necessary to ensure that there is no infringement of professional confidentiality except where strict compliance with the law demands it, whether in the event of volunteering information or supplying it at the request of TRACFIN. We would also point out that, in its judgement of 23 January 2008, the Constitutional Court of Belgium adopted an interpretation of the contested law that led to the introduction of similar provisions, designed to ensure that the guarantee provided by the

involvement of the President of the Order of Advocates lost none of its effectiveness. It was argued that the risk of unwarranted infringement of professional confidentiality [...] was no less during subsequent discussion of actual money laundering or funding of terrorism or of indications thereof than at the first contact". The preservation of relations of trust between the lawyer and his client demanded the guarantee provided by the involvement of an intermediary.

We shall end with article R. 563-4 of the Monetary and Financial Code. Under the terms of this article: "The persons referred to in 12 of Article L. 562-1 are required to make the declaration stipulated in Article L. 562-2 when, in the context of their professional activity, they execute for and on behalf of their customers any financial or real-property transaction or when they participate by assisting their customers with the preparation or execution of transactions relating to: (1) The buying and selling of real property or business concerns; (2) The management of funds, securities or other assets belonging to the customer; (3) The opening of bank current accounts, savings accounts or securities accounts; (4) Organisation of the contributions required to create companies; (5) The formation, administration or management of companies; (6) The formation, administration or management of foreign-law trusts or any similar structure."

It is claimed that, by failing to provide for any exemptions from the obligations stipulated in paragraph 12 of article L. 562-1, again in respect of information in the possession of or received by lawyers in the context of legal counselling[32], article R. 563-4 is illegal.

If we had established, by raising an objection of illegality, that the law of 11 February 2004 was not in compliance with the Convention because the due diligence requirements were not coupled with the required exceptions, the regulatory authority could not have intervened to ensure that the requirements flowing from the 2001 Directive were met. As we have already said, the area of activity to which the requirements apply – corresponding in effect to those cases in which they are required to relinquish their professional confidentiality – is determined solely by the law. Admittedly, in the event that legal provisions prove to be incompatible with Community rulings, it is for the national administrative authorities, subject to review by the courts, to instruct their departments not to apply them until they have been amended. However, you have ruled that such incompatibility does not provide these authorities with a legal basis entitling them to enact regulatory provisions to replace these legal provisions (27 July 2006 *Association "Avenir de la langue française"* in Recueil). The need to give full effect to Community requirements does not affect the way competences are distributed between laws and regulations. With respect to article R. 563-4 of the Monetary and Financial Code, the regulatory power would not have been competent to provide for an exception in the case of judicial procedures. But you would not have been able to criticise it, given that the decree is not being contested in this respect.

But we have adopted a conforming interpretation of the law, according to which the persons referred to in paragraph 12 of article L. 562-1 are only subject to due diligence requirements within the limits laid down by article L. 562-2-1.

We are prepared to accept that the regulatory authority has attempted, in adopting the contested article, to make explicit what is implicit in the law, in order to make the ruling more accessible and easier to explain. You accept the legality of a decree that does no more than recapitulate rules that are legally applicable provided that, in so doing, it does not encroach upon the domain of the law (Assemblée, 16 January 1981, *Fédération des associations de propriétaires et agriculteurs de l'Ile de France et Union nationale de la propriété immobilière* p.19). As the Government Commissioner Alain Bacquet explained in his conclusions on this decision: "[...] a decree is not necessarily illegal because it bears on a matter that is the preserve of the legislator and has already been dealt with by him. According to your case law, the regulatory authority responsible for the execution of laws can always invoke a general principle of law or a legislative rule, provided that it simply applies it without either extending it or setting limits to its application (Assemblée, 10 May 1974, *Barre et Honnet* p.276) [...] It may also interpret, explain or

[32] Except in cases where the person concerned is involved in money laundering activity, where the legal advice is provided for the purpose of money laundering and where the person acts in the knowledge that their clients wish to obtain legal advice for that purpose.

clarify rules laid down by the legislator, though without modifying their nature or extending their scope." (Section, 12 March 1965, *Fédération des chambres syndicales de négociants importateurs de la métallurgie et de la mécanique* p.165; 19 December 1979, *Société de droit anglais Hoverlloyd Limited* p.474).

However the contested provision does no such thing. It simply recapitulates the exemptions provided for in the context of legal proceedings without mentioning those relating to legal counselling. If the regulatory authority's intention had been to recapitulate the law, it should have reproduced it in its entirety. Given that it has failed to do so, article R. 563-4 has misrepresented the scope of application of the law and should therefore be annulled.

If you agree with us, you will rule two partial annulments of the decree of 26 June 2006: (i) that of article 1, to the extent that under paragraph III of article R. 562-2 of the Monetary and Financial Code it provides for direct contacts between the persons listed in paragraph 12 and the TRACFIN agency, in the event of these persons' furnishing information at the latter's request; and (ii) that of paragraph III of article 2 (introducing an article R. 563-4 recapitulating the requirements imposed on persons referred to in paragraph 12 of article L. 562-1) to the extent that it has not included the proviso regarding information obtained or received in the context of judicial counselling. You will dismiss the remainder of the form of order sought in the applications. You will order the state, as the unsuccessful party in this affair, to pay the Council of Bars and Law Societies of Europe the sum of 4,000 euros, in accordance with the requirements of article L. 761-1 of the Administrative Justice Code.

To end these lengthy conclusions, we would like to add two final observations.

We must emphasise that the decision you make is of great theoretical importance for the interrelation of European norms. The Kelsenian pyramid is no longer capable of doing justice to the relations between the different legal systems: national law, Community law and the law of the European Convention. Legal plurialism is a boon provided that it is properly organised[33]. Promoting coherence between normative networks is a weighty responsibility for the courts: in your decision on *Arcelor* you clarified the relationship between our constitutional system and the Community legal system. The cases before us provide you with an opportunity to complete the task of putting things to order. We have endeavoured to satisfy a twofold objective: to achieve the greatest possible reconciliation between Community laws and the requirements of the Convention and to ensure the highest level of protection of fundamental rights. You are not alone in pursuing this objective: in addition to the institutionalised dialogue with the Court of Luxembourg, spontaneous but crucial dialogues are underway with the Court of Strasbourg and national jurisdictions.

It is significant that this theoretical construct needs to be developed in the context of a case that calls into question one of the most crucial rights provided by our legal system: the professional confidentiality of lawyers. The monitoring procedure we would ask you to adopt entails acceptance of an interpretation that is consistent with the requirements of the European Convention on Human Rights, the Directive of 2001 and the transposing law of 2004. It leads to a twofold annulment of the decree of 26 June 2006 to the extent that the latter has not guaranteed the same level of protection. We do not underestimate the importance of the fight against money laundering, which is vital to the economic and financial security of the European states. But this fight cannot be waged at all cost. Higher imperatives require that certain areas of life must be protected. On the question of professional privilege we would like to quote Emile Garçon, as many have before us: writing in his annotated penal code about the confidentiality of the doctor, the priest and the lawyer, he observes that "it is important to the social order that these confidants be bound by discretion and required to observe a strict, unconditional silence, for nobody would dare to confide in them if they feared that their secret might be divulged." By stating now that the professional confidentiality of lawyers must, in cases where it is clearly justified, prevail over all other considerations, you are reinforcing one of the essential pillars of our society. The European legal area we share is founded upon common values: your decision will be all the more striking and resonant for

[33] On this point see Mireille Delmas-Marty's article "Le pluralisme ordonné et les interactions entre ensembles juridiques" Recueil Dalloz 2006 p. 951 25.

being based on respect for the fundamental rights that are protected by European institutions and of which we are all, European and national jurisdictions alike, the ultimate guarantors.