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### De geheimhoudingsplicht en het verschoningsrecht van de advocaat

*Een onderzoek naar het beginsel van vertrouwelijkheid tussen advocaat en cliënt in rechtsvergelijkend perspectief*

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## SUMMARY

# The obligation to observe secrecy and the right to refuse to give evidence on the part of the lawyer

## *Comparative law research on the principle of confidentiality between lawyer and client*

In chapter 1 I have presented the objective and the layout of my research. My research is focused on the application of the principle of confidentiality between lawyer and client in the Dutch legal system. Confidentiality in the relationship between a lawyer and his client is deemed to be of fundamental importance to be able to properly fulfil the role of the lawyer in the administration of justice. A person who requires a lawyer in order to gain insight into his legal position, or to implement his rights, must be able to discuss the matter that he submits to the lawyer in strict confidentiality. It must be prevented that, out of fear of disclosure, a person seeking justice does not share specific facts with his lawyer, which facts are relevant for the purpose of legal advice.

The confidentiality in the lawyer-client relationship is safeguarded in the Netherlands by the lawyer's obligation to observe secrecy (*geheimhoudingsplicht van de advocaat*) and, as a corollary, the right to refuse to give evidence (*verschoningsrecht van de advocaat*). The latter means in summary: the right of the lawyer to be able to maintain his obligation to observe secrecy with regard to his client towards everyone, therefore also the court. The obligation to observe secrecy and the right to refuse to give evidence of the lawyer are summarily arranged by law. The extent and the scope thereof have been detailed mainly in case law.

In 1985 the Dutch Supreme Court (*Hoge Raad*) determined in the *Notaris Maas* ruling that the right to refuse to give evidence of specific professionals who are in a position of trust is based on a general principle of law that is applicable in the Netherlands.<sup>1793</sup> On the basis of this general principle of law, upon engaging

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1793. Supreme Court 1 March 1985, *Dutch Law Reports* 1986, 173 (ECLI:NL:HR:1985:AC9066), with commentary from WLH under Supreme Court 25 October 1985, *Dutch Law Reports* 1986, 176.

these confidential advisors the interest of the truth coming to light in court must give way to the public interest that ‘anyone must be able to turn to them for assistance and advice freely and without fear of disclosure of the matters that have been discussed’. The lawyer is one of the confidential advisors referred to in this context. This general principle of law intends to guarantee persons seeking justice that they can consult a lawyer in strict confidentiality in order to have unhindered access to assistance and defence by a lawyer in legal proceedings and to expert legal advice from a lawyer. It also ensues from the *Notaris Maas* ruling that, with a view to legal certainty, any restrictions of and exceptions from this general principle of law are only permissible in very exceptional circumstances.

The balancing of interests as executed by the Supreme Court at the time is under pressure. From a number of developments in society, a trend is evident to permit more restrictions of this principle of law. An example of such a development is that, over the past years, more and more importance has been attached to crime prevention and the enhancement of security.<sup>1794</sup> In political discussions and in public statements made by or on behalf of the Public Prosecution Service, it is argued in this context that the obligation to observe secrecy and the right to refuse to give evidence of the lawyer form an obstacle for the fight against crime and that this ought to be restricted in scope and extent.<sup>1795</sup> It can be deduced from recent legislation and legislative proposals that the legislature is sensitive to this argument and has the tendency to allow the interest of the prevention and fight of crime to prevail over the principle of confidentiality between lawyer and client.<sup>1796</sup>

In my research, I have evaluated how the obligation to observe secrecy and the right to refuse to give evidence of the lawyer are regulated in the Dutch legal system. I have researched whether exceptions and restrictions are permissible, and if so, subject to which conditions, without affecting the general principle of law that intends to safeguard the confidentiality of communication between the lawyer and client. I have included the general rules and minimum conditions ensuing from European legislation and from the case law of the European Court of

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1794. See for example the government position dated 27 October 2003 concerning the Scientific Council for Government Policy report 2002, *Parliamentary Papers II* 2003/04, 29 279, no. 1, page 11. See also the security programme ‘*Naar een veiliger samenleving*’ (Towards a safer society) as presented in 2006 by the government, *Parliamentary Papers II* 2002-03, 28 684, no. 1.

1795. See for example Mooijen 2013, Van der Boon 2015. Answering Parliamentary questions dated 13 August 2005, *Parliamentary Papers II* 2014-15, Appendix 3029.

1796. See Article 16 in conjunction with article 23, paragraph 1 of the Money Laundering and Terrorist Financing (Prevention) Act (Dutch Wwft). See the Explanatory Memorandum to the Increase of options for combatting financial-economic criminality Act, *Parliamentary Papers II* 2012-2013, 33 685, no. 3, page 2, 10 and 11. See the letter from the Minister of Justice and Security to the House of Representatives dated 24 November 2015, reference 703969.

Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) which have effect in the Dutch legal system.

The two main questions that form the key elements in this research are:

- 1) To what extent are restrictions and exceptions permissible under current Dutch and European law with regard to the principle of confidentiality between lawyer and client in Dutch society?
- 2) (a) Does the current regulation of the obligation to observe secrecy and the right to refuse to give evidence of the lawyer in the Netherlands comply with the general legal principle of confidential and unhindered legal assistance by a lawyer?  
(b) Insofar as the current regulation does not comply: in what manner should this be adjusted?

I have also researched the French and English<sup>1797</sup> legal systems for inspiration in order to propose other solutions for possible points of improvement in the Dutch regulation.

In chapter 2, I have outlined a general view of the legal profession as this was, and continues to be, exercised in the Netherlands, France and England. It must be considered that the lawyer's obligation of professional secrecy in the three researched countries ensues from the nature of the profession exercised by the lawyer and has been traditionally linked to the roles and the specific characteristics of the legal profession. I have verified in this chapter whether 'the nature of the legal profession' is sufficiently similar in the three researched countries for a useful comparison of the principle of confidentiality in the researched countries. I am of the opinion that this is the case.

In spite of differences in professional regulation, organisation and in certain respects also the manner of professional practice, the lawyer fulfils a key role in the three countries as regards the administration of justice and in the implementation of the rights of persons seeking justice. The lawyer fulfils an important social task in this respect. In the Netherlands, the key task of the lawyer (*advocaat*) is regarded to be the safeguarding of the legal position of his client. The lawyer fulfils this task by providing legal advice as well as by representing and defending the client in legal proceedings and conflicts. In France, the lawyer (*avocat*) is an *auxiliaire de justice*, who contributes to the administration of justice by means of providing advice and assistance to, and the representation of, the client. In England, the *solicitor* and the *barrister* also play an important role in the administration of

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<sup>1797</sup>. All references to 'English' or 'England' in this summary are deemed to also include 'Welsh' or 'Wales'.

justice and are deemed to ensure access to justice and the court for persons seeking justice. The task of the *solicitor* as well as the *barrister* is to provide clients with legal advice and assistance. In addition, they represent and defend their clients in legal proceedings.

In order for the lawyer to properly fulfil his key task, specific requirements are set out for the lawyer in the Netherlands, France and England, and both he and his professional practice must fulfil a number of specific characteristics. In the three countries, these requirements are recorded in the law, the rules of professional practice and the rules of conduct. The three legal systems contain statutory provisions that confirm the role of the lawyer in the administration of justice and in the dispensation of justice. Requirements are set out for the expertise of the lawyer in the Netherlands, France and England. There are also requirements regarding admission, training and experience. Regulatory supervision is conducted and there are rules of conduct and disciplinary law to safeguard the quality of professional practice. In England, the *solicitor* is under supervision of the court, contrary to the Netherlands and France. Most of the same or comparable key values of the lawyer are recorded in the three countries, including the key value of ‘confidentiality’.

In chapter 3, I have described the basis and function of the principle of confidentiality between the lawyer and his client for each of the chosen legal systems.

In the Netherlands, the principle of confidentiality between lawyer and client is safeguarded by the lawyer’s obligation to observe secrecy and his right to refuse to give evidence. In France, the confidentiality of the communication between lawyer and client is safeguarded by the *secret professionnel* and in England by the *legal professional privilege*. An obligation to observe secrecy towards the client is vested in the lawyer in these three countries. In the Netherlands and France, the lawyer’s obligation to observe secrecy ensues from the nature of his profession and is enshrined in the law. In England, the obligation to observe secrecy regarding the communication conducted with the client ensues for *solicitors* from the agreement with the client, as well as from the *equity doctrine of confidentiality*. For the *barrister*, the obligation to observe secrecy is based – unless the *barrister* is directly engaged by a client – on the *equity doctrine of confidentiality*.<sup>1798</sup> This *equity* rule is based on the general importance of the protection of confidential professional communication.

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1798. If the *barrister* is directly engaged by the client, the obligation to observe secrecy for barristers of the communication conducted with the client ensues partly from the agreement with the client.

In the Netherlands, the right to refuse to give evidence is based on a general principle of law entailing that for specific confidential advisors, including lawyers, 'the public interest that the truth comes to light in legal proceedings, must give way to the public interest that anyone must be able to turn to them for assistance and advice freely and without fear of disclosure of the matters that have been discussed'. In Dutch law, this public interest of being able to speak confidentially with specific professionals, including lawyers, prevails on the basis of the balancing of interests over the public interest that 'the truth comes to light in legal proceedings.'

It is also accepted in England that the *legal professional privilege* is provided in the general interests of justice and in view of the proper administration of justice. Just as is the case in the Netherlands with regard to the right to refuse to give evidence, in England the principle for the *legal professional privilege* is based on the balancing of two conflicting public interests, whereby the interest that is served by the *legal professional privilege* must prevail. This concerns on the one hand the interest of establishing the truth and on the other hand the general interest that anyone must have access to professional and sound legal advice and assistance, and must be assured of unhindered communication with a lawyer in that respect. In France, the lawyer is regarded as one of the *confidants nécessaires*: a professional who is indispensable for society and regarding whom it is deemed to be of general interest that a person can consult with this professional in strict confidentiality. In France, the balancing of interests in case law has not been as clear as in the Netherlands and England, but the *secret professionnel* also prevails over other public interests, including the interest of establishing the truth.

It is clear from this chapter that in the Netherlands, France and England the protection of the confidentiality between lawyer and client serves a general public interest which is focused on guaranteeing the person seeking justice unhindered access to expert legal advice and necessary legal assistance from a lawyer, both at law and otherwise. It is assumed in the three legal systems that clients will not consult lawyers, or will not provide full disclosure of their case, if they cannot rely on guaranteed confidentiality. The general principle in the Netherlands, France and England is that the absence of guaranteed confidentiality could result in specific persons being discouraged from seeking expert help.

In chapter 4, I have identified and analysed a number of general rules and minimum conditions for the protection of confidential communication between lawyer and client based on European legislation and case law of the ECtHR and the CJEU. These general rules and minimum safeguards form part of the assessment criteria in my research.

The lawyer's obligation of professional secrecy is included in various European regulations, where it is acknowledged as a general fundamental principle which is communal for the professional practice of the lawyer in the European Union and which is the basis of the professional rules and rules of conduct applicable to lawyers in the EU. The general starting point that the principle of confidential communication between lawyer and client is protected in a large number of Western European states surrounding us, is clearly evidenced, for example, by (1) a Code of Conduct and a Charter of the CCBE, the Council of Bars and Law Societies of the European Union, (2) a recommendation from the Committee of the Ministers of the Council of Europe, and (3) a number of European Directives. In addition, the principle of confidential communication between lawyer and client is also protected in the case law of the ECtHR and the CJEU.

In the European Convention on Human Rights (ECHR), the protection of confidential communication between lawyer and client is not expressly regulated, but it is generally accepted that the double basis for the protection of the obligation of professional secrecy is found in article 6 and article 8 of the ECHR.

The protection of the principle of confidentiality between lawyer and client on the basis of article 8 of the ECHR is not absolute, in the sense that in exceptional cases other general social interests must prevail. On the basis of the case law of the ECtHR, an infringement or restriction of the lawyer's obligation of professional secrecy is only permitted in special circumstances. Such an infringement must in any event fulfil the legality test, the legitimacy test and the necessity test. Furthermore, there must be adequate and sufficient safeguards for the protection of the obligation of professional secrecy and for the prevention of any misuse and arbitrariness by the authorities. The exceptions to and restrictions of the obligation of professional secrecy as well as the safeguards for the protection of the obligation of professional secrecy must preferably have a legal basis. The following safeguards are regarded by the ECtHR as adequate and sufficient: the (prior) inspection or authorisation by a court; the presence of an independent observer or supervisor during a search for seizure; the option of an effective remedy at law to challenge an infringement of the obligation of professional secrecy and - if necessary - entrusting the assessment of the lawyer-client communication to a judge who is not involved in the proceedings and who has an obligation to observe secrecy.

It is also evident from the case law of the CJEU that the lawyer's obligation of professional secrecy is protected. In all member states, the confidentiality between lawyer and client serves 'the requirement deemed as important, namely that every person seeking justice must have the option to freely consult a lawyer, whose profession is to provide independent legal advice to anyone who requires this'. This

principle, also referred to as *legal privilege*, is viewed in EU law as part of the more comprehensive principle of the right of defence. In order to be eligible for protection of the obligation of professional secrecy at EU law level, the communication conducted with the lawyer must have taken place in the context of the right of defence of the client and the lawyer must be independent.

The European anti-money laundering Directives expressly take the lawyer's obligation of professional secrecy into consideration in both the preamble and in the actual provisions. The ECtHR has concluded that the duty to report pursuant to these anti-money laundering Directives for lawyers, as implemented in France, does not constitute a disproportional infringement of the obligation of professional secrecy for lawyers as protected by article 8 of the ECHR. The ECtHR attached importance to the manner in which the French legislation has included an exception to the duty to report. As a result of this exception, both work activities related to legal proceedings and the provision of legal advice are exempted from the duty to report, unless the information is acquired for the purpose of money laundering or the financing of terrorism, or in the knowledge that the client requires advice with the objective of money laundering or the financing of terrorism. The Court deems the provision that the reports must be made to the Dean another important safeguard for the professional obligation to observe secrecy. The CJEU held with regard to the duty to report for lawyers, as this ensues from the second Money Laundering Directive, that this does not infringe the right to a fair hearing under article 6 of the ECHR.

In chapter 5, a description is given of the current Dutch regulation pertaining to the obligation to observe secrecy and the right to refuse to give evidence of the lawyer. The lawyer's obligation to observe secrecy applies in the Netherlands as a fundamental principle of law, which the lawyer must observe during the exercise of his profession, and which clients must be able to rely upon unconditionally for the purpose of the correct safeguarding of their interests. The obligation to observe secrecy is enshrined in the law. Intentional infringement of the obligation to observe secrecy by the lawyer has been made punishable. In addition, disciplinary measures can be taken against a lawyer who infringes the obligation to observe secrecy.

The lawyer's obligation to observe secrecy is linked to the right of the lawyer to request to be excused from the duty to testify with regard to that which has been entrusted to him in this capacity. This right to refuse to give evidence ensures in summary that the lawyer can remain silent towards anyone, also towards the judge and other authorities, regarding matters that fall under his obligation to observe secrecy. The basis of the lawyer's right to refuse to give evidence is a general

principle of law applicable in the Netherlands. This principle of law entails that the general public interest of establishing the truth must give way to the general public interest of confidential and unhindered legal assistance.

The lawyer's right to refuse to give evidence is also protected in a number of specific areas of law and legal procedures. For example, the legislature has determined that certain powers pertaining to criminal procedure cannot be applied against professionals who are entitled to refuse to give evidence.

The legislation and regulations with regard to the obligation to observe secrecy and the right to refuse to give evidence is concise and the detailing thereof has therefore been left to a large extent to the courts. The case law and literature offer, for a large part, sufficient reference points in order to assess in individual cases whether the communication or documents fall under the right to refuse to give evidence. It is clear from established case law that the right to refuse to give evidence fulfils an essential role in the access for persons seeking justice to unhindered legal assistance. However, the obligation to observe secrecy and the right to refuse to give evidence are not absolute, in the sense that they can be set aside by a statutory obligation or in exceptional cases can be breached if other, more significant, interests prevail.

In this chapter I have pointed out a number of problem areas in the current Dutch regulation, from which it is clear that the regulation and the application of the obligation to observe secrecy and the right to refuse to give evidence can in practice result in legal uncertainty or in lack of clarity or transparency of the regulatory framework in certain cases. I have also pointed out that a number of rules, and the interpretation and the application thereof, do not fulfil the necessity requirement, or are in conflict with the objective of the right to refuse to give evidence. I have concluded that on these points, the Dutch regulation does not fulfil the general principle of law of confidential and unhindered legal assistance by a lawyer.

Chapter 6 deals with the regulation of the *secret professionnel* in France. The *secret professionnel* constitutes one of the essential features of the professional practice of the lawyer. The *secret professionnel* consists of the right of the lawyer and the client to confidential communication between them as well as the lawyer's obligation to observe secrecy. The lawyer is the *confident nécessaire* of the client. It is regarded as a general public interest that anyone can turn to a lawyer for legal assistance and advice freely and without fear of disclosure. The lawyer's obligation of professional secrecy is part of public order and is general (applicable with regard to anyone), absolute and not limited in time. A lawyer cannot be obliged to testify as a witness in legal proceedings.

The *secret professionnel* of the lawyer is recorded in, and ensues from, statutory provisions, implementing regulations and regulations of the bar association. It is recorded by law that both advisory work and work related to proceedings fall under the scope of the professional obligation to observe secrecy. In spite of the unambiguous legislative text, there are still rulings, in particular of the criminal division of the *Cour de Cassation*, in which a distinction is made, as regards the scope of the *secret professionnel*, between the procedural work of the lawyer and the legal advisory work. Infringement of the obligation of professional secrecy by the lawyer and other *confidants nécessaires* has been made punishable. In addition, disciplinary measures can be taken against a lawyer who infringes the obligation to observe secrecy.

The legislature has stipulated that a number of powers pertaining to criminal procedure cannot be applied against lawyers with regard to invoking the *secret professionnel*. In this manner, the lawyer's office has special protection. On the basis of law, search and seizure at a lawyer's office can only take place under strict conditions. Article 56-1 CPP comprehensively regulates the specific procedure of search and seizure of a lawyer's office. One of the safeguards for the protection of the *secret professionnel* included therein is the mandatory intervention by the Dean. It has been included in the regulation that only the Dean and the examining judge are permitted to view documents in order to assess whether these documents can be seized. Article 56-1 CPP also provides special proceedings in which the *juge des libertés et de la détention* provides a decision with regard to the opposition by the Dean against seizure of a document.

Although in France the *secret professionnel* is regarded as an absolute principle, a number of exceptions and restrictions are accepted in the scope thereof.

Chapter 7 deals with the *legal professional privilege* in England. The *legal professional privilege* is regarded in English law as an important general principle of common law and as a fundamental human right which is protected by article 6 and 8 of the ECHR. The *legal professional privilege* can be compared to the Dutch right to refuse to give evidence. However, in England it is the client who has control over the *legal professional privilege*. The client, or his lawyer on behalf of the client, can, by relying on the *legal professional privilege*, not be obliged to submit confidential communication or to give access thereto.

Since the *Three Rivers 6* judgment, it has been generally accepted that the *legal professional privilege* is an overarching principle which can be divided into two complementary parts, namely *legal advice privilege* and *litigation privilege*. In summary, *legal advice privilege* protects the communication between lawyer and client focused on providing and acquiring legal advice in the context of intended,

expected or pending proceedings as well as outside proceedings. *Litigation privilege* protects (a) communication between, on the one hand, a client and/or his lawyer and, on the other hand, third parties and (b) documents drawn up by or on the instructions from the client, whereby this communication takes place or these documents are drawn up with the main objective of acquiring information or legal advice for the preparation of intended, pending or expected legal proceedings.

The two most important differences between *legal advice privilege* and *litigation privilege* are the fact that *litigation privilege* also protects communication with third parties and that reliance on *litigation privilege* requires a link with judicial proceedings. With regard to both parts, there must be confidential communication and confidential documents. There is much case law and literature available in England on the basis of which the extent and scope of this principle is further detailed.

*Legal professional privilege* is regarded as an absolute principle, in the sense that this cannot be set aside by having another public interest prevail in specific circumstances. In this respect, there is no room for balancing of interests by the court in individual cases. However, there are boundaries for the scope of the *legal professional privilege*. The *legal professional privilege* can be restricted in special cases on the basis of a statutory provision drawn up in clear and unambiguous wording. Furthermore, such a statutory provision may not be in conflict with the Human Rights Act 1988 and must be in accordance with fundamental EU law. In addition, there are a number of exceptions or restrictions accepted in case law, the most important of which is the *crimelfraud exception*.

In chapter 8, a comparison is made of the manner in which the principle of confidentiality is protected in the Netherlands, France and in England. Firstly, I have compared the role of the lawyer, the key values and the professional practice of the lawyer in the three countries. As stated in this chapter, the legal profession and professional practice have many similarities in the Netherlands, France and England. In the three countries, the lawyer fulfils a key role in the administration of justice and the implementation of the rights of persons seeking justice who turn to the lawyer. The lawyer's key task is to safeguard the legal position of his client by means of providing legal advice as well as representing and assisting clients during legal proceedings and conflicts. In order to be able to properly fulfil his key task, specific requirements are set out for the lawyer, and the lawyer and his professional practice must fulfil a number of specific characteristics. Comparable principles or key values apply in the three countries which are deemed to be necessary for the professional practice of the lawyer.

Secondly, I have compared the function of the principle of confidentiality between lawyer and client. In the three chosen legal systems, the protection of confidentiality between lawyer and client serves a general public interest, namely the unhindered access to expert legal advice and the necessary assistance by the lawyer at law and otherwise. In the three countries, the general interest of unhindered legal assistance by the lawyer prevails over the general interest of establishing the truth. This interest can only be restricted or set aside in the three legal systems in exceptional cases.

Lastly, I have compared various aspects of the protection of confidentiality between lawyer and client. The following similarities and differences were noted in particular in that context.

In the Netherlands and France, it is the lawyer who decides in the relationship between the lawyer and client whether or not he will invoke his obligation of professional secrecy. In England, this right is vested in the client.

It is assumed in the three countries that, for the protection of the confidentiality of the communication with a client, the lawyer must have been approached and must have acted in his capacity as a lawyer. The explanation for this is mainly the same in the Netherlands, France and England.

A client can be a natural person or a legal entity in the three legal systems. In England, in the context of reliance on *legal advice privilege*, a more restrictive interpretation applies of the concept of 'client' than in France and probably also in the Netherlands.

The general principle in the Netherlands, France and England is that the regular professional practice of a lawyer entails activities related to both proceedings and legal advice. It has been included in the law in France that the *secret professionnel* relates to all the work of the lawyer, including the provision of legal advice. In the context of reliance on *legal professional privilege*, the concept of legal advice is interpreted broadly in England. In France, the protection of the *secret professionnel* also extends to the communication between lawyers mutually, with the exception of communication that is designated as "*officielle*". The two other countries have less far-reaching protection of correspondence with the lawyer of the other party. In England, in order to be protected by reliance on the confidentiality between lawyer and client, communication with third parties is bound by more strict conditions than in the Netherlands and France.

A detailed statutory arrangement applies in France for search for seizure at a lawyer's office as compared to the Netherlands and England. The role of the Dean in the seizure is also recorded by law under this arrangement. In the three countries, documents that are the subject of a criminal act or that have served for committing a criminal act (*corpora et instrumenti delicti*) do not fall under the

protection of the lawyer's professional obligation to observe secrecy. In any case, the general principle in all three legal systems is that a lawyer cooperating in and concealing criminal acts cannot be deemed to fall under a lawyer's usual professional practice. The communication between a lawyer and client that falls under this heading does not deserve any protection.

In the Netherlands, France and England, the law does not object to monitoring and recording communication in which a lawyer participates. In France, the law has included the obligation of engagement of the Dean for the interception of the telephone line at the office or home of the lawyer. Article 100-5 CPP prohibits, subject to being declared void, the transcription of the intercepted communication with a lawyer if this communication was conducted in the context of the exercise of the rights of the defence. This is not the case in the Netherlands, where detailed wiretap reports that contain statements falling under the right to refuse to give evidence must be destroyed. As opposed to France and England, the Netherlands has a number recognition system at this time.

In contrast to England and France, the Netherlands does not recognize an exemption from the duty to report which ensues from the third Money Laundering Directive regarding the provision of legal advice by lawyers which takes place outside the context of legal proceedings. In addition, in the Netherlands the duty to report is linked to unusual transactions, while in England and France this duty to report applies, in summary, to suspect transactions within the meaning of the third Money Laundering Directive.

In the last chapter (chapter 9), I have answered the two research questions. For the purpose of answering the research questions, I checked the current Dutch regulation of the obligation to observe secrecy and the right to refuse to give evidence of the lawyer against (i) the general principle of law as accepted in 1985 in the *Notaris Maas* ruling of the Supreme Court and against (ii) the minimum safeguards ensuing from the relevant case law of the ECtHR and the CJEU.

I have concluded with regard to the first research question that in accordance with current Dutch as well as European law the principle of confidentiality between the lawyer and his client can be restricted or set aside in exceptional circumstances. Any restrictions or exceptions must fulfil the principle of legal certainty and must be subjected to a legality test, a legitimacy test and a necessity test to ensure that the objective of the general principle of law is still achieved. Furthermore, such restrictions or exceptions are permissible only if they are provided with specific guarantees for the protection of the obligation of professional secrecy.

In answering the second research question, I would like to emphasize that the regulation of the obligation to observe secrecy and the right to refuse to give evidence in the Netherlands offers the person seeking justice, to an important extent, the certainty that a lawyer can be consulted in confidence. However, as discussed in chapter 5, a number of problem areas can be pointed out with regard to which it must be concluded that the current regulation of the obligation to observe secrecy and the right to refuse to give evidence does not fulfil the general legal principle of unhindered and confidential legal assistance. I have proposed a number of solutions in this chapter for improvement of the Dutch regulation of the obligation to observe secrecy and the right to refuse to give evidence and have made eight recommendations for this purpose. French and English law has also served as inspiration in that respect.