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OPINION

of the Committee on Petitions

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a European Parliament and Council directive on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing
(COM(2004)0448 – C6-0143/2004 – 2004/0137(COD))

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SHORT JUSTIFICATION

This is not the first time that Parliament has had to address the delicate issue of balancing the need to maintain public order and security and the need to safeguard fundamental rights. The Committee on Civil Liberties, Justice and Home Affairs has recently submitted (and secured Parliament's adoption of) an own-initiative report on the future of the area of freedom, security and justice (the Boursanges report [A6-0010/2004], which was adopted on 14 October 2004 [T6-0022/2004]), and also an amendment (adopted in plenary with 329 votes in favour) which provides for the preliminary assessment of any new proposal for a legislative act from the point of view of upholding fundamental rights. Prior assessment intended to ensure that the fundamental rights defined in the EU Charter of Fundamental Rights are upheld will have to be carried out in respect of any EU or EC legislative act.

The proposal for a directive on the prevention of the use of the financial system for the purpose of money laundering (including terrorist financing) therefore belongs in the grey area in which individual rights and freedoms may have to be sacrificed in the higher general interest of preventing and repressing terrorist activity. The legislator does certainly appear to be aware of the danger that the scope of the proposed legislation may give rise to a conflict of interests - so much so that in the proposal's final recital (recital 29) he makes a point of emphasising that the directive 'respects the fundamental rights and observes the principles recognised' in the Nice Charter (which has now been incorporated into the second part of the Constitutional Treaty), and also complies with the European Convention on Human Rights.

However, the substance of the provisions laid down in the proposal embodies merely a commonplace statement of principle that falls short of the political ethic adopted by Parliament, which - ever since the Charter was proclaimed in Nice - has endeavoured to abide by the substance of that charter as it exercises the powers conferred upon it as an institution. In its opinion on the Constitutional Treaty it recognises that all the EU institutions are bound by the same obligation: *the incorporation of the EU Charter of Fundamental Rights in part II of the Constitution, which means that all provisions of European Union law and all measures taken by the EU institutions or based on EU law will have to comply with those standards (EP resolution T6 0004/2005 of 12/1/05).*

The Commission too has always demonstrated that it wishes to adopt a similar pro-active approach to the Constitutional Charter, as emphasised by its former President - Mr Prodi - at the end of the last IGC in a message addressed to his own officials: *'The inclusion of the Charter of Fundamental Rights in this text and the clear statement of the EU's values and objectives and of the basis principles governing relations between the EU and its Member States mean that we can describe this basic text as our Constitution'.*

In the case referred to in Petition 693/2003¹ relating to the normal activities performed by lawyers in advising their clients and representing them in court, fundamental rights and freedoms could be at stake. This applies to the protection of personal data (II-68 of the Constitutional Treaty), freedom of expression and information (II-71 of the Constitutional Treaty), the freedom to choose an occupation and the right to engage in work (II-75.2 of the

¹ Petition 693/2003 by Paul-Albert Iweins (French), on behalf of the Paris Bar, the National Bar Council and the Conference of Chairmen of the Bar; Commission reply received on 19 May 2004 (see Fdr CM/528795).

Constitutional Treaty), and the right to appeal to an impartial judge. As the petitioners argue at length, a lawyer's independence (which is essential to the provision whereby 'everyone shall the possibility of being advised, defended and represented' - II-107 of the Constitutional Treaty) is based on the preservation of confidentiality in dealings with clients. Both independence and confidentiality would be jeopardised by the requirements to provide information which are referred to in Chapter III of the proposal under consideration. A lawyer who is required to disclose a suspect transaction to the financial information unit becomes an auxiliary agent of the State. In this connection it would be as well to point out that the Court of Justice of the European Communities¹ has always held that restrictions on the exercise of the right of ownership and the right to engage freely in professional activity are admissible, provided that they are actually needed in order to enable objectives of general interest to be achieved and that they do not constitute - in relation to the aim pursued - a disproportionate and intolerable burden which may undermine the substance of the fundamental rights guaranteed.

The relationship of trust which is fundamental to the conclusion of a contract between a lawyer and his client presupposes that the latter is free to confide in an adviser unreservedly and that the lawyer - acting impartially - is able to give his client suitable legal advice. However, if the lawyer is required from the outset of his dealings with his client to work in effect on behalf of a third party and to carry out a preliminary investigation in order to ascertain the client's identity and the ultimate aim of the client's request for advice, he will debase his role. And if there is no longer any lawyer involved to act as a filter, it will be even harder to prevent criminal acts from being perpetrated - which is the precise opposite of what the legislation under consideration is intended to achieve.

Petition 693/03 refers to Directive 2001/97/EC amending the earlier directive 91/308/EEC, which the new proposal is intended to repeal. However, in the Explanatory Memorandum the Commission emphasises that 'the new Directive should build on the current *acquis* and [...] the existing provisions, in particular as regards the treatment of the professions, should not be called into question where there is no need to do so.' On 7 December the Ecofin Council was careful not to reopen the debate on an issue which had been the subject of a thorny conciliation procedure in 2001. However, the petition is supported by professional bodies in France, Belgium, Germany, Italy, Spain and Poland, and also by European lawyers' associations. Since 2001 the interested parties have had to suffer the consequences of this obscurantist interpretation of justice. Pursuant to Article 2 of the 2001 Directive, the Commission was required to submit (three years after the directive came into force) a report assessing the way in which lawyers and other independent legal professionals had been treated. The Commission has yet to comply with that requirement. It is true that, in the meantime, the Financial Action Task Force (FATF) has put forward 40 recommendations for combating terrorism and the financing thereof, but this does not justify the wholesale dismissal of the countless protests expressed by interested parties calling for fundamental rights and freedoms to be upheld. The claim that the decision to repeal the existing directives was dictated - amongst other things - by the need for clarity is far from clear from a reading of the new wording of no fewer than 43 articles. The new text incorporates the distinction (not an easy one to grasp) between simplified and enhanced 'due diligence' requirements and it

¹ Judgments of 17 October 1995, the Queen/Minister of Agriculture, Fisheries and Food, *ex parte* Fishermen's Organisation and others, paragraph 55, and of 7 August 1996, *Commission v. Belgium*, paragraphs 31 and 32.

places a ban on any disclosure of the fact that information has been forwarded to the financial intelligence unit (although a pseudo-derogation is allowed in the case of notaries and other independent legal professionals [see Article 25(2)], whilst under Articles 37 and 38 a new Committee on the Prevention of Money Laundering has been given plenty of scope for discretion in the implementation of technical aspects and in the selection of the various detailed identification rules. All of this is in the name of a so-called reconciliation between the requirements of legal certainty and the requirements of public order.

Still unresolved is the linguistic matter raised in petition 177/2002 (submitted by the *Consejo General de la Abogancia Española*) concerning the dubious translation into many languages of the section of the text pursuant to which certain independent legal professionals (including lawyers) are exempted from the obligation to provide information in the course of ascertaining the legal situation of their clients (see Article 6(3) of Directive 2001/97/EC and Article 20(2) of the proposal under consideration). This is an inherently very vague concept which the Commission persists in using - having provided the Spanish petitioners with a somewhat Byzantine reply. It must be pointed out that, in the interests of safeguarding the individual's right of defence, other FATF member states (from Canada to the USA) have secured a moratorium on the implementation of the 40 recommendations designed to prevent money laundering. Furthermore, under Swiss law the activities of lawyers and notaries are specifically excluded from the scope of the measures designed to prevent money laundering, it being recognised that, in such matters, professional confidentiality has precedence.

The committee therefore calls for the proposal to be withdrawn and to be resubmitted once the preliminary assessment referred to in the Bourlanges Report (A6-0010/2004) has been carried out and/or the assessment report referred to in Article 2 of Directive 2001/97/EC has been drawn up. The committee also calls for the following amendments to be made to the text:

AMENDMENTS

The Committee on Petitions calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission ¹	Amendments by Parliament
Amendment 1 Article 2, paragraph 1, point 3 b)	
(b) notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or	(b) lawyers , notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in a financial or real estate transaction, or by assisting in the planning or execution

¹ Not yet published in OJ.

execution of transactions for their client concerning the:

- (i) buying and selling of real property or business entities;
- (ii) managing of client money, securities or other assets;
- (iii) opening or management of bank, savings or securities accounts;
- (iv) organisation of contributions necessary for the creation, operation or management of companies;
- (v) creation, operation or management of trust companies or similar structures;

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provided that the information thus obtained from their clients does not relate to activities covered by professional confidentiality.

Amendment 2
Article 3, point 12 a) (new)

12a) 'activities covered by professional confidentiality' means the ascertainment of the legal situation of the client by the lawyers, notaries and other liberal legal professionals and the performance by them of the duties involved in defending and/or representing the client in the course of legal or administrative procedures and of the activities engaged in by them in connection with arbitration and mediation procedures.

Amendment 3
Article 10, paragraph 3a (new)

3a. In any event the specific activities engaged in by the independent legal professionals referred to in Article 3 12a) shall not be subject to the obligations laid down in Article 6, 7 and 8 of this Directive,

in so far as the bond of professional confidentiality takes precedence over such obligations.

Amendment 4
Article 20, paragraph 2

2. Member States shall not ***be obliged to*** apply the obligations laid down in Article 19(1) to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

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Amendment 5
Article 20, paragraph 2, subparagraph 1a (new)

In any event, legal advice - which is not provided within an unmistakable context of money laundering - shall be subject solely to the bond of professional confidentiality.

Amendment 6
Article 21, paragraph 3 (new)

In so far as independent legal professionals are subject to the bond of professional confidentiality, they shall not be covered by the provisions of the third paragraph.

Amendment 7
Article 25, second paragraph

Where independent legal professionals, notaries, auditors, accountants and tax advisors, acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this shall not constitute a disclosure within the meaning of the first paragraph.

The prohibition laid down in the above paragraph shall not apply to those activities of legal professionals in which the bond of professional confidentiality takes precedence.

Amendment 8
Article 39

Within **three** years of the entry into force of this Directive, and at least at three yearly intervals thereafter, the Commission shall draw up a report on the implementation of this Directive and submit it to the European Parliament and the Council.

Within **two** years of the entry into force of this Directive - ***and, in any event, before the Treaty adopting a Constitution for Europe comes into force*** - and at least at three yearly intervals thereafter, the Commission shall draw up a report on the implementation of this Directive (***with particular reference to the way in which the professional confidentiality of lawyers and other independent legal professionals is treated***) and submit it to the European Parliament and the Council.