

## Legal professional privilege – Views from the Council of Bars and Law Societies of Europe (CCBE) in response to the Consultation on Draft “Rules on Investigations by the Fair Trade Commission” (Attachment 3) and Draft “Guidelines on treatments of objects recording confidential communications between an enterprise and an attorney” (Attachment 4).

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE is recognised as the voice of the European legal profession, representing European bars and law societies in their common interests before European and other international institutions.

The CCBE is pleased to have the possibility to respond to the Consultation on Draft “*Rules on Investigations by the Fair Trade Commission*” (Attachment 3) and Draft “*Guidelines on treatments of objects recording confidential communications between an enterprise and an attorney*” (Attachment 4).

The CCBE has prepared this paper with the aim of providing information on how legal professional privilege applies at a European level in the hope that it will be of assistance.

- **Legal professional privilege, client confidentiality and professional secrecy – general information**

For lawyers to be effective in defending their clients' rights, there must be confidence that communications between lawyers and their clients are kept confidential. This has been recognised throughout Europe for centuries. In essence, without this guarantee, there is a danger that a client would lack the trust<sup>1</sup> which enables the client to make full and frank disclosure to their lawyer, and, in turn, the lawyer would lack sufficient information required to enable the lawyer to provide full and comprehensive advice to their client, or represent their client effectively. Without that trust, the client would not have the assurance that he can be full and frank with his lawyer, which is essential for providing complete and accurate legal advice and support and is therefore a crucial guarantee for the fair trial process.

Because of this policy imperative, all European countries have provisions in order to ensure the protection of the right and duty of the lawyer to keep client matters confidential. In some jurisdictions in Europe, this is achieved by attaching to those communications the protection of legal professional privilege, and in other jurisdictions by treating them as professional secrets. However, both approaches seek to achieve the same end: the protection of information generated within the lawyer-client relationship for the purpose of giving or receiving legal advice (in both contentious and non-contentious matters) and/or representation in any type of legal proceedings, whether civil or criminal in nature.

Although a detailed analysis of legal professional privilege and professional secrecy lies outside the scope of the present document, it is helpful to understand the broad general approach taken by each.<sup>2</sup>

<sup>1</sup> ECtHR, *André v France* (18603/03), 2008, §41: “*professional secrecy [...] is the basis of the relationship of trust existing between a lawyer and his client.*”

<sup>2</sup> A full discussion can be found in the following reports: ‘[Report on The professional secret, confidentiality and legal professional privilege in the nine member states of the European Community](#)’, CCBE, D.A.O. Edward, Q.C., 1976; ‘[Update of the Edward’s Report on the professional secret, confidentiality and legal professional privilege in Europe](#)’, CCBE, 2003; ‘[Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions](#)’, CCBE, John Fish, 2004; *Legal Professional Privilege and European Case Law*, CCBE, Georges-Albert Dal (editor), 2010.

### The principle of legal professional privilege

The concept of legal professional privilege attaches to lawyer-client communications a privilege of confidentiality, which belongs to the client. The lawyer comes under an obligation arising from the lawyer-client relationship, to keep confidential all communications between the client and himself falling within the scope of his function as the lawyer instructed by the client, unless the client waives that confidentiality. That civil obligation translates into a deontological one. It is, however, important to understand that the privilege does not attach to communications which do not lie within the scope of the relationship between the client as client and the lawyer as that client's lawyer. For example, it does not apply to communications between an individual and a lawyer, who may well be acting as the client's lawyer in some matters, which relate to a matter which does not lie within the scope of the professional relationship. To take a clear example: if the lawyer is involved not in the criminal defence of a client who has been accused of committing a bank robbery or a terrorist act, but as co-conspirator in planning with the client a bank robbery or terrorist act, then clearly this will lie outside the scope of legal professional privilege. In common law jurisdictions, this is usually referred to as "the iniquity exception", though it is important to note that it is not truly an exception: rather it is a matter which does not, in the first place, fall under the scope of legal professional privilege.

### The principle of professional secrecy

Where the basis is professional secrecy, the obligation to keep communications confidential is an absolute one. It is an obligation which rests directly upon the lawyer and, in most jurisdictions, it cannot be waived by the client. In some jurisdictions professional secrecy has a constitutional status aimed to guarantee fundamental rights such as fundamental right to privacy, right to secrecy of communications, right to defence and fair trial. In some jurisdictions, violation of professional secrecy by a lawyer is a criminal offence, it is legislated into the Criminal Code and disclosure of information under the professional secrecy umbrella can be punished with imprisonment. Notwithstanding these important differences, the concept of professional secrecy shares with legal professional privilege the understanding that its scope does not extend to cover a case where the lawyer is engaged with the client in the furtherance of a criminal activity.

Any reference to professional secrecy or legal professional privilege in this paper shall be considered, unless otherwise specified, as including both professional secrecy and legal professional privilege.

- **Without confidentiality, no fair trial**

Most legal systems share a common understanding that if the right of the citizen to safeguard confidentiality, i.e. the right of the citizen to be protected against any divulging of his/her communication with his/her lawyer, were to be denied, people may be denied access to legal advice and to justice. Professional secrecy and legal professional privilege are thus seen as instruments by which access to justice and the maintenance of the rule of law can be achieved. Indeed, the European Court of Human Rights (ECtHR) has repeatedly linked the respect for legal professional privilege and professional secrecy to the observance of Articles 6 and 8 of the European Convention on Human Rights (ECHR). First, the Court considered that "*an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) of the Convention*"<sup>3</sup>. Furthermore, the Court stated that "*the right of everyone to a fair trial*"<sup>4</sup> is dependent upon the "*relationship of trust between [the lawyer and the client]*". Secondly, the Court repeatedly highlighted that undermining professional secrecy or legal professional privilege may violate Article 8, which protects the right to respect for private and family life. Indeed, the Article "*affords strengthened protection to exchanges between lawyers and their clients*"<sup>5</sup>. The Court provides that: "*this is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet they cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential*".

Further, in EU Law, Article 4 of the Right of Access to a Lawyer Directive (Directive 2013/48/EU) provides:

*"Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law."*

<sup>3</sup> ECtHR, [S. v. Switzerland](#) (12629/87), 1991, §48. Also see ECtHR, [Domenichini v. Italy](#) (15943/90), 1996, §39; ECtHR, [Öcalan v. Turkey](#) (46221/99), 2005, §1333; ECtHR, [Moiseyev v. Russia](#) (62936/00), 2008, §209; ECtHR, [Campbell v. the United Kingdom](#) (13590/88), 1992, §§ 44-48.

<sup>4</sup> ECtHR, [Michaud v. France](#) (12323/11), 2012, §117-8.

<sup>5</sup> Ibid; also see ECtHR, [Kopp v. Switzerland](#) (23224/94), 1998.

The confidentiality of communications between a lawyer and client is also enshrined in the Rules of Procedure and Evidence of the International Criminal Court (article 73.1):

*“...communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure...”*

It should be noted that the obligation on member states to respect confidentiality is an absolute one. Although the scope of the directive is limited to criminal law, Article 4 reflects the principle of the inviolability of professional secrecy and legal professional privilege.

- **Case law**

There is abundant jurisprudence by the European courts, both in Luxembourg and Strasbourg, that deals with professional secrecy and legal professional privilege and which highlights the importance of these principles. European and international legal instruments have also enshrined legal professional privilege and professional secrecy, as we will see below. Additionally, all EU Member States recognise 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. Moreover, the CCBE in its own CCBE Charter of Core Principles of the European Legal Profession, the CCBE Code of Conduct for European Lawyers and numerous other documents stipulates professional secrecy and legal professional privilege as being numbered among the core values of the European legal profession. Key decisions of the European courts, relevant European legal instruments as well as the CCBE’s own documents are referred to in more detail below.

- **Court of Justice of the European Union: the AM&S case**

In the *AM&S v. Commission* case, the Court of Justice of the European Union (CJEU) acknowledged that the maintenance of confidentiality as regards certain communications between lawyer and client constitutes a general principle of law common to the laws of all Member States and, as such, a fundamental right protected by EC law.<sup>6</sup> The Court held 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”*, and that, therefore, the confidentiality of certain lawyer-client communications must be protected.<sup>7</sup> Legal professional privilege and professional secrecy can be relied upon not only by natural persons, but also by companies that may be subject to a Commission investigation, regardless of their legal form. It covers all documents in the hands of the lawyer or the client and applies to communications originating from either.

The CJEU’s decision was of particular importance, and still is, since it confirmed the protection of privileged communication and it defined the scope of professional secrecy and its practical implications. The CJEU noted that professional secrecy and legal professional privilege are closely linked to the concept of the lawyer’s role as collaborating in the administration of justice by the courts<sup>8</sup>.

In *AM&S*, the CJEU defined the scope of professional secrecy/legal professional privilege in the European Community system, on the basis of the legal traditions common to the Member States. It interpreted Regulation 17 as protecting the confidentiality of written communications between a lawyer and his or her clients, subject to two conditions, incorporating such elements of that protection as were found to be common to the Member States’ laws in 1982,

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<sup>6</sup> CJEU, *AM & S v Commission* (155/79), 1982, §16 and 18.

<sup>7</sup> Ibid. Although *AM&S* was concerned with inspections, it has been generally acknowledged that the principles established in that case also apply to the Commission’s requests for information. *AM&S* originated in a dispute about the confidentiality of a series of documents which were found at the premises of *AM&S* - a UK company - during an investigation into a cartel. The company withheld some of the documents on grounds that they were privileged written communications between lawyer and client. The European Commission issued a decision requiring *AM&S* to produce these documents.

<sup>8</sup> Ibid, §24: *As regards the second condition, it should be stated that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose. Such a concept reflects the legal traditions common to the Member States and is also to be found in the legal order of the community, as is demonstrated by article 17 of the Protocols on the Statutes of the Court of Justice of the EEC and the EAEC, and also by Article 20 of the protocol on the statute of the Court of Justice of the ECSC.*

namely that such communications: (i) are made for the purposes and in the interests of the client's rights of defence, and (ii) emanate from independent lawyers who are qualified to practice in an EEA country.

With regard to the first requirement, the CJEU emphasized that it must be ensured that the rights of defence may be exercised in full in the context of the Commission's investigation proceedings, and that the protection of the confidentiality of written lawyer-client communications is an essential corollary to the rights of defence. It therefore recognized that all written communications exchanged after the initiation of the proceedings must be protected. However, since the Commission can commence an investigation before the formal initiation of proceedings, the Court held that – in order not to discourage any undertaking from taking legal advice at the earliest opportunity – the protection of professional secrecy and legal professional privilege extends to any earlier written communications that have a relationship to the subject-matter of that procedure. Legal advice is regarded as a “preparatory” step in the undertaking's defence<sup>9</sup>.

Pursuant to the second requirement established in *AM&S*, professional secrecy applies only to written communications emanating from independent lawyers who are entitled to practice their profession in one of the Member States, regardless of whether this is the same Member State in which the client resides.<sup>10</sup> This means that, by definition, communications involving lawyers qualified in third countries such as the United States will not fall to be treated as privileged for the purposes of the EU legal regime, even if those lawyers are based in the EC.

Moreover, the notion of “independent lawyer” does not encompass, in the Court's view, any legal expert who is bound to his or her client by a relationship of employment. The Court found that this requirement, as to the position and status of a legal adviser, is based on the “*conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs*”.<sup>11</sup> Despite its reference to “*the rules of professional ethics and discipline which are laid down in and enforced in the general interest by institutions endowed with the requisite powers for that purpose*” as being the counterpart of the protection of professional secrecy, the Court held in *AM&S* that, based on common criteria found in the national laws of the Member States, a document containing legal advice and exchanged between a lawyer and his or her client is protected against disclosure only if the lawyer is ‘independent’, “*that is to say one who is not bound to his client by a relationship of employment*”.<sup>12</sup>

However, some European countries allow for lawyers, registered with a Bar or Law Society, to work as an in-house lawyer for a company. In many of those jurisdictions, these lawyers are subject to the same or similar professional and ethical rules as other lawyers and enjoy the protection of legal professional privilege or professional secrecy under the relevant national laws.

- **Conclusion**

The foregoing material demonstrates that the confidentiality of communications between clients and lawyers is accorded very high importance by the European courts and other relevant European bodies. Confidentiality is seen not only as the lawyer's duty, but as a fundamental right of the client. Without the certainty of confidentiality there cannot be trust, which is key to the proper functioning of the administration of justice and the rule of law. The principle of privilege and professional secrecy is one of the most important requirements in striking a balance between an individual's right to a lawyer and access to justice along with the public interest in prosecuting and investigating criminal activity. The CCBE is happy to elaborate on any aspect of the above or any related aspect.

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<sup>9</sup> Fordham International Law Journal, Volume 28, Issue 4, page 1009, 2004.

<sup>10</sup> CJEU, *AM & S v Commission* (155/79), §25. The limits of this protection are to be determined by reference to the rules on the practice of the legal profession as set forth in Council Directive 77/249/EEC of March 22, 1977, to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78/17) and Directive 98/5/EC of the European Parliament and of the Council of February 16, 1998, to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77/36).

<sup>11</sup> CJEU, *AM & S v Commission* (155/79), §24 and 27.

<sup>12</sup> *Ibid.*