The Duties of Lawyers Under the Draft European Union Money Laundering Directive: is Confidentiality a Thing of the Past?*

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A. The Draft Money Laundering Directive

The European Economic Commission's (EEC) Directive 91/308 on the prevention of the use of the financial system for the purpose of money laundering[1] has been hailed by many European Union (EU) commentators as an extraordinary advance to the cause of EU integration, not least because it still is one of only few a directives, actually in force, in the field of EU criminal law. From the point of view of money laundering control, the Directive has been the EU's main weapon in its endeavours to ensure that the liberalization of the financial markets and the consequent freedom of capital movements 'is not used for undesirable purposes, such as money laundering'.[2] However, notwithstanding the undoubtful success of the Directive to introduce a minimum level of money laundering control mechanisms in all 15 EU Member States (some of which had not even criminalized money laundering before transposing the Directive), the EEC Directive 91/308 is no longer considered an adequately progressive piece of legislative text for further money laundering prevention equal to the pace currently in force both at the international level and within some of EU Member States. The legislative response of the EU to the need for increasingly progressive legislation has been the Draft Amendment of the Money

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1 See the European Economic Commission Directive of 28 June 1991, OJ 1991 L 166, at p. 77.

2 European Parliament, 'Proposal for a European Parliament and Council Directive Amending Council Directive 91/ 308EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering' in EP Document 599PC0352.

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Laundering Directive, which having been passed by the Council and the Parliament is currently in the final stages of becoming part of EU legislation.[3]

The main change in current EU legislation, introduced by the draft Directive, is the expansion of the circle of persons covered by its provisions to credit and financial institutions: accountants and auditors; real estate agents; transporters of funds; operators, owners and managers of casinos; dealers in high-value goods, such as precious stones or metals; and notaries and other independent legal professionals, including lawyers. In national implementing legislative texts this circle of persons may be extended further to include any other categories of professions which are likely to be used for money laundering purposes under the specific stipulations of their national legal order.[4] These professionals must now require means of identification by their customers whenever there is a suspicion of money laundering activities,[5] and especially when entering into business transactions, when opening an account or savings accounts, when offering safe custody facilities, or in any case involving a sum amounting to a total of 15,000 Euro or more.[6] In cases of insurance policies these are covered when the premium exceeds 1,000 Euro in any given year or a one-off payment is made of more than 2,500 Euro.[7] Casinos have the obligation to identify the true identity of their customers when they purchase or exchange gambling chips of at least 1,000 Euro.[8] Articles 7 and 9 of the Money Laundering Directive, as will be modified by the Draft Directive, address the issue of tipping off. Article 7 provides that persons covered by the Directive must refrain from participating in suspect transactions until they have notified the competent authorities as set out in the Directive. If refusal to execute may jeopardize the interception of those suspected of money laundering offences, the operation may take place as long as authorities are immediately informed. In order to reassure perspective informers that their reports will not involve them in prosecution for breach of national data protection legislation, the proposed Article 9 provides that such a breach can not be constituted even when legislative or administrative national legal regulations so provide.[9]

With reference to members of the legal profession, the Directive specifies that they must comply with the obligations imposed by the Directive when they assist or

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[3] The Draft Money Laundering Directive was discussed by the EP's parliamentary committee on 18 April 2000. It has already been forwarded to DGI and DGII which have discussed it in part sessions on 15 May 2000. For an update on the progress of the draft Directive, see the relevant internet site on the European Parliament Observatory at <http://wwwdb.europarl.eu.int/oeil/oeil_ViewDNL.ProcedureView?lang=2&procid=3673>.

[4] See the new Art. 12(1) as modified by the draft Directive.

[5] See Art. 3(6) as modified by the draft Directive.

[6] See Art. 3(2) as modified by the draft Directive.

[7] See Art. 3(3) as modified by the draft Directive.

[8] See Art. 3(3a) as modified by the draft Directive.

[9] For a detailed analysis of the provisions of the draft Directive, see C. Stefanou and H. Xanthaki, 'The EU Draft Money Laundering Directive: A Case of Inter-Institutional Synergy' in (2000) 3 *Journal of Money Laundering Control*, at pp. 325–335.

represent clients in the buying or selling of real property or business entities, handling of client money, securities or other assets, creation, operation or management of companies, trusts or similar structures, as well as execution of any other financial transactions. The inclusion of lawyers in the new list of members of the 'vulnerable professions' was not undertaken lightly by the Commission. In fact, in the Explanatory Memorandum of the Draft Directive, the Commission went to some lengths to reassure members of the legal profession that their duty of confidentiality would not be affected by their newly introduced obligations. This is also reflected in Article 6(3) which specifies that the obligations of the Directive do not apply with regard to information received by lawyers from clients in order to be able to represent them in legal proceedings, unless the information is provided as part of a request for advice sought for the facilitation of money laundering activities. Moreover, under Article 12(3), as modified by the Draft Directive, Member States may still exempt BAs and self-regulatory professional bodies from the relevant obligations. It follows that within the EU the obligations of lawyers to identify their clients, to abstain from suspect transactions, and to report such transactions will exist only to the extent introduced by their national legal provisions.

In view of the qualifying conditions, and the escape clause introduced by the draft Directive with regard to its application to members of the legal profession, the draft Directive may only be described as a half-hearted attempt by the EU to use the professional experience and legal expertise of the members of the legal profession as a barrier to the attempt of criminals to commit money laundering related offences. The question is what led the Commission to draft the relevant provisions as they now stand? If the Commission never really wanted to include members of the legal profession to the circle of persons covered by the draft Directive, the simplest way forward would have been to exclude them from the Directive's list of professionals altogether. Their current inclusion to this list indicates, at least *prima facie*, that the reasons behind the unenthused addition of the legal profession in the text of the draft Directive lies elsewhere.

B. The National Position: an Explanation?

This article suggests that the reasons for the Commission's choice to introduce an unqualified provision rendering the draft Directive applicable to all members of the legal profession within the EU lies with the current extreme lack of harmonization amongst the national legal orders of Member States in this particular field. In fact, this article advocates the view that this lack of harmonization, albeit undesirable not least for the supporters of European integration, is somewhat difficult to abolish since it stems from the application of the general principles of constitutional law common to the laws of many Member States who follow the civil law tradition. These arguments will be now discussed in turn.

Currently, the only Member State whose legal order introduces the obligation of lawyers to identify the true identity of their client is the UK. Similarly, only Greek law imposes on notaries the duty to verify the legality and truth of documents submitted to them, including those documents submitted as a means of identification of the true identity of their clients. Other countries of the civil law tradition also impose on notaries the duty to guarantee the legality of the documents produced by them, but this is achieved through the provisions of the relevant codes of ethics of these professions, whose legal value tends to be different within each national jurisdiction. In these countries members of the professional associations covered by the relevant rules of conduct must ensure that the true identity of their client is used in transactions taking place before them. Failure to do so leads to disciplinary penalties rather than criminal liability.

Similarly, only Greek and Belgian lawyers have the obligation to consider abstaining from transactions which are suspected of any connection with criminal activity. In Greece this is a duty and a right for lawyers suspecting that the requested action will assist or facilitate the conduct of any type of criminal activity, whereas in Belgium – and to a degree in the UK – this right and duty is focused on criminal activity related to money laundering only. In all other countries of the EU, tradition does not seem to allow lawyers to refuse requested services to their clients. This brief reference to the current national laws of the Member States on two of the three main duties imposed by the draft Money Laundering Directive is a clear sign of a situation of extreme non-compliance between the provisions of the draft Directive and the current national laws of the Member States. In view of this situation, it is no surprise that the Commission chose to use the draft Directive as a mere encouragement for all Member States to comply with EU standards. In fact, any other tactic from the Commission would have almost certainly led to lack of agreement of the Member States to the text of the Directive, thus rendering its passing positively improbable.

It can therefore be stated that the Commission's achievement to include provisions on the inclusion of lawyers in the field of application of EU money laundering legislation, albeit with restrictions and exemption clauses, is a resounding success whose value in the fight against organized crime cannot be underestimated. Having proven that the half-hearted inclusion of lawyers in the field of application of the draft Money Laundering Directive is due to the current diversity in the relevant national provisions of the Member States, it is important to discover the origins of such diversity. The question therefore is what is the reason behind the currently negative legal position of Member States with regard to the imposition of duties to identify their clients, abstain from suspect transactions and tip-off national prosecuting authorities to members of the legal profession? An examination of the national laws of Member States on the third duty, the duty to report suspect transactions, may be enlightening.

In some Member States the duty to report suspected criminal activity is imposed upon all citizens. Under the Act on Prevention and Clearing Money Laundering all Finnish citizens have the duty to report promptly any suspicions or information on activity relating to money laundering to the Money Laundering Clearing House

within the National Bureau of Investigation. Greek citizens have the duty to inform the authorities of any behaviour or information related to the planning or execution of any type of criminal activity. In Luxembourg citizens must co-operate with the authorities, if and when asked questions on the planning or actual commitment of money laundering related offences. In Spain citizens must report any crime that comes to their knowledge.

Apart from the general obligation of all citizens to report criminal activity in these countries, some Member States introduce a duty for specific professions to report criminal activity. With reference to money laundering related activities in particular, Belgian notaries, bailiffs and certified accountants must report to the *Cellule de Traîtement des Informations Financières* if within the framework of their professional role they are informed or come to suspect that money laundering is taking place. Finnish credit and financial institutions, insurance and estate agents already have a duty to report all suspect transactions. French bailiffs, chartered auditors, estate agent and notaries who within the framework of their professional duties exercise, supervise or advise on an operation which results in capital flows must make a report to the public prosecutor if they have reasons to suspect or believe that money laundering is taking place. In the UK all financial and legal professionals have the duty to report to the (NCIS). In Greece notaries and accountants have the professional duty to report all knowledge of criminal activity acquired during the execution of their professional duties. In Italy accountants have the obligation to report suspect transactions in order to avoid the risk of being accused of conspiring to the offence. In The Netherlands accountants have the obligation to report any information on the commitment of fraud. In Portugal public officers and police authorities are under similar duties, as are accountants. Swedish banks, financial institutions and auditors have the obligation to report any activities suspicious of money laundering to the police.

This brief reference to professions, with the duty to report suspected criminal activity based on information acquired during the execution of their professional duties, reveals that lawyers are not amongst the EU professionals who have the particular obligation to report such suspicions or information to the prosecuting authorities. Exemptions to this rule are British lawyers, who now have the duty to report transactions where they are suspicious of a connection to money laundering related offences, and Dutch lawyers who have the duty to report any such suspicions to the Dutch BA.[10] It is also worth noting that German lawyers are encouraged to report suspect transactions in connection to money laundering, but they do not have a legal duty to do so.[11] However conversely, the breach of professional confidentiality is a criminal offence in Germany.[12]

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[10] See, however, the observation of the principle of confidentiality in *Gerechtshof of Drenthe, 17 November 1969*, [1969] W 3161; also Rotterdam Arrondissementsrechtbank, 18 October 1954 [1955] NJ 368.

[11] See Art. 203 Strafgesetzbuch; also see Art. 42 of the guidance notes for the practice of law.

[12] See Art. 230ff of the Strafgesetzbuch.

In all other EU Member States lawyers are under no obligation to report suspect transactions to the police. In fact, in several Member States reporting dubious dealings to any national authority would constitute a direct breach of the lawyer's duty of confidentiality applicable to information acquired during the exercise of any type of their professional activity. Confidentiality as an overriding professional principle, whose breach is punishable under Article 548 of the Penal Code, has been expressly introduced in Belgium.[13] In Denmark such overriding confidentiality rules have been introduced by the Criminal Code,[14] whereas in Finland confidentiality is established by the Advocates Act 5b§. In France it is introduced by Articles 226–13 and Article 378 of the new Criminal Code. Equally condemning is Article 458 of the Penal Code of Luxembourg. Under Greek criminal law and the lawyers' professional rules of conduct, lawyers have an overriding duty of confidentiality, which can only be waived if permission is given to do so by the President of the local BA.[15] In Italy professional confidentiality is considered a reflection of the right to a fair trial and is therefore guaranteed under Article 24 of the Italian Constitution.[16] Similarly, in Portugal lawyers have an overriding duty of client confidentiality unless the President of their Bar Association (BA) waives it.[17] In Spain lawyers are exempted from the general duty of all citizens to report criminal activity to the police in the event they gained this information in the exercise of their professional activities.[18] In Sweden the principle of confidentiality is introduced by Chapter 36, Section 5 of the Swedish Code of Civil Procedure.

From the study of the national provisions of the Member States concerning the duty of lawyers to report suspect transactions to the prosecuting authorities it is very evident that, at least at the moment, the national laws of the Member States do not allow lawyers to be used as a vehicle of information on money laundering-related activities. Although notaries, accountants and other professionals are already being used for that purpose, lawyers are bound by their duty of confidentiality, which in many Member States overrides other obligations imposed on lawyers by special laws. The commonality of this position in such a large number of EU countries leads to the conclusion that the right and duty of lawyers to confidentiality is a general principle of law common to the laws of the Member States.[19]

It follows that the duty of lawyers to confidentiality is now part of the law of the

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[13] See at D.-M. Philippe, 'The Legal Professions in Belgium' in *The Legal Professions in Europe* (A. Tyrell and Z. Yaqub (eds)) (Great Britain, 1996) pp. 69–97, and at p. 83.

[14] See 39/1889 as amended, para 3; also see Art. 786 of the Code of Procedure.

[15] See Art. 49 of the Code of Lawyers; also see Art. 371 of the Criminal Code, and Art. 212 of the Code of Criminal Procedure.

[16] See E. de Leone, 'Il Segreto Professionale: Limiti e Guaranzie' in (1978) *Rivista Italiana di Diritto e Procedura Penale* 675.

[17] See Art. 81 of the Bar Rules.

[18] See Art. 437.2 of the Fundamental Law of Judicial Power; also see Art. 41 of the General Statute of the Abogacia and Art. 416 of the Criminal Procedure Act.

[19] See A. Tyrrell and Z. Yaqub, *The Legal Professions in the New Europe* (London, 1996), p. 25.

EU. This conclusion was drawn both in the 1976 Edward Report on Professional Secrecy and in the 1977 Ehlermann and Olderkop (FIDE) Report whose authors concluded that, considering the legal situation in the Member States, it seems justifiable to assume that there exists a general principle of law applicable in Community law as part of 'the law' in the sense of Article 164 EEC (Article 31 of the European Coal and Steel Community (ECSC) and Article 136 of the now disbanded East Asian Economic Caucus (EAEC)) which, within certain limits, 'assures the professional privilege, also in administrative proceedings'.[20] This was confirmed by the European Court of Justice (ECJ) in *AM and S Europe Ltd*,[21] where the Court held that the concept of professional privilege is applicable in EU law. In fact the Court accepted the intervention of the Council of the Bars and Law Societies of the European Community (CCBE) in the case and accepted that the duty of confidentiality covered all communications affecting the clients' defence and was applicable to all lawyers excluding in-house practitioners and members of non-EU professional associations.

The acceptance of the duty of confidentiality for EU lawyers and the subsequent difficulty even of the Commission in the reception of an unqualified clause in the draft Directive on the duty of lawyers to report suspect transactions is reflected in the Charter of the Professional Associations in Support of the Battle against Organized Crime,[22] which was characterized as 'the first tangible result of more than a year of dialogue'[23] between the Commission and the Conference of Notaries of the EU (CNUE), the CCBE, the Federation of European Accountants (FEE), the European Federation of Accountants and Auditors for Small- and Medium-Sized Enterprise (EFAA) and the European Tax Confederation (CFE). The initiative in launching the basic idea and outlines of the Charter of the professional associations was undertaken by the Commission. On the basis of the commitments undertaken within the Charter, new rules will be included in the codes of conduct for professional associations and supervisory and advisory mechanisms governing members of the professions.

These provisions will relate, in particular, to combating fraud, money laundering and corruption, and should help members of the professions to avoid finding themselves implicated in fraudulent activities. Under the new arrangements, the organizations will set up supervisory mechanisms to keep an even closer eye on their members and investigate any shortcomings in their conduct within a special regulatory framework for the professions. Moreover, the signatory European Professional Associations undertake the obligation to encourage their member associations to adopt standards within their existing rules of conduct to protect the

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[20] See FIDE, (Copenhagen, 1978) vol. 3, at 11.5–11.6.
[21] See Case 155/79, *AM and S Europe Ltd v. Commission* [1982] ECR 1575.
[22] See *Charter of the European Professional Associations in Supporting the Fight Against Organised Crime*, SG/TFJHA/02, 12 July 1999.
[23] See IP/99/565 of 27 July 1999.

professionals they represent from being involved in fraud, corruption and money laundering and, where necessary, to either improve or introduce new mechanisms for the monitoring of the compliance of their membership to the standards in question. These standards were expressly taken to include, amongst others, the determination of the true identity of a client in cases of financial transactions conducted on their behalf and the withdrawal from acting in cases of suspect transactions. The value of the Charter lies with the fact that it resolves the final point of debate between the EU and the persons covered by the Draft Directive. In the Charter the issue of confidentiality is only mentioned in paragraph 3(b) of the declaration of the signing parties that the use of confidential professional information for personal gain or unlawful purpose is forbidden. In fact, if anything, the Charter acknowledges the 'need for some flexibility in order e.g. to take into account the characteristics of some professions such as lawyers when defending their clients in front of criminal tribunals'.[24]

This brief resumé of national and EU legislation with regard to the issue of lawyer-client confidentiality demonstrates that the professional privilege is currently respected both at national and EU levels. An attempt by the Commission to impose on lawyers the obligation to report suspect transactions to the prosecuting authorities under the provisions of the new draft Money Laundering Directive would be a direct violation of EU law, as reflected by the Charter and the, admittedly limited, case law of the ECJ on this issue. It therefore seems that the only option for the achievement of the Commission's aim to introduce a lawyer's duty to report would be to achieve consensus at national level. The question is whether this suggestion is realistic? In other words, why is confidentiality such a well-guarded principle of the national laws of the Member States? And, perhaps more importantly, can it be limited or abolished (with reference to money laundering) in the foreseeable future?

In order to answer these questions, an analysis of the national positions in all Member States would have been necessary. However, in view of the limited length of this article, Greece has been chosen to be analysed as a case study. In view of the civil law tradition of the country, the Greek perception as to the origin and value of the duty of lawyer confidentiality can be used as a representative sample of the standpoint of most EU Member States[25] whose civil law tradition seems to lead to the absolute respect of the principle of confidentiality, thus rendering the imposition of the duty to report suspect transactions by EU legislative texts unrealistic for lawyers, at least *prima facie*.

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[24] See Explanations of the Amendments Proposed in the Final Draft for the Charter of 18 March 1999.

[25] At least the Austrian, German and French traditions are identical to the Greek; see D. Giakoumis, *The Legal Status of Lawyers and Themes of Civil and Disciplinary Liability* (Athens, 1987) at p. 275.

C. Greece as a Case Study

In Greece money laundering is regulated by Law 2331/1995 transposing Directive 91/308/EC into the Greek legal order.[26] There is no doubt that under Article 2 of Law 2331/1995 money laundering constitutes a criminal offence for all Greek citizens, including members of the legal profession. The question is whether lawyers have the obligation to report suspect transactions to the authorities? The text of the law expressly introduces the obligation to report suspect transactions, to co-operate with the authorities, to refrain from disclosing any information indicative or relevant to money laundering investigations to the persons under investigation or any third parties etc. However, this is binding for banking and credit companies exclusively. Lawyers and notaries do not have similar obligations, at least not under the current law on money laundering.

Nevertheless, other regulations of the Greek Criminal Code (CrC) can prevent the commitment of money laundering offences by use of the legal professions. Any type of assistance to the execution of a money laundering offence, through actual direct aid or through legal advice before, during or after the execution of the criminal act in question is prevented through Articles 46 and 47 of the CrC. Any involvement in the investment of dirty money falls within the prohibition of Article 394 of the CrC on the reception of proceeds of crime. Any attempt to withhold information on a money laundering offence constitutes a breach of Article 231 of the CrC on the hindrance of the persecution of a criminal sentenced for felony or misdemeanour. Possibly more importantly, withholding information on a money laundering offence is a clear violation of Article 232 of the CrC on the obligation of all Greek citizens to report to the authorities any trustworthy information concerning the planning or beginning of the execution of a criminal offence.

In Greece these provisions are considered to be efficient in the fight against money laundering, as they prevent all citizens from undertaking money laundering activities, from assisting in such activities, from taking part in the investment of 'dirty' money and from withholding information on the commitment of money laundering offences. These regulations apply to all Greek citizens and all foreign citizens domiciled in Greece. The question is whether special professional provisions impose additional obligations on members of the legal profession.

Problems arise as to the duty of lawyers to prevent future money laundering activities or to report to the authorities possible suspicions of money laundering offences planned or committed by their clients, when the relevant information has been brought to their attention within the framework of their work. These problems derive from a set of provisions on confidentiality mainly included in the

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[26] For an analysis of money laundering legislation in Greece, see C. Stefanou and H. Xanthaki, 'Greece: Money Laundering' in [1999] 3 *Journal of Money Laundering Control*, at pp. 161–172.

Code for Lawyers.[27] Under Article 45 lawyers enjoy 'full freedom and respect' from the courts and all other national authorities, whereas Article 49 expressly provides that lawyers have the duty to observe the duty of confidentiality, which covers all information entrusted to them by their clients. Of course, confidentiality only covers facts which comply with two conditions: first, they must not be widely-known, and, secondly, there must be a sensible and rational interest of the persons to whom the secrecy refers not to have the relevant facts revealed any further.[28] It must be noted here that the same obligation of confidentiality is repeated in Article 32 of the Code for Lawyers, which, however, lacks the legally binding value of the Code. As for any other information which, although not confided to the lawyer by a client, has been revealed to the lawyer during the exercise of a professional activity, the Code leaves it up to the conscience of the lawyer to decide whether that can be revealed in court without causing direct or indirect harm to the interests of a client.[29]

In any case, lawyers may not testify in court on any aspect of a case to which they became involved in their professional capacity without prior permission of the BA to which they belong, or – in circumstances of extreme urgency – of the President of that BA. Moreover, under paragraph 2 of the same Article, any type of search or confiscation in the office or house of a lawyer is prohibited if it relates to a case in which the lawyer is acting as a representative or defender.[30] Moreover, lawyers declaring that their testimony in court would clash with their duty of professional confidentiality are no longer required to testify.[31] This provision is repeated in Article 400 of the Code of Civil Procedure (CCP), according to which the court may not examine as witnesses lawyers whose knowledge on facts relevant to the case was acquired during the execution of their professional duties, unless the person who entrusted them with the information explicitly releases them from the duty of confidentiality.[32] A similar provision can be found in Article 212 of the Code of Criminal Procedure (CCrP) which renders a criminal trial, where lawyers have been unlawfully examined as witnesses in breach of their duty of confidentiality, invalid and therefore subject to judicial review.[33]

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[27] See Code for Lawyers, which entered into force on 8 December 1954, as subsequently amended.

[28] See El. Simeonidou-Kastanidou, 'Breach of Professional Confidentiality from Lawyers' in (1983) *Dikaio kai Politiki* 7 119, at p. 120.

[29] See K. Makridou, *Lawyers' Confidentiality* (Athens-Thessaloniki, 1989) at p. 6; also see Athens Court of Appeal 7547/1982, *Elliniki Dikaiosini* 24 [1983] 62; also, Athens Court of Appeal 1719/1981, *Elliniki Dikaiosini* 22 [1981] 431.

[30] Thus, Arts. 253 and 261 of the Code of Criminal Procedure are inapplicable in the case of lawyers. However, a search is allowed after the final conviction of the criminal and if the lawyer is a suspect for assistance to a criminal: see Order of the Procurator of Appeal of Athens 434/1978, *Poinika Chronika* [1978] 650.

[31] See Art. 50 of the Code for Lawyers.

[32] See Art. 400(1) of the Code of Civil Procedure, which entered into force on 3 July 1995.

What is noteworthy is that there is no distinction between information confided to lawyers in criminal or in civil cases: in fact, the duty of confidentiality is expressly introduced and respected under both the Codes of Criminal and of Civil Procedure. Moreover, the duty applies not only before the courts, but also before all investigating and prosecuting authorities.[34] Furthermore, the duty of confidentiality extends not only to the defence in a criminal trial, but to any lawyer who is called to perform a duty within the framework of a lawyer's professional tasks. Thus, even lawyers who provide legal advice without finally acquiring a mandate to defence are bound by the duty.[35] It is also interesting to note that the duty of confidentiality, as stipulated in the Greek legal order also applies expressly to all foreign lawyers acting within Greek territory, even if the national provisions of their country of origin differ from Greek law.[36]

Numerous judgments of the Greek courts have interpreted the duty of confidentiality. According to the Athens Court of Appeal, lawyers cannot be examined as witnesses on facts entrusted or revealed to them during the exercise of their professional duties.[37] The prohibition of testimony for lawyers concerning data revealed or entrusted to them during the exercise of their duties, and on which they have a duty of confidentiality, has been introduced as a means of protecting the person to whom the confidential information in question has been entrusted (namely the lawyer) and the person favoured by the confidential information. Thus, a lawyer deciding to disclose facts supporting the case of a client and revealed to the lawyer, who has no direct knowledge of them, by the client can be legally made known.[38]

Most higher Greek courts insist that lawyers can only disclose information covered by confidentiality upon permission from the Bar to which they belong.[39] However, lower courts have expressed the view, albeit sporadically, that the testimony of a lawyer witness who had not acquired prior permission from the respective The BA is still valid and may be legally taken into account.[40]

Such is the importance awarded to the duty of confidentiality that its breach constitutes a disciplinary offence with strict penalties for lawyers, especially those who have committed such breaches twice within a period of three years.[41]

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[33] See Areios Pagos 250/1960, *Nomiko Vima* 10 [1960] 389; also Areios Pagos 980/1987, *Poinika Chronika* [10987] 797.
[34] See K. Mpeis, *Lessons of Civil Procedure* (Athens, 1984) at p. 99.
[35] See El. Simeonidou-Kastanidou, *supra* note 27, at p. 124; also see I. Zisiadis, *Studies of Civil Procedure* (1954, Sakkoulas, Athens), p. 93; K. Tsoukalas, *Criminal Procedure* (1936, Sakkoulas, Athens), p. 135.
[36] See Art. 8 of Presidential Decree 152/2000, which entered into force on 23 May 2000.
[37] See Athens Court of Appeal 8770/1988, *Elliniki Dikaiosini* 34 [1993] 1356; also see Areios Pagos 234/1959, *Poinika Chronika*, 555.
[38] See Supreme Court 1285/1992, *Elliniki Dikaiosini* 35 [1994] 1336.
[39] See Areios Pagos 196/1980, unreported; also see Athens Court of Appeal 1719/1981, unreported, and 7223/1982, unreported.
[40] See Athens Multi-Member Court of First Instance 7653/1987, *Elliniki Dikaiosini* 29 [1988] 759.
[41] Ibid.

Another indication of the importance of the duty of confidentiality is that the duty exists even if the client allows the disclosure of information.[42]

Under the case law of the Supreme Court, the court has the obligation to exclude a witness from testifying in a case if the witness is a lawyer and the information which is to be conveyed to the court was entrusted to the lawyer or was discovered by the lawyer during the exercise of a professional activity. Judgments based on, or taking into account, such information are subject to a cassation before the Supreme Court.[43] In fact, the judgment is erroneous even if the court considers that the information testified by the witness does not fall within the witness's duty of confidentiality, as the danger to the interests of the client is existent even in the case of silence or concealment of facts.[44] However, this error can only be put forward by the client who has a legitimate interest in the disregard of the testimony of the lawyer.[45]

In fact, only a minority of judges of the Court of Malpractice went so far as to support the view that the duty of confidentiality should prevail even when in collision with Article 116 of the CCP on the lawyers' obligation to report the facts of the case truthfully.[46] The rationale of the minority of the judges in this case was that the duty of confidentiality is higher in hierarchy than the duty to say the truth.[47]

As for the duty of all citizens to report to the authorities any information on plans or actual execution of criminal offences, it must be accepted that in Greece lawyers seem to be in the difficult position of having to comply with their duty to report all information on serious crimes and the duty to abstain from assisting a criminal, as well as with their duty of confidentiality applicable to all information received within the framework of their work as legal counsellors in civil and criminal cases. If the independence of disciplinary from criminal proceedings is taken into account, it would be quite easy to imagine a situation where Greek lawyers would comply with their duty to report to the police a future money laundering activity brought to their attention by a client, only to lose their licence in disciplinary proceedings due to breach of their duty of confidentiality. Had the lawyers chosen to refrain from reporting to the police, they could have been found guilty of withholding information on the planning or the execution of a criminal offence which would have led to a sentence by the criminal

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[42] See Areios Pagos 1474/1979, unreported. This is a rule of ethics which does not effect the legal standing of the judgment based on the testimony of a lawyer who had not acquired prior permission from the respective Bar: see Areios Pagos 196/1980, *Nomiko Vima* 28 [1980] 1480; also, Supreme Disciplinary Council 66/1973, *Nomiko Vima* 21 [1973] 1524; Larissa Court of Appeal 749/1980, *Elliniki Dikaiosini* 23 [1982] 622.

[43] See Ch. Kalatzis, *Code of Criminal Procedure* (Athens, 1999) at pp. 275–276.

[44] See Supreme Court 844/1992, *Efimeris Ellinon Nomikon* 60 [1993] 600.

[45] Thus this argument as not accepted by the Supreme Court due to lack of legitimate interest in a case where both lawyers testified: see Areios Pagos 977/80, *Poinika Chronika* 31 [1980] 132.

[46] This view is also supported by Agg. Konstantinidis, *Duty to Testify and Professional Confidentiality in the Criminal Trial* Vol. 1 (Athens/Komotini, 1991) at p. 53.

[47] See Athens Court of Malpractice 9/1993, *Diki* 25 [1994] 829.

courts and consequent disciplinary proceedings before the Committee of their Bar leading again to disqualification. It must be noted here that this dilemma, should it be proven a real practical predicament, may be almost unavoidable for Greek lawyers who have the duty to take up any case brought before them, unless they can be certain that the case is obviously illegal or blatantly unfair.[48]

The question is, whether under the Greek legal order do these two duties really clash, or is there a hierarchical difference between the two? In order to address this question it is necessary to assess the source of the duty of confidentiality, namely the source from which it derives its legal value. According to Kontaxis, who reflects the prevailing view in Greek jurisprudence, the aim of Article 371 of the CrC (which criminalizes the breach of professional confidentiality for lawyers) is the protection of private secrecy and the fortification of the duty of confidentiality which serves wider social purposes, such the reinforcement of confidence in lawyers: the latter constitutes the basis of the institution of defence[49] which the legislator has raised to a social good 'also for criminal trials', as it serves the search for truth and 'the general public good'.[50] It is worth noting that this position was also supported by the UK in its intervention at the *AM & S* Case, where it was submitted that the basis of the principle lies in the recognition of the fact that the interests of justice and good administration require that persons should be able to seek and obtain legal advice; this can only be done on the condition of confidentiality.[51] According to Mpouropoulos, the *telos* of Article 371 of the CrC is the 'wider general public interest in maintaining privacy', which is the reason why the illegality of the breach of confidentiality is not abolished even in the case of consent by the client.[52] Simeonidou-Kastanidou identifies this general good as the unhindered function of the profession of the lawyer within the social system.[53] Zisiadis determines the aim of the protection of confidentiality as 'wider social purposes', such as the institution of defence.[54]

In fact, all criminal, civil and procedural provisions which regulate the principle of confidentiality are specific expressions of the principle of legal protection, which is introduced by Article 20(1) of the Greek Constitution.[55] Under this Article everyone

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[48] See Art. 6 of the Code of Conduct of the Athens Bar Association.
[49] See El. Simeonidou-Kastanidou, *supra* note 27, at p. 119.
[50] See Ath. Kontaxis, *Criminal Code, Special Part* (Athens, 1987) at p. 1895; also see P. Iliadis, 'The Duty of Confidentiality of Priests, Lawyers and Doctors' in (1936) *Dikastiki* 736; T. Filippidis, 'Breach of the Duty of Confidentiality' in (19**) B *Poinika Chronika* pp. 97–114, at p. 97.
[51] See Case 155/79, *AM and S Europe Ltd v. Commission* [1982] ECR 1575, at 1596.
[52] See Agg. Mpouropoulos, *Interpretation of the Code of Criminal Procedure: Volume B* (Thessaloniki/Athens, 1960) at p. 694.
[53] See El. Simeonidou-Kastanidou, *supra* note 44, at p. 122.
[54] See I. Zisiadis, *Penal Law: General Part, Volume A* (Athens, 1971) at pp. 374–375.
[55] See P. Dagtoglou, 'Constitutional and Administrative Law' in *Introduction to Greek Law* (K. Kerameus and Ph. Kozyris) (Deventer/Boston, 1993) at pp. 21–50, and at p. 47.

has the right to the provision of legal protection from the courts and may express their views on their rights and duties under the procedures regulated by Greek law. This provision introduces not only a legal rule, but also 'a fundamental procedural order, an institutional demand' which goes beyond the right of a single citizen to judicial protection.[56] In fact, the importance awarded to this principle by the constitutional legislator is demonstrated by its subjection to the category of principles which cannot be suspended.[57] The right to judicial protection includes the right of the people to present their views on their rights and duties before the authorities of the Greek State, part of which is their right to representation by a lawyer as a guarantee of the effectiveness of judicial protection provided by the state.[58] In view of the fact that the Constitution does not expressly introduce specific rights related to the right of judicial protection expressly,[59] all of its expressions – such as the presumption of innocence, the right to defence and the right of confidentiality – derive from this general provision. It must therefore be accepted that the source of the duty of confidentiality lies within Article 20(1) of the Constitution and, consequently, cannot even be suspended. Indeed, the right of citizens to judicial protection can only be effective if they are allowed to make full use of its content. Citizens must be allowed to express the arguments for their case, both before the judicial and all other relevant authorities, in as efficient a manner as possible. This requires representation by a specialized legal counsellor who, in full knowledge of the truth, will present the citizen's views as eloquently and legally soundly as professional ability allows. A limitation of the knowledge of facts can only impair the lawyer's professional performance and will, therefore, harm the effective exercise of the client's right to judicial protection.

Another constitutional provision which may be considered to be a source of the duty of confidentiality is Article 8 on the right to an unbiased judge, under which no one can be deprived involuntarily from access to the judge who is allocated to them by law. In fact, before the last Constitution the principle of judicial protection was considered to fall within the scope of the principle of the unbiased judge, as introduced by Article 8 of the Constitution.[60] Thus, in the past confidentiality was considered to derive from the principle of the natural judge. However, it must be accepted that the express introduction of the principle of judicial protection in a separate provision of the Constitution renders Article 8 specific to rights concerning access to justice, rather than to expressions of judicial protection. Therefore it is submitted that Article 8 is no longer relevant to confidentiality.

The principle of the provision of legal protection is an expression of Article 2(1) of

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[56] See P.D. Dagtoglou, 'Judicial Protection' in ibid., and P.D. Dagtoglou, *Constitutional Law: Personal Rights* (Athens, 1991) at pp. 991–1003, and at p. 995.
[57] See Art. 48(1) of the Constitution.
[58] See P.D. Dagtoglou, *supra* note 55, 1991, at pp. 996–997.
[59] See P.D. Dagtoglou, *supra* note 55, 1991, at p. 228.
[60] See K. Georgopoulos, *Single-Volume Constitutional Law* (Athens/Komotini, 1992) at p. 361.

the Constitution which introduces the fundamental obligation of the Greek State to protect the human dignity of its citizens.[61] Thus, the principle of confidentiality constitutes:

> a special expression of personal freedom since it identifies with the right of every person to find the moral, medical or legal support which is necessary without the fear that his secrets will be revealed.[62]

The principle of Article 2(1) is one of the fundamental bases of the Greek polity,[63] it constitutes a necessary element of the concept of the rule of law[64] and is a guarantee of the principle of popular sovereignty and democracy.[65] Thus, the duty of confidentiality is linked, albeit indirectly, to the fundamental elements of the Greek polity. This argument is supported by the statement of the CCBE which declared that 'the protection of legal confidence is a characteristic feature of democratic systems'.[66] However, the provision of Article 2(1), albeit absolutely legally binding, is a very general principle which can only be applied in aid or as a tool of interpretation of the specific provisions introducing specific human rights in the Greek Constitution.[67] Consequently, although the duty of confidentiality is traced to the foundations of democracy, the rule of law and popular sovereignty, its source is the right and duty to effective and complete judicial protection as expressly introduced by Article 20(1) of the Greek Constitution and specified in the relevant provisions of the Code for Lawyers, the Criminal Code and the Codes for Criminal and Civil Procedure.

As a result of the constitutional source of confidentiality, the clash between on the one hand the duty of lawyers to keep all information acquired during the performance of their duties secret, and, on the other hand the duty to report all crimes to the authorities and to abstain from assisting the execution of criminal offences as introduced by the Criminal Code is easily resolved. The source of confidentiality is the Constitution which is hierarchically superior to any other legal provision of Greek law: in fact, the legal basis of confidentiality can be traced in the fundamental characteristics of democracy, the rule of law and popular sovereignty. Thus, any interpretation requiring lawyers to put this constitutionally-derived duty aside in order to observe provisions of the Codes would be unconstitutional. This is the rationale behind the popular view that, when in clash with any other duty, confidentiality prevails. In fact, in Greek legal theory there is support for the opinion

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[61] For a detailed analysis of the principle, see A. Manesis, *Personal Freedoms I* (Thessaloniki, 1979) at pp. 110–113.
[62] See El. Simeonidou-Kastanidou, *supra* note 27, at p. 122.
[63] See K. Georgopoulos, *Single-Volume Constitutional Law* (Athens/Komotini, 1999) at p. 245.
[64] See D. Tsatsos, *Constitutional Law: Volume 2* (Athens/Komotini, 1993) at p. 150; also see E. Venizelos, *Lessons of Constitutional Law* (Thessaloniki, 1991) at p. 312.
[65] See K. Georgopoulos, *supra* note 62, at p. 113; also see E. Venizelos, *supra* note 63, at p. 255.
[66] See Case 155/79, *AM and S Europe Ltd v. Commission* [1982] ECR 1575, at 1600.
[67] See P.D. Dagtoglou, *supra* note 55, at p. 934.

that lawyers do not even have the duty to report to the police information which may prevent the commitment of murder.[68] However, there is an equally strongly supported opinion that lawyers are relieved from the duty of confidentiality when the revelation of the information which they possess will assist the prevention of a serious crime.[69] This debate cuts to the heart of the issue of the imposition of the duty on lawyers to report suspect transactions.

D. The Way Forward

From the analysis of Greek law on confidentiality it would seem that the obligation and right of lawyers to keep any information acquired during the exercise of their duties as secret really is an absolute one. However, even under the strict Greek legal order there are qualifying conditions which may release the lawyer from the duty to secrecy.

It is widely-accepted that the aim of the provisions introducing confidentiality within the framework of a criminal trial is the protection of the wider social good, whereas in the case of civil disputes it is individual secrecy which is protected.[70] Individual secrecy, albeit a legally protected human right applicable to all persons, is not as hierarchically high a good as the preservation of the foundations of the polity. In view of the need to balance the importance of the two clashing goods protected by the conflicted duties imposed on lawyers at any give time where secrecy is involved, it is possible to consider that the protection offered to individual secrecy may not be absolute. This is why Article 400(1) of the CCP accepts the testimony of lawyers before the civil courts as valid, provided that the client has approved the breach of confidentiality. It must therefore be accepted that, when permitted by the client and after permission of the respective Bar to which the lawyer belongs, the revelation of information acquired during the performance of their professional duties is a legitimate breach of the duty of confidentiality for lawyers.[71] This conclusion, albeit interesting from an academic point of view, is minimally relevant to the debate deriving from the draft Money Laundering Directive, as in the cases stemming from the application of the new duties imposed by the draft Directive lawyers will be called to reveal information connected to the commitment of a crime and would therefore fall within the field of application of criminal law, and the jurisdiction of the criminal courts. However, this conclusion serves as proof that the duty of confidentiality is not as absolute as it initially seems. In fact, one area where the duty

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[68] See A. Charalambakis, *Diagram of Criminal Law* (Athens/Komotini, 1999) at p. 185.
[69] See I. Manoledakis, *General Theory of Criminal Law* at p. 156; however, see *contra* Magakis, *Criminal Law* (1981) at pp. 271–271.
[70] See El. Simeonidou-Kastanidou, *supra* note 55, at pp. 122–123.
[71] See Fragistas, *Law of Proof* (Athens, 1975) at p. 173.

is indeed unconditional concerns data entrusted to the lawyer by a client whom the lawyer defends in a criminal trial. In this case, even the text of the draft Money Laundering Directive accepts that the duty to report suspect transactions retreats before the duty to defend a client as fully and effectively as possible.

The question is, whether the duty of confidentiality is equally absolute when the client of a lawyer in a criminal trial consents to the use of confidential information before the courts. Under the express provision of Article 212 of the CCrP consent of the client does not abolish the illegality of breach of confidentiality in cases of criminal trials. However, a small number of authors argue that even in the case of criminal trials consent of the client releases the lawyer from the duty to secrecy, as the information presented before the criminal courts can no longer be characterized secret since the second element of confidentiality (namely the wish of the person whom they concern not no have them known any further) is not fulfilled any more.[72] Although consent abolishes the illegality of a criminal offence within the field of Greek criminal law,[73] this present author is of the opinion that consent may not abolish the duty of confidentiality contrary to the express regulation of the Greek criminal legislator. The main argument of those following the positive view with reference to the second element of secrecy could have been valid, if the *telos* of the provision of Article 371 CC was the protection of private secrecy. In view of the fact that the aim of establishing the duty of confidentiality within the field of criminal law is the wider social good, the opinion of a single member of society, albeit the person whom the secret refers to, is irrelevant. Moreover, the prevalence of consent refers to crimes effecting the victim exclusively: thus, consent may abolish the illegality of the theft of a small amount of money, but it would be beyond comprehension to accept that the illegality of murder or even forgery renders these actions legal. This author believes that consent of the client does not release the lawyer from the duty of confidentiality in criminal cases.

Another issue refers to the position of a lawyer who comes into contact with a prospective client, acquires knowledge or suspicions about the commitment of a crime and in the end does not become the lawyer who actually defends this client before the criminal courts. This issue arises from the contradiction in the terms used in Article 371 of the CrC (which refers to lawyers in general) and Article 212 of the CCrP (which uses the term 'defence'). In view of the fact that the duty of confidentiality as introduced by the Code for Lawyers refers to all aspects of a lawyer's professional activity, it is submitted that it covers not only the defence in a criminal trial but all professional duties performed before any prosecuting or investigating authority. This position, which is prevalent in Greece, is strengthened by the fact that Article 212 of the CCrP regulates the error in the criminal judgment based on a testimony of the defence, whereas Article 317of the CrC criminalizes the

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[72] See N. Chorafas, *Criminal Law* (Athens, 1978) at p. 186; also see El. Simeonidou-Kastanidou, *supra* note 55, at p. 124; T. Filippidis, *supra* note 49, at pp. 111–112.

[73] See D. Karanikas, *Studies of Criminal Law: Volume 3* (Athens, 1962) at p. 333.

breach of confidentiality of all lawyers irrespective of their specific service as the defence in the particular case. In the Introductory Report of Article 371 of the CrC the legislators expressly included trainee lawyers or even non-lawyers acting as legal counsellors in military trials in its field of application.[74] Moreover, the case law of the Greek courts has declared the testimony of any lawyer to be a disciplinary and criminal offence, even when the judgment based on this testimony is not considered erroneous.[75]

From the analysis of the qualifying conditions under which the duty of confidentiality is binding in criminal cases, it becomes evident that lawyers may not disclose information acquired during the performance of their duties either before the criminal courts or before the prosecuting and investigating authorities. Thus, Greek lawyers suspecting or knowing that money laundering-related offences may take place are bound by the duty of confidentiality, if the relevant information or suspicions derive from facts entrusted to them by their clients. The imposition of the duty to report under the draft Money Laundering Directive could therefore not be received by the Greek legal order. This is a reflection of the position in many civil law jurisdictions, which justifies the choice of the Commission to allow an escape clause for Member States whose national laws could not allow the breach of confidentiality by obliging lawyers to report suspect transactions to the police or the prosecuting authorities.

However, the blatant imposition of the duty to report upon EU lawyers is not the only possible way forward. The EU has other options which, while respecting the privilege of confidentiality, may still achieve the aim of EU money laundering legislation, namely the successful combat against organized crime. One of the most realistic options can be traced in the Dutch, Portuguese and Greek model, which in cases of possible breach of confidentiality refers lawyers to the BA to which they belongs or to its President. Thus, EU lawyers may be asked to report suspicions or information on money laundering-related offences to their BA, where – in confidence – a trained group of lawyers may advise colleagues on the position applicable in that particular case.

This proposal seems to be similar to the manner in which the issue has been resolved in the case of banking and financial institutions, where persons playing the role of the link between employees and the police are appointed. The advantage of this suggestion is that lawyers would have access to specialized colleagues who, in full awareness of any conflicting duties, would provide an expert opinion on whether the lawyer is bound by confidentiality in the specific case. Thus, lawyers, whose field of specialization may not include ethics, will be guided by specialists within their own professional association. In fact, even contacting this group would offer the lawyer an indication of the probable position of the Bar in any disciplinary procedures related to that case. Moreover, lawyers would have an indication on the outcome of

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[74] See *Introductory Report*, 1933, p. 551.
[75] See Supreme Disciplinary Court 66/1973, *Nomiko Vima* [1973] 1524.

a possible application to the Bar for their exemption from their duty of confidentiality, thus being protected from the risk of submitting an application and revealing information which may then be considered confidential. Furthermore, lawyers contacting their BAs prove beyond doubt that they do not intent to assist or participate in the relevant crimes.

D. Conclusion

The transposition of the draft Money Laundering Directive can result in severe grievance to the duty and right of lawyer confidentiality, as regulated by the national laws of many EU Member States. In view of its pivotal role in the EU national legal systems, and its acceptance as a principle of EU law, confidentiality is not, and should never become, a thing of the past. The sources and consequent value of confidentiality are traced to the foundations of democracy, popular sovereignty and the rule of law as expressed in the constitutional principle of effective judicial protection which is common to the laws of Member States. The Commission's recognition of the difficulty involved in the implementation of the relevant provisions of the draft Directive by many Member States is reflected in the escape clause expressly introduced by the draft Directive.

However, the duty of confidentiality must not become a hurdle to the fight of the EU against organized crime. Nor is this the intention or wish of the members of the legal professions. The real way forward is the need for further collaboration and negotiation between the Commission and the BAs for their agreement upon a framework which will advance the fight against organized crime while ensuring that the safeguard of confidentiality remains very much a part of the future.