Confidentiality of client-lawyer communications: a shield for citizens' rights

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In the context of the delicate balance between rights and their enforcement and – even before this stage – between citizens and their rights, the confidentiality of lawyer-client communications stands there, a bit like a strange animal.

This principle – usually referred to as 'professional secrecy' or 'legal professional privilege' – often in fact gives rise to various questions: what is it for? What is its purpose?

And most importantly – who is it for?

From the outside one could be tempted to view it as another feature of our legal profession, one which characterises our work - which inevitably deals with delicate, confidential matters.

But looking closer: one learns that it is not about the profession, but rather about a legal system that recognises the need for those that appear before it to be properly advised.

It is about how the legal system works, about the way rights in democratic societies are handled in two critical phases: when citizens need to get access to their rights and when they need to enforce their rights in Court.

In both instances, citizens need a lawyer.

And in both instances citizens need to make such a lawyer aware of their needs, of their concerns.

Lawyers represent their clients in many ways – whether in Court, helping with their legal problems or providing advice to get through difficult times. In order to receive advice, clients need to be open in their communications with their lawyer in order to ensure that the advice which is being sought is relevant. In this delicate moment, the client needs to be able to communicate with their lawyer in the knowledge that the communications are confidential.

The confidentiality of lawyer-client communication offers therefore a shield without which one would ultimately feel unsafe and not free to communicate.

Without the safety net of this protection, the legal system – simply – cannot work.

Clearly therefore – this protection, this shield, has a fundamental nature. The legal system works because this right is respected.

This emerges from our Charter of Fundamental Rights[1], from our deontological background[2], from national legislation of all EU Member States[3], from important case law of the CJEU[4] and the ECtHR[5].

Why is it fundamental?

To respond to this question, we should clarify that "*the protection of lawyers' professional secrecy is a principle with two aspects*"[6]: one procedural and one substantive. On the one hand, the obligation to respect professional secrecy is essential to guarantee fundamental procedural rights such as the right to a fair trial, the right of defence, the right to legal assistance and the right not to incriminate oneself.[7] On the other hand, the substantive basis corresponds to the respect for private life, meaning specifically the right to have recourse to a lawyer with the guarantee that he or she will carry out the tasks fairly and completely independently.

It is a *fundamental* principle because it touches *fundamental* rights[8].

This is its true landmark.

Against this background, amongst recent developments having an impact on professional secrecy, lawyers have been following the evolution of the anti-money laundering (AML) framework. The AML legislation has introduced an important exception to this protection, when lawyers have been called to play a part in the fight against money laundering, filing suspicious transaction reports (STRs) in certain circumstances related to the provision of legal advice to their clients.

Lawyers have learned how to make their part in the fight against this crime, walking the delicate balance of making STRs in a context in which the perimeter of the exemption is not always clear from the applicable provision, as lawyers are not obliged to report when it comes to litigation matters, but the parameters to trigger this exemption when it comes to legal advice are much less unequivocal.

But we learned a lot, are still learning and are willing to learn further.

We are part of the team fighting this fight.

But, at times, we also have a role and responsibility to educate legislators. Legislators need to ensure that legislation strikes the right balance with respect to a client's right to confidentiality when seeking legal advice.

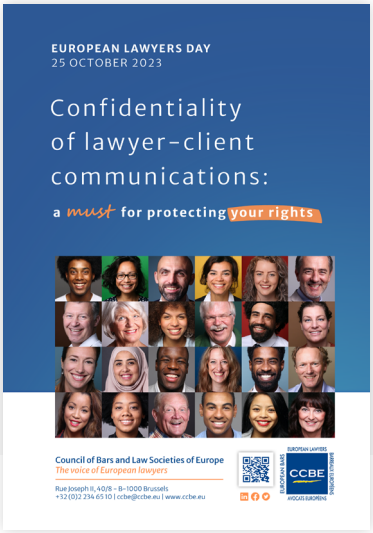
The upcoming AML package, with the "*single rulebook*", is projecting further changes to the exemption to report STRs: the European Parliament mandate for trialogue negotiations clearly suggested to further reduce the perimeter of the exemption to report. The changes in question would make the already complex relationship between the lawyer's duty to report and the duty to maintain professional secrecy even more critical. Within the framework of the new package, among the various proposals, the Parliament one stands out, and not for its particular merit[9]. The Parliament as a defender of citizens' rights should be aware of the consequences of its legislation, as it is unimaginable that the Parliament is seeking a diminution of citizens' rights. Professional secrecy is fundamental to protect the information generated in the context of the relationship between a client and their lawyer in order to be best advised and defended. Any erosion of this principle is an erosion of every citizen's right to consult their lawyer in confidence.

Besides the vagueness of the proposal, the real question is: who pays the cost of this further shrinking of the safety net granted by this fundamental principle?

The answer is simple.

All of us EU citizens pay a significant price. It is, therefore, very dangerous and it comes with a cost: ultimately a system less free and less democratic.

If the shield is protecting the citizen, then we must protect the shield.



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FINAL NOTES

1 Its protection is expressly referred to in Article 41. 2. b) of the Charter of Fundamental Rights of the European Union, providing the right to good administration, which enshrines "*the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy*". This principle is also recognised, albeit indirectly, by Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention on Human Rights, in terms of respect for private life and one's correspondence.

2 A landmark present in all European legal system that recognises professional secrecy or legal professional privilege as one of the major objectives and principles of regulation for the legal profession, the violation of which constitutes – in some EU Member States – not only a professional violation, but also a criminal offence. The EU Directive 2013/48, in its article 4, obliges Member States to: "*respect the confidentiality of communications between suspects or accused persons and their lawyer in the exercise of the right to a lawyer [...].*" This obligation is an absolute one. Additionally, this principle is clearly embedded in art. 2.3 of the CCBE Code of Conduct for European Lawyers when indicating "*[i]t is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer*".

3 See *The professional secret, confidentiality and legal professional privilege in Europe*, 2003, an update of the 1976 Report by D.A.O. Edward, QC. This Report shows the results of a comparative study of the rules of professional secrecy for lawyers in the various national legal systems, in the light of the answers from the member delegations of the CCBE questionnaire on professional secrecy.

4 See case C-155/79, 4 February 1981, AM & S v. Commission: in this ruling, the Court states that the protection of "*confidentiality serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it*". See also case C-309/99, 19 February 2002, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten. In this judgment, one goes deeper on what the role of a lawyer is. The issue concerned the deontological obligations of lawyers. In the case before the Court, lawyers Wouters and Savelbergh, registered at the Bars of Amsterdam and Rotterdam, were prevented from forming an integrated practice with the firms of auditors Arthur Andersen and Price Waterhouse. This prohibition stemmed from a Dutch regulation of 1993 that, while allowing collaboration between lawyers and auditors and other professions such as notaries and tax consultants, prevented the establishment of integrated firms in order to guarantee the independence of lawyers. The CJEU specifies that lawyers offer legal assistance in various forms, such as, for example, preparing opinions, drafting contracts and other documents, representation and defence in court, against payment of a fee. This particular economic activity must be performed in compliance with certain fundamental rules. The lawyer has a duty to defend his client in the latter's exclusive interest, which can only be guaranteed if the lawyer operates in a situation of complete independence, avoiding any kind of conflict of interest and respecting the obligation of professional secrecy. Moreover, see case C305/05, 26 June 2007, Ordre des barreaux francophones et germanophones and Others v. Conseil des Ministres. In this last cited case, the Court reiterated that "*lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations*".

5 In case Michaud v. France (2012), §119, the ECtHR states that "*legal professional privilege, while primarily imposing certain obligations on lawyers, is specifically protected by [...] Article 8 ECHR*". With reference to Article 6 ECHR, in case Niemietz v. Germany (1992), §37, the Court points out that "*where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention*". For similar judgments, see also case S. v. Switzerland (1991), §48. Also, see case Demirtaş and Yüksekdağ Senoğlu v. Türkiye (1991), §106: the Court asserts that "*a derogation from that essential principle may be permitted only in exceptional cases and provided that it is surrounded by adequate and sufficient safeguards against abuse*".

6 Opinion of Advocate General Poiares Maduro delivered on 14 December 2006, Case C-305/05, I- 5321, § 44.

7 In the recent judgment of the Court (Grand Chamber), Case C694/20, 8 December 2022, Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering, § 60, the CJEU recalled that "*the right to a fair trial, guaranteed by that provision, consists of various elements. It includes, inter alia, the rights of the defence, the principle of equality of arms, the right of access to the courts and the right of access to a lawyer, both in civil and criminal proceedings. Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 47 of the Charter, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations (see, to that effect, judgment of 26 June 2007, Ordre des barreaux francophones et germanophones and Others, C305/05, EU:C:2007:383, paragraphs 31 and 32).*"

8 In common law systems, see also recently a resolution of the American Bar Association (Report to the House of Delegates), dated February 2023, at Principle 8, pages 14-15, that reaffirms "*the vital importance of lawyer-client confidentiality for the rule of law; recognizes that a client's confidence in lawyer-client confidentiality is essential to ensure effective assistance of counsel in criminal, civil, and administrative proceedings and be able to advise a client against a course of action that could be illegal or improper*".

9 If approved, lawyers will be under an obligation to make STRs if they "*know or have a well-grounded suspicion that the client is seeking legal advice for the purposes of money laundering or terrorist financing.*"