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PART B: EXPLANATORY STATEMENT

Rapporteur: Mr F. D'ANGELOSANTE

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Or. It.

EXPLANATORY STATEMENTI. DEFINITION

1. Despite the various attempts that have been made at national level, it is difficult to give a precise definition of the term 'secret'. The concept of 'secrecy' may be considered from a number of different angles: the subject-matter of the secret, the beneficiary, the obligation to keep the secret, and the obligation on unauthorized persons (including the state) not to breach the principles of secrecy.

If we consider the definition contained in national legislation, we must bear in mind that the law does not protect the secret as such: rather it requires that certain kinds of information, falling, for example, within the ambit of 'professional secrecy', should be treated as confidential, and specifies which natural and legal persons must comply with this principle: those engaged in the professions in general, and medical and paramedical practitioners, lawyers, priests, etc. in particular.

The term 'secret' covers not just what is said in confidence, but also what is not said and whatever information has come to be knowledge of the person placed in a position of trust in his professional capacity. Not everything that has been confided is a secret: a secret exists legally only in relation to the professional status of the person in whom it is confided. With this qualification, then, we might say that a secret exists only to the extent that it can be violated, to the extent, therefore, that an offence is committed by the disclosure of facts which are prejudicial to the protected person. The principle of professional secrecy could be said to vary depending on the type of secret involved and the constant interplay between the general interest and the private interest. There is undoubtedly a social interest at the basis of professional secrecy, because the fact that its violation could cause harm to the private individual would not alone suffice to make it an indictable offence. The law punishes the violation because the general interest requires that it should do so. Secrecy is absolute and in the public interest: since the smooth functioning of society requires that the sick person find a doctor and the accused person a lawyer etc., the law which protects relationships with such professional people enshrines an essential freedom.

In order to ensure total trust, it is necessary that the secret should be made inviolable and that the law should impose silence. This imposition of silence implies that the act of speaking out should be punished. The conflict here is obvious. For example, the need for the legal authorities to know the truth on the one hand and the need to protect certain secrets on the other seem irreconcilable. It might be justified to divulge a secret in cases where the law permits or requires such action, in cases involving the protection of the repository of the secret, in cases where permission is given by the author of the secret, or in cases of legitimate defence. Each case must be judged on its merits.

II. CHANGES IN THE ORDER OF PRIORITY

2. The individual is protected in respect of certain secrets. There can be no individuality or freedom without a measure of privacy. Nowadays, however, the distinction between the private interest and the principle of professional secrecy is becoming blurred, although the two are not exactly the same thing. The former is safeguarded by the protection of the privacy of the individual as a corollary of freedom (Art. 12 of the Universal Declaration of Human Rights and Arts. 8 and 10 of the European Convention on Human Rights).

The emphasis is steadily shifting: it is less the individual who benefits from protection than society as a whole. The group's independence is now safeguarded more than the individual's. We are dealing, then, with both individual and collective secrets. The declining importance of individual professional secrecy and the increasing importance attached to the higher basic interests of the group are only the most striking manifestation of the order of priority of social values. For example, the secrecy of an undertaking takes second place to the requirements of the fiscal authorities representing the national interest. However, this in no way means that professional secrecy need no longer be protected. On the other hand, interests which effectively come higher up in the order of priority must, where strictly necessary, take first place, which could lead to a limited 'erosion' of the right to secrecy. It would be more accurate to say that we are dealing with a change in the interpretation of secrecy: the secrets of the undertaking divulged to the tax authorities take on the aspect of collective secrets of a special nature.

Admittedly, such secrets retain their general and absolute character, but it is necessary to take note of the way in which they have changed. It is both in the interests of the person entrusted with confidential information and in the interest of creating and preserving the essential trust in a given profession that secrecy should be waived where certain legislative provisions dictated by a higher social interest apply.

It would be extremely difficult, and probably not desirable, to formulate a common definition which applied to all the Member States. This would imply a choice of values which might clash with the different social systems and the different order of priority of the values themselves.

III. LAWS GOVERNING PROFESSIONAL SECRECY IN THE INDIVIDUAL MEMBER STATES OF THE EUROPEAN COMMUNITY

A. Lawyers

3. Article 3 of the Treaty of Rome provides for the 'approximation of the laws of the Member States to the extent required for the proper functioning of the common market'. The Treaty does not call for the approximation of the national legal systems, but, since the work of the professions has implications for the economy, the smooth functioning of the common market might ultimately require an approximation of the laws relating to secrecy.

In all the Member States, the law provides for the protection of professional secrecy, but prescribes different methods for the achievement of that end. While all the states recognize the same principle, their laws are so markedly different that approximation would require fundamental changes not just to the provisions governing secrecy, but also, for example, to the various procedures. The laws governing legal professional secrecy are closely bound up with the procedural legislation and therefore differ according to certain specific factors: whether the procedure is 'inquisitorial' or 'accusatory', whether or not the prosecution is conducted by a magistrate, whether the judge is a member of the legal profession or is independent thereof, etc.

In order to be able to suggest ways in which regulations on professional secrecy might be standardized in the Member States, it would be useful at this stage to take a close look at the distinctive features of the national laws and to assess their similarities (1).

4. In France, the Supreme Court of Appeal had defined a 'secret' as 'tout ce qui a un caractère intime que le client a un intérêt moral et matériel à ne pas révéler' (2) (Cass. crim., May 1982, D.P. 1862, I, 545), thus providing that confidential information should be kept within the bounds of the relationship between lawyer and client. This contractual and 'private' interpretation has since been superseded by provisions in the Penal Code which now place the accent on the social interest attaching to professional secrecy. The duty to preserve the professional secret is imposed on doctors, surgeons and other medical practitioners, pharmacists, midwives and 'all other persons who, by reason of their status or profession or of any office temporary or permanent, are 'dépositaires' of secrets which are entrusted to them'. This is an absolute duty, but no offence is committed where the law requires or authorizes disclosure of a secret. In the specific case of the lawyer, however, considerable scope is allowed for the exercise of independent judgement. The lawyer is the 'maitre du secret'. It must be pointed out that even if his client consents to disclosure of the secret, the lawyer cannot be released from his obligation to preserve it or forced to disclose it. He must be guided by his own conscience. There are two exceptions to these rules. First, the court may require a witness to answer a question, even where he has claimed the protection of the professional secret, if the question is precise and relates to information which could not be considered as covered by the professional secret. Second, the secret may be revealed for reasons pertaining to the legitimate defence of the repository.

In the event of a search of a lawyer's office and the seizure of documents, the procedure for protecting professional secrets is regulated by agreement between the Bar Association and the Public Prosecutor.

(1) Source: Consultative Committee of Bar Associations of the EEC Member Countries: The professional secret, confidentiality and legal professional privilege in the nine Member States of the European Community - Report prepared by D.A.O. Edward, 1975

(2) 'Anything of a private nature which it is in the client's moral and material interests not to reveal.'

The search must be carried out by the examining magistrate in the presence of the president of the Bar Association or his delegate, who determines what documents are protected by the professional secret. The Code of Criminal Procedure expressly requires the police and the examining magistrate, before instituting a search, to 'take all appropriate steps beforehand to ensure that the professional secret and the rights of the defence are protected'. The only documents which may be seized are those which constitute the corpus delicti (corps du délit). As for the rights of companies, there is no violation of the professional secret in the case of seizure, after search of the home of a lawyer, of documents relating to company administration which are not confidential in character.

The confidentiality of correspondence between lawyers is treated more as a matter of professional rather than legal obligation. In France, as in Italy, Belgium, Luxembourg and the Netherlands, such correspondence is treated as being confidential in principle. This principle does not apply where the correspondence is expressly stated not to be confidential or cannot by its nature be confidential, or where the correspondence, although initially confidential, discloses a concluded agreement between the parties. Otherwise, correspondence between lawyers may only be produced in court by agreement between the lawyers concerned or, if they cannot agree, with the authorization of the president of the Bar Association. The terms of the Penal Code are such, however, that any 'secret' communicated in confidence to a lawyer in his professional capacity by any person is covered by the obligation of professional secrecy. The obligation therefore extends, not only to information communicated by the client, but also to information communicated by the opposing party or by a third party, and hence also to information contained in correspondence between lawyers. It follows that a lawyer is not completely free to disclose information derived from others to his own client. In France, the obligation of professional secrecy applies even where the facts are susceptible of being known by others.

5. In Belgium and Luxembourg, the definition of a 'secret' is very similar to that contained in the French Penal Code, and the relevant legislation in Luxembourg is identical to that applied in Belgium. Under the Belgian Penal Code, persons to whom professional secrets have been entrusted commit a criminal offence if they reveal them, 'except where they are called to give

evidence in legal proceedings or the law requires them to disclose the secrets in question'. The person to whom a secret has been entrusted cannot be compelled to speak if he believes it to be his duty to preserve the secret. On the other hand, he may reveal it if he believes it to be his duty to do so. Otherwise, a violation of the professional secret occurs whenever the disclosure of facts covered by the professional secret is voluntary and spontaneous.

The procedure for search of the office of a lawyer is similar to that followed in France, as is the procedure for the protection of correspondence between lawyers.

6. In Italy, no profession is specifically mentioned, and the duty to preserve the professional secret is imposed upon 'whoever has knowledge of a secret by reason of his particular status or office, or of his particular profession or skill'. The terms of the Italian, Belgian, French and Luxembourg Codes are wide enough to include lawyers from any state, their trainees and other employees. Article 622 of the Italian Penal Code provides that it is an offence to reveal a professional secret 'without justifiable cause' and imposes a penalty only 'if damage may result'. 'Damage' in this context means 'any prejudice which is legally significant, whether it is prejudice of a patrimonial nature or simply moral'.

It has been suggested that the term 'justifiable cause' is probably meant to exist where disclosure is 'effectively inevitable'. The lawyer is protected against being required to give evidence, in criminal cases, by the Code of Criminal Procedure and, in civil cases, by a law of 1933. The Code of Criminal Procedure provides that the following cannot be obliged to give evidence 'on what was confided to them or came to their knowledge by reason of their ministry, office or profession': (1) ministers of religion, (2) lawyers, prosecutors, expert witnesses and notaries, and (3) doctors and other members of the medical profession. The Code goes on to provide that, where the prosecuting authority has reason to suspect that a refusal to give evidence is unjustified, and subsequent investigations prove this to be the case, the witness must give evidence.

As far as the arrangements for search and seizure are concerned, the Penal Code provides that 'seizure may not take place in the premises of defence advocates or expert witnesses of papers or documents which they have received into their keeping in the performance of their function, except where such papers or documents constitute part of the corpus delicti (corpo del reato)'. The lawyer himself (not the president of the Bar Association,) must protect documents from seizure. Correspondence between lawyers may be produced in court by agreement between the lawyers concerned or, if they cannot agree, with the authorization of the Bar Association. In Italy, the obligation of professional secrecy applies where the fact is not generally known and there exists a juridically appreciable interest in its concealment.

7. In the Netherlands, the Code provides as follows. 'He who deliberately violates a secret of which he knows or has reason to suspect, which he is obliged to preserve by reason of his office or profession or a legal regulation, as well as of his former office or profession, shall be punished. An offence is considered to have been committed only if a professional secret is revealed 'deliberately'. The Dutch Code also provides that 'where this offence is committed against an identified person, it may only be prosecuted on the complaint of that person'. Both the Code of Criminal Procedure and the Civil Code provide that 'those who, by virtue of their status, profession or office have an obligation to maintain secrecy, may excuse themselves from giving evidence or from answering specific questions, but only about that of which the knowledge was entrusted to them in that capacity'. A lawyer may reveal a secret in order to protect himself against an unjustified accusation. The Code of Criminal Procedure distinguishes between seizure and search: 'Where letters or other documents to which the obligation of maintaining secrecy extends are in the possession of persons entitled to excuse themselves from giving evidence as provided by Article 218, such letters or documents may not be seized without their consent. Search may only take place in the premises of such persons without their consent insofar as it can proceed without breaching the secrets of their status, profession or office; and such search may not extend to letters or documents other than those which constitute the corpus delicti or which have served towards the commission of the crime'.

Correspondence between lawyers may be produced in court either with the agreement of the lawyers concerned or with the authorization of the Bar Association. In practice, the law is substantially the same as in the countries already considered, except that the relationship between a lawyer and the opposing party or a third party is not treated as being per se a relationship of confidence.

8. In Germany, the terms of the Code are very specific. The duty to preserve the professional secret is imposed upon the lawyer, the patent lawyer, the notary and the defence advocate in a trial governed by statute. By a separate provision of the same Article, the same duty is imposed upon their professional assistants and persons working with them in preparation for a professional career and, after the death of the person obliged to keep the secret, upon any person who heard of it from him or through succession to his estate. An offence is only committed by a person who reveals a professional secret 'without authorization to do so'.

The obligation of secrecy continues after the death of the author of the secret, but a prosecution may only proceed on the application of the person injured or his next of kin. The list of persons entitled to refuse to give evidence includes 'lawyers, defence advocates, patent lawyers, notaries, their assistants and persons who participate in the practice of the profession in preparation for a professional career'. These lawyers cannot refuse to give evidence if they are no longer subject to the requirement of confidentiality. As far as the assistants and trainees are concerned, the decision rests with their principals.

Article 97 of the Code of Criminal Procedure provides that the following are not subject to seizure: 'written communications between the accused and persons who are entitled to refuse to give evidence; notes which such persons have made about matters confided to them by the accused or about matters which are covered by the right to refuse to give evidence; other objects which are covered by the right to refuse to give evidence. These limitations only apply if the objects are in the actual possession of the person who has the right to refuse to give evidence. These limitations do not apply if those entitled to refuse to give evidence are suspected of complicity in, or encouragement of, crime or of receiving stolen property'.

Apart from the general protection provided by Article 13 of the Basic Law, the limitation on seizure acts as a further protection against search. No search can be ordered for documents which are protected by Article 97. Such documents cannot be used as evidence against the accused. It is generally acknowledged that communications from a defence lawyer which are in the possession of a client on criminal charges are also protected from seizure, but such communications are not protected by Article 97. Correspondence between lawyers is not treated as confidential unless it is expressly marked 'Confidential'.

In Germany, the protected 'secret' is what comes to the knowledge of the lawyer in his professional capacity. The Principles of Professional Conduct promulgated by the Federal Bar Association Council (Bundesrechtsanwaltskammer) provide that 'the obligation of confidentiality goes beyond the statutory obligation of secrecy and covers everything which is confided to the lawyer in the exercise of his profession or which becomes known to him in the course of the exercise of his profession, unless otherwise determined by statute or by principles of jurisprudence'.

9. The United Kingdom and Ireland recognize the basic principle of professional conduct that a lawyer should not disclose information which has become known to him in his professional capacity.

The law or circumstances may require the UK lawyer to disclose information either because the communication in question is not 'privileged' in the legal sense, or because a statute imposes a positive duty of disclosure. Since the law of 'legal privilege' has been developed by judges, it is neither static nor precise. On the other hand, since Parliament can override the courts, the scope of legal professional privilege is liable to be curtailed by statute at any time and in any way. The law of Scotland is not the same, either in origin or in detail, as the law of England, whereas the law of Ireland has more in common with the law of England. Nevertheless, the important basic principles are the same in all three countries.

The same principles of law apply to solicitors, barristers and advocates in private practice, salaried lawyers employed by government departments, salaried lawyers employed by commercial companies, foreign lawyers and their assistants and trainees. This is because 'privilege' attaches to communications, rather than to the information communicated, the person to or by whom it was communicated, or the method of communication. In a disputed case, therefore, the law will look at the relationship which existed between the parties concerned at the time when the communication was made. The question to establish in each case is whether the communication was made to or by a lawyer in his professional capacity as a legal adviser or advocate.

It is not necessary that a formal legal relationship should have been created between lawyer and client in order that a communication should become privileged. The communication remains privileged after the death of the client or of the lawyer, or after the formal relationship of lawyer and client has come to an end. Where a lawyer is preparing a client's case, the communications between the lawyer and third parties are privileged. (Scottish law distinguishes more sharply between communications ante litem motam and post litem motam).

The law protects communications by the lawyer to his clients. A document is equally protected whether it is in the hands of the lawyer, or in those of the client, or in those of a third party. It can never be used as evidence.

Communications between lawyers may be privileged. What matters is the relationship between the lawyers concerned. Communications between two lawyers acting for the same party are privileged. Communications between two lawyers acting for different parties may, or may not, be privileged according to the circumstances of the case.

Written communications between solicitors are treated as confidential if they are marked 'Without Prejudice', although these words do not automatically confer privilege.

Privilege also covers communications from or to foreign lawyers. It does not offer protection in cases where a lawyer assists a client to commit a fraud or crime.

Privilege exists unless it is expressly overridden by statute. It is preserved even where monopolies and restrictive practices are concerned. Nevertheless, it has been considerably reduced by recent tax legislation.

Privilege is conferred solely for the benefit of the client. If the client authorizes the lawyer to give evidence or to produce a document, the lawyer's rights and duties cease to exist. The lawyer's duty is a contractual duty to his client. A breach of duty may give rise to disciplinary sanctions or to an action for damages, but not to a criminal prosecution.

10. In Denmark, as in the United Kingdom, the violation of professional secrecy is not treated as a criminal offence. Danish procedure, like UK procedure, is 'accusatorial', but the lawyer's right to withhold evidence is regulated by the Code of Procedure. Correspondence between lawyers is not in principle confidential.

Article 170 of the Danish Code of Procedure provides: '... Clergymen, doctors, defence advocates and lawyers may not be required to give evidence on matters which have come to their knowledge in the practice of their profession against the wish of the person who has the right to require that secrecy be maintained. The court may order doctors or lawyers, other than defence advocates in criminal cases, to give evidence when the evidence is considered decisive for the outcome of the case, and when the nature of the case and its importance to the party concerned or to society is found to justify a requirement that evidence be given. In civil cases such an order cannot be extended to include what a lawyer may have learned from a lawsuit entrusted to his care or to the advice he may have given in such a lawsuit. The courts may determine the extent to which evidence shall not be given, having regard to that which, by virtue of the law, the witness has the obligation to keep secret and about which the maintenance of secrecy has essential importance. The rules in Articles 1, 2 and 3 apply also to the assistants of the persons concerned'. As far as search and seizure are concerned, Article 72 of the Danish Constitution provides that: 'House searching, seizure, and examination of letters and other papers as well as any breach of the secrecy to be observed in postal, telegraph and telephone matters shall take place only under a judicial order unless particular exception is warranted by statute'.

11. In Greece, Article 212 of the Code of Criminal Procedure requires the following to preserve professional secrecy: priests, lawyers, notaries, doctors, pharmacists and, in the case of military or diplomatic secrets or of secrets relating to state security, government officials. A 'secret' is defined as anything which comes to their knowledge in the performance of their duties. These same principles are spelt out in Article 400 of the Civil Code.

Whoever uses a professional secret to commit a fraud or practice deception is punished under Article 224 of the Penal Code. Those who infringe Article 212 of the Penal Code incur the penalties provided for by Article 371 of the Code (annulment of the act).

As far as searches and the seizure of secret documents are concerned, Article 261 of the Code of Criminal Procedure stipulates that all the categories of person listed in Article 212 must surrender the documents to the legal authorities except where they make a written statement to the effect that a document is confidential, without, however, disclosing any other information. Article 262 provides that, in the event of a search, they are equally entitled to make a verbal statement attesting to the secrecy of the document. If the legal authority considers this statement to be false, it may seize the document, mark it 'Confidential' and hand it over to the competent professional association, which will decide whether it is secret. If it is found not to be secret, it is again seized and further action may be taken under Article 224 of the Penal Code.

12. To sum up, in all the Community countries apart from the United Kingdom and Ireland, the primary source of the law on professional secrecy is an article of the Penal Code, which provides that it is an offence to reveal another person's 'secret'. The duty that this implies is not simply a professional or contractual duty, but a matter of public order. In order to fulfil this duty, the lawyer has the right to refuse to give evidence on matters covered by the professional secret and the right to prevent the seizure of protected documents. The obligation of secrecy is generally imposed on all those who, by reason of their professional duties, may have secrets confided in them by other persons. The right to withhold evidence is conferred only on those who are bound by an obligation of secrecy.

In the United Kingdom, on the other hand, a basic distinction is made between 'the official secret', i.e. information entrusted to persons in authority, and 'legal professional privilege', which protects communications to and by lawyers.

The law governing official secrets is not unlike the law governing professional secrecy in the other member countries. In the UK, the rules relating to legal privilege form part of the rules of evidence and proof which protect all aspects of the relationship between the lawyer and his client. The rules of evidence protect advice given by the lawyer to his client as well as information communicated by the client to the lawyer. The lawyer's duty is, therefore, only a professional and contractual duty to his client, and breach of duty may give rise to disciplinary sanctions.

However, the differences between the United Kingdom and the other member countries are differences of approach or method rather than differences of result. In a sense, the Danish law forms a bridge between the two systems. As in the United Kingdom, violation of professional secrecy is not a criminal offence. On the other hand, the lawyer's right to withhold evidence is regulated by the Code of Procedure, as in Germany, Italy and the Netherlands. The essential difference between the Danish law and the law of the other nine states is that it applies certain subjective tests. In Denmark, questions of the following kind have to be answered: Is the evidence decisive for the outcome of the case? Is it important to the party concerned or to society? Does the maintenance of secrecy have essential importance? By contrast, the question asked in the United Kingdom would be: 'Is the communication privileged?', and in the other member countries: 'Does the professional secret apply?'.

In other words, the fundamental differences introduced by the Danish law are greater than those which separate the United Kingdom from the other nine Member States. Moreover, they throw up ideas which deserve to be considered in the not too distant future.

8. Doctors

13. It will be apparent from the foregoing that the legal bases of professional secrecy are the same for the legal and the medical profession.

The main points to be clarified concern:

- (a) the extent to which doctors are bound by professional secrecy;
- (b) the obligation, if any, to inform relatives (or other persons) of the patient's state of health;
- (c) the right of access, if any, to the patient's clinical records.

14. In France, Article 378 of the Penal Code provides that a sentence of one to six months' imprisonment and a fine of FF 24,000 to FF 120,000 may be imposed on doctors, surgeons and all other health service workers such as pharmacists and midwives in whom secrets have been confided in their professional capacity and who have revealed those secrets without being legally obliged or authorized to do so. Professional secrecy is also covered by Articles 11, 12 and 13 of the Code of Medical Conduct. Article 11 defines a 'secret' as 'any information which has come to the knowledge of the doctor in his professional capacity, that is to say, not only what has been confided in him, but also what he has seen, heard or understood'.

The law stipulates that a secret is whatever the patient considers to be such or is presumed to consider to be such.

Professional secrecy in the medical profession is absolute in character.

Doctors are excused from giving evidence before the courts on matters covered by professional secrecy. The doctor is held responsible under civil law for the disclosure of confidential information by staff employed by him (Art. 12 of the Code of Medical Conduct). There are limits to the doctor's contractual relationship both with the patient and with the patient's heirs. The professional secret cannot be used against the patient. He may have access to the clinical records through the doctor with whom he is registered.

The patient may request a medical certificate from the treating physician, who may not refuse such a request. A doctor required to give evidence may refuse to reveal a secret, even if his patient has given his consent.

A doctor may not issue a certificate requested by the employer of a patient if this is likely to damage the interests of the patient, since in such cases the patient is considered not to be a free agent.

On the question of heirs, the law is somewhat ambiguous. Generally speaking, the doctor does not have the right to reveal a secret to enable third parties to act against the patient's heirs. On the other hand, the secret may not be used against the patient's heirs where these are asserting their rights. In this case, however, the doctor may not reveal a secret which might damage the reputation of the deceased patient.

There are, moreover, legal limits on medical professional secrecy, viz.:

- when legal action is taken by the patient or his heirs against the doctor;
- when births and deaths must be certified;
- when infectious or venereal diseases must be reported to the health authorities;
- when accidents at work must be reported;
- when certificates must be issued to permit the official committal of mentally ill persons.

A doctor treating a patient with the assistance of other doctors must acquaint them with all the facts relevant to the treatment of the patient.

A doctor required to draw up an expert medical report for legal purposes must reveal to the judge all the facts that have come to his knowledge in the course of his work.

A doctor may reveal certain facts to the next of kin if the object is to secure their help and collaboration in treating the patient. Where a fatal illness has been diagnosed and the patient has not notified his family, the doctor must do so unless the patient expressly forbids it (Art. 42 of the Code of Medical Conduct).

15. In Belgium, the deliberate violation of a professional secret is punished under Article 458 of the Penal Code, while infringements resulting from carelessness, forgetfulness or thoughtlessness are a civil law matter and governed by Articles 1382 and 1383 of the Civil Code. In Belgium, the medical professional secret is absolute in character and the law provides that it may not be used against the patient.

Even if the patient gives his consent, a doctor is not obliged to reveal a secret confided in him. Actual practice, however, is very similar to what it is in France. As far as right of access to clinical records is concerned, the patient is not entitled to demand the entire dossier. The law allows the doctor to remove from the records such technical notes as might be harmful to the patient should he become aware of their content. This principle is also enshrined in the preliminary draft law on the protection of private life (Art. 21, para. 4), which provides that patients may not have access to computerized data relating to their physical and mental health.

16. In Luxembourg, the medical professional secret is protected by Article 458 of the Penal Code. The doctor is obliged to comply with this provision except when required to give evidence in court or when the law compels him to reveal a medical secret. The law intimates, however, that the doctor may testify, but is not under obligation to do so. The doctor is not required by law to inform the patient's next of kin, and there are no rules on right of access to clinical records.

17. In Italy, the limits on medical professional secrecy are not established by law, but these may be inferred from the principle that it is the doctor's duty to inform the patient of his state of health and to acquaint him with the treatment needed to restore him to health.

The patient must give his consent before any surgical operations are performed, especially operations covered by the law on social security and accidents at work. A patient who refuses medical treatment forfeits his right to the benefits provided for by the law (Arts. 81, 82 and 87 of the provisions on compulsory insurance).

The principle of the patient's consent is waived in the following cases: compulsory vaccinations, infectious and venereal diseases, and the habitual use of drugs. Italian case law upholds the principle of consent (see Cass. Civ. Sez. III, 6 July 1967 - Istituto Ospedalieri di Milano v. Zacchia).

This principle also implies that the doctor has a duty to inform the patient of his state of health. If it is not possible for the doctor to do so and the health of the patient is in serious jeopardy, the doctor may proceed with the necessary treatment. In this case, Article 54 of the Penal Code applies (state of necessity).

The law is different where the doctor diagnoses a very serious illness which might be aggravated if the patient is informed of the diagnosis. It seems, however, that the usual practice is to inform the patient, although, as the code of professional conduct suggests, the doctor should perform this task with the utmost tact and consideration. Doctors also have a duty to inform minors, provided that they show evidence of sufficient mental maturity. Consequently, the doctor is obliged to notify the next of kin only if the patient is unable to do so because of his mental or physical condition.

The patient may consult the clinical records only when he leaves the hospital or clinic in which he has been treated.

18. In Germany, the conditions governing medical professional secrecy are laid down by Article 203 of the Penal Code. The following are required to keep medical secrets: doctors, dentists, veterinary surgeons, pharmacists and other members of the medical professions, as well as the staff of private sickness and accident insurance agencies and life assurance agencies, etc. Assistants and medical students are also obliged to keep a medical secret confided in a doctor even after the latter's death, just as a doctor must keep a secret confided in him after the death of his patient. If a doctor or his assistant is required to give evidence in court, he may refuse to reveal facts covered by the professional secret (Sections 53 and 53a of the Penal Code; Section 383 of the Civil Code).

The obligation of professional secrecy is waived where:

- the patient agrees to the disclosure of confidential information;
- the doctor is required by law to report certain illnesses or diseases;
- the doctor is required by law to communicate information to the social security authorities;
- the doctor is aware of a plan to commit a crime which could be prevented if he informed the police (Sections 138 and 139 of the Penal Code);
- some danger or hazard resulting from the rights protected by the law justifies a breach of confidence;
- it is necessary for the doctor to defend his interests.

The doctor has a duty to inform the next of kin only if the patient himself cannot be informed because of his mental or physical condition.

The patient has no right of access to the clinical records, since these are considered to be an 'aide-mémoire' for the doctor. The doctor may forward the records to another doctor who is to continue the treatment. Case law upholds the right of the patient to have his own clinical record, but the doctor always has the right to prohibit the compilation of such a record, especially if it could be upsetting to the patient.

19. In the Netherlands, the Penal Code contains an article, similar to that applied to lawyers, on breaches of medical secrecy. Only at the request of the person directly concerned may legal proceedings be instituted.

Case law recognizes that there is a specific obligation on doctors not to disclose confidential information. This obligation has no statutory basis, but derives from the particular requirements of the profession.

A doctor who fails to comply with this obligation is liable to prosecution under penal and/or civil law.

The disclosure of a secret may be justified:

- if the patient gives his consent;
- in cases of emergency or of force majeure;
- if an appropriate legal provision exists;
- if an official order has been issued.

The obligation applies to the medical profession as such: doctors' assistants and medical students are treated as 'parties by association' to the confidentiality demanded of the medical profession.

It is difficult to say whether a criminal action may be brought against the assistants or against the doctor himself. Nowadays, however, since the medical profession has a disciplinary code, it is far more likely that a person found guilty of a breach of professional secrecy would be subjected to disciplinary rather than criminal proceedings. Doctors are required, however, to appear in court to give oral evidence as experts. Failure to comply with this obligation is punishable under Article 192 of the Penal Code. A doctor may, of course, refuse to disclose to a court information covered by professional secrecy.

The patient has no explicit right to information about his state of health, although it is generally acknowledged that the doctor has a duty to provide such information. This duty does not extend to a patient's family, but it does extend to the legal guardians of a minor or of a person who is mentally ill.

The doctor informs relatives if the patient so wishes or in the event of an emergency.

The patient is not entitled to consult the clinical records, although the Dutch Medical Association now takes the view that this should be authorized. At present, it is up to the health service administration to decide whether and how clinical records should be made available to the patient or his next of kin.

20. In the United Kingdom, professional secrecy is a matter of professional ethics, as laid down by Article 5 of the 1978 Medicine Act. According to this article, it is the duty of the General Medical Council to determine the rules with which a doctor must conform if he is not to be suspended or struck off the medical register for serious professional misconduct. The fundamental rule is that the doctor must scrupulously refrain from revealing a secret without the consent of the patient. However, a doctor cannot refuse to disclose information if he is ordered to do so by a court. There are also many cases in which the law compels the doctor to reveal information, although in some such cases the disclosure of more information than is strictly necessary is expressly prohibited. This law applies, for example, to the 1967 Abortion Act and to the 1974 National Health Service Regulation on Venereal Diseases.

A doctor is obliged to:

- notify the district public health inspector of cases of infectious diseases or food poisoning;
- notify the appropriate health and social security authority of cases of lead, phosphorus, arsenic or mercury poisoning, the source of which is the place of work;
- report cases of drug addiction to the head of the health department at the Home Office;
- inform the head of the health department at the Department of Health and Social Security of all abortions carried out under the 1967 Abortion Act;
- state the cause of death on death certificates in accordance with the 1953 Registration of Births and Deaths Act.

Professional misconduct does not arise where a doctor:

- informs the patient's next of kin when, for medical reasons, he believes that it would be inadvisable to ask the patient for his consent;

- reveals the identity of the patient when a medical research project approved by a medical ethics committee is in progress;
- informs the police, a local authority or the NSPCC that an offence has been committed.

No-one has right of access to clinical records. Since most doctors work within the National Health Service, the records belong to the appropriate local health authority or district health committee, or the committee of general practitioners, with which the doctor has a contractual relationship.

The submission of clinical records might be ordered by courts dealing with claims for damages in respect of physical injuries or death.

The laws on mental health care and the supervision of nursing homes also provide for the examination of clinical records.

21. In Denmark, Article 9 of the Code of Medical Practice provides that, unless he is authorized by law to reveal confidential information to protect his own interests or the interests of others, a doctor who violates the principle of professional secrecy will be punished under the relevant provisions of the Penal Code. The doctor may reveal a secret with the consent of his patient. Since protection of the interests of others extends to the interests of the patient, the doctor may inform the next of kin of the state of health of his patient, but he must first establish whether the disclosure of such information is in the interest of each individual patient. These rules apply to all medical personnel, including assistants and all other persons acting in an official capacity.

It is up to the doctor to decide whether access should be allowed to clinical records.

The doctor is entitled, for example, to authorize his colleagues and assistants to consult the records. Medical staff other than doctors may consult them to the extent that this is justified by the performance of their duties. In general, the doctor with whom the patient is registered

informs the hospital or other doctors of the condition of the patient, and vice versa. In certain circumstances, the doctor is required by law to forward clinical records to official bodies such as the National Health Council, or to a court.

There is also a long list of legal provisions which require the doctor to communicate information about his patients to the appropriate authorities: infectious diseases, venereal diseases, diseases contracted and injuries sustained at the place of work, congenital malformations, death certificates, persons who are a danger to others, prevention of serious criminal offences, cruelty to children, compulsory vaccinations, etc.

In principle, the doctor is excused from giving evidence in court on matters covered by professional secrecy. As we have said, the court may order the doctor to give evidence, provided that it gives an assurance that this will not entail the disclosure of information covered by the obligation of professional secrecy, if secrecy is imperative.

22. In Greece, the Code of Medical Practice (Law No. 1565/1939, Art. 23) and the Regulation on Medical Ethics (Royal Decree of 25 May/July 1955, Arts. 15 and 18) impose a legal and moral obligation on doctors to preserve medical professional secrecy. Special provisions exist which require doctors promptly to certify births and deaths and immediately to report accidents and infectious diseases, and criminal acts - planned or in progress - of which they are aware, to the appropriate authorities. Failure to fulfil these obligations is punishable under Article 371 of the Penal Code. The doctor is not guilty of a breach of professional secrecy if he divulges confidential information with a view to protecting a higher general interest which cannot be protected in any other way. There is no provision which requires the doctor to inform the next of kin of the condition of his patient. Article 32 of the Regulation on Medical Ethics stipulates that, unless the patient demurs, surgeons and specialists must notify the doctor with whom the patient is registered before performing an operation or commencing clinical treatment.

The law does not provide for a right of access to a patient's clinical records. Article 212 of the Code of Criminal Procedure nullifies the evidence given by a doctor if, in the course of an inquiry, he is questioned about matters covered by the obligation of professional secrecy - even if he has been authorized to disclose such matters by the patient. Article 261 of the same Code provides that a doctor is under no obligation to submit to the courts or the examining magistrate documents relating to facts subject to professional secrecy.

IV. THE HARMONIZATION OF NATIONAL LEGISLATION: REQUIREMENTS AND PROSPECTS

A. Lawyers

23. Our comparative analysis of the national laws on professional secrecy has shown that, although all the Community Member States recognize the same basic principles, there are considerable practical differences, especially in matters of criminal procedure.

Admittedly, since the protection of confidential information is an essential corollary of basic human rights and freedoms, it should be subject to identical provisions in the legal systems of all the Member States. However, such an ideal objective would be very difficult, if not impossible, to achieve, inasmuch as it would require not only the laws on the exercise of the liberal professions to be harmonized, but also the laws governing procedure.

Consequently, it would perhaps be advisable at this stage to ensure adequate protection for lawyers of one Member State who move to and provide services in another Member State. This could be done by subjecting them to the laws of the host country and releasing them from any obligations deriving from the laws of the country of origin, thereby avoiding a situation in which they would be subject to two different sets of regulations on professional responsibility and criminal liability.

24. At Community level, in the specific area of competition, problems have arisen with the application of Article 14 of Council Regulation 17/62 concerning the investigative powers of the Commission. These problems are illustrated by the judgment of the Court of Justice of 18 May 1982 in Case 155/79: AM & S v. Commission of the European Communities (1).

In order to prevent further difficulties from arising in connection with the competition rules of the EEC Treaty, Regulation 17/62 should perhaps be reviewed with the aim of clarifying the Commission's investigative powers.

25. To sum up, then, the Commission could be requested to consider, in collaboration with the Consultative Committee of the Bar Associations of the EEC Member Countries, the fundamental problems which arise, in connection with the protection of legal professional secrecy, for lawyers providing their services in a Member State other than their own, and to submit its findings and the solutions which appear most suitable to the competent committee of the European Parliament.

(1) In this Case, the Court of Justice declared that it was competent to decide whether or not particular communications were 'privileged'. It could suspend a Commission order to produce documents whilst the proceedings were pending. The Court of Justice recognizes that all the Member States accept the principle that communications between lawyers and clients must be protected. However, the Court restricts the scope of this privilege to written communications from or to an independent lawyer (a lawyer not bound by an employment contract with a company). These communications are privileged if they are made after proceedings have been initiated and might have repercussions on the client's right of defence. Previous communications may be covered by privilege only if they have a bearing on the proceedings initiated by the Commission. The Court also ruled that the company must provide sufficient information to the Commission to prove the secrecy of the document, without, however, revealing its entire content. Where the Commission is not convinced that a given document is privileged, it may, by means of a decision, order it to be handed over. The company may appeal against this decision before the Court. An appeal of this kind would not, however, have a suspensive effect; the company may therefore make a further appeal to the Court to order suspension of the decision. Documents recognized as being privileged are not subject to the investigative powers of the Commission within the meaning of Article 1 of Regulation 17/62. The Commission, for its part, decided on 27 June 1983 not to extend legal protection of confidential documents to lawyers employed by companies in the Member States. Similarly, it does not grant such protection in respect of independent lawyers from third countries, who may receive the same treatment as Community lawyers provided that there is reciprocity.

B. Doctors

26. As far as doctors are concerned, further harmonization is not at present required under Community regulations. Council Directive 75/362 concerns the mutual recognition of diplomas and includes measures to facilitate the effective exercise of the right of establishment and freedom to provide services; Directive 75/363 concerns the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of doctors; Directive 75/364 set up an Advisory Committee on Medical Training. A doctor can, therefore, fully exercise his profession in a Member State other than his own by registering with the appropriate professional association. Article 7 of Directive 82/76, which amends Directives 75/362 and 75/363, specifies that: '... Member States may, so as to permit the implementation of the provisions relating to professional conduct in force in their territory, require either automatic temporary registration or 'pro forma' membership of a professional organization or body or, as an alternative, registration, provided that such registration or membership does not delay or in any way complicate the provision of services or impose any additional costs on the person providing the services'.

MOTION FOR A RESOLUTION

tabled by Mr CALVEZ, Mr DELEAU, Mr TYRRELL, Mrs von ALEMANN, Mr BANGEMANN, Mr BEYER DE RYKE, Mr BERKHOUWER, Mrs BOOT, Mr CECOVINI, Mr DE GOEDE, Mr DELATTE, Mr DELOROZOY, Mr d'ORMESSON, Mr EISMA, Mr GALLAND, Mr ISRAEL, Mr PAULHAN, Mrs PAUWELYN, Mr PONIATOWSKI, Mrs PRUVOT, Mr SABLE, Mrs SCRIVENER, Mr SEITLINGER and Mr SHERLOCK

pursuant to Rule 47 of the Rules of Procedure

on professional secrecy

The European Parliament,

- A Whereas, in the European Community, as a result of technological, economic and social developments, the private life of individuals is subjected to increasingly complex and technical problems - thereby necessitating the advice and assistance of qualified specialists in a growing number of areas,
- B whereas this applies in particular to medical, para-medical, legal, financial and technical areas, in which such assistance is provided by the members of the professions,
- C whereas it is more important than ever scrupulously to respect not only this right in itself, but also the necessary guarantees which accompany it - in particular that of secrecy,
- D whereas the right to secrecy should, however, be invoked by the members of the professions solely to protect their clients and not to shelter themselves,
- E whereas the 'right to secrecy' is regarded as an essential basic freedom and human right,
- F noting that, while professional secrecy is required by national legislation in the Community Member States in many cases, deliberate or incidental, direct or indirect derogations, which seriously breach the abovementioned freedoms and rights, are either embodied in laws or regulations on the one hand, or are customary, tolerated or established practice on the other,

- G noting that such breaches cannot be justified, whether they are of a political, scientific or administrative nature, and that nothing must be allowed to endanger the rights and freedoms which are based on professional secrecy,
- H whereas it is essential for the European Parliament, as guardian of the abovementioned rights and liberties, to address itself to this problem and take measures to solve it,
1. Requests the Commission to inform it, as a matter of urgency, of the situation in each of the Community Member States in connection with the above matter;
 2. Requests the Commission to submit to the European Parliament a report containing appropriate proposals;
 3. Instructs its President to forward this resolution to the Council and the Commission.