

NOTE

THE EUROPEAN UNION'S GATEKEEPER INITIATIVE: THE EUROPEAN UNION ENLISTS LAWYERS IN THE FIGHT AGAINST MONEY LAUNDERING AND TERRORIST FINANCING

I. INTRODUCTION

Globalization, the rapid expansion of the Internet, and advancements in communications and transportation technologies all seem to be either the symptoms or the causes of a more interconnected and interdependent world. As these technological developments have allowed companies and individuals to operate on a more global scale, they have also allowed for the worldwide expansion of criminal activity and heightened sophistication with which this activity is carried out and financed. Drug trafficking, arms smuggling, terrorism, and human trafficking are no longer of purely national concern, and the international community has realized that criminals rely heavily on financial transactions to disguise funds derived from, or used to commit, these serious crimes.¹

Accordingly, the hard stance many countries have taken in their fight against the laundering of criminal proceeds as a way to combat that international criminal activity is understandable. However, the manner in which various countries have gone about doing so has raised great debate and concern among members of the legal profession who are fearful that they are being enlisted in this fight against money laundering and terrorist financing. More specifically, these lawyers are fearful that the fundamental principles of their profession, including attorney-client confidentiality and professional independence, will become its silent victims.²

1. Patricia Shaughnessy, *The New EU Money-Laundering Directive: Lawyers as Gatekeepers and Whistle-Blowers*, 34 *LAW & POL'Y INT'L BUS.* 25, 26 (2002).

2. News Release, Int'l Bar Ass'n, IBA Debates Concerns About Anti-Money Laundering Legislation at FATF Summit (Nov. 16, 2006) (on file with the Hofstra Law Review).

The European Union ("EU") has taken a particularly strong interest in the fight against money laundering and has been one of the strongest supporters of the international money laundering countermeasures since their inception. The EU has taken an active role in the development of money-laundering countermeasures and leads the way in adopting those measures.³ In its implementation of these countermeasures, the EU has called on its people, businesses, and institutions to help join the fight against money laundering. Ten years after the implementation of a directive that imposed stringent identification and reporting duties on all financial institutions and entities, and in the wake of the September 11th terrorist attacks, the EU called upon the legal profession to enlist in its fight against money laundering and terrorist financing.⁴

Faced with the realization that lawyers are often vulnerable to being used for money laundering activities, the European Council determined that, in order to effectively prevent money laundering, it would be necessary to cast a wider net. This new and wider net was to be cast to cover not only the financial sector, but also certain professions that regularly aided their clients in effectuating financial transactions, such as accountants, notaries, and lawyers. This new directive imposed on lawyers an obligation to report their clients to authorities if there was mere suspicion that the client was engaging in money laundering activities.⁵ Needless to say, the members of the legal profession across Europe cried out in disbelief and concern that the dearly held principles of client trust and confidentiality that had always been a cornerstone of their profession were at risk of being undermined or even completely eliminated.⁶

This Note will examine the manner in which the EU has chosen to combat money laundering by analyzing the legislative framework of the three directives that set forth the relevant money laundering countermeasures and the major effects and obstacles those

3. Valsamis Mitsilegas & Bill Gilmore, *The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards*, 56 INT'L & COMP. L.Q. 119, 119 (2007).

4. *Id.* at 122-24.

5. Shaughnessy, *supra* note 1, at 44.

6. COUNCIL OF BARS AND LAW SOC'YS OF EUR., CCBE COMMENTS ON THE COMMISSION STAFF WORKING DOCUMENT: THE APPLICATION TO THE LEGAL PROFESSION OF DIRECTIVE 91/308/EEC ON THE PREVENTION OF THE USE OF THE FINANCIAL SYSTEM FOR THE PURPOSE OF MONEY LAUNDERING ¶16, (Feb. 13, 2007), available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_130207_CCBE_comme1_1194003555.pdf [hereinafter CCBE COMMENTS TO THE COMMISSION]; Council of Bars and Law Soc'ys of Eur., CCBE-INFO, (CCBE, Brussels, Belgium), Jan. 2007, at 6-7, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_17_enpdf1_1179229661.pdf [hereinafter CCBE-INFO].

countermeasures will have on the attorney-client relationship in Europe. Part II of this Note will examine the way in which the attorney-client relationship is regulated in Europe and in the various individual Member States. Parts III and IV will outline the development and evolution of the current anti-money laundering legislation in the EU with particular emphasis on the effects it has had and will continue to have on the legal profession. Part V will discuss the manner in which the EU Member States have chosen to adopt the directives, as well as the various effects that this national legislation implementing the directives has had on the legal profession in the individual Member States. Finally, Part VI will shift the focus to the United States and will discuss whether this approach of enlisting lawyers in the fight against money laundering and terrorist finance is merely a European inclination or a global phenomenon that will eventually impact the legal profession in the United States.

II. REGULATION OF LEGAL ETHICS ISSUES IN EUROPE

A. *Combined Regional and Global Regulation of Legal Ethics Issues*

There are at least four documents, created at either a global or regional level by either international or multiregional bar associations, which have strongly influenced the regulation of the legal profession in Europe. These documents include (1) the International Bar Association (“IBA”) Resolution on Deregulating the Legal Profession; (2) the Union Internationale des Avocats (“UIA”) Turin Principles; (3) the Council of Bars and Law Societies of Europe’s (“CCBE”) Code of Conduct; and (4) the CCBE Charter of Core Principles of the European Legal Profession.⁷

The IBA and the UIA are the two main general-purpose international bar associations. “The IBA tends to be more English-language, common-law oriented than the UIA, which is more French language, civil-law oriented.”⁸ Both organizations include as members “both bar association and individual lawyers from Africa, Asia, Australia, and South America, as well as Europe, and North America.”⁹ The IBA’s Resolution on Deregulating the Legal Profession (“Core Values Resolution”) was drafted in response to the negotiations for the

7. Laurel S. Terry, *A “How To” Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course*, 51 ST. LOUIS U. L.J. 1135, 1150-54 (2007).

8. *Id.* at 1151.

9. *Id.* at 1151-52.

General Agreement on Trade in Services (“GATS”) and “identifies the . . . ‘core values’ of the legal profession” that the Member States of the World Trade Organization “should strive to protect during the GATS negotiations.”¹⁰

The UIA’s Turin Principles were adopted in 2002 and refer to the UN Basic Principles on the Role of Lawyers¹¹ that were adopted in 1990 at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, as part of the UN’s ongoing efforts to implement standards across the globe to ensure the administration of Criminal Justice.¹² Both the UIA’s Turin Principles and the IBA’s Core Values Resolution recognize a duty for lawyers to keep “client matters” confidential.¹³ However, the Turin Principles are more specific in maintaining that under no circumstance does a lawyer have a duty to report the activities of his client.¹⁴

While the IBA and the UIA are considered influential, the CCBE is the most influential multiregional bar association in Europe. It is an international, non-profit association incorporated in Belgium and is considered the official representative organization for the legal profession in the EU and “acts as the liaison between the EU and Europe’s national bars and law societies.”¹⁵ Its role as the voice of the European legal profession is recognized by both the national bars and law societies of the EU Member States, as well as by the EU institutions.¹⁶

The CCBE represents more than 700,000 lawyers and consists of thirty-one delegations whose members are nominated by regulatory bodies of the Bars and Law Societies in at least twenty-seven EU

10. *Id.* at 1152; IBA, Resolution on Deregulating the Legal Profession (adopted 1998), <http://www.ibanet.org/images/downloads/Resolution%20on%20Deregulating%20the%20Legal%20Profession%201998.pdf> (last visited Jan. 2, 2009) [hereinafter Core Values Resolution].

11. Int’l Assoc. of Lawyers, Charte de Turin sur l’Exercice de la Profession d’Avocat au 21ème Siècle [Turin Principles of Professional Conduct for the Legal Profession in the 21st Century] (Oct. 27, 2002), <http://www.uianet.org/documents/qquia/resolutions/Exercice%20de%20la%20Profession%20d'Avocat%20au%2021eme%20siecle.pdf> (last visited Jan. 2, 2009) [hereinafter Turin Principles].

12. Eighth U.N. Cong. on the Prevention of Crime & the Treatment of Offenders, Aug. 27-Sept. 7, 1990, *Basic Principles on the Role of Lawyers* ¶22, U.N. Doc. A/CONF.144/28 Rev. 1 (1990), available at http://www.unhchr.ch/html/menu3/b/h_comp44.htm [hereinafter UN Basic Principles].

13. Turin Principles, *supra* note 11, at 4; Core Values Resolution, *supra* note 10.

14. Turin Principles, *supra* note 11, at 4.

15. CCBE.org, Introduction to the Council of Bars and Law Societies of Europe, <http://www.ccbe.eu/index.php?id=12&L=0> (last visited Dec. 21, 2008).

16. *Id.*

Member States and Switzerland.¹⁷ Additionally, the CCBE includes two associated members (Croatia and Turkey) and eight observer members (Albania, Armenia, Former Yugoslav Republic of Macedonia, Georgia, Moldova, Montenegro, Serbia, and Ukraine).¹⁸ The CCBE has been at the “forefront of advancing the views of European lawyers and defending the legal principles upon which democracy and the rule of law are based.”¹⁹

The CCBE Code of Conduct for European Lawyers was first adopted in 1988 and most recently revised in 2006.²⁰ It was “designed to apply to EU lawyers who are engaged in cross-border transactions with one another” and could be considered the counterpart of the ABA Model Rules.²¹ The CCBE Charter of Core Principles of the European Legal Profession, on the other hand, was adopted in a plenary meeting in November 2006.²² This document may wind up having a broader reach than the CCBE Code of Conduct, “because the Council of Europe has expressed interest in this document” as a guideline for the development of a common code of ethics for lawyers.²³ However, until the creation of such a common code of ethics, the CCBE Code of Conduct continues to be the most important document affecting the legal profession in Europe.

The CCBE objects to the inclusion of lawyers within the scope of the money laundering directives because such inclusion would result in a “breach of the independence of a lawyer and the irrevocable violation of the principle of client confidentiality.”²⁴ Additionally, access to legal advice is jeopardized if a lawyer is obligated to report his suspicions concerning the client to the relevant authorities.²⁵ The right of a client to consult a lawyer and be assisted by a lawyer in confidence is a fundamental right, which in some countries is even constitutionally protected.²⁶ The CCBE has always given professional secrecy great importance and has even incorporated this ethic in its Code of Conduct,

17. Terry, *supra* note 7, at 1149; *see also* CCBE, Members by Countries, <http://www.ccbe.eu/index.php?id=22&L=0> (last visited Dec. 26, 2008).

18. CCBE, *supra* note 17.

19. CCBE.org, *supra* note 15.

20. COUNCIL OF BARS AND LAW SOC'YS OF EUR., CODE OF CONDUCT FOR EUROPEAN LAWYERS (2006), *available at* http://www.ccbe.org/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf [hereinafter CCBE CODE OF CONDUCT].

21. Terry, *supra* note 7, at 1149.

22. CCBE-INFO, *supra* note 6, at 3.

23. Terry, *supra* note 7, at 1154.

24. CCBE COMMENTS TO THE COMMISSION, *supra* note 6, ¶ 10.

25. *Id.*

26. In Germany, for example, the right of a client to be assisted by a lawyer in confidence is constitutionally protected. *See infra* note 40 and accompanying text.

which states that “[c]onfidentiality is . . . a primary and fundamental right and duty of the lawyer.”²⁷

In February 2001, the CCBE issued a “Statement of Position on Lawyers’ Confidentiality” in which it expressed the concern that the obligation to report on clients could lead to the erosion of the attorney-client relationship and the underlying concept of professional secrecy and confidentiality.²⁸ It also emphasized that the prevention of criminal activities such as money laundering should not be pursued in a manner that is inconsistent with the protection of lawyers’ obligations of confidentiality.²⁹

B. National Regulation of Attorney-Client Confidentiality

Within the countries of the EU, what is known as the “legal privilege” encompasses the core principle of lawyer-client confidentiality (also known throughout Europe as the principle of professional secrecy).³⁰ In civil law systems, confidentiality is a single concept that is absolute, which means that confidential information protected by the rule cannot be revealed by the lawyer even if the client consents.³¹ In common law systems, the principle of confidentiality incorporates two related bodies of law, “the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality set forth in a code of ethics for the profession.”³² In such common law systems, the confidential information belongs to the client, which means that the information can be revealed if the client consents.³³

The manner in which Member States choose to regulate the legal privilege varies from country to country. In common law countries, such as the United Kingdom, the privilege has been developed by an

27. CCBE CODE OF CONDUCT, *supra* note 20, § 2.3.1.

28. COUNCIL OF BARS AND LAW SOCIETIES OF EUR., STATEMENT OF POSITION ON LAWYERS’ CONFIDENTIALITY ¶4 (Feb. 22, 2001), *available at* http://www.ccbe.org/fileadmin/user_upload/NTCdocument/secretprofukpdf1_1184072657.pdf.

29. *Id.* ¶3.

30. *See, e.g.*, Case 309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577 ¶ 182 (Opinion of Advocate General Leger).

31. ABA Sec. of Int’l Law, Ad Hoc Task Force on Money Laundering & Prof’l Responsibilities, Comments to the ABA Task Force on Attorney-Client Privilege Pertaining to the Gatekeeper Initiative, the Attorney-Client Privilege and Client Confidentiality, and International Perspectives on Legal Professional Privilege 10 (May 5, 2005), <http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/laundrying3.pdf> [hereinafter ABA Comments on the Gatekeeper Initiative].

32. *Id.*

33. *Id.*; *see also* CCBE Comments to the Commission, *supra* note 6, ¶ 11.

extensive body of case law. In civil law countries, the privilege is normally regulated by national law or regulation either by enactment of specific legislation to govern the conduct of lawyers, or by the inclusion of sanctions for a breach of the privilege into that state's penal code, or by a combination of both.³⁴ In some instances, the privilege is even directly guaranteed in a member state's national constitution.³⁵ In addition, many Member States have also developed their own legislation to specifically address the related principle of confidentiality (professional secrecy).³⁶

In the United Kingdom, where the privilege has been developed by case law, the legal privilege is referred to as the legal professional privilege.³⁷ In 1996, the House of Lords confirmed the absolute nature of the legal professional privilege in its ruling in *R. v. Derby Magistrates' Court, ex parte B and another Appeal*.³⁸ The Lords further held that the privilege is a "fundamental condition on which the administration of justice as a whole rests[,]” reasoning that people would not seek assistance from counsel if that counsel could be compelled to testify against them and, consequently, that they would not be able to defend themselves properly.³⁹

In Germany, the approach is twofold. First, the right to a fair trial, which is inextricably linked to the concept of lawyer-client confidentiality, is embodied in Article 20(3) and Article 2(1) of the national Constitution (Grundgesetz) setting forth, respectively, the constitutional principles for the Rule of Law (Rechtstaatprinzip) and the basic provision on liberty.⁴⁰ Second, the legal profession is also regulated by a Federal Code for Lawyers (Bundesrechtsanwaltdordnung or "BRAO").⁴¹ Before 1994, "the BRAO only imposed on the lawyer a general duty to work in a reliable, thorough, conscientious, and careful manner such that he proves himself worthy of the respect and trust of

34. The Application to the Legal Profession of Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, PARL. EUR. DOC. (SEC 1793) (Dec. 21, 2006), available at <http://register.consilium.europa.eu/pdf/en/06/st17/st17064.en06.pdf> [hereinafter Commission Staff Working Document].

35. *Id.*

36. *Id.*

37. Caryl Ben Basat & Julian D. Nihill, *Corporate Counsel*, 31 INT'L LAW. 245, 250 (1997).

38. *Id.* (citing *Regina v. Derby Magistrates' Court, ex p B*, [1996] 1 A.C. 487, 508-09 (H.L.) (U.K.)).

39. *Id.*

40. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution], May 23, 1949, Bundesgesetzblatt [BGBl] I at 1, arts. 20(3), 2(1), available at <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf>.

41. Basat & Nihill, *supra* note 37, at 253.

others.”⁴² The BRAO was amended in 1994 to include Section 43(a), which unambiguously “laid down the duty of the lawyer to keep information obtained from clients confidential,” including “all information that the lawyer receives in the course of exercising his profession.”⁴³ A breach of BRAO Section 43(a) is punishable with a fine or suspension by the attorney self-regulating body.⁴⁴

Both France and Spain are examples of countries that have criminalized the breach of the legal privilege and thereby also the breach of professional secrecy. In France, the legal privilege was embodied in Article 378 of the former French Penal Code.⁴⁵ Article 378 made it a criminal offense for a lawyer to divulge any confidential information, which a client had given him in the course of professional dealings.⁴⁶ The provisions regarding the legal privilege were not substantially modified when the new Penal Code was enacted in 1994.⁴⁷ In Spain, the legal privilege “is regulated, both as a right and as a duty, by the General By-laws for the Legal Profession of 1982 (Estatuto General de la Abogacia) and by the By-Laws for Court Solicitors (Estatuto General de los Procuradores de los Tribunales).”⁴⁸ An amendment was made to the Criminal Code in 1996, under which professionals who disclose their clients’ confidential information are subject to four years imprisonment and confiscation of their license to practice for two to six years.⁴⁹

III. ORIGIN OF THE EU MONEY LAUNDERING DIRECTIVE

The European Community and its Member States have actively participated in the development of international and regional money-laundering countermeasures from their inception. These early countermeasures included the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“Vienna Convention”) and the Council of Europe 1990 Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (“Money Laundering Convention”).⁵⁰ Additionally, many EU Member States (including all original fifteen European Community

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 252.

46. *Id.*

47. *Id.*

48. *Id.* at 258.

49. *Id.*

50. WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES 50, 124 (2d ed. 1999).

Member States) and the European Commission have participated in the Financial Action Task Force and have contributed significantly to the development of the Financial Aid Task Force's ("FATF") 40 Recommendations.⁵¹

These international agreements are essential to understanding the EU's response to money laundering and the development of the EU money-laundering directives.⁵² Thus, the first EU money-laundering Directive adopted in 1991 could be considered a combined product of the approaches of the Vienna Convention and the Money Laundering Convention on one hand, and the recommendations of the FATF on the other.⁵³

A. Vienna Convention

In recognition of escalating international drug production and trafficking, the United Nations drafted the Vienna Convention.⁵⁴ This Convention has been considered the "primary international effort to halt the laundering of drug proceeds upon which the [EU Directives] and other efforts rely."⁵⁵ It was formally enacted in November 1990 after being ratified by the requisite twenty nations⁵⁶ with the aim of depriving "persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing."⁵⁷ The Convention focuses upon international cooperation as the essential means for eliminating "drug money laundering,"⁵⁸ and calls on all member countries to adopt national measures criminalizing the laundering of proceeds derived from drug trafficking and production.⁵⁹

51. Mitsilegas & Gilmore, *supra* note 3, at 119.

52. *See id.*

53. *Id.*

54. Scott E. Mortman, Note, *Putting Starch in European Efforts to Combat Money Laundering*, *FORDHAM L. REV.*, May 1992, at S429, S440.

55. *Id.* at S439.

56. *Id.* at S440.

57. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances pmbl., opened for signature Dec. 20, 1988, 1582 U.N.T.S. 95, reprinted in 28 I.L.M. 493, available at http://www.unodc.org/pdf/convention_1988_en.pdf (last visited Jan. 2, 2009) [hereinafter Vienna Convention]. Signatories to the Vienna Convention include Cyprus, Denmark, Great Britain, Italy, Luxembourg, Norway, Spain, Sweden, Turkey, and the United States. Mortman, *supra* note 54, at S440 n.84.

58. Mortman, *supra* note 54, at S440.

59. Vienna Convention, *supra* note 57, at art. 3.

B. Council of Europe Money-Laundering Convention

The Council of Europe is not an institution of the EU and should not be confused with the Council of the EU (also known as the EU Council). It was originally created by and limited to ten western European countries with the aim of achieving “a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.”⁶⁰ After the fall of Communism at the end of the Cold War, the Council was able to include more central and eastern European countries such as Russia and the former Yugoslav Republic of Macedonia. The inclusion of these countries enabled the Council to become the “first truly pan-European organisation.”⁶¹

The Council of Europe was the first organization to concentrate methodically on money laundering.⁶² In 1980, it adopted a recommendation entitled “Measures Against the Transfer and Safekeeping of Funds of Criminal Origin.”⁶³ This recommendation was the first to impose the “know-your-customer” rule, which today is a supporting pillar of any money-laundering countermeasure.⁶⁴ The main idea behind the know-your-customer rule was that by promoting more scrutiny within banking services through more direct customer identification, and relaxing national bank secrecy laws, banking institutions could serve as guarding portals against the deposit of ill-gotten gains.⁶⁵ The criminals could thereby not only be identified, but also discouraged from using the banking system to launder their criminal proceeds.⁶⁶

In 1990, the Council incorporated this recommendation in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.⁶⁷ The Convention ultimately shifted the approach

60. Statute of the Council of Europe, Europ. T.S. No. 1, art. 1(a), (Aug. 3, 1949), available at http://cms.ifa.de/fileadmin/content/informationsforum/kulturabkommen/ec_ets001_en.pdf.

61. GILMORE, *supra* note 50, at 121. Today, the Council of Europe has forty-seven members and five observer members including the Holy See, the United States, Canada, Japan, and Mexico. COE.int, About the Council of Europe, http://www.coe.int/T/E/Com/about_coe/ (last visited Jan. 2, 2009).

62. GILMORE, *supra* note 50, at 123.

63. *Id.*

64. *Id.*

65. *Id.* at 123; Konstantinos D. Magliveras, *The European Community's Combat Against Money Laundering: Analysis and Evaluation*, 5 ILSA J. INT'L & COMP. L. 93, 102 (1998).

66. See GILMORE, *supra* note 50, at 123.

67. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Europ. T.S. No. 141, pmb. (Aug. 11, 1990), available at <http://conventions.coe.int/>

from a prevention-based mechanism to an approach that allowed for the implementation of criminal sanctions.⁶⁸ The main purpose of the Convention was “to facilitate international co-operation as regards investigative assistance, search, seizure and confiscation of the proceeds from all types of criminality, especially serious crimes, and in particular drug offences, arms dealing, terrorist offences, trafficking in children and young women . . . and other offenses which generate large profits.”⁶⁹ The Convention, therefore, effectively broadened the scope of the prior 1988 Vienna Convention, which only covered the laundering of proceeds derived from drug offenses.⁷⁰

Indeed, by 1999 twenty-five states had acceded to the Convention, which made it the most important and successful international agreement in the field of money laundering since the Vienna Convention.⁷¹ Additionally, the Convention does not use the word “European,” which indicates the legislators’ intent to expand the membership and applicability of the agreement beyond Europe’s borders.⁷²

C. Financial Action Task Force

The EU also relied heavily on the FATF’s report in formulating its money-laundering directives.⁷³ The FATF is an intergovernmental body, which was established by the G-7 Economic Summit Group in 1989,⁷⁴ with the aim of developing and promoting policies to combat money laundering⁷⁵ and which has “spearheaded” the international anti-money laundering efforts for more than a decade.⁷⁶ Currently, the FATF membership includes thirty-two countries and two regional organizations (the European Commission and the Gulf Cooperation Council).⁷⁷

Treaty/Commun/QueVoulezVous.asp?NT=141&CL=ENG [hereinafter Confiscation of the Proceeds from Crime Convention].

68. Mortman, *supra* note 54, at S436.

69. GILMORE, *supra* note 50, at 125.

70. *See id.*

71. *Id.* at 124.

72. *Id.*

73. Mortman, *supra* note 54, at S436.

74. FATF-GAFI.org, History of the Financial Action Task Force, http://www.fatf-gafi.org/document/63/0,3343,en_32250379_32236836_34432255_1_1_1_1,00.html (last visited Jan. 1, 2009).

75. *Id.*

76. *Id.*

77. FATF-GAFI.org, Members and Observers of the Financial Action Task Force, http://www.fatf-gafi.org/document/52/0,3343,en_32250379_32237295_34027188_1_1_1_1,00.html (last visited Jan. 2, 2009). The FATF members include Argentina, Australia, Austria,

The driving force behind the FATF's effort to combat money laundering is its official report consisting of 40 Recommendations that were issued in 1990 and subsequently revised in 1996 and again in 2003.⁷⁸ Even though the original 40 Recommendations were designed to "combat misuse of financial systems" by persons attempting to launder drug money, the subsequent revisions also address the laundering of money derived from other serious crimes.⁷⁹

Furthermore, the FATF has adopted nine additional Special Recommendations, which, in combination with the revised 40 Recommendations, create a comprehensive "framework to detect, prevent and suppress the financing of terrorism and terrorist acts."⁸⁰ Since the 40+9 Recommendations do not have the force of law, the FATF can only encourage member countries to implement them through national law, regulation, or policy.⁸¹ However, the FATF Forty Recommendations have currently been endorsed by more than 130 countries and are widely accepted as the "leading international anti-money laundering standard."⁸²

In 2001, the FATF initiated a review of its 40 Recommendations in order to "identify numerous ways that the Recommendations could be expanded to address increasingly sophisticated money laundering techniques and to combat terrorist financing."⁸³ The review resulted in a "Consultation Paper" issued on May 30, 2002, outlining various ways of strengthening national money-laundering countermeasures.⁸⁴ The Consultation Paper proposed that the existing and new anti-money laundering initiatives be extended to non-financial businesses and professionals such as casinos, real estate brokers, lawyers, notaries, accountants, and auditors, as well as investment advisors.⁸⁵ This

Belgium, Brazil, Canada, Denmark, the European Commission, Finland, France, Germany, Greece, The Gulf Cooperation Council, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Id.*

78. ABA Comments on the Gatekeeper Initiative, *supra* note 31, at 2; *see also* FATF-GAFI.org, *supra* note 74.

79. ABA Comments on the Gatekeeper Initiative, *supra* note 31, at 2.

80. FIN. ACTION TASK FORCE ON MONEY LAUNDERING, SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING (2001), <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf> (last visited Jan. 12, 2009) [hereinafter FATF SPECIAL RECOMMENDATIONS].

81. ABA Comments on the Gatekeeper Initiative, *supra* note 31, at 2.

82. FIN. ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW OF THE FATF FORTY RECOMMENDATIONS: CONSULTATION PAPER § 2.1.2 (May 30, 2002), *available at* <http://www.fatf-gafi.org/dataoecd/32/3/34046414.pdf> [hereinafter FATF CONSULTATION PAPER].

83. ABA Comments on the Gatekeeper Initiative, *supra* note 31, at 2.

84. *Id.*

85. FATF CONSULTATION PAPER, *supra* note 82, § 5 art. 231.

proposal has been colloquially dubbed the “Gatekeeper Initiative,” and stands for the idea that certain professionals, such as lawyers, under certain circumstances act as “gatekeepers” to the international financial and business markets and should be enlisted to support law enforcement efforts to combat money laundering and terrorist financing.”⁸⁶

The specific anti-money-laundering initiatives, which the Consultation Paper considered extending to lawyers included mainly:

- (1) increased regulation and supervision of the profession, (2) increased due diligence requirements on clients, (3) new internal compliance training and recordkeeping requirements for lawyers and law firms, and, (4) under certain circumstances, ‘suspicious transaction reporting’ . . . requirements that would require lawyers to report to a government enforcement agency or a self-regulatory organization . . . information that triggers a ‘suspicion’ of money laundering relating to a client activity.⁸⁷

Furthermore, the Consultation Paper promulgated the so-called “no tipping off” rule, which sets forth that lawyers should be prohibited from informing their clients when a Suspicious Transaction Report (“STR”) has been filed.⁸⁸

On June 20, 2003, the FATF issued a revised version of its 40 Recommendations, which incorporated the Consultation Paper’s proposal that lawyers, notaries, other independent legal professionals and accountants be subject to the STR requirement, to the extent that, “on behalf of or for a client, they engage in a financial transaction in relation to”:⁸⁹ (1) “buying and selling of real estate;” (2) “managing of client money, securities or other assets;” (3) “management of bank, savings or securities accounts;” (4) “organisation of contributions for the creation, operation or management of companies;” and (5) “creation, operation or management of legal persons or arrangements, and buying and selling of business entities.”⁹⁰ The Revised Recommendations also incorporated the “no-tipping off” rule,⁹¹ but the interpretive notes set forth a limitation to the rule in that a lawyer’s efforts to dissuade a client

86. ABA Comments on the Gatekeeper Initiative, *supra* note 31, at 2.

87. *Id.*

88. *Id.*

89. FIN. ACTION TASK FORCE, THE FORTY RECOMMENDATIONS, rec. 16(a) (June 20, 2003), available at <http://www.fatf-gafi.org/dataoecd/7/40/34849567.pdf> [hereinafter FATF 2003 FORTY RECOMMENDATIONS].

90. *Id.* at rec. 12(d).

91. *Id.* at rec. 14(b).

from engaging in questionable conduct should not constitute “tipping off.”⁹²

The Revised Recommendations do acknowledge the existence of the attorney-client privilege. Specifically, the Revised Recommendations state that the STR requirement would not apply if the “relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.”⁹³ “However, the scope of the exception is unclear.”⁹⁴ An interpretive note states that “[i]t is for each jurisdiction to determine the matters that would fall under legal professional privilege or professional secrecy.”⁹⁵ Typically, this would cover “information lawyers . . . receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings.”⁹⁶

Currently, the FATF 40+9 Recommendations are considered the most influential standards regarding the deterrence and prevention of money laundering and have been widely implemented by various FATF member countries in accordance with their particular circumstances and constitutional frameworks; however, in many countries, especially within the EU, implementation is proving challenging with regard to the legal profession.⁹⁷ Lawyers in these countries have expressed concern that the obligation to report suspicious transactions breaches the principle of lawyer-client confidentiality, and therefore “severely harms the rule of law and democracy; and impairs access to justice.”⁹⁸ They also maintain that enforcement of the STR requirement is incompatible with the responsibility all lawyers have to their clients and to society at large. According to the IBA, this incompatibility of the STR requirement with the notion of lawyer-client confidentiality is the main reason the United States has not yet implemented this aspect of the FATF.⁹⁹

92. *Id.* at annex, rec. 14.

93. *Id.* at rec. 16.

94. ABA Comments on the Gatekeeper Initiative, *supra* note 31, at 3.

95. FATF 2003 FORTY RECOMMENDATIONS, *supra* note 89, at annex, rec. 16.

96. *Id.*

97. News Release, Int’l Bar Ass’n, *supra* note 2.

98. *Id.*

99. *Id.*

IV. LEGISLATIVE EVOLUTION OF THE MONEY-LAUNDERING DIRECTIVE IN EUROPE

EU law now has what is known as a three pillar structure.¹⁰⁰ This structure is “often presented as resembling a temple façade with three pillars supporting the architrave and pediment of the [European] Union.”¹⁰¹ The First Pillar encompasses what are often referred to as the European Communities, which include the European Coal and Steel Community (“ECSC”) in existence since 1952, the European Atomic Energy Community (“Euratom”) set up in 1958, and the European Economic Community (“EEC”) established under the Treaty of Rome in 1957.¹⁰² The Second Pillar of EU law aspires to create a common foreign and security policy (“CFSP”), while the Third Pillar mandates cooperation in justice and home affairs.¹⁰³ This three pillar structure of the EU creates a distinction between Community law and EU law. Community law is limited to the First Pillar, which is governed by the provisions and articles of the Treaty of Rome and focuses on the social and economic foundations of the single market. This First Pillar, collectively with the other two pillars, establish the entire body of EU law.¹⁰⁴

When the EEC was established by the Treaty of Rome in 1957, it only addressed economic integration. In 1993, it was amended by the Maastricht Treaty and officially renamed the Treaty Establishing the European Community or EC Treaty.¹⁰⁵ The Maastricht Treaty was “superimposed” over the Treaty of Rome, which had the effect of not only amending the Treaty of Rome but also of establishing two additional pillars to the already existing pillar of Community law on

100. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 4 (7th ed. 1999).

101. P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN UNION 38 (3d ed. 1998).

102. MATHIJSEN, *supra* note 100, at 4. “When reference is made to the ‘Community’, it is the EEC which is generally meant, the other two communities no longer play an independent role; for all practical purposes they have been absorbed into the EEC.” *Id.*

103. KAPTEYN & VAN THEMAAT, *supra* note 101, at 38. The Second and Third Pillar are kept “strictly separated” from the First Pillar and “operate in a much more intergovernmental framework, . . . in which . . . the Commission, while it is fully associated with the work, does not have the sole right of initiative which is so central to its pivotal status in the Communities” (that is, the First Pillar). *Id.*

104. WALTER CAIRNS, INTRODUCTION TO EUROPEAN UNION LAW 2 (1997); *see also* RALPH H. FOLSOM, PRINCIPLES OF EUROPEAN UNION LAW 7 (2005).

105. FOLSOM, *supra* note 104, at 6-7.

economic integration.¹⁰⁶ The ratification of the Maastricht Treaty created the basic three pillar structure for what is today known as the EU.¹⁰⁷

The Maastricht Treaty ultimately expanded the areas deemed of “common interest” to include judicial and customs cooperation, with the aim of “preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.”¹⁰⁸ Until the adoption of the Maastricht Treaty, areas such as justice and home affairs were considered inalienable national concerns, outside the purview and reach of the Community.

In 1999, the Treaty of Amsterdam transferred the areas of illegal immigration, visas, asylum, and judicial co-operation to the European Community (the First Pillar) and the Third Pillar was amended to control “Police and Judicial Cooperation in Criminal Matters (“PJCC”).”¹⁰⁹ The designation “Justice and Home Affairs” now refers both to the fields that have been transferred to the First Pillar governed by the EC Treaty as well as the fields that have remained under the Third Pillar of Justice and Home Affairs.¹¹⁰

Article 249 of the EC Treaty sets forth the types of legal acts that the political institutions of the Community may take and the legal effects those acts shall have.¹¹¹ More precisely, Article 249 provides that the European Council, the European Parliament (acting jointly with the Council), and the European Commission may, “in accordance with the provisions of this Treaty,” issue regulations, directives, decisions, recommendations, or opinions.¹¹²

Regulations and directives are the two primary types of legislative acts within the EU. While a regulation has general application and is binding “in its entirety and directly applicable” in all Member States, directives are only binding upon each Member State in regard to the “result to be achieved” and leaves to the national authorities the “choice

106. *Id.* at 7, 19.

107. KAPTEYN & VAN THEMAAT, *supra* note 101, at 38.

108. Treaty on European Union (consolidated text), Dec. 29, 2006, 2006 O.J. (C 321), art. 29, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf> [hereinafter Maastricht Treaty]; see also GILMORE, *supra* note 50, at 155.

109. Verena Murschetz, *The Future of Criminal Law Within the European Union—Union Law or Community Law Competence?*, 38 VICT. U. WELLINGTON L. REV. 145, 146 (2007).

110. *Id.*

111. FOLSOM, *supra* note 104, at 30.

112. Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321), art. 249 [hereinafter EC Treaty].

of form and methods.”¹¹³ A directive establishes Union policy and leaves it to the Member States to achieve the implementation of that policy in “whatever way is appropriate to their national legal system.”¹¹⁴ This may involve a “new statute, a Presidential decree, an administrative act or even a constitutional amendment.”¹¹⁵

A. “First Directive”—Council Directive 91/308/EEC

Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (“First Directive”) was issued in 1991, two years before the creation of a framework for the cooperation in Justice and Home Affairs under the Third Pillar of EU law, created by the adoption of the Maastricht Treaty in 1993.¹¹⁶ These circumstances posed two distinct constitutional obstacles to the enactment of the money laundering legislation.

First, “[a]ny legislation dealing with money laundering countermeasures would . . . have to be adopted with a legal basis under the EC Treaty” (the First Pillar).¹¹⁷ This caused some difficulty since money-laundering legislation is arguably of a criminal law nature and has as its primary objective the fighting of crime, which was still considered a purely national concern.¹¹⁸ Second, the legislation would defy the limits posed by EC law in accommodating criminal law, as well as the limits of EC competence, to adopt legislation that defined criminal offenses and imposed sanctions.¹¹⁹

It was finally agreed that the legal basis for the legislation would be founded on the economic nature of the Directive in that the prevention of money laundering “was essential to ensure the integrity of the Community financial system and the internal market.”¹²⁰ Thus, it was possible to adopt the First Directive under the First Pillar based on a

113. *Id.* Decisions are only binding upon those to whom they are addressed. Recommendations and Opinions have no binding force. *Id.*

114. FOLSOM, *supra* note 104, at 31.

115. *Id.*

116. Mitsilegas & Gilmore, *supra* note 3, at 136.

117. *Id.* at 135.

118. *Id.*

119. *Id.* Article 230 of the EC Treaty provides that lack of competence is grounds for invalidating Community measures. EC Treaty, *supra* note 112, at arts. 230-31. The principle of competence requires that both the Community as an entity has authority to take certain action and that the particular institution taking the action is the competent authority to do so. Case C-327/91, France v. Comm’n, 1994 E.C.R. I-3641 ¶¶ 26, 42 (concluding that the antitrust agreement signed between the Commission and the United States was void because only the Council, rather than the Commission, had competence to conclude such an agreement).

120. Mitsilegas & Gilmore, *supra* note 3, at 136.

“dual free-movement/internal market legal basis” even though the primary nature of the Directive was ostensibly of a criminal law nature.¹²¹ Regarding the issue of competence, or rather the Community’s lack thereof, a compromise was reached and instead of criminalizing money laundering under the Directive (for which the Community had no competence), it was merely prohibited.¹²² However, even though the First Directive did not expressly impose an obligation on Member States to criminalize money laundering, the practical effect of the Directive’s prohibition left them with little choice and money laundering was soon criminalized in all Member States.¹²³

Article 1 of the First Directive sets forth a definition of money laundering derived from the Vienna Convention¹²⁴ and provides that:

Money Laundering means the following when committed intentionally:

- the conversion or transfer of property, *knowing* that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;
- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, *knowing* that such property is derived from criminal activity or from participation in such activity;
- the acquisition, possession or use of property, *knowing*, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;
- participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the actions mentioned in the foregoing indents.¹²⁵

Article 1 also states that the offense of money laundering is committed even where “the activities which generated the property to be laundered were carried out in the territory of another Member State or in

121. *Id.*

122. *Id.*

123. *Id.*

124. Mortman, *supra* note 54, at S432.

125. Council Directive 91/308, On Prevention of the Use of the Financial System for the Purpose of Money Laundering, art. 1(C), 1991 O.J. (L 166) (EC) [hereinafter First Directive] (emphasis added).

that of a third country.”¹²⁶ Article 1 sets forth the applicable definition of Credit and Financial Institutions, which attempts to cover the whole financial system of the European Community by making its provisions not only applicable to banks but also to all types of credit and financial institutions that are being used or could be used by money launderers.¹²⁷

The Article 1 definition of Criminal Activity of the First Directive encompassed all offenses specified in Article 3(1)(a) of the Vienna Convention,¹²⁸ which includes “the cultivation, production, manufacture, transportation and sale of narcotic drugs and the management or financing of any of these activities.”¹²⁹ The First Directive further states that “Member States may designate any other offence as a criminal activity for the purposes of this Directive.”¹³⁰ This wording has created two related problems. First, many Member States may not feel compelled to “extend the scope of [the] prohibited money laundering operations to proceeds other than those deriving from drug trafficking offenses (the predicate offenses).”¹³¹ Second, when Member States have decided to go beyond the predicate offenses listed in the Directive, the expansion has not been uniform, leading to considerable disparities among national legislation.¹³²

By combining the approaches of the UN, the Council of Europe, and the FATF, the First Directive created a two-pronged approach of criminalization and prevention of money laundering. This dual approach to money laundering made the “First Directive the first major regional instrument” to adopt a nearly “comprehensive anti-money laundering framework.”¹³³ Regarding the criminalization approach, Article 2 of the First Directive provided that “Member States shall ensure that money laundering as defined in this Directive is prohibited.”¹³⁴ Originally, this article stated that Member States shall “ensure that money laundering is treated as a criminal offense” but this wording was strongly opposed by the Council of Ministers due to the Community’s lack of competence to legislate in the area of criminal law.¹³⁵ Since this opposition ultimately

126. *Id.*

127. *Id.* at art. 1; *see also* Magliveras, *supra* note 65, at 97.

128. First Directive, *supra* note 125, at art. 1(E).

129. Magliveras, *supra* note 65, at 99; *see also* Vienna Convention, *supra* note 57, art. 3(1)(a)(i).

130. First Directive, *supra* note 125, at art. 1(E).

131. Magliveras, *supra* note 65, at 99.

132. *Id.*

133. Mitsilegas & Gilmore, *supra* note 3, at 119-20.

134. First Directive, *supra* note 125, at art. 2.

135. Magliveras, *supra* note 65, at 100.

jeopardized the adoption of the entire Directive, a compromise was reached, which led to the adoption of the “watered-down” version of Article 2 calling for mere prohibition.¹³⁶ However, as previously mentioned, the practical effect of the prohibition was in fact “de facto” criminalization.¹³⁷

Regarding the prevention approach, the First Directive incorporated the 1990 FATF Recommendations under Articles 3 through 7.¹³⁸ The provisions of these articles introduced a series of obligations that Member States were required to impose on credit and financial institutions including: (1) the obligation “to identify customers and keep records,” (2) the obligation “to refrain from transactions they know or suspect are linked with money laundering,” (3) the obligation “not to tip off customers that they are being investigated for money laundering,” and (4) “a proactive duty to report suspicious transactions to the competent national authorities.”¹³⁹

The First Directive was to be implemented by Member States by January 1, 1993, at the latest.¹⁴⁰ However, a majority of Member States did not comply with this deadline.¹⁴¹ Interestingly, even countries which had already promulgated relevant legislation before the adoption of the Directive did not observe the deadline.¹⁴² For example, the United Kingdom did not incorporate the First Directive into national law until after the deadline¹⁴³ even though the 1986 Drug Trafficking Offenses Act had already made the laundering of proceeds from drug trafficking a criminal offense.¹⁴⁴ The First Directive was finally incorporated later in 1993 by virtue of the Criminal Justice Act and 1993 Money Laundering

136. *Id.* at 100-01.

137. Mitsilegas & Gilmore, *supra* note 3, at 136.

138. *Id.* at 120; *see also* Magliveras, *supra* note 65, at 102.

139. Mitsilegas & Gilmore, *supra* note 3, at 120; *see also* First Directive, *supra* note 125, at arts. 3-7. Institutions must comply with the customer identification requirement when an account is opened or a transaction is carried out exceeding ECU 15,000 (equal to \$13,650 at that time) either in a single operation or in separate operations that appeared to be “loosely connected.” Magliveras, *supra* note 65, at 102. Additionally, “the identification requirement is implemented when banks check in detail the identity of customers (the so-called *know your customer* principle) and refrain from opening anonymous or proxy accounts where the beneficiary’s identity is not fully revealed.” *Id.* The Directive did not contain any “provisions regarding the nature, functions, and powers of these [competent national] authorities.” Mitsilegas & Gilmore, *supra* note 3, at 122. Member States were given full discretion in the designation of such authorities, which has led to the development of various different models of reporting systems within the EU. *Id.*

140. Mortman, *supra* note 54, at S435.

141. Magliveras, *supra* note 65, at 107.

142. *Id.* at 107.

143. *Id.*

144. *See id.* at 107 & n.74; Drug Trafficking Offenses Act, 1986, c. 32, § 24 (Eng.).

Regulations.¹⁴⁵ Similarly, Belgium, by virtue of the Act of July 17, 1990, introduced Article 505 to its Penal Code, which made intentional or negligent money laundering a criminal offense.¹⁴⁶ The First Directive, however, was not adopted until the Money Laundering Act of January 11, 1993, was finally given effect.¹⁴⁷

The primary method of implementation opted for by most Member States has been to amend their Penal Codes to “criminalize money laundering and to promulgate separate legislation catering for the substantive provisions of the Directive.”¹⁴⁸ This method was followed by Germany, which introduced paragraph 261 to its Penal Code in 1992 via the Act on impeding illegal drug trafficking and other forms of organized crime¹⁴⁹ and in 1993 incorporated the substantive provisions of the Directive via the Act on the detection of proceeds from serious crimes.¹⁵⁰

The First Directive stipulates that money launderers may only be prosecuted if they know that the property given to them for conversion was derived from committing or participating in a predicate offense.¹⁵¹ This means that in order for a money laundering case to succeed before the courts, it must be proven that the charged money launderer had “concrete knowledge” of the property’s (that is, money’s) “illicit origin.”¹⁵² However, not all Member States have adhered to this strict requirement that the alleged money laundering operations must have been “intentional” in order to be prosecuted. For example, the implementing legislation in the Netherlands, Ireland, and the United Kingdom also punish negligent money laundering.¹⁵³ Negligent money laundering occurs where the charged money launderer merely had reason to suspect that the proceeds he disguised were derived from the commission of a predicate offense. In other words, the defendant should have suspected that he was disguising “dirty money.”¹⁵⁴

145. Magliveras, *supra* note 65, at 107; *see also* Criminal Justice Act, 1993, c. 36, § 93(A) (Eng.).

146. Magliveras, *supra* note 65, at 107.

147. *Id.*

148. *Id.* The substantive provisions of the First Directive encompass the identification requirement, the obligation to reveal to the competent authorities suspicious transactions, and the tipping-off requirement. *Id.*

149. *Id.*

150. *Id.* at 108.

151. First Directive, *supra* note 125, at art. 1(C).

152. Magliveras, *supra* note 65, at 99.

153. *Id.* at 99-100; *see, e.g.*, THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE DUTCH PENAL CODE 245 (Louise Rayar & Stafford Wadsworth trans., 1997).

154. Magliveras, *supra* note 65, at 100.

B. “Second Directive”—Council Directive 2001/97/EC

Since issuing its first set of 40 Recommendations in 1990, the FATF continued to monitor “trends and typologies in money laundering,” as well as the “legal and practical effect of its Recommendations.”¹⁵⁵ By the mid-1990s, the FATF realized that the “existing global anti-money laundering framework was not adequate to address the changes in money laundering operations” created by technological advances or the laundering of proceeds derived from non-drug-related criminal activity.¹⁵⁶ Therefore, in 1996 the FATF revised its 40 Recommendations.¹⁵⁷

These revisions set forth numerous ways in which countries could be more effective in their fight against money laundering. First, they suggested that the list of predicate offenses for money laundering should be expanded beyond drug-related criminal activity. Second, they recommended that the customer identification system be updated in order to take into account new technologies money launderers had been using to sidestep the previous money laundering countermeasures. Finally, they suggested that the obligations previously imposed only on institutions within the financial sector also be imposed on other institutions and individuals that were vulnerable to being used for money laundering purposes.¹⁵⁸

The latter group included lawyers. The FATF considered some activities of lawyers particularly vulnerable to exploitation by money launderers because lawyers have the ability to create “corporate vehicles, establish trust arrangements, and provide financial advice in complex transactions.”¹⁵⁹ Money launderers could also use lawyers’ client accounts for “layering and concealing funds” that could be hidden behind the veil of secrecy offered by the legal privilege.¹⁶⁰

In 1999, these revisions led the European Commission to draft a proposal for a second money laundering directive that would update the First Directive by incorporating the FATF Revised Recommendations.¹⁶¹

155. Mitsilegas & Gilmore, *supra* note 3, at 122-23.

156. *Id.* at 123.

157. *Id.*

158. *Id.*

159. Shaughnessy, *supra* note 1, at 30.

160. *Id.*

161. Mitsilegas & Gilmore, *supra* note 3, at 123; see Commission Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, COM (1999) 352 final (July 19, 1999).

In an explanatory memorandum, the Commission remarked on its high regard for the FATF Recommendations, noting that:

Just as the 1991 Directive moved ahead of the original FATF 40 Recommendations in requiring obligatory suspicious transaction reporting, the European Union should continue to impose a high standard on its Member States, giving effect to or even going beyond the 1996 update of the FATF 40 Recommendations. In particular the EU can show the way in seeking to involve certain professions more actively in the fight against money laundering alongside the financial sector.¹⁶²

However, negotiations for the Directive dragged on, due to concerns by the European Parliament, which was co-legislating with the Council of Ministers on the Directive. These concerns were based mainly on how the extension of the First Directive's duties to the legal profession would impact the right to a fair trial and the principle of lawyer-client confidentiality.¹⁶³ Immediately prior to the September 11th terrorist attacks, the proposal for the Second Directive was in conciliation, which would have signified the expiration of the proposal if an agreement had not been reached soon.¹⁶⁴

The September 11th terrorist attacks created a new urgency for reaching an agreement in the sense that it became "politically correct to support measures to strangle the channels for financing terrorism and politically incorrect to appear to value self-serving professional interests over the international goal of fighting terrorism."¹⁶⁵ Finally, in late November 2001, the Council of Ministers and the European Parliament reached a compromise and Directive 2001/97/EC amending the First Directive ("Second Directive") was adopted on December 4, 2001.¹⁶⁶

162. Explanatory Memorandum to the Commission Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, COM (1999) 352 final, at 2 (July 14, 1999), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0352:FIN:EN:PDF>.

163. Mitsilegas & Gilmore, *supra* note 3, at 123.

164. *See id.* Conciliation is a formal legislative process whereby representatives of the Council and an equal number of representatives from the Parliament form a Conciliation Committee pursuant to Article 251(4) of the EU Treaty. The Committee is established when the two institutions are unable to agree upon a final text. The Committee has six weeks to agree upon a text by a qualified majority in the Council and by an absolute majority of the members of Parliament, otherwise the proposal will be rejected. *See* EC Treaty, *supra* note 112, at art. 251(4).

165. Shaughnessy, *supra* note 1, at 30.

166. *Id.* at 31; *see* Council Directive 2001/97, amending Council Directive 91/308/EC On Prevention of the Use of the Financial System for the Purpose of Money Laundering, 2001 O.J. (L 344) (EC) [hereinafter Second Directive].

In line with the revised 40 Recommendations, the Second Directive brought about an extension of the predicate offenses to include serious crime. Not only does it include traditional serious crime, but it also lists serious fraud, corruption, and any “offence which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State.”¹⁶⁷ Furthermore, the Second Directive still allows the Member States to designate any other criminal offense as a predicate offense.¹⁶⁸ Additionally, the applicable scope of the Second Directive was extended to impose the duties prescribed by the First Directive on auditors, notaries, external accountants and tax advisors, estate agents, art dealers, and casinos, as well as lawyers and other independent legal professionals, when they are engaged in a series of specified financial activities.¹⁶⁹

The Second Directive had two basic requirements relating to identification and disclosure.¹⁷⁰ The identification provision imposes a more stringent application of the identification requirements underlying the know-your-customer principle on individuals and entities subject to the Second Directive, in that they are required to perform a due diligence investigation upon all their clients and establish a client’s identity “by means of supporting evidence.”¹⁷¹

Subject entities and individuals must only impose these identification requirements upon the occurrence of certain triggering events including: (1) when entering into a business relationship with a new client; (2) when opening a client account; (3) when offering safe custody facilities; or (4) when any transaction involves €15,000 or more.¹⁷² However, if the entity or individual has reason to suspect that the client is involved in money laundering, then the client identification requirements must be carried out regardless of whether they have been triggered by any of the enumerated occurrences.¹⁷³ The Second Directive seemed most concerned about the risks of money laundering in non-face-to-face transactions, and in such situations required that all entities and individuals subject to the Directive take “specific and adequate

167. Second Directive, *supra* note 166, at art. 1(E).

168. *Id.*

169. *Id.* at art. 2a.

170. Shaughnessy, *supra* note 1, at 32.

171. Second Directive, *supra* note 166, at art. 3(1).

172. *Id.* at art. 3(1)-(2).

173. *Id.* at art. 3(8).

measures,” such as requiring additional documentary evidence and certifications, in order to ensure the identity of the client.¹⁷⁴

The disclosure provision required that subject entities and individuals inform the appropriate authorities “of any fact which might be an indication of money laundering,” and, upon request, provide those authorities with all necessary information, which in essence meant the filing of STRs.¹⁷⁵ However, the language of the Second Directive setting forth the appropriate standard of awareness that should trigger the filing of such a report deviates from that of the FATF Recommendations.¹⁷⁶

The FATF Recommendations set forth two possible options for determining when a STR should be filed. The first option establishes an objective standard by using the terminology “suspect or have reasonable grounds to suspect”¹⁷⁷ and the second option establishes a subjective standard by using the term “suspect.”¹⁷⁸ The Second Directive requires disclosure “of any fact which might be an indication of money laundering,” which establishes an even broader objective standard than set forth by the FATF Recommendations.¹⁷⁹

In contrast to the United States, licensed attorneys in Europe do not have a monopoly to practice law. Because lawyers make up only a small portion of the large class of professionals who are legally authorized to perform many of the same legal services as lawyers, they face extensive competition from accounting firms, notaries, and other service providers working in multidisciplinary practices. Therefore, the Second Directive uses the intentionally broad term “independent legal professionals”¹⁸⁰ in order to include any professional who provides legal services.¹⁸¹

However, most Member States regulate the legal professionals who are not bound to the client by a relationship of employment differently than those lawyers who are bound to their client by a relationship of employment, such as in-house counsel.¹⁸² Accordingly, the European Court of Justice has determined, due to this common distinction

174. *Id.* at art. 3(11).

175. *Id.* at art. 6(1)(a)-(b).

176. *Id.* *But see* FIN. ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS, rec. 15 (Sept. 1, 1996), *available at* <http://www.fatf-gafi.org/dataoecd/15/51/40262612.pdf> [hereinafter FATF 1996 FORTY RECOMMENDATIONS].

177. FATF SPECIAL RECOMMENDATIONS, *supra* note 80, at rec. 4; *see also* FATF CONSULTATION PAPER, *supra* note 82, § 3.7.3.2.

178. FATF 1996 FORTY RECOMMENDATIONS, *supra* note 176, at rec. 15; *see also* FATF CONSULTATION PAPER, *supra* note 82, § 3.7.3.2.

179. Second Directive, *supra* note 166, at art. 6(1)(a).

180. *Id.* at art. 2(5).

181. Shaughnessy, *supra* note 1, at 36.

182. *Id.* at 37.

prevalent in most Member States, that the principle of lawyer-client confidentiality should only apply to lawyers regulated by Member State bar associations as well as any legal professional who is not employed by or who is independent of his client. This distinction excludes European in-house counsels from the scope of the Second Directive.¹⁸³

To ease the concerns of the European Parliament that the Second Directive's reporting obligations would have an adverse effect on the principle of lawyer-client confidentiality with devastating implications for the concept of a fair trial, it provides for the possibility of exempting lawyers from certain obligations to report suspicious transactions and to refrain from tipping off.¹⁸⁴ However, these exemptions are not obligatory, and the Second Directive allows Member States broad discretion in the implementation of the obligations regarding notaries and other independent legal professionals.¹⁸⁵

The Second Directive recognizes the need for lawyer-client confidentiality and provides for two exemptions to the disclosure requirements. First, the Directive allows Member States to exempt lawyers from disclosing any information "obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client."¹⁸⁶ However, it seeks to subject lawyers to its provisions when they engage in activities especially vulnerable to money laundering, such as when "participating in financial or corporate transactions, including providing tax advice."¹⁸⁷

More specifically, the Second Directive subjects lawyers to its provisions when they assist "in the planning or execution of transactions for their clients concerning the:" (1) "buying and selling of real property or business entities;" (2) the "managing of client money, securities or

183. See Case 155/79, *AM & S Europe Ltd. v. Commission*, 1982 E.C.R. 1575, 1611-12 (finding that the legal privilege applicable to EC proceedings was limited to lawyers who were members of a Member State Bar Association and who were independent from their client, thereby excluding in-house lawyers); see also FOLSOM, *supra* note 104, at 289-90 (stating that the European Court of Justice in *AM & S* held that written communications with in-house counsel as well as communications with non-EU counsel—lawyers who are not licensed EU attorneys—are not subject to the legal privilege and therefore are not exempt from disclosure); FATF CONSULTATION PAPER, *supra* note 82, § 5.4, ¶ 280 (noting that the FATF recommendations intend to cover only "independent legal professionals," defined as "lawyers and legal professionals that are licensed or admitted to practice and who work in law firms or are self-employed").

184. Mitsilegas & Gilmore, *supra* note 3, at 124.

185. *Id.*

186. Second Directive, *supra* note 166, at recital 17.

187. *Id.* at recital 16. Given the background of the Directive and reading it as a whole, it becomes clear the word "participating" in this context refers to situations where the lawyer assists a client in money laundering transactions rather than actually participates in them. Shaughnessy, *supra* note 1, at 37.

other assets;” (3) the “opening or management of bank, savings or securities accounts;” (4) the “organisation of contributions necessary for the creation, operation or management of companies;” and (5) the “creation, operation or management of trusts, companies or similar structures, or by acting on behalf of and for their client in any financial or real estate transaction.”¹⁸⁸

Second, the Directive allows Member States to exempt lawyers from the disclosure requirements of the Directive when they are “ascertaining the legal position of a client” or when they are “representing a client in legal proceedings.”¹⁸⁹ These exemptions, however, only apply to the disclosure requirements of suspicious transaction reporting and tipping-off. They therefore do not relieve lawyers of the know-your-client identification requirements.¹⁹⁰

Two general problems, however, arise from the wording used in the exemption provisions, including how to define what is meant by legal/judicial proceedings¹⁹¹ and how to interpret the phrase “ascertaining the legal position for their client,” and whether it should include giving general legal advice.¹⁹² The CCBE has taken the view that this exemption should apply to giving general legal advice and has accordingly advised its Member bar associations to encourage their national governments to adopt this broad interpretation of the exemption.¹⁹³

However, even under the CCBE’s broad interpretation, the exemptions from disclosure are not applicable in three instances: (1) when a lawyer participates in money-laundering; (2) when legal advice is provided for the purpose of laundering money; or (3) when the lawyer “*knows* that the client [seeks] legal advice for money laundering purposes.”¹⁹⁴ Nevertheless, problems arise in determining the lawyer’s requisite knowledge. The definition of the substantive offense of money laundering in Article 1(C) sets forth a standard of “*knowing*,” but also states that such knowledge may be “inferred from *objective* factual

188. Second Directive, *supra* note 166, at art. 2(5)(a)-(b).

189. *Id.* at recital 17.

190. Shaughnessy, *supra* note 1, at 38.

191. *Id.*

192. *Id.* at 39; *see also* COUNCIL OF BARS AND LAW SOCIETIES OF EUR., ACTION POINTS FOR EU BARS AND LAW SOCIETIES ON THE IMPLEMENTATION OF THE MONEY LAUNDERING DIRECTIVE, Action Point II(a) (Jan. 31, 2002), *available at* http://www.ccbe.org/index.php?id=94&id_comite=20&L=0 [hereinafter CCBE ACTION POINTS].

193. Shaughnessy, *supra* note 1, at 39; *see also* CCBE ACTION POINTS, *supra* note 192, at Action Point II(a).

194. Second Directive, *supra* note 166, at recital 17 (emphasis added).

circumstances.”¹⁹⁵ On the other hand, the language in the provision setting forth the three instances in which the exemptions for lawyers are inapplicable in Recital 17, provides that the requisite knowledge is when “the lawyer ‘*knows*’” without specifying whether such knowledge may be inferred from the objective, subjective, or any other kind of factual circumstances.¹⁹⁶ It would seem that the definition of the substantive offense requires that the lawyer’s knowledge be considered from an objective perspective, while the recital requires that the lawyer’s “actual knowledge” be considered from a subjective perspective.¹⁹⁷

The Second Directive itself does not provide any support for an interpretation that would make the objectively inferable knowledge standard in the definition article applicable to other provisions. Accordingly, the definition article’s objective knowledge standard should not be transferred to Recital 17’s provisions for determining when the exemptions from reporting are inapplicable and the advice given by the lawyer is no longer subject to the principle of professional secrecy.¹⁹⁸ In other words, the lawyer should only have to file a STR if he has actual knowledge that the client he is representing in legal proceedings or for whom he is ascertaining the legal position is seeking legal advice for money laundering purposes.

However, such an interpretation could be detrimental to lawyers and other independent legal professionals. Once the lawyer’s activities for a certain client fall within the reporting exemptions, the lawyer is under no obligation to report his client unless he has actual knowledge of his client’s offense. However, the lawyer could still be charged with aiding money laundering if he should have known that his client was engaged in money laundering, even if he did not have actual knowledge of the offense.¹⁹⁹

In some respects, the provision removing a lawyer from the exemption to report when he knows that the client is seeking to launder money is analogous to the crime-fraud exception to the attorney-client privilege under the Model Rules of Professional Conduct (“MRPC”) in the United States.²⁰⁰ MRPC section 1.6 provides an exception to the Rule of Confidentiality that permits the lawyer to “reveal information relating to the representation of a client to the extent the lawyer

195. *Id.* at art. 1(C) (emphasis added).

196. *Id.* at recital 17; Shaughnessy, *supra* note 1, at 39.

197. Shaughnessy, *supra* note 1, at 39.

198. CCBE ACTION POINTS, *supra* note 192, at Action Point II(b).

199. Shaughnessy, *supra* note 1, at 40.

200. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2).

reasonably believes necessary” to “prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.”²⁰¹ However, under this rule the lawyer is not required to report the misconduct of his client. Comment 7 to the rule plainly states that while the lawyer may reveal the client’s misconduct, he is under no obligation to do so.²⁰²

C. “Third Directive”—Council Directive 2005/60/EC

In 2004, the European Commission drafted a proposal for a third Directive, amending the two earlier texts.²⁰³ The main justification for this proposal was the need to bring EC law up to date with the new work done by the FATF, which following September 11th, was extended to cover not only money laundering, but also terrorist finance.²⁰⁴ This approach is reflected in a series of Eight Special Recommendations that the FATF adopted in 2001. In 2003, the FATF issued a revision of its original 40 Recommendations and in October 2004 a ninth measure was added to the previously promulgated additional Eight Special Recommendations.²⁰⁵

The negotiations between the Council and the European Parliament ultimately were less difficult than they were in the case of the Second Directive, and agreement was reached almost immediately.²⁰⁶ Council Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (“Third Directive”) was published in November 2005 and effectively repealed the earlier Directives.²⁰⁷

The deadline for national implementation of the Third Directive was set for December 15, 2007. The Third Directive consolidated the previous two Money Laundering Directives and brought the European

201. *Id.*

202. *Id.* at cmt. 7.

203. See European Commission Proposal for Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering Including Terrorist Financing, COM (2004) 448 final (June 30, 2004) [hereinafter Third Directive Proposal].

204. *Id.* at recital 5.

205. FIN. ACTION TASK FORCE, ANNUAL REPORT: 2004–05 ¶3 (June 10, 2005), <http://www.fatf-gafi.org/dataoecd/41/25/34988062.pdf>.

206. Mitsilegas & Gilmore, *supra* note 3, at 125.

207. Council Directive 2005/60, On the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, 2005 O.J. (L 309) (EC) [hereinafter Third Directive].

Legislation up-to-date with the 40+9 Recommendations made by the FATF. The objective of complying with international standards is again reflected in the Preamble, with specific references to the threat from terrorism,²⁰⁸ the need to take into account the work of the FATF,²⁰⁹ and the need to change customer identification provisions in light of international developments.²¹⁰

A number of changes from the previous two directives involve the criminal law-related aspects of the Third Directive. While the Third Directive also states that money laundering is prohibited, the definition of money laundering was amended to align the definition of serious crime in the Directive with the one in the 2001 Framework Decision on Confiscation and now also prohibits terrorist financing.²¹¹ The definition of terrorist financing is similar to the one found in the 1999 UN Convention for the Suppression of the Financing of Terrorism,²¹² and “terrorism is formulated in accordance with the relevant EU Framework Decision” on combating terrorism.²¹³

Other major changes have been introduced in the field of customer identification and due diligence. Chapter II of the Third Directive, now entitled “Customer Due Diligence,” is comprised of fifteen articles that have, for the most part, been expanded from the earlier texts.²¹⁴ “The provisions on customer identification have been expanded to introduce various levels of diligence,” which apply varying degrees of due diligence measures on a risk-sensitive basis.²¹⁵

The greatest change regarding the reporting duties has been the inclusion of express provisions covering Financial Intelligence Units (“FIUs”). “Member States are asked to establish FIUs with specific tasks,” and ensure that “the units are given maximum powers of access

208. *Id.* at recital 1.

209. *Id.* at recital 5.

210. *Id.* at recital 9.

211. Mitsilegas & Gilmore, *supra* note 3, at 126. Compare Third Directive, *supra* note 207, at art. 3(5)(a), (f), with Council Framework Decision 2001/500/JHA, art. 1(b), 2001 O.J. (L 182) 1 (EC).

212. Mitsilegas & Gilmore, *supra* note 3, at 126. Terrorist financing within the meaning of the Third Directive is defined as:
provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

Third Directive, *supra* note 207, at art. 1(4).

213. Mitsilegas & Gilmore, *supra* note 3, at 126.

214. *Id.* at 126 (citing Third Directive, *supra* note 207, at arts. 6-19).

215. Third Directive, *supra* note 207, at arts. 8(2), 13(1); Mitsilegas & Gilmore, *supra* note 3, at 127.

to national databases.”²¹⁶ Under the Third Directive, STRs are viewed within the specific context of the FIUs, since the institutions and persons involved are now required to send STRs directly to the FIU rather than the previously designated appropriate authority.²¹⁷ This procedure for STR filing also applies to the case of legal professionals.²¹⁸

Furthermore, the circumstances under which the obligation to report is triggered has been amended to read that institutions and persons subject to the Third Directive must promptly inform “the FIU, on their own initiative, where the institution or person . . . *knows, suspects or has reasonable grounds to suspect* that money laundering or terrorist financing is being or has been committed or attempted.”²¹⁹

“On the subject of lawyers, the [exemptions] from reporting duties remain[.]”²²⁰ But, “an important change has been made to the ‘tipping off’ provision,” now set forth in Article 28.²²¹ The possibility of Member States exempting lawyers from this obligation has been deleted, since it was not considered to be in line with the Revised FATF Recommendations.²²² Instead, Article 28(6) now states that where lawyers “seek to dissuade a client from engaging in illegal activity, this will not constitute tipping off within the meaning of the [Third] Directive.”²²³ Another change to the tipping-off provision has been to include the prohibition of disclosure to the client or third party that an investigation “may be carried out.”²²⁴ Thus, a potential loophole has been closed off since previously the no-tipping-off provision was limited to situations in which an investigation was already underway.²²⁵

The new blanket prohibition on tipping-off also poses a complex array of problems for European and American lawyers working in European branch offices of American law firms. Lawyers operating in Europe find themselves in a difficult position with their American colleagues when faced with an obligation to file an STR against a common client. Since tipping-off is prohibited, the lawyer may not

216. Third Directive, *supra* note 207, at art. 21; Mitsilegas & Gilmore, *supra* note 3 at 127.

217. Mitsilegas & Gilmore, *supra* note 3, at 127.

218. *Id.*

219. Third Directive, *supra* note 207, at art. 22(1)(a) (emphasis added).

220. Mitsilegas & Gilmore, *supra* note 3, at 127; *see also* Third Directive, *supra* note 207, at art. 23(2).

221. Mitsilegas & Gilmore, *supra* note 3, at 127-28.

222. Third Directive Proposal, *supra* note 203, at 6; Mitsilegas & Gilmore, *supra* note 3, at 128.

223. Mitsilegas & Gilmore, *supra* note 3, at 128; *see also* Third Directive, *supra* note 207, at art. 28(6).

224. Third Directive, *supra* note 207, at art. 28(1); Mitsilegas & Gilmore, *supra* note 3, at 128.

225. Mitsilegas & Gilmore, *supra* note 3, at 128.

disclose to the client that an STR has been filed. Additionally, he may not tell his American colleagues that he was obligated to file an STR because in the United States, the client's lawyer would be required to disclose that fact to the client,²²⁶ and this would be a violation of all national legislation implementing the Third Directive.

V. IMPLEMENTATION AND EFFECTS OF THE MONEY-LAUNDERING DIRECTIVE IN THE EU MEMBER STATES

In the United States, the concept of lawyer-client confidentiality is client-centered in that it is based in large part on the individual client's need for effective representation.²²⁷ This effective representation requires that a lawyer be fully informed of all facts of the matter he is handling.²²⁸ A client who knows that his lawyer will keep his information confidential will feel more inclined to disclose all relevant facts of his matter to the lawyer. Furthermore, by knowing all the facts of a client's matter, the lawyer is in a better position to persuade the client to do the right thing, which is also a socially desirable corollary of being able to establish a relationship of trust and confidence with the client.²²⁹

Similarly, in the EU, the legal privilege is justified as an essential component of the right of defense²³⁰ and as an important aspect of individual freedom and privacy.²³¹ Even though the regulation of the legal privilege and the ethical rules regarding confidentiality vary significantly among Member States, a common understanding of the legal privilege has evolved within the EU as it continues to intensify and extend its integration.²³² On several occasions the European Court of Human Rights has found some aspects of the legal privilege to be

226. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3), 1.4(b).

227. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 129 (3d ed. 2004).

228. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that "[the] purpose [of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

229. FREEDMAN & SMITH, *supra* note 227, at 130.

230. Case 155/79, *AM & S Europe Ltd. v. Commission*, 1982 E.C.R. 1575, 1611 (calling the privilege "an essential corollary" to the right of defense).

231. See, e.g., Case 309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2001 E.C.R. I-1577, I-1631 (Opinion of Advocate General Leger) (stating that "[p]rofessional secrecy also constitutes an 'essential guarantee of the freedom of the individual and of the proper working of justice'").

232. *Id.* at I-1630; see also *supra* text accompanying notes 34-49.

protected under the European Human Rights Convention.²³³ Furthermore, in 2000, the Council of Europe noted that lawyers must be able to counsel their clients in private in an adopted recommendation on the freedom of exercise of the profession of lawyers.²³⁴

However, since neither the European Court of Human Rights nor the Council of Europe are proper institutions of the EU,²³⁵ the fact that the European Court of Justice has recognized the legal privilege as a general principle of law is even more significant.²³⁶ Even though the procedures and methods of the European Court of Justice are solidly based upon civil law traditions, it has emerged as a powerful lawmaker and main interpreter of the EU's founding treaties.²³⁷ The court's law-making role becomes most evident when it recognizes general principles of law, which can be construed as an evolving body of general EU common law.²³⁸ Accordingly, since the court has recognized the legal privilege as a general principle of law, the directives should be interpreted in a manner that is compatible with that general principle.

The most recent opinion of the European Court of Justice, in June 2007, held that advice and assistance given by lawyers in financial and real estate transactions that had no link with judicial proceedings were not exempt from the duty to cooperate in combating money laundering.²³⁹ According to Article 234 of the EC Treaty, the European Court of Justice has jurisdiction to give preliminary rulings on the interpretation of the Treaty as well as the validity and interpretation of acts by the Union's Institutions, such as the money-laundering Directive in this case, when requested by a national court or tribunal.²⁴⁰ In the

233. See, e.g., *Niemietz v. Germany*, 251 Eur. Ct. H.R. (ser. A) at 36 (1992) (noting that “an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention [on Human Rights]”); *Campbell v. United Kingdom*, 233 Eur. Ct. H.R. (ser. A) at 16 (1992) (applying Article 8 of the European Convention on Human Rights to protect correspondence between a prisoner and his lawyer); *S. v. Switzerland*, 220 Eur. Ct. H.R. (ser. A) at 14 (1991) (applying Article 6 of the European Convention on Human Rights to the right to effectively consult a lawyer).

234. Council of Eur., Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer, Principle 1(5) (Oct. 25, 2000), <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=533749&SecMode=1&DocId=370286&Usage=2> (last visited Feb. 5, 2009).

235. FOLSOM, *supra* note 104, at 58.

236. See *supra* note 231.

237. FOLSOM, *supra* note 104, at 54-55.

238. *Id.* at 55.

239. Case C-305/05, *Ordre des Barreaux Francophones et Germanophones v. Conseil des Ministres*, 2007 E.C.R. I-05305, ¶ 33, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0305:EN:HTML>.

240. EC Treaty, *supra* note 112, at art. 234.

underlying case, the request for the preliminary ruling originated from the Cour d'arbitrage (now the Cour Constitutionnelle) in Belgium and involved a question concerning the interpretation of Article 2a(5) of the Second Directive, which effectively extended the obligations imposed by the Directive to notaries and independent legal professionals.²⁴¹

The claimants, consisting of the Association of the French-speaking and German-speaking Bars, the French Bar Association of Brussels, the society of Flemish Bars, and the Dutch Bar Association of Brussels, applied for the annulment of certain articles of Belgian law implementing the Second Directive.²⁴² The claimants argued that the Belgian law implementing the Second Directive infringed on the Belgian Constitution and on Article 6 of the European Human Rights Convention,²⁴³ in that the obligation on lawyers to report a client's suspicious activities unjustifiably encroached upon the principle of professional secrecy and the independence of lawyers.²⁴⁴

The referring court held that since the Belgian law was based upon a Council Directive, it was first necessary to ascertain whether that Directive was lawful.²⁴⁵ Accordingly, the question it posed the European Court of Justice for a preliminary ruling was whether Article 2a(5) of the Second Directive infringed on the right to a fair trial guaranteed by Article 6 of the European Human Rights Convention.²⁴⁶

The court held that, since the question referred was confined to the legality of the Second Directive in reference to the right to a fair trial, it could not consider other rights such as the respect for privacy provided for in Article 8 of the European Human Rights Convention.²⁴⁷ Article 6 of the Convention, entitled "Right to a Fair Trial," provides in pertinent part:

- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .
- (2) Everyone charged with a criminal offence shall be

241. Reference for a Preliminary Ruling from the Cour d'Arbitrage (Belg.), 2005 O.J. (C 243) 15.

242. Case 305/05, *Ordre des Barreaux*, ¶ 2.

243. *See id.* ¶ 12. Even though the ECHR has been ratified by all EU member states individually, the EU as an institution has not acceded to it. However, the ECJ has previously recognized and drawn upon the Convention in its rulings. *See FOLSOM, supra* note 104, at 58.

244. Case 305/05, *Ordre des Barreaux*, ¶ 12.

245. *Id.* ¶ 15.

246. *Id.* ¶ 16.

247. *Id.* ¶¶ 17, 19.

presumed innocent until proved guilty according to law.

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

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.²⁴⁸

The court acknowledged that lawyers would be unable to satisfactorily carry out their tasks of advising, defending, and representing their clients in the context of judicial proceedings or the preparation for such proceedings if the lawyers were obliged to cooperate with the authorities by passing them information obtained in the course of legal consultations with their clients.²⁴⁹ Furthermore, such an interpretation of the Second Directive would ultimately deprive potential clients of the rights conferred on them by Article 6 of the European Human Rights Convention.²⁵⁰

However, the Court of Justice maintains that lawyers are only subject to the obligations laid down in the Second Directive when participating in certain transactions—particularly ones of a financial nature or involving real estate, listed in Article 2a(5)(a) of that Directive.²⁵¹ The court held that since the Article 2a(5) activities took place in a context with no link to judicial proceedings, they fell outside the scope of the right to a fair trial.²⁵²

Furthermore, the court held that a lawyer advising a client on one of the transactions listed in Article 2a(5) will be exempt from such

248. Convention for the Protection of Human Rights and Fundamental Freedoms, *amended by* Protocol 11, art. 6, Nov. 4, 1950, Europ. T.S. No. 5.

249. Case 305/05, *Ordre des Barreaux*, ¶ 32.

250. *Id.*

251. *Id.* ¶ 33.

252. *Id.*

reporting duties as soon as he assists in defending or representing the client before the courts in regard to that transaction.²⁵³ He will also be exempt from the reporting obligations if the same client were to request legal advice about instituting or avoiding judicial proceedings regarding that transaction.²⁵⁴ The court emphasized that this exemption from the obligation to report is set forth in Article 6(3) of the Second Directive and applies regardless of whether the information was received or obtained before, during, or after the proceedings.²⁵⁵ Thus, as soon as the lawyer is called upon by his client to represent him in court and the matter is no longer of a mere transactional nature, all information between the lawyer and that client remains confidential, and the lawyer is not subject to any reporting obligations.

Therefore, the court concluded that obligations to inform and cooperate with the authorities responsible for combating money laundering as set forth in Article 6(1), and imposed on lawyers by Article 2a(5) of the Directive did not infringe on the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights.²⁵⁶ Even though the court did not explicitly address whether the Second Directive impinged on the principle of professional secrecy, the right to a fair trial is inextricably linked to issues of confidentiality and trust between a client and his lawyer. So, by way of implication, the court may have also already addressed this issue as well.

A. National Legislation Implementing the Directive

Since the national implementation of directives is ultimately at the discretion of the Member States, different approaches regarding the transposition of money laundering legislation within the EU have evolved.²⁵⁷ However, the integration methods are subject to ultimate review by the European Court of Justice in the event they are challenged.²⁵⁸ Currently the most drastic differences among countries include: (1) “the manner in which the crime of money laundering is expressed;” (2) “how professional privilege exceptions are determined;” (3) “how suspicious activity reports are permitted to be made;” (4) “the

253. *Id.* ¶ 34.

254. *Id.*

255. *Id.*

256. *Id.* ¶ 37.

257. IBA, Anti-Money Laundering Legislation Implementation Group—Attends on the DG Internal Markets and Services Division of the European Commission: Summary of Meeting (Oct. 16, 2006).

258. Shaughnessy, *supra* note 1, at 35.

process of verification of non-face to face transactions;” and (5) the “tipping off provisions.”²⁵⁹

Even though the national implementation deadline of the Third Directive was set for December 15, 2007, few countries met this deadline.²⁶⁰ While the Third Directive repealed the Second Directive, it builds on the previous Directives and does not significantly alter the substantive obligations imposed on the legal profession. Since all directives become directly applicable after the implementation date has passed, the Third Directive is in effect in all Member States even if it has not yet been transposed into national law.²⁶¹ Therefore, since the Third Directive does not substantively alter many of the provisions implemented through the Second Directive, but merely adds onto the existing framework, the legislation implementing the Second Directive is still relevant in as much as it implements those provisions of the Second Directive that have not been altered by the Third Directive.²⁶²

Regarding the Second Directive, Member States were required to implement national legislation transposing the Directive by no later than June 15, 2003.²⁶³ However, many Member States did not observe this deadline, especially in regards to the obligations imposed on the legal profession.²⁶⁴ Only six of the then fifteen Member States including Denmark, Germany, Finland, the Netherlands, Ireland, and Spain were successful in implementing the Second Directive either before the deadline or shortly thereafter.²⁶⁵ Austria, Belgium, and the United Kingdom implemented the Directive by the end of 2003 after the opening of infringement proceedings by the European Commission.²⁶⁶ The ten Member States that joined the EU in 2004 either had appropriate

259. News Release, IBA, IBA Urges Caution in the Implementation of the Third EU Money Laundering Directive, at 2 (July 2, 2007), available at <http://www.anti-moneylaundering.org/AboutAML.aspx#comments>.

260. Third Directive, *supra* note 207, at art. 45. As of June 2008 the EU was pursuing infringement actions against fifteen member states, including Belgium, the Czech Republic, Germany, Greece, Spain, Finland, France, Ireland, Luxembourg, Malta, the Netherlands, Poland, Portugal, Sweden, and Slovakia for failing to adopt and implement the Third EU Money Laundering Directive into national law by the stipulated deadline. IBA Anti-Money Laundering Forum, The Lawyer's Guide to Legislation and Compliance: Germany, <http://www.anti-moneylaundering.org/europe/germany.aspx> (last visited Jan. 11, 2009) [hereinafter Implementation of the Third Directive: Germany].

261. See *supra* text accompanying notes 203-19; see also *supra* note 113 and accompanying text.

262. Commission Staff Working Document, *supra* note 34, ¶ 2.

263. Mitsilegas & Gilmore, *supra* note 3, at 124.

264. Commission Staff Working Document, *supra* note 34, ¶ 7.

265. *Id.* ¶ 7.

266. *Id.*

legislation in place by then²⁶⁷ or put such legislation in place soon afterwards.²⁶⁸ Greece finally implemented national legislation in December 2005, while France and Italy did so in 2006.²⁶⁹

1. Germany

Germany was among the few countries that observed the deadline for implementation of the Second Directive, which has been in force since August 14, 2002. The relevant legislation can be found under the Money Laundering Act in the version of the Act on the Improvement of the Suppression of Money Laundering and Combating the Financing of Terrorism of August 8, 2002.²⁷⁰ In Germany, tipping-off was not permitted under the Second Directive.²⁷¹ According to Section 11 of the Money Laundering Act, lawyers shall not disclose to their clients or to third persons that information has been transmitted to the authorities or that a money laundering investigation is being carried out.²⁷² However, it was not forbidden under Section 11 to give general legal advice.²⁷³

In 2004, three German lawyers challenged the national law implementing the Second Directive by appealing their criminal convictions before the German Constitutional Court sitting in Criminal Matters.²⁷⁴ The trial court had sentenced all three lawyers to nine months in jail not only for having ignored their duty to report their suspicions concerning their clients' transactions, but also for having accepted payments which they knew had been received through the money laundering practices of their clients.²⁷⁵ The main reason for the strict sentence was that according to the court, the defendants not only neglected to perform their duty, they actively participated in the crime by accepting the "dirty money."²⁷⁶ Accordingly, the trial court held that

267. *Id.* (Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, and Slovenia).

268. *Id.* (the Czech Republic).

269. *Id.*

270. Gesetz zur Verbesserung der Bekämpfung der Geldwäsche und der Bekämpfung der Finanzierung des Terrorismus, Geldwäschekämpfungsgesetz [GwBekG] [Anti-Money Laundering Act], Aug. 14, 2002, BGBl. I at 3105 (F.R.G.).

271. COUNCIL OF BARS AND LAW SOCIETIES OF EUR., OVERVIEW OF THE IMPLEMENTATION OF THE 2001 MONEY LAUNDERING DIRECTIVE, question 2, § 7 (Mar. 2004), available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/mld_implementation1_1183722950.pdf [hereinafter CCBE OVERVIEW OF IMPLEMENTATION].

272. *Id.*

273. *Id.*

274. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 30, 2004, 110 Entscheidung des Bundesverfassungsgerichts [BVerfGE] 226, ¶ 1 (F.R.G.) [hereinafter BVerfGE].

275. *Id.* ¶¶ 34, 40.

276. *Id.* ¶ 86.

any lawyer who accepts remuneration, which he knows to have been generated by one of the predicate offenses listed in Section 261 of the Penal Code pertaining to money laundering, can be charged with and found guilty of money laundering.²⁷⁷

The defendants, who are all defense attorneys, mainly argued that this law impinges on their constitutional right to freely exercise their professions as well as on the basic principles underlying the criminal defense system, namely the principle of professional secrecy and by implication, the right to a fair trial.²⁷⁸ The Constitutional Court, after lengthy and careful analysis, rejected the constitutional arguments, but rendered the statute virtually meaningless by holding that defense attorneys could be subject to criminal charges for money laundering only if they knew with absolute certainty that the origin of their compensation was derived from money-laundering operations at the time they accepted the compensation for their services.²⁷⁹ The court further held that this interpretation was within the public interest because it would guard against lawyers being used by their clients to further illegal objectives without impinging on the principle of professional secrecy.²⁸⁰

Even though a first governmental draft was published on October 11, 2007, and the lower House of the German Parliament (Bundestag) passed a new proposal amending this first draft by October 27, 2007, Germany did not transpose the Third Directive by the stipulated December 15, 2007, deadline.²⁸¹ As a result, the European Commission began pursuing infringement proceedings against Germany, as reported on June 5, 2008.²⁸² A month later, the draft proposal was finally reviewed by the upper house of Parliament that represents the German states (Bundesrat)²⁸³ and a final version of the draft was adopted on August 13, 2008.²⁸⁴

277. *Id.* ¶ 41; see also THE AMERICAN SERIES OF FOREIGN PENAL CODES: GERMANY 151 (Stephan Thaman trans., 2002).

278. BVerfGE, *supra* note 274, ¶¶ 61-62.

279. *Id.* ¶ 143.

280. *Id.* ¶ 145.

281. Implementation of the Third Directive: Germany, *supra* note 260.

282. *Id.*

283. *Id.*

284. Gesetz zur Fortentwicklung der Bekämpfung der Geldwäsche und der Bekämpfung der Terrorismusfinanzierung, Geldwäschebekämpfungsergänzungsgesetz [GwBekErgG] [The Act on the Further Development of the Fight Against Money Laundering and the Fight Against Terrorist Financing], Aug. 13, 2008, BGBl. I at 1690 (F.R.G.).

2. Spain

Spain was one of the two countries that transposed the Second Directive into national law only shortly after the official deadline without needing additional convincing from the European Commission. Accordingly, the Second Directive has been implemented since July 5, 2003, by the law 19/2003, of July 4, 2003, “sobre régimen jurídico de los movimientos de capitales y de las transacciones económicas con el exterior y sobre determinadas medidas de prevención del blanqueo de capitales.”²⁸⁵ The law presents amendments to the previous Spanish legislation.²⁸⁶

Spain is currently reviewing its legislation for the purposes of implementing the Third Directive.

The Spanish Government has drafted a document entitled “technical basis,” which is [still] awaiting approval from the Ministry of Finance. Once the “technical basis” document is approved, a ‘political decision’ must be made in order to draw up a draft bill [that will] be sent to the Spanish Parliament for approval.²⁸⁷

However, several factors may further postpone implementation of the Third Directive.²⁸⁸ First, due to the difficulty of reaching an agreement between Spain’s various agencies, the “political decision” has been postponed.²⁸⁹ Second, due to the recent presidential elections, the next Parliament and Government have not yet been formed.²⁹⁰

3. Belgium

Only after the European Commission initiated infringement proceedings did Belgium transpose the Second Directive, which was implemented by the Law of January 12, 2004.²⁹¹ This law effectively amended the law of January 11, 1993, on the Prevention of the Use of

285. Act on the Movement of Capital and External Economic Transactions and Money Laundering Countermeasures (B.O.E. 160) (2003) (Spain).

286. Decree Modifying Regulation 19/1993 of Dec. 28, 1993 on the Prevention of Money Laundering (B.O.E. 19) (2005) (Spain).

287. IBA Anti-Money Laundering Forum, The Lawyer’s Guide to Legislation and Compliance: Spain, <http://www.anti-moneylaundering.org/europe/spain.aspx> (last visited Jan. 11, 2009).

288. *Id.*

289. *Id.*

290. *Id.*

291. See *supra* text accompanying note 266; see also IBA Anti-Money Laundering Forum, The Lawyer’s Guide to Legislation and Compliance: Belgium, <http://www.anti-moneylaundering.org/europe/Belgium.aspx> (last visited Jan. 11, 2009) [hereinafter Implementation of the Third Directive: Belgium].

the Financial System for the Purpose of Money Laundering, the law of March 22, 1993, on the Status and the Role of the Credit Institutions, and the law of April 6, 1995, on the Status of Investment Companies and their Supervision, Intermediaries, and Advisers.²⁹² It was this law that was challenged by various Belgian Bar Associations before the Cour d'arbitrage and referred to the Court of Justice for a preliminary ruling.²⁹³

On April 27, 2007, the anti-money laundering statute of January 11, 1993, was amended by the Loi Programme or Programmawet ("Program Statute"), which "extended the reporting requirement to the (possible) suspicion of money laundering resulting from serious and organised tax fraud where complex mechanisms or procedures at an international level are used."²⁹⁴ In November 2007, the Belgian bar associations initiated a second challenge to the implementation of the Second Directive. This time the European Court of Justice refused to issue a ruling on the bar associations' challenge that the Program Statute "obliges lawyers to work with the government, and thus breaches the right to privacy provided in article 8 of the European Convention on Human Rights."²⁹⁵ After the European Court of Justice declined its request for a preliminary ruling, the Belgian Constitutional Court ruled that the Program Statute was to remain applicable to lawyers.²⁹⁶

There is currently no draft legislation for the implementation of the Third Directive available to the public yet. The pre-draft procedure was interrupted because the process of forming the new government broke down.²⁹⁷ The European Commission has initiated infringement proceedings against Belgium for its failure to transpose the Directive by the stipulated deadline.²⁹⁸ In the meantime, however, the Third Directive is in full force and directly applicable in Belgium.²⁹⁹

4. United Kingdom

The United Kingdom was another one of the many Member States that required additional convincing via the European Commission's opening of infringement proceedings before it transposed the Second

292. Implementation of the Third Directive: Belgium, *supra* note 291.

293. *See supra* text accompanying notes 239-54.

294. Implementation of the Third Directive: Belgium, *supra* note 291.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *See supra* text accompanying note 266.

Directive.³⁰⁰ Part 7 of the 2002 Proceeds of Crime Act (“POCA”) implemented certain provisions of the Second Directive.³⁰¹ The Act was brought into force on February 24, 2003, and “principally strengthened obligations to report money laundering to the authorities, and the ability of the authorities to give instructions to the reporting party not to execute the operation.”³⁰² In addition to the POCA, the government issued the 2003 Money Laundering Regulations (“MLRs”), which imposed statutory anti-money-laundering procedures on various organizations.³⁰³ The Regulations also applied to lawyers who conducted legal work for their clients that could be categorized within one of the activities listed in the Second Directive.³⁰⁴

While Part 7 of the POCA, section 333(1), sets forth that tipping-off is a criminal offense,³⁰⁵ sections 333(2)(c) and 333(3) provide that a person does not commit the offense if she is a “professional legal adviser” and the disclosure is “to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or to any person in connection with legal proceedings or contemplated legal proceedings.”³⁰⁶ However, once a Suspicious Activities Report (the United Kingdom’s version of the Suspicious Transaction Report) is made, lawyers are no longer allowed to speak to their clients or any other parties regarding the Suspicious Activity Report to authorities.³⁰⁷ Furthermore, the POCA exceeds the Article 8(1) requirement of the Second Directive in that the offense of tipping-off can be committed if a disclosure of any type is made, not just disclosure that information has been transmitted to the authorities.³⁰⁸

In 2005, the Criminal Division of the Court of Appeal in England issued a small victory for opponents of anti-money-laundering legislation in its ruling in *Bowman v. Fels*.³⁰⁹ The central dispute in *Bowman* arose out of a civil proceeding between Jennifer Mary Bowman and William John Fels who had lived together for 10 years in a house registered in Fels’s sole name. When their relationship ended, Bowman

300. See *supra* text accompanying note 266.

301. CCBE OVERVIEW OF IMPLEMENTATION, *supra* note 271, at question 1, § 22.

302. *Id.*

303. *Id.*

304. *Id.*

305. Proceeds of Crime Act, 2002, c. 29, § 333 (U.K.).

306. *Id.* § 333(2)(c), (3).

307. *Delegates Challenge EU Money-Laundering Laws*, IBA DAILY NEWS, Sept. 28, 2005, at 1 [hereinafter *Delegates Challenge EU*].

308. See Proceeds of Crime Act, 2002, c. 29, § 333(1).

309. *Delegates Challenge EU*, *supra* note 307, at 2.

asserted a beneficial interest in the property and proceedings ensued.³¹⁰ Shortly before trial, Bowman's solicitors notified the National Criminal Intelligence Service ("NCIS") of a suspicion that Fels had included within business accounts the cost of works carried out on the house which were not properly business expenses.³¹¹

Bowman's solicitors believed that section 328 of the POCA required them to inform NCIS of this, but also prohibited them from notifying either their client or the defendant Fels's solicitors of this disclosure.³¹² Claimant's solicitors then made a "without notice" application to the court for an order adjourning the trial date.³¹³ The judge granted the order, which was served on Fels's solicitors without the basis for the application being disclosed.³¹⁴ Fels's solicitors responded by requesting that the adjournment order be set aside and disclosure be made of the basis and underlying evidence supporting the claimant's application.³¹⁵ The lower court held that Bowman's solicitors could have disclosed to both the court and Fels's solicitors why it sought an adjournment and need not have stopped trial preparation.³¹⁶ Bowman subsequently sought leave to appeal the lower court's judgment.

The central issue before the Court of Appeal was whether section 328 of the POCA means

that as soon as a lawyer acting for a client in legal proceedings discovers or suspects anything in the proceedings that may facilitate the acquisition, retention, use or control (usually by his own client or his client's opponent) of "criminal property", he must immediately notify NCIS of his belief if he is to avoid being guilty of the criminal offence of being concerned in an arrangement which he knows or suspects facilitates such activity.³¹⁷

Section 328 of the POCA provides that "[a] person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."³¹⁸ The court ultimately held that section 328 was not intended

310. *Bowman v. Fels*, (2005) 1 W.L.R. 3083, 3087 (Eng.).

311. *Id.* at 3087-88.

312. *Id.* at 3088.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 3091.

318. Proceeds of Crime Act, 2002, c. 29, § 328(1).

to cover or affect the ordinary conduct of litigation by legal professionals, since that ordinary conduct did not fall within the concept of “becoming concerned in an arrangement which . . . facilitates . . . the acquisition, retention, use or control of criminal property.”³¹⁹

The United Kingdom has already implemented the Third Directive. Following the publication of its consultation paper “Implementing the Third Money Laundering Directive” in July 2006, the British Treasury published the draft Money Laundering Regulations for 2007 for consultation.³²⁰ These 2007 Money Laundering Regulations entered into force on December 15, 2007, thereby effectively implementing the Third Directive in the UK.³²¹ “Additionally, the Government has published an anti-money laundering and counter-terrorist financing strategy document that sets out how the challenges will be met over the next five years.”³²²

5. France

The legal profession in France has challenged the implementation of the Second Directive since its adoption by the Council. Despite this strong challenge, however, the Second Directive was partially implemented into French law by the Law of 11 of February 2004 and the Decree of 26 June 2006.³²³

The French bars petitioned the European Parliament in May 2003, objecting to the Second Directive.³²⁴ The petitioners’ main argument was that, by requiring lawyers to denounce their clients on the basis of mere suspicion, the Second Directive breached the foundations of justice, the Rule of Law and democracy, as well as the fundamental rules of the legal profession.³²⁵ Furthermore, petitioners maintained that

319. *Bowman*, 1 W.L.R. at 3110.

320. HM Treasury, *Money Laundering Regulations 2007*, http://www.hm-treasury.gov.uk/consult_moneylaundering_2007.htm (last visited Jan. 19, 2009).

321. IBA Anti-Money Laundering Forum, European Chart: IBA Overview of the Implementation of the Third EU Money-Laundering Directive, <http://www.anti-moneylaundering.org/EuropeanChart.aspx> [hereinafter IBA Overview of Implementation].

322. *Id.*

323. IBA Anti-Money Laundering Forum, The Lawyer’s Guide to Legislation and Compliance: France, <http://www.anti-moneylaundering.org/europe/france.aspx> (last visited Jan. 11, 2009) [hereinafter Implementation of the Third Directive: France].

324. COUNCIL OF BARS AND LAW SOC’YS OF EUR., POSITION OF THE COUNCIL OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN UNION (CCBE) ON THE REQUIREMENTS ON A LAWYER TO REPORT SUSPICIONS OF MONEY LAUNDERING AND ON THE EUROPEAN COMMISSION PROPOSAL FOR A THIRD DIRECTIVE ON MONEY LAUNDERING REGULATIONS ¶ 10 (Nov. 2004).

325. Conseil National des Barreaux, Conseils de Vigilance et de Procédures Internes Destinés à Prévenir l’Utilisation de la Profession d’Avocat aux Fins de Blanchiment des Capitaux d’Origine Illicite et de Financement du Terrorisme, at 11 (Sept. 2007), available at http://www.cnb2008.com/docs/cahier_blanchiment.pdf.

denunciation of crimes and offenses is alien to the professional practice of a lawyer and since a lawyer is an auxiliary of justice, rather than of the police, he is independent of the judge, of the client, of special interest groups, as well as political authorities.³²⁶

However, despite this apparent opposition to the Directives, the law implementing the Third Directive is currently being discussed between the government and the Conseil National des Barreaux.³²⁷ On June 10, 2008, the French Parliament passed a bill, the Law on the Modernization of the Economy, which would implement the Third Directive.³²⁸ The law was slated to go before the French Senate on June 30, 2008, but has not yet been passed.³²⁹ However, “in the meantime, the Third EU Money Laundering Directive has had direct effect since 15 December 2007.”³³⁰

VI. WILL THE UNITED STATES BE THE NEW FRONTIER FOR THE GATEKEEPER INITIATIVE?

The fact that many in the international community have chosen to implement the FATF's recommendation calling for an expansion of the Gatekeeper Initiative to include the legal profession has put pressure on the United States to adopt similar measures.³³¹ This pressure became even more apparent following the September 11th attacks, when the investigation of the attacks revealed that the “terrorists were, in part, funded through money laundering activities.”³³²

Almost overnight, the United States was made acutely aware of the weaknesses in its financial systems and of the insufficiency of its current money laundering countermeasures.³³³ In response to these attacks Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism,” also known as the USA PATRIOT Act.³³⁴

326. *Id.*

327. Implementation of the Third Directive: France, *supra* note 323, at 1.

328. IBA Overview of Implementation, *supra* note 321.

329. *Id.*

330. Implementation of the Third Directive: France, *supra* note 323, at 1.

331. Rebecca Gregory, *The Lawyer's Role: Will Uncle Sam Want You in the Fight Against Money Laundering and Terrorism?*, 72 UMKC L. REV. 23, 36 (2003).

332. *Id.* at 23-24.

333. *Id.* at 46.

334. *Id.*

A. *The USA PATRIOT Act*

“For many years the Bank Secrecy Act has required banks and other entities to file confidential reports of suspicious activities, known as Suspicious Activity Reports (“SARs”), with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN).”³³⁵ However, the USA PATRIOT Act of 2001 made significant changes to the money laundering and currency reporting laws, including major amendments to the Bank Secrecy Act.³³⁶ Most of the requirements promulgated by the Act, including more stringent identification requirements and the obligation to adopt anti-money laundering programs, are directed toward institutions of the financial service industry, including banks, trust companies, brokers, mutual funds, and investment advisors.³³⁷

In particular, Title III of the Act, entitled the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001, not only alters, but also expands the responsibilities and possible liabilities of the United States in regards to countering money laundering and the financing of terrorist activities.³³⁸ This portion of the Act requires all parties subject to it to establish due diligence policies, procedures, and controls necessary to detect money laundering in all private accounts opened and maintained in the United States for foreign individuals.³³⁹

Such policies include[:] (1) employee training and education to ensure employees are sensitive to customers and transactions that have a risk of money laundering, (2) the adoption of ‘best practices’ prescribed from time to time by domestic regulatory bodies and trade organizations, and (3) extensive customer identification programs that require financial institutions to know their customers.³⁴⁰

Financial institutions, subject to these policies, and their officers, directors, and employees, must report suspicions of money laundering in

335. Nicole M. Healy, *Ad Hoc Task Force on Professional Responsibilities Regarding Money Laundering: PATRIOT Act and Gatekeeper Update*, 37 INT’L LAW. 631, 635 (2003).

336. Gregory, *supra* note 331, at 46.

337. *Id.* at 48; *see also* Henry Christensen III, *Application to Lawyers of Current Anti-Money Laundering Rules Adopted by the Financial Action Task Force on Money Laundering (FATF) and the United States Government: Recommendations of Good Practices for ACTEC Fellows*, 31 ACTEC J. 302, 309 (2006).

338. Christensen, *supra* note 337, at 309.

339. *Id.* at 310.

340. Henry Christensen III & M. Catherine Pieroni, *Anti-Money Laundering Legislation and its Impact on Gatekeepers*, in INTERNATIONAL TAX & ESTATE PLANNING 2007: STRATEGIES & TECHNIQUES FOR MAXIMUM ADVANTAGE 33, 41 (2007).

a customer account by filing a SAR with the appropriate government agencies.³⁴¹ The Act also prohibits any covered institution from alerting the customer when a SAR has been filed.³⁴²

FinCEN is one of the delegated regulatory and enforcement agencies charged with overseeing portions of the USA PATRIOT Act. In particular, it oversees the Act's financial crimes provisions³⁴³ and "monitors [the] covered institutions to ensure they are complying with all of the anti-money laundering requirements imposed by U.S. law."³⁴⁴ "If FinCEN finds evidence of wrongdoing, either actual participation in money laundering schemes or loopholes or failures in the anti-money laundering rules or procedures, it may apply severe penalties."³⁴⁵

B. *The Lawyer's Role Under the USA PATRIOT Act*

Shortly after the terrorist attacks of September 11th, the FATF met in Washington, D.C. to discuss expanding its mandate beyond "traditional money laundering" to include terrorist financing.³⁴⁶ The result of that meeting was the Consultation Paper prepared and published for comment in 2002.³⁴⁷ In response to this Consultation Paper, the former President of the American Bar Association formed the Task Force on the Gatekeeper Regulation and the Profession.³⁴⁸ The main objective of the Task Force was to review the FATF's proposals and to determine whether the Gatekeeper Initiative should extend to lawyers in the United States.³⁴⁹ The Task Force "responded with its own set of recommendations, endorsing certain aspects of FATF's proposals and rejecting others."³⁵⁰

Even though the Task Force approved the general principle that efforts must be made to fight terrorism and money laundering, and that lawyers should take part in that effort, it also fervently maintained that

341. *Id.*

342. *Id.*

343. Christensen, *supra* note 337 at 310.

344. Christensen & Pieroni, *supra* note 340, at 41.

345. *Id.*

346. Gregory, *supra* note 331, at 36.

347. *Id.*; see also ABA Task Force on Gatekeeper Regulation & the Profession, Comments of the ABA Task Force on Gatekeeper Regulation and the Profession on the Financial Action Task Force Consultation Paper dated May 30, 2002, at 2-3 (Aug. 23, 2002), available at <http://www.abanet.org/crimjust/taskforce/comments.doc> [hereinafter Comments of the ABA Task Force].

348. Comments of the ABA Task Force, *supra* note 347, at 3.

349. *Id.*

350. Gregory, *supra* note 331, at 38.

the FATF's Recommendations must be limited "primarily" to lawyers "who, when acting as financial intermediaries, receive and transfer funds on behalf of clients."³⁵¹ While the Task Force recognized that in many instances lawyers serve as gatekeepers to the world's financial systems, it strongly opposed the requirement that lawyers submit SARs based on "mere suspicion" that the funds derived from an illegal activity.³⁵²

It justified this position by reasoning that the duties of loyalty and confidentiality form the "bedrock" of the attorney-client relationship in the United States.³⁵³ Therefore, imposing such a reporting requirement would fundamentally undermine every aspect of that hallowed relationship.³⁵⁴ In the words of the ABA Task Force, the attorney would turn into a "potential government informant."³⁵⁵ Furthermore, the Task Force determined that the FATF's recommended exceptions to such reporting duties for privileged communications and when the lawyer is involved in litigation for his client were inadequate since the distinction between privileged and non-privileged information is unlikely to be clean or workable.³⁵⁶

However, in 2003, "the legal profession encountered the first potential gatekeeper requirements in FinCEN's preparations to regulate persons involved in real estate closings and settlements."³⁵⁷ In an "advance notice of proposed rulemaking," FinCEN indicated that lawyers involved in real estate transactions could be subject to the rule³⁵⁸ via section 352(a) of the USA PATRIOT Act, which requires all financial institutions, including "persons involved in real estate closings and settlements, to maintain money laundering compliance programs."³⁵⁹ FinCEN justified its new rule by arguing that, "attorneys often play a key role in real estate closings and settlements."³⁶⁰ However, FinCEN also noted, with regard to attorneys, that section 352(a) "does not prescribe any reporting requirements, and thus does not raise issues of attorney-client privilege."³⁶¹

351. Comments of the ABA Task Force, *supra* note 347, at 4.

352. *Id.* at 15-16.

353. *Id.* at 7.

354. *Id.* at 16.

355. *Id.*

356. *Id.* at 17.

357. Edward J. Krauland & Aaron R. Hutman, *Money Laundering Enforcement and Policy*, 38 INT'L LAW. 509, 518 (2003).

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

At periodic intervals the FATF “sends small working groups of representatives of member states to other member states . . . to conduct ‘Mutual evaluations’” regarding the state’s success in adopting its Recommendations.³⁶² The third and last Mutual Evaluation Report on efforts in the United States to combat money laundering was issued in 2006.³⁶³ While the Report concluded that the United States, through the USA PATRIOT Act, was in substantial compliance with most of the Recommendations, it also concluded that it was “lagging” in compliance with some of the other Recommendations.³⁶⁴

More specifically, the Report noted that the efforts of the United States with respect to Recommendation 16, which sought to extend the Gatekeeper Initiative to lawyers and notaries, were inadequate and non-compliant.³⁶⁵ The FATF Report also recommended that accountants, lawyers, and real estate agents be made subject to the “tipping-off” provision of Recommendation 16, and should be protected from liability when they choose to file a suspicious transactions report.³⁶⁶

In response to the Report, FinCEN has “urg[ed] professional organizations in the United States to adopt guides of best practices” in order to fulfill the goals of FATF Recommendation 16.³⁶⁷ However, FinCEN has so far “refrained from extending provisions of the U.S.A. PATRIOT Act to cover lawyers acting as principals, even though it has extended coverage of the Act to parties outside the banking and financial industries.”³⁶⁸ The ABA also continues to warn against the adoption of any such regulations³⁶⁹ since its ramifications would include sacrificing the “dearly held principle that attorneys and clients enjoy and depend on a relationship founded on loyalty and confidentiality.”³⁷⁰

The United States has adopted most of the FATF recommendations through implementation of the USA PATRIOT Act. However, the United States still lags behind other countries, including Canada, Switzerland, and the EU Member States, in the adoption of measures that would call upon lawyers to take a more active role in the fight

362. Christensen & Pieroni, *supra* note 340, at 46.

363. *Id.*

364. *Id.* at 47.

365. FAFT-GAIF, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America, at 210-11 (June 23, 2006), available at <http://www.fatf-gafi.org/dataoecd/44/9/37101772.pdf>.

366. *Id.* at 210.

367. Christensen & Pieroni, *supra* note 340, at 48.

368. *Id.* at 50.

369. ABA Comments on the Gatekeeper Initiative, *supra* note 31, at 12.

370. Gregory, *supra* note 331, at 50.

against money laundering and terrorist financing. The opinions in the United States regarding the Gatekeeper Initiative and its application to lawyers diverge greatly. However, the opinion that has prevailed, so far, is that the principle of attorney-client confidentiality must be preserved.³⁷¹

VII. CONCLUSION

It is undisputed that the objective of the EU money-laundering directives to combat and prevent criminal activity by cracking down on the money laundering operations that are derived from and finance these crimes is well-founded. However, the broad scope and application of these directives may prove to have dire consequences. The directives undermine the principle of lawyer-client confidentiality by forcing lawyers to investigate the identity of all their clients, the sources of their funds, and their motives for seeking legal advice, as well as requiring that lawyers disclose confidential information about their clients when they know, suspect, or even just have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted.

Since lawyer-client confidentiality “serves the public administration of justice by ensuring client candor and promoting trust and loyalty in the relationship between clients and their lawyers, which is necessary for effective representation,”³⁷² the directives risk damaging more than just the privacy of clients. Due to the vague definition of when a lawyer is providing the type of legal services subject to the directives, “the uncertainty of what should trigger suspicions, and the breadth of the underlying predicate offenses,” many European lawyers may find themselves forced to view each client with suspicion.³⁷³ This will ultimately reduce the client’s willingness to confide in the lawyer completely, which will in turn adversely affect the efficacy with which the lawyer is able to represent the client.

Further difficulties arise through the fact that the directives set forth three different requisite knowledge standards. If the lawyer determines that his legal services for a particular client are subject to the reporting duties of the directives then he must disclose confidential information of his client if he merely suspects that the client is or is attempting to launder money or finance terrorism. If the lawyer determines that his

371. See, e.g., ABA Comments on the Gatekeeper Initiative, *supra* note 31, at 12.

372. Shaughnessy, *supra* note 1, at 44.

373. *Id.*

dealings with the client fall within one of the enumerated exemptions, then the lawyer may keep the client's information confidential unless he has actual knowledge that the client is using his services to launder money or finance terrorism. In that case, he must report the client's activities to the appropriate authorities.

However, if under this exemption, the lawyer only has knowledge of his client's illegal activities, which he inferred from the objective circumstances surrounding his dealings with that client, as opposed to actual knowledge, then the lawyer is not required to file an STR. He may still, however, be charged with aiding money laundering. Thus, lawyers will now be more wary of taking on clients merely to escape the possibility of criminal charges themselves. The practical effect of this is that while the lawyer has denied his services to many clients who in fact were seeking his services in order to launder money, he will also have invariably denied his services to some innocent clients as well.

Thus, while the objectives of the directives are well-founded, the pursuit of those objectives may have come at quite an expense. The EU has led the way in extending the scope of the Gatekeeper Initiative to lawyers and it remains to be seen whether other countries will adopt a similar approach to fighting money laundering. In particular, lawyers in the United States must consider whether the government may one day consider the fundamental principle of lawyer-client confidentiality a necessary casualty in its war against terror.

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