Advokatrådet

ADVOKAT SAMFUNDET

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L 102: Forslag til lov om ændring af blandt andet hvidvaskloven

Ved brev af 29. januar 2009 afgav Advokatrådet et høringssvar over et udkast til ovennævnte lovforslag.

Advokatrådet er efter hvidvaskloven tillagt beføjelser til at føre tilsyn med, at advokaterne overholder lovens krav. Advokatrådet yder i den forbindelse både skriftlig og mundtlig vejledning til advokater om lovens indhold.

Advokatrådet har derfor en særlig interesse i ændringer af hvidvaskloven. Dette er baggrunden for, at Advokatrådet har besluttet at rette henvendelse til Folketingets Erhvervsudvalg vedrørende lovforslaget.

Advokatrådet kan på baggrund af den kommenterede høringsoversigt og det fremsatte lovforslag konstatere, at en række af de forhold vedrørende lovudkastet, der blev påpeget fra en bred kreds af myndigheder og organisationer, har ført til væsentlige ændringer i det fremsatte lovforslag.

Advokatrådet støtter disse ændringer, men kan samtidig konstatere, at Finanstilsynet fastholder forslaget om at ændre i kravene til de indberetningspligtige virksomheders og organisationers forpligtelse til at identificere den reelle ejer, jf. hvidvasklovens § 12, stk. 3.

Det fremsatte forslag er efter Advokatrådets opfattelse problematisk, og Advokatrådet finder samtidig, at Finanstilsynets redegørelse i den kommenterede høringsoversigt på centrale punkter kan give anledning til misforståelser ved den praktiske administration af loven.

Advokatrådet har i sit høringssvar af 29. januar 2009 redegjort for, at den foreslåede ændring af § 12, stk. 3 indebærer en skærpelse i forhold til direktivet, og at de danske regler dermed går videre end direktivet kræver. Advokatrådet har samtidig redegjort for, hvilke problemer, der er forbundet med en sådan videregående implementering.

Skærpelsen består i, at der efter forslaget ikke længere skal foretages "rimelige" foranstaltninger for at klarlægge en virksomheds ejer- og kontrolstruktur, og dermed den reelle ejer. I stedet stilles der efter forslaget nu krav om, at virksomhedens ejer- og kontrolstruktur "skal klarlægges", ligesom det nu er et krav, at der indhentes legitimationsoplysninger om den reelle ejer. Af bemærkningerne til forslaget fremgår, at der er tale om en skærpelse af kravene.

En ordlydsfortolkning af såvel den foreslåede § 12, stk. 3 som de ledsagende bemærkninger, kan efter Advokatrådets opfattelse kun føre til, at der indføres et absolut krav om, at den reelle ejer altid skal identificeres og legitimeres. Imidlertid fremgår det af den kommenterede høringsoversigt, side 18, at der efter Finanstilsynets opfattelse ikke er tale om et absolut krav, idet der trods den foreslåede ændring fortsat er mulighed for, at virksomhederne på baggrund af en risikovurdering kan undlade at klarlægge den reelle ejer. I samme høringsoversigt fastslår Finanstilsynet imidlertid, at forslaget indebærer en skærpelse, som indebærer en byrde virksomhederne.

Advokatrådet finder, at den af Finanstilsynet anlagte fortolkning indebærer en sammenblanding af spørgsmålet om, hvornår der er tale om et absolut krav, og hvornår et krav kan opfyldes gennem en risikobaseret tilgangsvinkel. Advokatrådet finder endvidere, at Finanstilsynets bemærkninger i høringsoversigten indebærer så væsentlige, og nye, fortolkningsbidrag til bestemmelsens indhold, at det i givet fald som minimum bør afspejle sig i lovforslagets bemærkninger.

Advokatrådet er desuden usikker på, hvad den præcise rækkevidde af det fremsatte ændringsforslag er, såfremt Finanstilsynets fortolkning lægges til grund. Navnlig ønsker Advokatrådet præciseret, hvornår det i fremtiden ud fra en risikovurdering er tilstrækkeligt at foretage "rimelige" foranstaltninger til afklaring af ejerforholdet, herunder eksempler på, hvordan bestemmelsen om en risikobaseret tilgangsvinkel kan praktiseres, samt hvornår en sådan risikovurdering kan føre til, at der ikke skal indhentes identitetsoplysninger om den reelle ejer.

Advokatrådet har noteret sig, at Finanstilsynet i den kommenterede høringsoversigt har anført, at det foreslåede lovkrav *svarer til direktivets krav.* Dette er efter Advokatrådets opfattelse ikke en retvisende beskrivelse af direktivets krav.

Det følger af artikel 8, stk. 1, litra b, at kundelegitimationsproceduren omfatter "*eventuel* identifikation af den reelle ejer", idet der skal træffes "*risikobaserede og passende foranstaltninger*" for at kontrollere dennes identitet (Advokatrådets fremhævning). Der er således efter direktivet klart tale om et eventualkrav og ikke et absolut krav. Som nævnt ovenfor, kan ordlyden og bemærkningerne til den foreslåede § 12, stk. 3 vanskeligt forstås anderledes, end at der efter den danske lov fremover vil være tale om et absolut krav.

Som det fremgår, er der tale om teknisk ganske vanskelige regler. Der kan derfor være grund til at fremhæve, at ovenstående har væsentlig praktisk betydning for omfanget af de krav, der stilles til de virksomheder, der omfattes af loven, og at den foreslåede ændring desuden vil gøre det vanskeligt for virksomhederne at forudberegne de krav, der konkret stilles til virksomhedernes kundekendskab. Advokatrådet skal herved henvise til den redegørelse for de praktiske problemer med forslaget, der er indeholdt i rådets høringssvar, og som ikke er omtalt nærmere i Finansministeriets høringsoversigt.

Advokatrådet skal således fremhæve, at en forpligtelse til at *indhente* identitetsoplysninger på f.eks. aktionærer i et selskab, der ejer et selskab, der ejer et selskab, der er kunde hos en advokat eller anden virksomhed omfattet af loven, er en ganske vidtgående forpligtelse, der i praksis kan være vanskelig at opfylde. Hertil kommer, at det alene vil være i et ganske begrænset antal tilfælde, hvor der kan forventes efterfølgende at være selvstændig merværdi for efterforskningen af hvidvask i de nævnte oplysninger. Advokatrådet skal således foreslå, at der indhentes dokumentation fra Finanstilsynet for, at de gældende regler indebærer en konkret risiko for overtrædelser, eller væsentligt vil kunne forhindre opklaring af begåede overtrædelser. Advokatrådet har forståelse for ønsket om at imødekomme internationale anbefalinger på området, men skal samtidig fremhæve, at sådanne anbefalinger ikke bør føre til væsentlig mere vidtgående lovgivning, end påkrævet for at tilgodese lovens formål. Advokatrådet savner således konkret dokumentation for behovet for de anbefalinger, der ligger bag ønsket om ændringer af § 12, stk. 3.

Advokatrådet skal både ud fra lovtekniske grunde og på baggrund af rådets opgave som tilsynsmyndighed med advokaters overholdelse af hvidvasklovens krav anmode om, at det nøje overvejes, hvorvidt det er hensigtsmæssigt at gennemføre den foreslåede ændring, herunder i lyset af de fortolkningsbidrag, der fremgår af Finanstilsynets høringsoversigt.

Advokatrådet skal desuden som også anført i rådets høringssvar på ny anbefale, at der nedsættes en arbejdsgruppe med repræsentanter for de virksomheder mv., der omfattes af loven, med henblik på at tilvejebringe et samlet, gennemarbejdet lovgrundlag på hvidvaskområdet, som lever op til de kvalitetskrav, der kan stilles til lovgivningen. Advokatrådet finder således ikke, at den gældende hvidvasklov lever op til de krav om klarhed, forudsigelighed og konsistens, som bør være gældende for navnlig love med et indgribende indhold.

Særligt vedrørende advokaters pligt til at foretage indberetning

Finanstilsynet har i høringsoversigten anført, at det ikke er muligt at undtage advokater fra underretningspligten ved mistanke om hvidvask.

Advokatrådet skal i den forbindelse fremhæve, at der i den seneste tid er afsagt 2 domme af henholdsvis den belgiske og franske forfatningsdomstol, som med

henvisning til fundamentale retsprincipper, herunder principperne i den europæiske menneskeretskonvention medfører så væsentlige begrænsninger i medlemsstaternes muligheder for at stille krav til advokaters indberetningspligt, at den danske lovs i forvejen uklare regulering af forholdet mellem advokaters tavshedspligt og hvidvasklovens krav om indberetning af mistanke bør tages op til snarlig revision.

Efter den danske hvidvasklov er advokater undtaget, når de repræsenterer eller forsvarer en klient under eller i forbindelse med en retssag, jf. hvidvasklovens § 8. endvidere følger det af § 8, at advokater er undtaget, når de "fastslår den pågældende klients retsstilling". Rækkevidden af sidstnævnte er i både direktivet og i den danske lov uklart beskrevet. Med den franske og den belgiske forfatningsdomstols afgørelser er det imidlertid fastslået, at advokater, der modtager oplysninger som led i deres udøvelse af advokathvervet er undtaget fra kravet om indberetning af mistanke om hvidvask, idet dette medfører en uproportional tilsidesættelse af tavshedspligten.

Med de to afgørelser, som fortolker det europæiske regelsæt, der også bærer de danske regler, er det fastslået, at advokaters tavshedspligt og værnet herom er en hjørnesten i et retssamfund. I lyset af de nævnte afgørelser finder Advokatrådet det nødvendigt, at spørgsmålet om advokaters indberetningspligt efter hvidvaskloven tages op til en nærmere overvejelse med henblik på i lovsform klart at fastsætte betingelserne for, hvornår advokater i givet fald er omfattet af en forpligtelse til at tilsidesætte tavshedspligten og videregive oplysninger til myndighederne. behovet for et klart regelsæt understreges af, at indberetningspligten indebærer en vanskelig balancegang for advokater. Advokaters tavshedspligt er således – når bortses fra hvidvaskområdet, og anmodninger udsted ved en dommerkendelse – absolut. Det indebærer, at advokater alene må bryde deres tavshedspligt, når der er sikker hjemmel hertil. I det lys er det efter Advokatrådets opfattelse særdeles problematisk, at hvidvaskloven ikke indeholder en klar afgrænsning af, hvornår pligten til at indberette mistanke om hvidvask tilsidesætter advokatens tavshedspligt.

Advokatrådet deltager fortsat gerne i de foreslåede udvalgsarbejder med henblik på at sikre et gennemarbejdet lovgrundlag.

Der vedlægges kopi af afgørelsen fra den belgiske forfatningsdomstol (affattet på engelsk) og af den franske forfatningsdomstol (affattet på fransk.)

Kopi af brevet er samtidig sendt til Finanstilsynet, Erhvervsministeriet og Justitsministeriet.

Med venlig hilsen

Henrik Rothe

Cause-List Numbers 3064 and 3065
Judgment No. 10/2008 of 23 January 2008

JUDGMENT

In the matter of the actions for the annulment of Articles 4, 5, 7, 25, 27, 30 and 31 of the Act of 12 January 2004 "amending the Act of 11 January 1993 for the prevention of the use of the financial system for the purpose of money laundering, the Act of 22 March 1993 on the status and supervision of credit institutions, and the Act of 6 April 1995 on the status and supervision of investment firms, intermediaries and investment advisers", instituted by the *Ordre des barreaux francophones et germanophones* (Association of French and German-Speaking Bars) and others.

The Constitutional Court,

composed of Presidents M. Melchior and M. Bossuyt, the judges P. Martens, R. Henneuse, E. De Groot, L. Lavrysen, A. Alen, J.-P. Snappe and J.-P. Moerman, and, in accordance with Article 60 (1) of the Special Act of 6 January 1989, President Emeritus A. Arts, assisted by the registrar, P.-Y. Dutilleux, and chaired by President M. Melchior,

delivered the following judgment after deliberations:

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I. *Subject of the Actions for Annulment and the Administration of Justice*

a. By means of an application sent to the Constitutional Court on 22 July 2004 by registered post, and which was received by the Registrar on 23 July 2004, an action was lodged for the annulment of Articles 4, 27, 30 and 31 of the Act of 12 January 2004 "amending the Act of 11 January 1993 for the prevention of the use of the financial system for the purpose of money laundering, the Act of 22 March 1993 on the status and supervision of credit institutions, and the Act of 6 April 1995 on the status and supervision of investment firms, intermediaries and investment advisers" [published in the *Belgisch Staatsblad* (Belgian Official Journal) of 23 January 2004, second edition), by the *Ordre des barreaux francophones et germanophones* (Association of French and German-Speaking Bars), with registered office at Gulden Vlieslaan 65, 1060 Brussels, and the French Bar Association of Brussels, with registered office at the Law Courts, Poelaertplein 1, 1000 Brussels.

b. By means of an application that was sent to the Constitutional Court on 22 July 2004 by registered post, and which was received by the Registrar on 23 July 2004, an action was lodged for the annulment of Articles 4, 5, 7, 25, 27, 30 and 31 of the same Act by the Flemish Bar Council, with registered office at Koningsstraat 148, 1000 Brussels and the Dutch Bar Association of Brussels, with registered office at the Law Courts, Poelaertplein 1, 1000 Brussels.

These cases, registered under numbers 3064 and 3065 of the Constitutional Court's cause-list respectively, were joined.

Statements were submitted by:

- the Council of Bars and Law Societies of Europe (CCBE), whose registered office is located at Blijde-Inkomstlaan 1-5, 1040 Brussels;

- the Liège Bar Association, whose registered office is located at the Law Courts, place Saint-Lambert; 4000 Liège;

- the Belgian Cabinet.

The applicants submitted answers. The Council of Bars and Law Societies of Europe, the Liège Bar Association and the Belgian Cabinet also submitted statements of reply.

The following persons entered an appearance at the public hearing of 11 May 2005:

. *mr.* F. Tulkens, lawyer at the Brussels bar, on behalf of the applicants in case no. 3064;

. *mr.* M. E. Storme, lawyer at the Brussels bar, on behalf of the applicants in case no. 3065;

. *mr.* E. Lemmens, lawyer at the Liège bar, on behalf of the Liège Bar Association;

. *mr.* M. Mahieu, lawyer at the Court of Cassation, on behalf of the Council of Bars and Law Societies of Europe;

. *mr.* P. Peeters, lawyer at the Brussels bar, on behalf of the Belgian Cabinet;

- the judge-reporters, J.-P. Moerman and E. De Groot, issued a report;

- the aforementioned lawyers presented their arguments;

- and the cases were taken under advisement.

By means of interlocutory ruling no. 126/2005 of 13 July 2005, published in the *Belgisch Staatsblad* (Belgian Official Journal) of 2 August 2005, the Court referred the following question to the European Court of Justice for a preliminary ruling:

"Does Article 1 (2) of Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering infringe the right to a fair trial which is guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and, as a consequence, Article 6 (2) of the Treaty on European Union, insofar as the new Article 2a (5) which it inserted into Directive 91/308/EEC requires the inclusion of members of independent legal professions, not excluding the profession of lawyer, in the scope of that directive, which in essence has the aim of imposing on the persons and institutions targeted by it an obligation to inform the authorities responsible for combating money laundering of any fact which might be an indication of such money laundering (Article 6 of Directive 91/308/EEC, replaced by Article 1(5) of Directive 2001/97/EC)?"

The European Court of Justice gave its preliminary ruling on the question in its judgment of 26 June 2007.

By means of a ruling of 19 July 2007, the Court set the date for the hearing as 4 October 2007, after having invited the parties to formulate any observations they may have had in a supplementary statement by no later than 17 September 2007, a copy of which had to be served on the other parties within the same period, as a result of the aforementioned judgment of the European Court of Justice.

The applicants, the Council of Bars and Law Societies of Europe, the Liège Bar Association and the Belgian Cabinet submitted written observations.

The following persons entered an appearance at the public hearing of 4 October 2007:

. *mr.* F. Tulkens, lawyer at the Brussels bar, on behalf of the applicants in case no. 3064;

. *mr.* M.E. Storme, lawyer at the Brussels bar, on behalf of the applicants in case no. 3065;

. *mr.* E. Lemmens, lawyer at the Liège bar, on behalf of the Liège Bar Association;
. *mr.* M. Mahieu, lawyer at the Court of Cassation, on behalf of the Council of Bars and Law Societies of Europe;

. *mr.* L. Swartenbroux, lawyer at the Brussels bar, on behalf of the Belgian Cabinet;

- the judge-reporters, J.-P. Moerman and E. De Groot, issued a report;

- the aforementioned lawyers presented their arguments;

- and the cases were taken under advisement.

The provisions of the Special Act of 6 January 1989 on the administration of justice and the use of languages were applied.

II. *In law*

- A -

With regard to the admissibility of the actions for annulment and the third-party interventions

A.1. By means of its judgment no. 126/2005 at 13 July 2005, the Constitutional Court held that the *Ordre des barreaux francophones et germanophones* (Association of French and German-Speaking Bars, hereinafter the OBFG), the Flemish Bar Council, the French Bar Association of Brussels, and the Dutch Bar Association of Brussels (the applicants), and the Liège Bar Association (the intervener) had demonstrated the required interest to request an annulment of the provisions that relate to the profession of lawyer and which could directly and unfavourably affect the situation of lawyers, which is moreover not disputed by the Belgian Cabinet.

A.2. The Constitutional Court held in the same judgment that the Council of Bars and Law Societies of Europe had demonstrated the required interest to intervene in actions for the annulment of provisions which could directly and unfavourably affect the situation of lawyers, and accordingly rejected the plea of inadmissibility that the Belgian Cabinet had put forward with regard to that intervener.

With regard to the grounds for annulment

With regard to Articles 4, 7, 25, 27, 30 and 31 of the Act of 12 January 2004 (first ground for annulment in both cases)

A.3.1. The OBFG and the French Bar Association of Brussels contend that Article 4 of the Act of 12 January 2004, insofar as it makes the Act of 11 January 1993 applicable to lawyers, so that they are henceforth obliged to inform the President of the Bar Association whenever they ascertain facts which they know or suspect are related to money laundering, is inconsistent with the fundamental principles of the independence of the lawyer and professional secrecy, which are the very cornerstone of the rights of defence entrenched in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 6 (2) of the Treaty on European Union and Article 48 (2) of the Charter of Fundamental Rights of the European Union. They accordingly complain of an infringement of Articles 10 and 11 of the Belgian Constitution, read in conjunction with the aforementioned international provisions. They are of the opinion that the infringement by the Act of 12 January 2004 on the independence and professional secrecy of the lawyer is disproportionate and incompatible with Belgium's international obligations concerning human rights.

A.3.2. The Flemish Bar Council and the Dutch Bar Association of Brussels are of the opinion that Articles 4, 7, 25, 27, 30 and 31 of the Act of 12 January 2004 infringe Articles 10 and 11 of the Belgian Constitution, whether or not read in conjunction with Articles 6, 7 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the general principles of the right of defence, Articles 47 and 48 of the Charter of Fundamental Rights of the European Union and Articles 12 and 14 of the Belgian Constitution. They explain that making the Act of 11 January 1993 applicable to lawyers impacts on the very essence of the legal profession and, as such, generally prejudices the professional secrecy and independence of the lawyer, as well as a client's fundamental right to a lawyer who takes all his initiatives in a case solely in the interests of his client. They further add that the provisions challenged by them lead to the self-incrimination of the client.

A.3.3. The applicants contend that the profession of lawyer presents specific characteristics that are incompatible with the provisions they are challenging and that professional secrecy is in the public interest, that it arises from the nature of the profession of lawyer itself, belongs to the essence of the profession and constitutes an essential guarantee for the rights of defence.

A.3.4.1. The Belgian Cabinet is of the opinion that the applicants are wrongly relying on Articles 47 and 48 of the Charter of Fundamental Rights of the European Union because this Charter, given that it is included in Part II of the draft Treaty establishing a Constitution for Europe (TCE), will only come into force with that Constitution and is for the meantime only political in scope.

A.3.4.2. The response of the OBFG and the French Bar Association of Brussels is that it is possible that by the time the Constitutional Court must make its decision, the Treaty will have been ratified and the Charter will form part of the standards submitted to that Court for testing.

A.3.5. The Belgian Cabinet is of the opinion that the applicants in case no. 3065 do not explain how Articles 12 and 14 of the Belgian Constitution are supposedly infringed by the contested provisions. It therefore contends that the ground for annulment does not comply with the requirements of Article 6 of the Special Act of 6 January 1989. The same applies to the argument that is derived from the infringement of Articles 7 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

A.3.6.1. On the merits, the Belgian Cabinet explains it is evident both from the context of the contested legislation and from the analysis of the provisions thereof, that the Belgian federal legislator actually did take into account the specific characteristics of the profession of lawyer, in the same way as the European legislator, and that this is clear both from the limitation of the scope of application of the law on money laundering with regard to lawyers and from the specific rules that have been implemented in order to take into account professional secrecy and the rights of defence. It concludes from this - in light of the lawful purpose of combating money laundering and from the determination that criminal organisations are increasingly relying on legal professions to perform their money laundering activities - that the legislator was within its powers to extend the obligations under the Act of 11 January 1993 to lawyers.

A.3.6.2. The response of the OBFG and the French Bar Association of Brussels is that the Belgian Cabinet did not take into account the principle of independence that is attributed to the lawyer, both by the European Court of Justice and the European Court of Human Rights. They further add that the distinction that is based on whether the lawyer's activities are essential or secondary in nature is legally untenable, unless one is to follow the route of greater legal uncertainty.

A.3.6.3. The response of the Flemish Bar Council and the Dutch Bar Association of Brussels is that there is a fundamental difference between the "mere" breach of professional secrecy, and betraying and incriminating the client, which absolutely violates the relationship of trust between him and his lawyer.

A.3.6.4. The Council of Bars and Law Societies of Europe is of the opinion that equating lawyers to the other persons referred to in the Act of 11 January 1993 goes further than appears at first sight and that the list of the few activities during which the lawyer is subject to the obligations under that Act, as included in the new

Article 2 (2) of the Act of 11 January 1993, makes it impossible to protect all the traditional activities of the lawyer. It further adds that the involvement of the President of the Bar Association is likewise not of such a nature that it limits the consequences of the contested provisions for the practice of the profession of lawyer. It calls to mind that the independence, professional secrecy and duty of loyalty, as specific characteristics of the legal profession, contribute to the trust of the public in those officers of the court and that this trust does not only apply to some of the lawyer's specific mandates. It believes that the contested Article 4 radically prejudices the guarantees of a fair trial and that the disproportionate character thereof is even more evident from the existence of alternative solutions with a view to the fight against money laundering, namely the existing disciplinary and repressive measures.

A.3.7.1. As far as the applicants' contention that the Act supposedly leads to the self-incrimination of the client is concerned, the Belgian Cabinet observes that the contested Act does not in any way compel the client to disclose the offences of money laundering himself and that the limited scope of the Act must be taken into account given that a lawyer who defends a client prosecuted for money laundering does not fall under the scope of the Act. It further adds that the argument is based on the incorrect premise that the client and lawyer identify with each other completely.

A.3.7.2. The response of the Flemish Bar Council and the Dutch Bar Association of Brussels is that the lawyer is the main emphasis in the issue of self-incrimination in the case law of the European Court of Human Rights.

A.4.1. The applicants, the interveners and the Belgian Cabinet unanimously acknowledge that the contested Act of 12 January 2004 transposes the provisions of Directive 2001/97/EC into Belgian national law.

A.4.2. At the request of the OBFG and the French Bar Association of Brussels, the Court by means of its judgment no. 126/2005 of 13 July 2005, referred the following question for a preliminary ruling to the European Court of Justice under Article 234, first paragraph, (b) of the Treaty Establishing the European Community:

"Does Article 1 (2) of Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering infringe the right to a fair trial which is guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and, as a consequence, Article 6 (2) of the Treaty on European Union, insofar as the new Article 2a (5) which it inserted into Directive 91/308/EEC requires the inclusion of members of independent legal professions, not excluding the profession of lawyer, in the scope of that directive, which in essence has the aim of imposing on the persons and institutions targeted by it an obligation to inform the authorities responsible for combating money laundering of any fact which might be an indication of such money laundering (Article 6 of Directive 91/308/EEC, replaced by Article 1(5) of Directive 2001/97/EC)?".

A.4.3. The European Court of Justice gave its preliminary ruling on the question posed by the referring Court, by means of a judgment of 26 June 2007 in the case C-305/05:

"The obligations of information and of cooperation with the authorities responsible for combating money laundering, laid down in Article 6 (1) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, and imposed on lawyers by Article 2a (5) of Directive 91/308, account being taken of the second subparagraph of Article 6 (3) thereof, do not infringe the rights of fair trial as guaranteed by Article 6 of the Convention for the Objection of Human Rights and Fundamental Freedoms and Article 6 (2) EU".

A.5. The OBFG, the French Bar Association of Brussels, the Council of Bars and Law Societies of Europe and the Liège Bar Association hold the view that the judgment of the European Court of Justice only has limited repercussions for the annulment action. They stress that the answer does not relate to the second, third and fourth ground for annulment and believe it is inadequate in relation to the first ground for annulment.

They argue in that regard that the European Court of Justice, contrary to its established case law, refused to extend its examination to the observance of the general principles of community law and of the right to the respect of privacy as referred to in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
They are accordingly of the opinion that the Constitutional Court is faced with the following alternative. On the one hand, it could deliver judgment, without infringing the authority of the judgment of the European Court of Justice, on the merits of the first ground for annulment in light of all the relevant rules of international and community law that were not examined by the European Court of Justice, or make a reference for a new preliminary ruling concerning validity to the European Court of Justice on the compatibility of the obligation to inform against a client with the relevant rules of international and community law that were not examined. On the other hand, the Constitutional Court could develop a conciliatory interpretation of Article 6 (3) of the Directive and of Article 14 (1), § 3 (2) of the Act of 11 January 1993, according to which the concept of "ascertaining the client's legal position" would not be limited to the strict confines of legal proceedings, but in that sense would be understood to include providing legal advice, even during the practice of the activities referred to in Article 2 (2), (1) (a) to (e) of the Act, and could refer a question of interpretation to the European Court of Justice for a preliminary ruling, when appropriate.

A.6. The Flemish Bar Council and the Dutch Bar Association of Brussels hold the view that although the question of the validity of the Directive as regards community law may be interesting, it is not relevant for this case, given that the sole task of the Constitutional Court is to examine the congruence of the Act in relation to the Belgian Constitution. They further add that the European Court of Justice has absolutely no jurisdiction with regard to the Belgian Constitution and holds no monopoly on the interpretation of fundamental rights. They believe the Constitutional Court is the most appropriate forum for interpreting constitutional tradition and testing the Act against that. They are moreover of the opinion that the delegation of powers granted to European institutions can never be interpreted so that it allows for any deviation from constitutional guarantees. They finally state that the interpretation given to the European Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Justice is not binding on the Constitutional Court.

A.7. The Belgian Cabinet is of the opinion that the Court should follow the lesson from the judgment of the European Court of Justice. It calls to mind that the binding force of the judgments which deliver preliminary rulings on referred questions, does not only apply to the operative part of the judgment, but also to the grounds and reasons. It concludes from the judgment of the European Court of Justice that in order to observe the principles of uniformity of interpretation and priority of community law, Directive 2001/97/EC, which amends Directive 91/308/EEC, must be regarded as not being contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It deduces from this that the Act which forms the subject of the action for annulment is not contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or, accordingly, Article 6 (2) of the Treaty on European Union.

With regard to Article 5 of the Act of 12 January 2004 (second ground for annulment in case no. 3065)

A.8.1. The Flemish Bar Council and the Dutch Bar Association of Brussels request the annulment of Article 5 of the contested Act on the basis it infringes Articles 12 and 14 of the Belgian Constitution, whether or not read in conjunction with Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 49 of the Charter of Fundamental Rights of the European Union. They explain that the provision that they dispute, which adds a list of criminal offences to Article 3 of the Act of 11 January 1993, is contrary to the principle of legality because one does not clearly know to which offences the duty of disclosure applies.

A.8.2. The Belgian Cabinet calls to mind that, for the reasons set out in A.3.4.1, Article 49 of the Charter of Fundamental Rights of the European Union is only political in scope. It adds that the Court does not have jurisdiction to take cognisance of a ground for annulment derived from Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

A.8.3.1. The Belgian Cabinet is of the opinion that the Act of 11 January 1993 must be regarded in its entirety as an administrative law and not as a criminal law. It observes that the Act does not create any criminal offence relating to the offence of money laundering but limits itself to preventing the financial system from being used for money laundering or the financing of terrorism. It concludes from this that the principle of legality is not applicable in this case.

A.8.3.2. The response of the Flemish Bar Council and the Dutch Bar Association of Brussels is that the principle of legality also applies to administrative sanctions. They add that the contested provision also includes an indirect form of criminalisation attributable to the uncertainty surrounding the offences to which the duty of disclosure relates. A lawyer who makes a disclosure to the Financial Information Processing Cell in good faith, when not being obliged to do so, will be liable to punishment under Article 458 of the Belgian Criminal Code.

A.8.4. The Belgian Cabinet is further of the opinion that the ground for annulment is not admissible insofar as it targets the offence of serious and organised tax fraud, because this offence is introduced into the Act of 7 April 1995 and has not been amended by the contested article.

A.8.5.1. The Belgian Cabinet is finally of the opinion that the Act and the parliamentary preparation thereof actually provide adequate points of reference for a sufficiently thorough, clear and predictable description.

A.8.5.2. The response of the Flemish Bar Council and the Dutch Bar Association of Brussels is that the Belgian Cabinet, by systematically referring to the parliamentary preparation, accepts that the principle of legality has been infringed because the precise description of each offence is therefore not included in the text of the Act itself.

A.8.5.3. The Council of Bars and Law Societies of Europe holds the view that insofar as the new obligations imposed on the lawyer by the Act of 12 January 2004 are provided for under the new Article 22 of the Act of 11 January 1993, under penalty of administrative fines of up to €1,250,000, those obligations must be clearly formulated, which is not the case herein.

With regard to Article 31 of the Act of 12 January 2004 (second ground for annulment in case no. 3064 and fourth ground for annulment in case no. 3065)

A.9.1. The OBFG and the French Bar Association of Brussels explain that Article 31 of the contested Act - insofar as it extends the scope of Article 19 of the Act of 11 January 1993 to lawyers and Presidents of Bar Associations, so making applicable to them the absolute prohibition of notifying a client that information has been given to the Financial Information Processing Cell - equates lawyers and the other professions referred to in the Act without justification, which constitutes an infringement of Articles 10 and 11 of the Belgian Constitution, as read in conjunction with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 48 (2) of the Charter of Fundamental Rights of the European Union and the general legal principles on the rights of defence.

A.9.2. They call to mind that the prohibition on tipping off the client in the Directive is optional. They add that the lack of loyalty which the contested provision obliges the lawyer to display is incompatible with the principle of independence.

A.9.3. The Flemish Bar Council and the Dutch Bar Association of Brussels hold the view that the contested provision constitutes an infringement of Articles 10 and 11 of the Belgian Constitution, whether or not read in conjunction with Articles 6, 7 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the general principles of the rights of defence, insofar as it results in the relationship of trust between the lawyer and his client being irreparably harmed.

A.9.4.1. The Belgian Cabinet calls to mind that the applicants in case no. 3064 wrongly raised Article 48 (2) of the Charter of Fundamental Rights of the European Union (A.3.4.1). It adds that the Constitutional Court

does not have jurisdiction to rule on a ground for annulment that directly asserts an infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the general legal principles without basing it on an infringement of a constitutional provision submitted to that Court for testing.

A.9.4.2. The response of the OBFG and the French Bar Association of Brussels is that the reference to the Charter is not necessarily inadmissible (A.3.4.2) and that the ground for annulment is admissible insofar as it is based on the infringement of Articles 10 and 11 of the Belgian Constitution, as read in conjunction with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the general legal principles.

A.9.5.1. On the merits, the Belgian Cabinet is of the opinion that the federal legislator did make sure not to disproportionately prejudice the rights of defence, and that it was capable of judging that the prohibition imposed on lawyers and the President of the Bar Association from notifying the client or third parties that information had been disclosed to the Financial Information Processing Cell, or that an investigation into money laundering was underway, was necessary to guarantee the effectiveness of the rule. It explains that the European legislator intended to extend the prohibition on tipping off to the independent practitioners of legal professions, which accounts for the Belgian federal legislator officially extending that prohibition to lawyers for reasons of effectiveness.

A.9.5.2. The response of the OBFG and the French Bar Association of Brussels, as well as the Flemish Bar Council and the Dutch Bar Association of Brussels, is that the Directive left the federal legislator the choice and that it accordingly must make a choice in accordance with the Belgian Constitution, namely to enable the lawyer to inform his client.

A.9.5.3. The Council of Bars and Law Societies of Europe adds that, although it is conceivable that the secrecy of the judicial inquiry applies to the lawyer with regard to his client as far as the content of the judicial inquiry is concerned, the existence of the judicial inquiry must on the other hand be brought to the attention of the client once the lawyer is informed thereof.

With regard to Article 27 of the Act of 12 January 2004 (third ground for annulment in case no. 3064 and third ground for annulment (first part) in case no. 3065)

A.10.1. The OBFG and the French Bar Association of Brussels explain that Article 27 of the contested Act, insofar as it determines that the Financial Information Processing Cell can have the lawyer who made the disclosure about a suspicion, directly disclose all additional information that it deems useful without providing for the involvement of the President of the Bar Association, breaches the professional secrecy of the lawyer and thus the rights of defence, which constitutes an infringement of Articles 10 and 11 of the Belgian Constitution, read in conjunction with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 48 (2) of the Charter of Fundamental Rights of the European Union and the general legal principles regarding the right of defence.

A.10.2. The Flemish Bar Council and the Dutch Bar Association of Brussels complain of an infringement of Articles 10 and 11 of the Belgian Constitution, whether or not read in conjunction with Articles 6, 7 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the general principles of the right of defence. They believe that the contested provision constitutes discrimination insofar as the Financial Information Processing Cell approaches a lawyer directly and insofar as, if the lawyer must provide additional information, he must provide it directly to the aforementioned Cell, which means that professional secrecy is lifted *a priori* and absolutely, without the filter of the President of the Bar Association.

A.10.3.1. The Belgian Cabinet is principally of the opinion that the Court does not have jurisdiction to directly judge whether a legal rule is congruous with provisions which arise from international treaties. It adds that Article 48 (2) of the Charter of Fundamental Rights of the European Union has no binding value (A.3.4.1)

A.10.3.2. The OBFG and the French Bar Association of Brussels refer to their answer relating to the other pleas of inadmissibility (A.3.4.2 and A.9.4.2).

A.10.4.1. On the merits, the Belgian Cabinet explains that the contested provision does not in any way result in the *a priori* and absolute lifting of professional secrecy, because in accordance with Article 15 of the Act of 11 January 1993, which refers to Article 11, § 2, of the same Act, the core activities of the legal profession are exempt from the duty of disclosure included in Article 14a (3) (2) of the same Act. It adds that the filtering function of the President of the Bar Association cannot be extended to the case where the Financial Information Processing Cell requests information, insofar as the Directive does not provide for that possibility for Member States, but that nothing prevents the aforementioned Cell from approaching the President of the Bar Association to obtain the information it requires.

A.10.4.2. The OBFG and the French Bar Association of Brussels hold the view that the legislator could not constitutionally determine that the lawyer is not protected when asked for additional information, and that the rule must either be annulled or the interpretation must be entrenched according to which the involvement of the President of the Bar Association is compulsory for every disclosure by the lawyer to the Financial Information Processing Cell.

A.10.4.3. The Flemish Bar Council and the Dutch Bar Association of Brussels for their part contest the Belgian Cabinet's allegation that it is impossible because of the Directive to incorporate the filter of the President of the Bar Association when the aforementioned Cell calls for additional information.

With regard to Article 30 of the Act of 12 January 2004 (fourth ground for annulment in case no. 3064 and third ground for annulment (second part) in case no. 3065)

A.11.1. The OBFG and the French Bar Association of Brussels explain that Article 30 of the contested Act, insofar as it permits any employee of a lawyer to personally disclose information to the Financial Information Processing Cell when the normal procedure cannot be followed, constitutes an infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 48 (2) of the Charter of Fundamental Rights of the European Union and the general legal principles on the rights of defence. They hold the view that if the inclusion of lawyers in the scope of the Act is open to criticism, this applies *a fortiori* to the employees, all the more so given that their inclusion has taken place without any safety net.

A.11.2. The Flemish Bar Council and Dutch Bar Association of Brussels explain that Article 30 of the contested Act implies that professional secrecy is being lifted *a priori* and absolutely, which is contrary to the lesson from judgment no. 46/2000 of the Constitutional Court.

A.11.3. The four applicants moreover emphasise that the aforementioned employees are neither competent nor authorised to disclose information to the Financial Information Processing Cell, so that the contested measure is irrelevant.

A.11.4.1. The Belgian Cabinet calls to mind that Article 48 (2) of the Charter of Fundamental Rights of the European Union has no binding value (A.3.4.1) It also repeats that the Court does not have jurisdiction to judge whether a legislative provision is congruous with international standards.

A.11.4.2. The OBFG and the French Bar Association of Brussels refer to their answer relating to the other pleas of inadmissibility (A.3.4.2 and A.9.4.2).

A.11.5.1. On the merits, the Belgian Cabinet is of the opinion that the contested provision must be read in conjunction with the provisions that were introduced in order to take into account the specific character of the legal profession.

A.11.5.2. The response of the OBFG and the French Bar Association of Brussels is that, in the absence of annulment, a principle must be explicitly entrenched, by way of consistent interpretation, according to which

it is strictly prohibited for the employees of lawyers to make any direct disclosure to the Financial Information Processing Cell, and that those employees should on the other hand contact the President of the Bar Association if the lawyer remains in breach of his obligation to do so.

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With regard to the admissibility of the actions for annulment and of the third-party interventions

B.1. By means of its judgment no. 126/2005 of 13 July 2005, the Constitutional Court held that the actions for annulment and third-party interventions were admissible.

With regard to the Charter of Fundamental Rights of the European Union

B.2.1. Various grounds for annulment put forward the infringement of provisions of the Belgian Constitution read in conjunction with provisions of the Charter of Fundamental Rights of the European Union, signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission during the European Council meeting in Nice on 7 December 2000 and published in the Official Journal of the European Communities on 18 December 2000, no. C-364.

B.2.2. The Constitutional Court may take the Charter into consideration in its judgment insofar as the Charter confirms the existence of EU community values which are mainly also included in the provisions of the Belgian Constitution.

Given that the Charter is not included in a normative text with binding force with regard to Belgium, the grounds for annulment are however not admissible insofar as they are derived from the infringement of constitutional provisions, read in conjunction with provisions of the Charter.

With regard to the contested provisions

B.3. The applicants request the partial annulment of the Act of 12 January 2004 "amending the Act of 11 January 1993 for the prevention of the use of the financial system for the purpose of money laundering, the Act of 22 March 1993 on the status and supervision of credit institutions, and the Act of 6 April 1995 on the status and supervision of investment firms, intermediaries and investment advisers". The provisions of the Act of 12 January 2004 targeted by the annulment actions read as follows:

"Article 4. An Article 2b is inserted in [the Act of 11 January 1993], which reads:

'Article 2b - To the extent express provision is made herein, the provisions of this Act shall also apply to lawyers:

1. when they assist their client in preparing or performing transactions relating to:

a) the purchase or sale of immovable property or businesses;

b) the management of the client's money, securities or other assets;

c) the opening or management of bank, savings or securities accounts;

d) the organisation of the capital contribution needed for the incorporation, running or management of companies;

e) the establishment/incorporation, running or management of trusts, companies or similar structures;

2. or when they act in the name and for the account of their client in any financial transactions or immovable property transactions'.

Article 5. The following amendments shall be introduced in Article 3 of the same Act, amended by the Act of 7 April 1995:

1, a § 1 (1) shall be inserted, which reads as follows:

'§ 1 (1). For the application of this Act, the financing of terrorism is understood within the meaning of Article 2, § 2 (b), of the framework decision of the Council of the European Union of 13 June 2002 on combating terrorism, and in Article 2 of the International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999';

2. the following amendments shall be introduced in § 2 (1):

a) under the first dash, the word "terrorism" shall be replaced by the words "terrorism or the financing of terrorism";

b) under the eighth dash, the words "illegal use among animals of substances having a hormonal, anti-hormonal, beta-adrenergic or product-stimulating action or illegal trade in such substances" shall be replaced by the words "illegal use among animals of substances having a hormonal action or illegal trade in such substances";

c) under the tenth dash, the words "of the European Union" shall be replaced by the words "of the European Communities";

d) under the twelfth dash, the words "bribery of public officials" shall be replaced by the words "embezzlement by people who perform public duties and bribery";

e) subsection (1) shall be completed by the following dashes:

'- serious environmental crimes;

- counterfeiting of coins or bank notes;

- counterfeiting of goods;

- piracy';

3. in § 2 (2), the words "or an unlawful public raising of savings income" shall be replaced by the words "the unlawful public raising of savings income or the provision of investment services, foreign exchange trading services or money transfer services without a licence";

4. in § 2 (3), the words "a financial fraud" shall be replaced by "a fraud, abuse of trust, misuse of company assets" and the words "a fraudulent bankruptcy" are replaced by the words "a criminal offence that relates to the state of bankruptcy";

5. the following amendments shall be introduced in § 3:

a) the words "in Article 2" shall be replaced by the words "in Articles 2, 2 (1) and 2 (2)";

b) the words "of money laundering" shall be replaced by the words "of money laundering and the financing of terrorism".

"Article 7. Article 4 of the same Act, amended by the Act of 10 August 1998, shall be replaced as follows:

'Article 4 - § 1: The enterprises and persons referred to in Articles 2, 2 (1) (1) to (4), and 2 (2) must identify their clients and their clients' agents and verify their identity on the basis of a supporting document, of which a copy must be obtained on paper or on an electronic carrier when:

1. they enter into a business relationship whereby the parties involved become habitual clients;

2. the client wishes to perform:

a) a transaction for an amount of €10,000 or more, regardless of whether it is performed in one or in more transactions among which there proves to be a connection; or

b) a transaction, even if the amount is lower than €10,000, as soon as it is suspected that such transaction relates to money laundering or the financing of terrorism; or

c) a transfer of funds, as referred to in Article 139a of the Act of 6 April 1995 on the status and supervision of investment firms, intermediaries and investment advisers;

3. they doubt the veracity or accuracy of the identification details of an existing client.

The identification and the verification relates to the surname, first name and address of natural persons. Notwithstanding Article 5 § 1, the identification and verification for legal entities and trusts relates to the name and registered office of the legal entity, the directors/trustees and knowledge of the provisions relating to the authority to enter into

obligations for the legal entity or trust. The identification also relates to the subject and expected nature of the business relationship.

§ 2. The enterprises and persons referred to in Article 2, 2 a (1) to (4) and 2b must be permanently vigilant with regard to the business relationship and make sure they attentively examine the performed transactions to ensure these are consistent with their knowledge of the client, his commercial activities, risk profile and, if necessary, the source of the funds.

§ 3. When the enterprises and persons referred to in Article 2, 2a (1) to (4) and 2b do not comply with the duty of vigilance as referred to in §§ 1 and 2, they may not enter into or maintain any business relationship. In this way they decide whether it is necessary to impose a disclosure to the Financial Information Processing Cell on themselves in accordance with Articles 12 to 14b.

§ 4. The enterprises and persons referred to in Article 2, with the exception of those in Article 2 (17), (18) and (21), may have the duty of vigilance referred to in §§ 1 and 2 performed by a third party agent, insofar as this is also a credit or financial institution within the meaning of Article 1 of Directive 91/308/EEC, or a credit or financial institution from a country whose legislation imposes due diligence that is equivalent to that imposed in Articles 4 and 5. The member states of the Financial Action Task Force (FATF) are presumed to comply with this requirement. On the advice of the Financial Information Processing Cell, the King may extend this presumption to other States.

§ 5. The enterprises referred to in Article 2, whose activities include money transfers within the meaning of Article 139a of the Act of 6 April 1995 on the status and supervision of investment firms, intermediaries and investment advisers, shall when remitting or transferring money or in the reporting thereof, record correct and useful information about the clients/principals of the transactions concerned. These enterprises must keep all that information and pass it on if they act as an intermediary in a payment chain.

§ 6. The terms of application of the obligations summarised above shall be explained by the authorities referred to in Article 21 and, where appropriate, via regulations in accordance with Article 21a, depending on the risk that the client, business relationship or transaction represents. With regard to § 5, it is specifically determined under which circumstances information must be kept or made available to authorities or other financial institutions, provided that specific provisions may be made in the regulations for cross-border transfers that are forwarded in batches".

"Article 25. The following amendments shall be introduced in Article 14 (1) of the same Act, inserted by the Act of 10 August 1998:

1. § 1 shall be replaced as follows:

'§ 1. The persons referred to in Article 2a (1) to (4) who, in the practice of their profession, determine facts which they know or suspect are related to money laundering or the financing of terrorism, must immediately inform the Financial Information Processing Cell";

2. in § 2 (1), the words "money laundering" shall be replaced by the words "money laundering or the financing of terrorism';

3. this article shall be supplemented by the following section:

'§ 3. The persons referred to in Article 2b who, when performing the activities summarised in that article, determine facts which they know or suspect are related to money laundering or the financing of terrorism, must immediately inform the President of the Bar Association of which they are members.

The persons referred to in Article 2b shall however not provide that information if they receive such information from one of their clients or obtain such information about one of their clients when ascertaining that client's legal position, or when defending or representing that client in or with regard to legal proceedings, including advice about the institution or avoidance of a legal action, regardless of whether such information was received or obtained before, during or after such proceedings.

The President of the Bar Association shall determine whether the conditions referred to in Article 2 (2) and the previous sub-article have been observed. If these conditions have been observed, he shall immediately provide the information to the Financial Information Processing Cell'."

"Article 27. Article 15 (1) of the same Act, amended by the Acts of 7 April 1995 and 10 August 1998, shall be replaced as follows:

' § 1. When the Financial Information Processing Cell receives information as referred to in Article 11 (2) the Cell, one of its members or one of its employees, designated for this purpose by the magistrate who leads the Cell or his deputy may require that all additional information deemed useful for the performance of the Cell's duties must be provided within a period that he stipulates:

1. by all institutions and persons referred to in Articles 2, 2a and 2b, as well as by the President of the Bar Association referred to in Article 14a (3);

2. by the police forces, in derogation from Article 44 (1) of the Act of 5 August 1992 on the office of police, as amended by the Act of 26 April 2002 on the essential elements of the status of police force employees and containing various other provisions relating to the police forces;

3. by the administrative departments of the State;

4. by receivers/liquidators in a bankruptcy or liquidation;

5. by the provisional administrators as referred to in Article 8 of the Belgian Bankruptcy Act of 8 August 1997;

6. by the judicial authorities. However, information may not be disclosed by an investigating judge to the Cell without the express permission of the attorney-general or of the federal attorney and any information obtained by the Cell from the judicial authority may not be disclosed to a foreign institution under Article 17, §2 without the express permission of the attorney general or the federal attorney.

The persons referred to in Article 2b and the President of the Bar Association referred to in Article 14a (3) shall not provide that information if the persons referred to in Article 2 (2) received such information from one of their clients or obtained such information about one of their clients when ascertaining that client's legal position, or when defending or representing that client in or with regard to legal proceedings, including advice about the institution or avoidance of a legal action, regardless of whether such information was received or obtained before, during or after such proceedings.

The judicial authorities, police forces, administrative departments of the State, receivers/liquidators in a bankruptcy/liquidation and the provisional administrators may at their own initiative provide the Financial Information Processing Cell with all information that they deem useful for the performance of its duties.

The Public Prosecution Service shall inform the Financial Information Processing Cell of all final decisions that have been taken in cases in which the Cell provided information in accordance with Articles 12 (3) and 16".

"Article 30. The following amendments are introduced in article 18 of the same Act, amended by the Act of 10 August 1998:

1. the first sub-article shall be replaced as follows:

'The disclosure of the information referred to in Articles 12 to 14b shall normally be made by the person appointed by the enterprises referred to in Articles 2 and 2a (5) in accordance with Article 10, or by the persons referred to in Articles 2a (1) to (4) and 2b. ';

2. in the second sub-article, the words "in Articles 2 and 2a (5)" shall be replaced by the words "in Articles 2, 2a and 2b".

Article 31. In Article 19 of the same Act, as amended by the Act of 10 August 1998, the words "the enterprises or persons referred to in Articles 2 and 2a" shall be replaced by the words "the enterprises or persons referred to in Articles 2, 2a and 2b and the President of the Bar Association referred to in Article 14a (3)".

With regard to the grounds for annulment

With regard to Articles 4, 7, 25, 27, 30 and 31 of the Act of 12 January 2004 (first ground for annulment in both cases)

B.4. In their first ground for annulment, the applicants complain that the provisions they contest extend the scope of application of the Act of 11 January 1993 for the prevention of

the use of the financial system for the purpose of money laundering and the financing of terrorism to lawyers. On the one hand, they contend that the legislator, by targeting lawyers, has irresponsibly prejudiced the principles of professional secrecy and their independence, so infringing Articles 10, 11 and 22 of the Belgian Constitution, as read in conjunction with Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the general legal principles concerning the rights of defence and Article 6 (2) of the Treaty on European Union. On the other hand, they submit that the provisions are insufficiently clear, so that lawyers are not able to determine the circumstances under which the Act applies to them, and Articles 12 and 14 of the Belgian Constitution, as read in conjunction with Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, have accordingly been infringed.

B.5.1. After having held that the extension of the individual scope of application of the Act of 11 January 1993 to lawyers was imposed on the Belgian legislator by the Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001, amending Directive 91/308/EEC of the Council for the prevention of the use of the financial system for the purpose of money laundering, the Constitutional Court by means of judgment no. 126/2005 granted the request of some of the applicants and interveners and, before examining the grounds for annulment, referred the question set out in A.4.2 to the European Court of Justice for a preliminary ruling.

B.5.2. In its judgment of 26 June 2007 in case C-305/05, the European Court of Justice ruled that the right to a fair trial, as guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6 (2) of the Treaty on European Union, is not infringed by the obligation on lawyers to inform and cooperate with the authorities responsible for combating money laundering, taking into account the restrictions imposed or permitted on that obligation by Directive 91/308/EEC, as amended by Directive 2001/97/EC.

B.5.3. The Constitutional Court is examining the grounds taking the aforementioned judgment of the European Court of Justice into consideration.

B.6.1. In Belgium, lawyers play a significant part in the administration of justice, which accounts for the unique rules in relation to the conditions for access to and practising their profession that have to be taken into account and which differ from those that apply to other liberal professions. According to Article 456 of the Belgian Judicial Code, the profession of lawyer is based on the principles of "dignity, honesty and discretion".

B.6.2. Lawyers are subject to strict ethical rules, the due observance of which is firstly ensured by the disciplinary committee of the Bar Association. The disciplinary committee may, depending on the case, "warn, reprimand or suspend a lawyer for a period not exceeding one year, strike a lawyer off the role, from the list of lawyers that practice under the professional title of another EU member state or from the list of trainee lawyers" (Article 460 (1) of the Belgian Judicial Code).

B.6.3. It follows from the special status of lawyers, as laid down in the Belgian Judicial Code and the regulations adopted by the bar associations established under the Act of 4

July 2001, that the profession of lawyer in Belgium is distinguished from other independent legal professions.

B.7.1. The effectiveness of the rights of defence of any person seeking justice necessarily assumes that a relationship of trust can be established between him and the lawyer that advises and defends him. The necessary relationship of trust can only be established and maintained if the person seeking justice is guaranteed that the lawyer will not disclose the information entrusted to him by the client. It follows from this that the principle of professional secrecy, the breach of which is specifically punished under Article 458 of the Belgian Criminal Code, is a fundamental element of the rights of defence.

B.7.2. It is true that the rule of professional secrecy must give way when this proves necessary or when it is inconsistent with a value that is deemed more important. The lifting of the lawyer's professional secrecy must however be compatible with the fundamental principles of the Belgian legal system, be justified on account of urgency and be strictly proportional.

B.7.3. When the obligations that the contested Act imposes on lawyers are not observed, that non-compliance is moreover punished with an administrative fine. That fine may amount to as much as €1,250,000 and has a predominantly repressive character, so that the description of what constitutes non-compliance must comply with the principle of the foreseeability of criminalisation, according to which this description must be formulated using words that anyone, at the moment they undertake certain action, can determine whether or not that action is punishable. The principle requires that sufficiently precise and clear wording providing legal certainty is used to determine which actions are made criminal offences, so that, on the one hand, anyone undertaking certain action, can adequately assess beforehand what the criminal consequences of that action will be and, on the other hand, so that the court is not left with too great a freedom of discretion.

B.7.4. Although, as emphasised in the judgment with which the European Court of Justice delivered its preliminary ruling on the question posed by the Belgian Constitutional Court, Article 6 (3) of the Directive is open to various interpretations, so that the precise scope of the duty of information and cooperation to which lawyers are subject cannot be unambiguously determined (point 27), the contested provision would not be able to contain such a lack of clarity without infringing the principle of the foreseeability of criminalisation.

It is therefore up to the Constitutional Court to clearly examine the scope that must be given to the contested provisions.

B.7.5. Point 28 of the judgment of 26 June 2007 calls to mind that:

"Member States must not only interpret their national law in a manner consistent with Community law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law".

B.7.6. The same judgment calls to mind the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the principle of professional secrecy of lawyers that is related to the requirements of the right to a fair trial. The European Court of Justice already emphasised in its *AM & S* judgment of 18 May 1982 (*Jur.*, 1982, p. 1575) that the confidentiality of communications between lawyers and their clients 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" (point 18).

B.7.7. In its *Wouters and others* judgment of 19 February 2002 (*Jur.*, 2002, I, p. 1577), the European Court of Justice also emphasised that every member state, in the absence of specific community rules, remains free in principle to organise the practice of the profession of lawyer in its territory, that the rules may accordingly differ significantly from one member state to another and that, in a country where the lawyer finds himself in situation of independence vis-à-vis the authorities, other operators and third parties, he "[must] guarantee that all steps taken in a case are taken in the sole interest of the client" (point 102) and that a Member State may be of the opinion that the lawyer must defend his client independently and with due observance of strict professional secrecy (point 105).

B.7.8. The same principles have been restated by the Court of First Instance of the European Communities, according to which the purpose of the confidentiality of communications between lawyers and clients "is both to guarantee the full exercise of individuals' rights of defence and to safeguard the requirement that any person must be able, without constraint, to consult his lawyer", and that such protection firstly seeks to "safeguard the public interest in the proper administration of justice in ensuring that a client is free to consult his lawyer without fear that any confidences which he imparts may subsequently be disclosed" (*Akzo Nobel Chemicals Ltd* judgment of 17 September 2007, points 86 and 87).

B.7.9. As indicated in its judgment no's 50/2004, 100/2006 and 129/2006, the Constitutional Court is also of the opinion that the relationship of trust that must exist between the lawyer and his client can only be established and maintained if the party seeking justice is certain that the communications made in confidence to his lawyer will not be disclosed by the latter.

B.7.10. It follows from the aforementioned that the constitutionality of the contested provisions must be assessed taking into account the fact that the professional secrecy of the lawyer is a general principle that relates to the observance of fundamental rights, that the rules deviating from that secrecy can only be interpreted strictly for those reasons and with the application of the principle of the foreseeability of criminalisation, and that the manner in which the profession of lawyer is organised within the national legal system must also be considered.

B.8. Combating money laundering and the financing of terrorism, which unmistakably influences the growth of the organised crime that constitutes a unique threat to society, is a legitimate objective in the public interest. However, that objective could not justify an

unconditional or unrestricted lifting of the lawyer's professional secrecy, because lawyers, for the reasons called to mind in B.6.1 to B.6.3, must be distinguished from the authorities responsible for tracking down crimes.

B.9.1. Article 2b of the Act of 11 January 1993 for the prevention of the use of the financial system for money laundering and the financing of terrorism, inserted by means of Article 4 of the contested Act, determines that the obligations of that Act are applicable to lawyers when they act in a specific number of matters that are listed restrictively and "do not form part of the core activity of the profession of lawyer" (*Parliamentary Publications*, Chamber, 2003-2004, DOC 51-0383/001, p. 28). More specifically as concerns mandatory cooperation with the authorities, that provision must be read in conjunction with Article 14a (3) of the same Act, inserted by means of Article 25 (3) of the contested Act, which specifies that lawyers may not disclose information to the authorities relating to facts which they know or suspect are related to money laundering or the financing of terrorism, if that information "is received from one of their clients or obtained about one of their clients when they are ascertaining their client's legal position, or defending or representing that client in or in relation to legal proceedings".

B.9.2. It is clear from that provision that all information to which the lawyer becomes privy as part of legal proceedings in the matters listed in Article 2a of the aforementioned Act of 11 January 1993, are covered by his professional secrecy and shall remain so "regardless of whether the information has been received or obtained before, during or after the proceedings" (ECJ, aforementioned judgment of 26 June 2007, point 34).

B.9.3. However, the professional secrecy of the lawyer could not be limited to all his activities involving legal defence and representation. For this reason, the aforementioned Article 14a (3") also prohibits the information to which lawyers become privy "when ascertaining the legal position of their clients", including in the matters that are listed in the same Article 2b, from being disclosed to the authorities. The same provision stipulates that the information that is received or obtained as part of "advice about instituting or avoiding legal proceedings" may likewise not be disclosed to the authorities.

B.9.4. The words "in the course of ascertaining the legal position of their clients" in the Act, are taken over in full from Article 6 (3) that is inserted in Directive 91/308/EEC by the aforementioned Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001, and must therefore be interpreted in light of the interpretation of the Directive. In that regard, 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."
Based on that recital, the Advocate-General observed in the opinion which preceded the judgment of the European Court of Justice 26 June 2007:

"In this case, it seems to me that the concept of 'ascertaining the legal position for a client' used by the Directive can easily be construed as including that of legal advice. Such a reading is consistent with respect for fundamental rights and for the principles of a State governed by the rule of law, which are protected by the Community legal order.

It is moreover consistent with the wording of the recital 17 in the preamble to the Directive, which provides that, in principle, 'legal advice remains subject to the obligation of professional secrecy'. I therefore propose to interpret the second subparagraph of Article 6 (3) of the Directive as meaning that it exempts lawyers engaging in the provision of legal advice from any obligation to inform" (ECJ, case C-305/05, Opinion of the Advocate-General, issued on 14 December 2006).

In the Explanatory Memorandum to the Bill that became the contested Act, express reference is furthermore made to recital 17 of the Directive when the scope of the Act with regard to lawyers is described, and it is moreover noted with regard to lawyers that "it is very difficult to determine what is just simple advice and what has to do with a legal defence, given that the provision of advice can always be used for that purpose" (*Parliamentary Publications*, Chamber, DOC 51-0383/001, pp. 16 and 17).

B.9.5. In the practice of the profession of lawyer, as organised by the provisions of the Belgian Judicial Code and ethical rules of the profession that are particular to Belgium, and called to mind in B.6.1 to B.6.3, the purpose of the activity of providing legal advice concerning one of the matters referred to in Article 2 (2) (1) (a) to (e), even outside any legal proceedings, is to inform the client about the legislative position that applies to his personal situation or the transaction he is considering, or to advise him on how to be able to perform that transaction legally. The purpose is always to enable the client to avoid legal proceedings with regard to that transaction. By the application of Article 14 (1), § 3, of the Act, the information that is obtained or received when the lawyer provides advice on the matters listed in Article 2b (1) (a) to (e) therefore escapes compulsory disclosure to the authorities.

B.9.6. It follows from the aforementioned that the information to which the lawyer becomes privy when performing the essential activities of his profession, including the matters summarised in aforementioned Article 2b, namely the legal representation or defence of the client and provision of legal advice, remains covered by professional secrecy, even outside of any legal proceedings, and cannot be disclosed to the authorities.

The lawyer can only be subject to the obligation of disclosing information of which he is aware to the authorities when he practises an activity in one of the matters that are summarised in Article 2b, outside his specific mandate to legally defend or represent and provide legal advice.

B.10. Provided the contested provisions are interpreted in the manner stated in B.9.6, they do not disproportionately prejudice the principle of the lawyer's professional secrecy and therefore do not infringe Articles 10, 11 and 22 of the Belgian Constitution, read in conjunction with Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The first ground for annulment in case no. 3064 and,

insofar it is derived from the infringement of those provisions, the first ground for annulment in case no. 3065 are unfounded.

B.11. Provided the contested provision is interpreted in the manner stated in B.9.6, the first ground for annulment in case no. 3065, insofar it is derived from the infringement of Articles 12 and 14 of the Belgian Constitution, read in conjunction with Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is likewise unfounded.

With regard to Article 5 of the Act of 12 January 2004 (second ground for annulment in case no. 3065)

B.12.1. The applicants in case no. 3065 requested the annulment of Article 5 of the Act of 12 January 2004 on the basis that it infringes Articles 12 and 14 of the Belgian Constitution, whether or not read in conjunction with Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. They hold the view that the description of the criminal offences in the contested provision is insufficiently clear, which would be contrary to the principle of the legality of the criminalisation and the punishment.

B.12.2. Article 5 of the Act of 12 January 2004 supplements Article 3 of the Act of 11 January 1993. The purpose of that provision is to specifically define, for the application of the Act, what is meant by "money laundering" (§ 1) and the "financing of terrorism" (§ 1 (1)), and to determine the underlying criminal offences which produce the illegal money or illegal assets that form the subject of the laundering activity (§ 2).

Accordingly, the contested Article 5, just like Article 3 of the Act of 11 January 1993 that it amends, is not intended to and does not result in making one or more actions an offence or introduce penalties. In that sense, Articles 12 and 14 of the Belgian Constitution do not apply thereto.

B.12.3. The definition of the underlying criminal offences is however one aspect that the lawyer must know in detail to determine whether he is dealing with money from an illegal source that is being laundered and whether he is consequently obliged to inform the President of the Bar Association. Under Article 22 of the Act of 11 January 1993, an administrative penalty of up to €1,250,000 may be imposed on a lawyer who decides not to share information with regard to money laundering or the financing of terrorism that has come to his attention, which would not be covered by his obligation of professional secrecy in accordance with Article 14a (3) (2) of the same Act. Such a penalty has a predominantly repressive character and the principle of the foreseeability of criminalisation is accordingly applicable thereto.

B.12.4. It is clear from the Explanatory Memorandum of the contested provision that the legislator wished to define the terminology in the list of underlying criminal activities in more detail and adapt this terminology to the actions being criminalised in the Criminal Code and some special Acts. He was not obliged in this regard to refer to the articles of the Belgian Criminal Code, but could make use of prevailing words, given that these are

sufficiently clear for a professional legal practitioner to be able to determine whether the source of the money that he suspects is being laundered is illegal for the purpose of the Act. The information in the Explanatory Memorandum moreover sufficiently indicates what is meant by the words of the Act (*Parliamentary Publications*, Chamber, 2003-2004, DOC 51-0383/001, pp. 28 to 31).

B.12.5. The ground for annulment is unfounded.

With regard to Article 31 of the Act of 12 January 2004 (second ground for annulment in case no. 3064 and fourth ground for annulment in case no. 3065)

B.13.1. Article 31 of the contested Act extends to lawyers and Presidents of Bar Associations the prohibition, contained in Article 19 of the Act of 11 January 1993, on notifying the client concerned or third parties that information has been disclosed to the Financial Information Processing Cell or that an investigation into money laundering is underway.

B.13.2. The applicants hold the view that the prohibition is contrary to Articles 10 and 11 of the Belgian Constitution, as read in conjunction with Articles 6, 7 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, insofar as it prejudices the independence of the lawyer and the relationship of trust between the lawyer and his client.

B.13.3. Whilst Directive 2001/97/EC does not compel the Member States to prohibit lawyers from notifying clients that their personal details have been disclosed to the authorities (Article 1 (7), which amends Article 8 of Directive 91/308/EEC), Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorism financing, which had to be transposed into national law by no later than 15 December 2007, does prohibit this information from being disclosed to the client (Article 28 (1)). However, that Directive does specify in Article 28 (6) that when a lawyer seeks to dissuade a client from engaging in illegal activity, this does not constitute a disclosure for the purpose of Article 28 (1) of the Directive.

B.13.4. It is clear from the Explanatory Memorandum that the legislator views the prohibition on notifying the client or third parties that information has been disclosed to the Financial Information Processing Cell as the "finishing touch that guarantees the effectiveness of the provision" (*Parliamentary Publications*, Chamber, 2003-2004, DOC 51-0383/001, p. 50).

B.13.5. A lawyer who seeks to dissuade a client from performing or participating in a laundering transaction or a transaction to finance terrorism, which are activities that he knows are illegal, and establishes that he has been unsuccessful in his attempts, is obliged, when he finds himself in a situation in which the duty to inform applies to him, to report the details of which he has knowledge to the President of the Bar Association, who will in turn inform the authorities. In that case, the lawyer involved can no longer act for and must therefore end his relationship with the client, and there is accordingly no further question of

a relationship of trust between the lawyer and his client. On the other hand, if the lawyer establishes that he did persuade his client not to perform or participate in an illegal transaction, nothing prevents the relationship of trust between the lawyer and his client from continuing to exist, since in that case no information relating to the client must be reported to the Financial Information Processing Cell.

Having regard to the limited scope of application of the duty to disclose information to the authorities with regard to lawyers, interpreted as set out in B.9.6, the contested measure is not disproportionate.

B.13.6. The grounds for annulment are unfounded.

With regard to Article 27 of the Act of 12 January 2004 (third ground for annulment in case no. 3064 and third ground for annulment (first part) in case no. 3065)

B.14.1. The applicants take issue with Article 27 of the Act of 12 January 2004 - which amends Article 15 of the Act of 11 January 1993 - in that it enables the authorities to receive all additional information they deem useful for the continuation of their task from the lawyers who have disclosed information relating to a suspected laundering transaction or financing of terrorism, without the involvement of the President of the Bar Association, whilst, when a lawyer discloses information to the authorities under Article 14a (3), of the Act of 11 January 1993, he must first disclose that information to the President of the Bar Association of which he is a member, who in turn will provide this information to the Financial Information Processing Cell after determining whether that actually must happen under the Act.

B.14.2. The involvement of the President of the Bar Association in disclosing information provided by lawyers to the Financial Information Processing Cell is an essential guarantee, both for lawyers and for their clients, in that it provides certainty that professional secrecy will only be breached in the cases strictly provided for by the Act. The role of the President of the Bar Association is to determine whether the statutory conditions for the application of the duty to inform have actually been satisfied and, if he determines this is not the case, he must refrain from passing on the information that has been disclosed to him. The Directive provided for the involvement of a self-regulating professional body "in order to take proper account of these professionals' [the lawyers] duty of discretion owed to their clients" (Directive 2001/97/EC, recital 20). The involvement of the President of the Bar Association was interpreted as "a filter" between lawyers and the judicial authorities "to prevent any infringement of the fundamental rights of defence" (*Parliamentary Publications*, Chamber, 2003-2004, DOC 51-0383/001, p. 17).

B.14.3. Given that the involvement of the President of the Bar Association is regarded as an essential guarantee to safeguard the professional secrecy of the lawyer and the fundamental rights of the persons involved in the disclosure of information during the initial contact between the lawyer and the authorities, it is unwise not to provide for the same "filter" when, after the first contact, further information is requested from the lawyer who made the disclosure. After all, the risk of a negligent breach of the lawyer's professional secrecy is no

less when subsequent information is exchanged about facts or indications of money laundering or the financing of terrorism than it was during the initial contact.

B.14.4. Article 15 (1) of the Act of 11 January 1993, amended by means of Article 27 of the contested Act, should be read in conjunction with Article 14a (3) of the same Act, which determines that the lawyers are obliged to inform the President of the Bar Association, failing which the effectiveness of the guarantee provided by his involvement would be prejudiced. According to that interpretation, which moreover corresponds to Article 23 of Directive 2005/60/EC, lawyers may only disclose information - both during a first disclosure relating to one of their clients and when passing on additional information regarding the same facts at the request of the Financial Information Processing Cell - to the President of the Association of which they are members, who will provide this to the Cell once he has determined that the conditions for the application of the duty to inform continue to be satisfied.

B.14.5. The grounds for annulment are unfounded, subject to Article 27 of the Act of 12 January 2004 being interpreted as set out in B.14.4.

With regard to Article 30 of the Act of 12 January 2004 (fourth ground for annulment in case no. 3064 and third ground for annulment (second part) in case no. 3065)

B.15.1. The applicants take issue with Article 30 (2) of the contested Act, which amends Article 18 (2) of the Act of 11 January 1993, and makes it possible for every employee or representative to personally disclose information to the Cell whenever the normal procedure cannot be followed - i.e. whenever the lawyer cannot transmit the information himself - contending that it breaches professional secrecy and accordingly infringes Articles 10 and 11 of the Belgian Constitution, as read in conjunction with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

B.15.2. The Explanatory Memorandum states that the purpose of the provision is to "make it possible for employees and representatives of these professionals to personally make the disclosure, when the professionals themselves are unable to comply with their obligations or wish to back out of their obligations in bad faith" (*Parliamentary Publications*, Chamber, 2003-2004, DOC 51-0383/001, p. 50).

B.15.3. The Belgian Cabinet states it is clear that this provision must be read in conjunction with the provisions inserted in the legislation to take into account the specific character of the profession of lawyer.

Even in that interpretation of the provision, nothing could justify a person standing outside the relationship between the lawyer and his clients being able to provide information regarding that client to the authorities. That is even more so given that the employees of the lawyer probably may not possess any legal qualifications or skills and it can therefore not be understood how they would be able to assess whether the conditions for the application of the Act to the lawyer who employs them, or whom they represent, have been satisfied.
B.15.4. Insofar as it is permitted that any employee and representative of lawyers personally provide information to the Cell, even via the President of the Bar Association,

Article 30 of the Act of 12 January 2004 irresponsibly breaches the professional secrecy of the lawyer and infringes the provisions referred to in the ground for annulment.

B.15.5. In Article 18 (2) of the Act of 11 January 1993, amended by Article 30 (2) of the Act of 12 January 2004, the words "and 2b" must be annulled.

For these reasons,

the Court

1. annuls the words "and 2b" in Article 18 (2) of the Act of 11 January 1993 for the prevention of the use of the financial system for the purpose of money laundering and the financing of terrorism, as amended by Article 30 (2) of the Act of 12 January 2004;

2. dismisses the other actions for annulment, subject thereto:

a) that Article 2 (2), inserted in the aforementioned Act of 11 January 1993 by means of Article 4 of the Act of 12 January 2004, is interpreted so that

- the information to which the lawyer becomes privy when performing the essential activities of his profession, including the matters summarised in that Article 2 (2), namely the defence or legal representation of the client and the provision of legal advice, remains covered by professional secrecy, even outside of any legal proceedings, and can therefore not be disclosed to the authorities, and

- the lawyer can only be subject to the duty to disclose the information he is aware of to the authorities when he carries out an activity, in relation to one of the matters summarised in the aforementioned Article 2 (2), that goes further than a specific mandate of defence or legal representation and providing legal advice;

b) Article 15 (1) (1) of the same Act of 11 January 1993, replaced by Article 27 of the Act of 12 January 2004, is interpreted so that every disclosure of information to the Financial Information Processing Cell is made via the President of the Bar Association.

Judgment thus delivered in French, Dutch and German, in accordance with Article 65 of the Special Act of 6 January 1989, at the public hearing of 23 January 2008.

The Registrar,
P.-Y. Dutilleux

The President,
M. Melchior

CONSEIL D'ETAT
statuant
au contentieux

chh

Nos 296845,296907

REPUBLIQUE FRANÇAISE

AU NOM DU PEUPLE FRANÇAIS

CONSEIL NATIONAL
DES BARREAUX et autres

CONSEIL DES BARREAUX
EUROPEENS

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

Mlle Aurélie Bretonneau
Rapporteur

Sur le rapport de la 6ème sous-section
de la section du contentieux

M. Mattias Guyomar
Commissaire du gouvernement

Séance du 28 mars 2008
Lecture du 10 avril 2008

Vu 1°), sous le n° 296845, la requête sommaire et le mémoire complémentaire, enregistrés les 25 août et 21 décembre 2006 au secrétariat du contentieux du Conseil d'Etat, présentés pour le CONSEIL NATIONAL DES BARREAUX, dont le siège est 22, rue de Londres à Paris (75009), la CONFERENCE DES BATONNIERS DE FRANCE ET D'OUTRE-MER, dont le siège est 12, place Dauphine à Paris (75001), l'ORDRE DES AVOCATS AU CONSEIL D'ETAT ET A LA COUR DE CASSATION, dont le siège est 5, quai de l'Horloge à Paris (75001) et l'ORDRE DES AVOCATS DE PARIS, dont le siège est 11, place Dauphine à Paris (75001) ; le CONSEIL NATIONAL DES BARREAUX et autres demandent au Conseil d'Etat d'annuler pour excès de pouvoir trois dispositions du décret du 26 juin 2006 relatif à la lutte contre le blanchiment de capitaux et modifiant le code monétaire et financier, codifiées aux articles R. 562-2, R. 563-3 et R. 563-4 de ce même code ;

.....

Vu 2°), sous le n° 296907, la requête sommaire et le mémoire complémentaire, enregistrés les 28 août et 28 décembre 2006 au secrétariat du contentieux du Conseil d'Etat, présentés pour le CONSEIL DES BARREAUX EUROPEENS, dont le siège est 1-5, avenue de la Joyeuse Entrée à Bruxelles (1040), Belgique ; le CONSEIL DES BARREAUX EUROPEENS demande au Conseil d'Etat :

1°) d'annuler pour excès de pouvoir deux dispositions du décret du 26 juin 2006 relatif à la lutte contre le blanchiment de capitaux et modifiant le code monétaire et financier, codifiées aux articles R. 562-2 et R. 563-4 de ce même code ;

2°) de mettre à la charge de l'Etat le versement d'une somme de 8 000 euros au titre de l'article L. 761-1 du code de justice administrative ;

.....

Vu les autres pièces des dossiers ;

Vu la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ;

Vu le Traité sur l'Union européenne ;

Vu le Traité instituant la Communauté européenne ;

Vu la directive 91/308/CEE du 10 juin 1991 modifiée par la directive 2001/97/CE du 4 décembre 2001 ;

Vu le code monétaire et financier ;

Vu l'arrêt du 15 octobre 2002 de la Cour de justice des Communautés européennes, Limburgs Vinyl Maatschappig ;

Vu l'arrêt de la Cour de justice des Communautés européennes du 26 juin 2007, « Ordre des barreaux francophones et germanophones et autres » ;

Vu le code de justice administrative ;

Après avoir entendu en séance publique :

- le rapport de Mlle Aurélie Bretonneau, Auditeur,

- les observations de la SCP Bachellier, Potier de la Varde, avocat du CONSEIL NATIONAL DES BARREAUX et autres et de la SCP Delaporte, Briard, Trichet, avocat du CONSEIL DES BARREAUX EUROPEENS,

- les conclusions de M. Mattias Guyomar, Commissaire du gouvernement ;

Considérant que les requêtes présentées, d'une part, sous le n° 296845, par le CONSEIL NATIONAL DES BARREAUX, la CONFERENCE DES BATONNIERS DE FRANCE ET D'OUTRE-MER, l'ORDRE DES AVOCATS AU CONSEIL D'ETAT ET A LA COUR DE CASSATION et l'ORDRE DES AVOCATS DE PARIS et, d'autre part, sous le n° 296907, par le CONSEIL DES BARREAUX EUROPEENS, sont dirigées contre le même décret ; qu'il y a lieu de les joindre pour qu'il soit statué par une seule décision ;

Sur l'intervention de la Chambre nationale des avoués près les cours d'appel au soutien de la requête n° 296845 :

Considérant que la Chambre nationale des avoués près les cours d'appel a intérêt à l'annulation du décret attaqué ; qu'ainsi, son intervention est recevable ;

Sur les textes applicables :

Considérant que la directive 2001/97/CE du Parlement européen et du Conseil du 4 décembre 2001 a modifié la directive 91/308/CEE du Conseil du 10 juin 1991 relative à la prévention de l'utilisation du système financier aux fins de blanchiment de capitaux afin, notamment, d'étendre les obligations qu'elle édicte en matière d'identification des clients, de conservation des enregistrements et de déclaration des transactions suspectes à certaines activités et professions ; qu'elle a inclus dans son champ d'application les notaires et les membres des professions juridiques indépendantes lorsqu'ils participent à certaines transactions ; qu'à cette fin, elle a introduit dans la directive du 10 juin 1991 un article 2^{bis}, aux termes duquel « les Etats membres veillent à ce que les obligations prévues par la présente directive soient imposées aux établissements suivants : (...) 5° notaires et autres membres de professions juridiques indépendantes lorsqu'ils participent, a) en assistant leur client dans la préparation ou la réalisation de transactions concernant : i) l'achat et la vente de biens immeubles ou d'entreprises commerciales ; ii) la gestion de fonds, de titres ou d'autres actifs, appartenant au client ; iii) l'ouverture ou la gestion de comptes bancaires ou d'épargne ou de portefeuilles ; iv) l'organisation des apports nécessaires à la constitution, à la gestion ou à la direction de sociétés ; v) la constitution, la gestion ou la direction de fiducies, de sociétés ou de structures similaires ; b) ou en agissant au nom de leur client et pour le compte de celui-ci dans toute transaction financière ou immobilière » ; qu'aux termes de l'article 6 de la directive, dans sa nouvelle rédaction : « 1. Les Etats membres veillent à ce que les établissements et les personnes relevant de la présente directive, ainsi que leurs dirigeants et employés, coopèrent pleinement avec les autorités responsables de la lutte contre le blanchiment de capitaux : a) en informant, de leur propre initiative, ces autorités de tout fait qui pourrait être l'indice d'un blanchiment de capitaux ; b) en fournissant à ces autorités, à leur demande, toutes les informations nécessaires conformément aux procédures prévues par la législation applicable (...) ; 3. (...) Les Etats membres ne sont pas tenus d'imposer les obligations prévues au paragraphe 1 aux notaires, aux membres des professions juridiques indépendantes, aux commissaires aux comptes, aux experts-comptables externes et aux conseillers fiscaux pour ce qui concerne les informations reçues d'un de leurs clients, lors de l'évaluation de la situation juridique de ce client ou dans l'exercice de leur mission de défense ou de représentation de ce client dans une procédure judiciaire ou concernant une telle procédure, y compris dans le cadre de conseils relatifs à la manière d'engager ou d'éviter une procédure, que ces informations soient reçues ou obtenues avant,

pendant ou après cette procédure » ; enfin, qu'aux termes du considérant n° 17 de la directive : « (...) Il y a lieu d'exonérer de toute obligation de déclaration les informations obtenues avant, pendant et après une procédure judiciaire ou lors de l'évaluation de la situation juridique d'un client. Par conséquent, la consultation juridique demeure soumise à l'obligation de secret professionnel, sauf si le conseiller juridique prend part à des activités de blanchiment de capitaux, si la consultation juridique est fournie aux fins du blanchiment de capitaux ou si l'avocat sait que son client souhaite obtenir des conseils juridiques aux fins du blanchiment de capitaux » ;

Considérant que la loi du 11 février 2004 réformant le statut de certaines professions judiciaires ou juridiques, des experts judiciaires, des conseils en propriété industrielle et des experts en ventes aux enchères publiques, avait notamment pour objet de transposer la directive du 4 décembre 2001 ; que les dispositions contestées du décret du 26 juin 2006 ont pour objet de préciser les conditions dans lesquelles doivent satisfaire aux obligations en matière de lutte contre le blanchiment de capitaux les membres des professions que la directive du 4 décembre 2001 et la loi du 11 février 2004 prise pour sa transposition ont incluses dans le champ d'application du dispositif ;

Sur le cadre juridique du litige :

Considérant que les requérants soutiennent que la directive du 4 décembre 2001 et la loi du 11 février 2004 prise pour sa transposition méconnaîtraient les articles 6 et 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ainsi que des principes généraux du droit communautaire ;

Considérant, en premier lieu, qu'il résulte tant de l'article 6 § 2 du Traité sur l'Union européenne que de la jurisprudence de la Cour de justice des Communautés européennes, notamment de son arrêt du 15 octobre 2002, que, dans l'ordre juridique communautaire, les droits fondamentaux garantis par la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales sont protégés en tant que principes généraux du droit communautaire ; qu'il appartient en conséquence au juge administratif, saisi d'un moyen tiré de la méconnaissance par une directive des stipulations de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, de rechercher si la directive est compatible avec les droits fondamentaux garantis par ces stipulations ; qu'il lui revient, en l'absence de difficulté sérieuse, d'écarter le moyen invoqué, ou, dans le cas contraire, de saisir la Cour de justice des Communautés européennes d'une question préjudicielle, dans les conditions prévues par l'article 234 du Traité instituant la Communauté européenne ;

Considérant, en second lieu, que lorsque est invoqué devant le juge administratif un moyen tiré de ce qu'une loi transposant une directive serait elle-même incompatible avec un droit fondamental garanti par la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et protégé en tant que principe général du droit communautaire, il appartient au juge administratif de s'assurer d'abord que la loi procède à une exacte transposition des dispositions de la directive ; que si tel est le cas, le moyen tiré de la méconnaissance de ce droit fondamental par la loi de transposition ne peut être apprécié que selon la procédure de contrôle de la directive elle-même décrite ci-dessus ;

Sur les moyens mettant en cause la validité de la directive du 4 décembre 2001 :

Considérant qu'il résulte de l'interprétation de la directive du 4 décembre 2001 qui a été donnée par l'arrêt du 26 juin 2007, « Ordre des barreaux francophones et germanophones et autres », de la Cour de justice des Communautés européennes, saisie d'une question préjudicielle par la Cour d'arbitrage de Belgique, que les dispositions de son article 6 qui, ainsi qu'il a été dit, permettent, dans certains cas, aux Etats membres de ne pas imposer aux avocats les obligations d'information et de coopération qu'il prévoit, doivent être regardées, à la lumière du considérant n° 17 de la directive, et afin de donner une interprétation du texte compatible avec les droits fondamentaux garantis par la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, comme excluant que de telles obligations puissent, dans les cas ainsi mentionnés, leur être imposées ;

Considérant, en premier lieu, qu'il résulte de ce qu'a jugé la Cour de justice des Communautés européennes que la directive, ainsi interprétée, ne méconnaît pas les exigences liées au droit à un procès équitable garanti par l'article 6 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, dès lors qu'elle impose que soient exclues du champ des obligations d'information et de coopération les informations reçues ou obtenues par les avocats à l'occasion de leurs activités juridictionnelles ;

Considérant, en deuxième lieu, que si la Cour de justice des Communautés européennes, qui n'était saisie que de la question de la validité de la directive au regard de l'article 6 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, ne s'est pas explicitement prononcée en ce qui concerne les informations reçues ou obtenues par un avocat lors de l'évaluation de la situation juridique d'un client, il résulte de l'interprétation qu'elle a donnée de la directive que celles-ci doivent également, à la lumière du considérant n° 17, être exclues du champ des obligations d'information et de coopération à l'égard d'autorités publiques, sous les seules réserves des cas où le conseiller juridique prend part à des activités de blanchiment de capitaux, où la consultation juridique est fournie à des fins de blanchiment de capitaux et où l'avocat sait que son client souhaite obtenir des conseils juridiques aux fins de blanchiment de capitaux ; que dans ces conditions, et eu égard à l'intérêt général qui s'attache à la lutte contre le blanchiment des capitaux, doit être écarté le moyen tiré de ce que la directive, ainsi interprétée en ce qu'elle concerne les activités d'évaluation par les avocats de la situation juridique de leur client, porterait une atteinte excessive au droit fondamental du secret professionnel protégé par l'article 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, lequel prévoit qu'il peut y avoir ingérence de l'autorité publique dans l'exercice du droit au respect de la vie privée et familiale, notamment lorsqu'une telle mesure est nécessaire à la sûreté publique, à la défense de l'ordre et à la prévention des infractions pénales ;

Considérant enfin que le moyen tiré de ce que la directive laisserait aux Etats membres le soin de déterminer eux-mêmes le niveau de protection à assurer aux informations détenues par les avocats ne peut, compte tenu de l'interprétation qu'il convient de donner à ce texte, qu'être écarté ; que la circonstance que la directive ne définit pas la notion de procédure « judiciaire » ne saurait être regardée comme entraînant une méconnaissance du principe de sécurité juridique, dès lors que la directive a eu recours, comme il lui appartenait de le faire, à une notion susceptible de s'appliquer aux différents systèmes juridiques des Etats membres ;

qu'enfin, les requérants ne sauraient utilement invoquer la Charte des droits fondamentaux de l'Union européenne, laquelle est dépourvue, en l'état applicable du droit, de force juridique ;

Considérant qu'il résulte de ce qui précède, et sans qu'il soit besoin de saisir la Cour de justice des Communautés européennes d'une question préjudicielle, que les moyens mettant en cause la validité de la directive du 4 décembre 2001 ne peuvent qu'être écartés ;

Sur les moyens relatifs à la loi du 11 février 2004 :

Considérant, en premier lieu, que la loi du 11 février 2004 a introduit dans le code monétaire et financier un article L. 562-2-1 relatif aux modalités d'application de l'obligation de déclaration de soupçon aux personnes mentionnées au 12 de l'article L. 562-1, c'est-à-dire aux notaires, huissiers de justice, administrateurs judiciaires et mandataires judiciaires à la liquidation des entreprises ainsi qu'aux avocats au Conseil d'Etat et à la Cour de cassation, aux avocats et aux avoués près les cours d'appel ; qu'aux termes de l'article L. 562-2-1, ces personnes sont tenues de procéder à la déclaration de soupçon prévue à l'article L. 562-2 « lorsque, dans le cadre de leur activité professionnelle, elles réalisent au nom et pour le compte de leur client toute transaction financière ou immobilière ou lorsqu'elles participent en assistant leur client à la préparation ou à la réalisation des transactions concernant : 1° L'achat et la vente de biens immeubles ou de fonds de commerce ; 2° La gestion de fonds, titres ou autres actifs appartenant au client ; 3° L'ouverture de comptes bancaires, d'épargne ou de titres ; 4° L'organisation des apports nécessaires à la création de sociétés ; 5° La constitution, la gestion ou la direction des sociétés ; 6° La constitution, la gestion ou la direction de fiducies de droit étranger ou de toute autre structure similaire » ; que, toutefois, aux termes du même article, ces personnes ne sont pas tenues de procéder à la déclaration de soupçon « lorsque les informations ont été reçues d'un de leurs clients ou obtenues sur l'un d'eux, soit dans le cadre d'une consultation juridique sauf si celle-ci est fournie aux fins de blanchiment de capitaux ou si ces personnes y procèdent en sachant que leur client souhaite obtenir des conseils juridiques aux fins de blanchiment de capitaux, soit dans l'exercice de leur activité dans l'intérêt de ce client lorsque cette activité se rattache à une procédure juridictionnelle, que ces informations soient reçues ou obtenues avant, pendant ou après cette procédure, y compris dans le cadre de conseils relatifs à la manière d'engager ou d'éviter une telle procédure » ; qu'enfin, l'article L. 562-2 prévoit que la déclaration de soupçon, par dérogation au régime de droit commun, est communiquée par l'avocat au Conseil d'Etat et à la Cour de cassation, l'avocat ou l'avoué près la cour d'appel, selon le cas, au président de l'ordre des avocats au Conseil d'Etat et à la Cour de cassation, au bâtonnier de l'ordre auprès duquel l'avocat est inscrit ou au président de la compagnie dont relève l'avoué, à charge pour ces autorités de transmettre à la cellule dite TRACFIN la déclaration qui leur a été remise, sauf si elles considèrent qu'il n'existe pas de soupçon de blanchiment de capitaux ; qu'en tous ces points, la loi du 11 février 2004 a fait une exacte transposition des dispositions de la directive du 4 décembre 2001 ;

Considérant, en second lieu, que pour définir le champ d'application du chapitre III du titre VI du livre V du code monétaire et financier relatif aux obligations de vigilance, la loi renvoie aux personnes mentionnées à l'article L. 562-1 du même code ; que les dispositions du 12 de cet article font mention des « notaires, huissiers de justice, administrateurs judiciaires et mandataires judiciaires à la liquidation des entreprises ainsi que des avocats au Conseil d'Etat et à la Cour de cassation, des avocats et des avoués près les cours d'appel, dans les conditions prévues à l'article L. 562-2-1 » ; qu'il résulte de la combinaison de l'ensemble des dispositions législatives applicables que les personnes mentionnées au 12 de l'article L. 562-1 ne

sont soumises aux obligations de vigilance prévues au chapitre III que dans les limites et conditions posées à l'article L. 562-2-1 rappelées ci-dessus, qui réservent les seuls cas où la personne concernée prend part à des activités de blanchiment de capitaux, où la consultation juridique est fournie aux fins de blanchiment de capitaux et où la personne qui y procède sait que son client souhaite obtenir des conseils à cette fin ; que, dans ces conditions, la loi a procédé, s'agissant des obligations de vigilance, à une exacte transposition des dispositions de la directive ;

Considérant qu'il résulte de ce qui précède que les moyens tirés de ce que la loi du 11 février 2004 serait incompatible avec les droits fondamentaux garantis par les stipulations des articles 6 et 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ne peuvent qu'être écartés ;

Sur les moyens dirigés contre le décret du 26 juin 2006 :

En ce qui concerne l'article R. 562-2 du code monétaire et financier :

Considérant qu'aux termes du troisième alinéa de l'article R. 562-2 du code monétaire et financier, dans sa rédaction issue du décret attaqué : « Sous réserve des dispositions du deuxième alinéa de l'article R. 562-2-2, les commissaires aux comptes, les notaires, les huissiers de justice, les administrateurs judiciaires et mandataires judiciaires, les avocats au Conseil d'Etat et à la Cour de cassation, les avocats et les avoués près les cours d'appel et les commissaires-priseurs judiciaires sont chargés, à titre individuel, de répondre aux demandes de la cellule TRACFIN et de recevoir les accusés de réception, quelles que soient les modalités de leur exercice professionnel » ; que, toutefois, il résulte des dispositions de l'article L. 562-1 telles qu'interprétées ci-dessus que les personnes mentionnées au 12 de cet article ne sont soumises aux obligations de déclaration de soupçon et aux autres obligations de vigilance que dans les conditions posées aux huitième et neuvième alinéas de l'article L. 562-2-1, qui prévoient, pour la communication entre les intéressés et la cellule TRACFIN, un dispositif de filtre, selon les cas, du président de l'ordre des avocats au Conseil d'Etat et à la Cour de cassation, du bâtonnier de l'ordre auprès duquel l'avocat est inscrit ou du président de la compagnie dont relève l'avoué ; qu'il en résulte que les requérants sont fondés à soutenir qu'en imposant une relation directe entre les intéressés et la cellule TRACFIN dans les cas où ils répondent aux demandes de cette dernière, le décret attaqué a méconnu les dispositions de la loi et doit, dans cette mesure, être annulé ;

En ce qui concerne l'article R. 563-3 du code monétaire et financier :

Considérant qu'en vertu de l'article R. 563-3 du code monétaire et financier, dans sa rédaction issue du décret attaqué, il appartient aux organismes financiers et aux personnes mentionnés à l'article L. 562-1 d'adopter des procédures internes destinées à mettre en œuvre les obligations de lutte contre le blanchiment des capitaux et le financement du terrorisme, ainsi qu'un dispositif de contrôle interne destiné à assurer le respect des procédures ; que si le deuxième alinéa du même article prévoit que ces procédures « sont définies le cas échéant soit par arrêté du ministre compétent, soit par des règlements professionnels homologués par le ministre compétent, soit par le règlement général de l'Autorité des marchés financiers », ces dispositions n'ont eu pour objet et ne pouvaient avoir légalement pour effet que de soumettre l'adoption des procédures en cause aux règles définies par les dispositions législatives qui

déterminent l'organisation générale de la profession concernée ; que, par suite, le moyen tiré de ce que l'article R. 563-3 donnerait compétence au ministre pour homologuer les procédures internes dont doivent se doter les avocats en matière de lutte contre le blanchiment des capitaux et le financement du terrorisme doit être écarté ;

En ce qui concerne l'article R. 563-4 du code monétaire et financier :

Considérant qu'aux termes de l'article R. 563-4 du code monétaire et financier : « Les personnes mentionnées au 12 de l'article L. 562-1 n'appliquent les dispositions du présent chapitre que lorsque, dans le cadre de leur activité non juridictionnelle, elles réalisent au nom et pour le compte de leur client toute transaction financière ou immobilière ou lorsqu'elles participent en assistant leur client à la préparation ou à la réalisation des transactions concernant : 1° L'achat et la vente de biens immeubles ou de fonds de commerce ; 2° La gestion de fonds, titres ou autres actifs appartenant au client ; 3° L'ouverture de comptes bancaires, d'épargne ou de titres ; 4° L'organisation des apports nécessaires à la création de sociétés ; 5° La constitution, la gestion ou la direction de sociétés ; 6° La constitution, la gestion ou la direction de fiducies de droit étranger ou de toute autre structure similaire » ;

Considérant que les requérants soutiennent qu'en s'abstenant de prévoir une dérogation aux obligations fixées par le chapitre III, pour les personnes mentionnées au 12 de l'article L. 562-1, en ce qui concerne les informations qu'elles détiennent ou reçoivent dans le cadre d'une consultation juridique, et sous réserve des seuls cas où la personne concernée prend part à des activités de blanchiment de capitaux, où la consultation juridique est fournie aux fins de blanchiment de capitaux et où la personne qui y procède sait que son client souhaite obtenir des conseils à cette fin, l'article R. 563-4, introduit par le III de l'article 2 du décret attaqué, est entaché d'illégalité ;

Considérant qu'ainsi qu'il a été dit précédemment, la loi n'a soumis aux obligations de vigilance définies par le chapitre III les personnes visées au 12 de l'article L. 562-1 que dans les limites posées par l'article L. 562-2-1 citées ci-dessus ; qu'en se bornant à rappeler les dérogations propres aux procédures juridictionnelles, sans mentionner celles correspondant aux consultations juridiques, l'article R. 563-4 a méconnu le champ d'application de la loi ; que les requérants sont fondés à en demander, dans cette mesure, l'annulation ;

Sur les conclusions tendant à l'application des dispositions de l'article L. 761-1 du code de justice administrative présentées par le Conseil des barreaux européens :

Considérant qu'il y a lieu, dans les circonstances de l'espèce, de faire application de ces dispositions et de mettre à la charge de l'Etat le versement au Conseil des barreaux européens d'une somme de 4 000 euros au titre des frais exposés par lui et non compris dans les dépens ;

D E C I D E :

Article 1er : L'intervention de la Chambre nationale des avoués près les cours d'appel au soutien de la requête n° 296845 est admise.

Article 2 : L'article 1er du décret du 26 juin 2006 relatif à la lutte contre le blanchiment de capitaux et modifiant le code monétaire et financier est annulé en tant qu'il introduit, au troisième alinéa de l'article R. 562-2 du code monétaire et financier, des dispositions qui prévoient une relation directe entre les personnes mentionnées au 12 de l'article L. 562-1 et la cellule TRACFIN dans les cas où ces personnes répondent aux demandes de cette dernière.

Article 3 : Le III de l'article 2 du décret du 26 juin 2006 relatif à la lutte contre le blanchiment de capitaux et modifiant le code monétaire et financier, qui introduit un article R. 563-4 rappelant les obligations imposées par le chapitre III au personnes mentionnées au 12 de l'article L. 562-1, est annulé en tant qu'il n'a pas assorti ce rappel des réserves relatives aux informations que ces personnes détiennent ou reçoivent dans le cadre d'une consultation juridique.

Article 4 : L'Etat versera au Conseil des barreaux européens une somme de 4 000 euros au titre de l'article L. 761-1 du code de justice administrative.

Article 5 : Le surplus des conclusions des requêtes est rejeté.

Article 6 : La présente décision sera notifiée au CONSEIL NATIONAL DES BARREAUX, à la CONFERENCE DES BATONNIERS DE FRANCE ET D'OUTRE-MER, à l'ORDRE DES AVOCATS AU CONSEIL D'ETAT ET A LA COUR DE CASSATION, à l'ORDRE DES AVOCATS DE PARIS, au CONSEIL DES BARREAUX EUROPEENS, à la Chambre nationale des avoués près les cours d'appel, au Premier ministre, au ministre de l'économie, de l'industrie et de l'emploi et au garde des sceaux, ministre de la justice.

Une copie en sera adressée au ministre de l'intérieur, de l'outre-mer et des collectivités territoriales et au ministre de la santé, de la jeunesse, des sports et de la vie associative.