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Lawyer - Client confidentiality
Case law of the ECHR

1. Introduction

In this paper I will address some topical issues relating to lawyer-client confidentiality as seen from the standpoint of the European Convention on Human Rights.[1] A particular attention will be paid to case law of the European Court of Human Rights[2] on this point. As will be shown below the principle of lawyer client confidentiality has a firm ground in Council of Europe standards.

The principle can be formulated in different ways; such as protection of professional secrecy, legal professional privilege, attorney-client privilege and protection of the confidentiality of communication between lawyer and his client. This principle requires the lawyer to keep silent about what has come to his or her knowledge and at the same time hinders the authorities from requiring the disclosure of confidential information.

The *rationae* of the principle is that every person should be able to address a lawyer for legal advice and assistance, and for representation or defence in different proceedings. Just as the respect for the impartiality of a judge, subjectively as well as from an objective point of view, is necessary to inspire confidence in the judicial process on behalf of parties to a dispute as well as the general public, so is the principle of trust between a lawyer and his client. It is therefore seen as an important element in the good administration of justice ("*la bonne administration de la justice*"). This is *i.a.* manifested in the *Code of conduct of European lawyers*.[3]

2. Legal framework

[1] Hereinafter referred to as ECtHR
[2] Hereinafter referred to as ECHR.
[3] *Code of Conduct of European Lawyers* , adopted 28 October 1998 by the Council of Bars and law societies of Europe http://www.ccbe.eu

As regards the legal basis of the principle one should first mention that the Committee of Ministers of the Council of Europe has adopted a recommendation on the freedom of exercise of the profession of lawyer.[4] The recommendation relates to different aspects of the profession of lawyers such as legal education, training, entry into the legal profession, role and duty of lawyers, access of all persons to lawyers, associations of lawyers and disciplinary proceedings.

The first chapter of the recommendation sets forth the general principles on the freedom of exercise of the profession of lawyer. Point 6 addresses directly the topic of this presentation, namely the lawyer – client confidentiality, stating that: "All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law."

The ECHR does not contain a specific provision pertaining directly to the confidentiality of the lawyer client relationship. However it is presumed that for the exercise and enforcement of the rights provided for in the Convention legal assistance is of utmost importance, not the least when it comes to criminal proceedings. It follows that the principle has been firmly recognised in the case law of the ECtHR.

A clear general manifestation of the principle can be found in the case of *Campbell* v *United Kingdom* (25/03/1992) where in § 46 it is stated:

> *It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged.*

Another manifestation is *Foxley v United Kingdom* of 20/06/2000 which states in § 43:

> *The court notes in this connection that the lawyer-client relationship is, in principle privileged and correspondence in that context, whatever its purpose, concerns matters of a private and confidential nature.*

3. Case law

I shall now take a closer look at the case law of the Court relating to lawyer-client confidentiality. Most of the cases relate to Articles 6 and 8. As regards Article 6 of the Convention access to a lawyer and unhindered and confidential communication with a lawyer is seen a necessary component in the fairness of judicial proceedings. Article 8 on the other

[4] *Recommendation Rec (2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer* (Adopted on 25 October 2000).

hand relates to the private nature of the content of the communication with the lawyer. I shall now summarise several cases relating to these issues. In the final chapter the main principle as they transpire from the case will be set forth.

3.1 Article 6 rights

3.1.1 Right to legal assistance

Article 6 of the Convention aims at securing the right to a fair trial. Paragraph 3 (c) provides for the minimum rights in order secure the fairness of criminal proceedings. According to this provision, everyone charged with a criminal offence has the right to "defend himself in person or through *legal assistance* of his own choosing" The case law has confirmed that the provision presupposes the confidentiality of the communication between the accused and his lawyer. See for example *S v Switzerland* (28/11/1991)**.** In the case a prisoner had not been allowed to talk in privacy with his lawyer, as they were constantly under surveillance when they spoke together. The Court held 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) (art. 6-3-c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective ..."

Since the Convention is intended to guarantee rights that are practical and effective it found a violation of Art 6 § 3 (c).

Another example is *Brennan v United Kingdom* (16/10/2001). The applicant, an Irish national, was arrested in connection with the murder of a former member of the Ulster Defence Regime. The consultations with his lawyer took place within sight and hearing of the police officer who was in close proximity to them. The Court held in §58 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 and follows from Article 6 § 3 (c)".

From these two judgments it is clear that the right to confidential and private communication with ones lawyer is seen as an integral part in of basic requirements of a fair trial embedded in Article 6 § 3 (c).

Related to Article 6 issues are those relating to Article 5 §4 (right to have lawfulness of detention decided speedily by a court). An example is Modârcă v Moldova of 10 May 2007 where the Court found a violation. In this case the applicant, who was in pre-trial detention,

was only permitted to have meetings with his lawyer in a room where they were separated by a glass partition, with no space for exchanging documents, across which they claimed they had to shout to hear each other. The applicant had only indirect proof that his discussions with his lawyer had been overheard. However the Court accepted that the applicant could reasonably have had grounds to believe that his conversations with his lawyer in the meeting room were not confidential. The Court concluded that the impossibility for the applicant to discuss with his lawyers issues directly relevant to his defence and to his appeal against the detention, affected his right to defence, in violation of Article 5 § 4.

3.1.2 Right not to incriminate oneself

Article 6 § 1 protects the right not to incriminate oneself. Several judgments support this, i.a. *Funke v France* (25/02/1993), *Saunders v UK* (17/12/1996), *Jalloh v Germany* (11/07/2006), *Gäfgen v Germany* (01/06/2010).

This right presupposes that the state (prosecution) shall prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the person charged (see for example *JB v Switzerland* (03/05/2001). Disrespect of the lawyer-client relationship can lead to a breach of this principle. See for example *André v France* (24/07/2008) where the Court stated that a search in the lawyers office amounted to improper compulsion on behalf of the state authorities and in breach of this right (see §41).

> *La Cour estime que des perquisitions et des saisies chez un avocat portent incontestablement atteinte au secret professionnel, qui est la base de la relation de confiance qui existe entre l'avocat et son client. D'ailleurs, la protection du secret professionnel est notamment le corollaire du droit qu'a le client d'un avocat de ne pas contribuer à sa propre incrimination, ce qui présuppose que les autorités cherchent à fonder leur argumentation sans recourir à des éléments de preuve obtenus par la contrainte ou les pressions, au mépris de la volonté de l'« accusé ».*

From this judgment it is clear that a searching in the lawyer's office and seizures documents incontestably touches upon the professional secrecy, which is at the core oft the relationship of trust which should exists between lawyer and his customer. Moreover, the protection of the professional secrecy is in particular seen as the corollary of the right not to incriminate oneself, since the authorities must seek to build up their case without resorting to evidence obtained in breach of convention rights.

3.2 Article 8 (1): Right to respect for private and family life

Article 8 (1) states that everyone has the right to respect for his private and family life, his home and his correspondence. The Court has given this provision a broad interpretation as extended the term “home” to business premises. Furthermore it has also included professional activities in the term “private life”. See for example *Niemietz v Germany* (16/12/1992). The applicant was a lawyer. His office had been searched by the police in order to identify a certain person who had insulted a judge. The Court accepted that there had been an interference with the applicant's rights under Article 8. It held that respect for private life comprised to a certain degree the right to establish and develop relationships with others. There was no reason of principle why the notion of "private life" should be taken to exclude professional or business activities, since it was in the course of their working lives that the majority of people had a significant opportunity of developing such relationships. To deny the protection of Article 8 on the ground that the measure complained of related only to professional activities could lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities could not be distinguished. To interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the object and purpose of Article 8. In addition, it was clear from the particular circumstances of the case that the search operations must have covered "correspondence" within the meaning of Article 8. In the Court's opinion, the interference in question was "in accordance with the law" and pursued aims that were legitimate under paragraph 2 of Article 8, but was not "necessary in a democratic society". It considered in particular that, having regard to the materials that were in fact inspected, the search impinged on professional secrecy to an extent that was disproportionate in the circumstances. The Court thus concluded that there had been a breach of Article. See a different conclusion in *Tamosius v United Kongdom* (01/09/2002).

A violation of Article 8 was also found in *Petri Sallinen and Others v. Finland* (27/09/2005). The applicants were 18 Finnish nationals. One of them, Mr Sallinen was a member of the Finnish Bar and the other 17 applicants were his clients at the relevant time. In January 1999 the police searched and seized certain materials from Mr Sallinen’s premises in the course of a police investigation in which they considered him to be a witness. A second search warrant was issued on the basis that he was suspected of having aided and abetted the offence of aggravated debtor’s fraud, allegedly committed by two of his clients. The two clients were subsequently charged with aggravated debtor’s dishonesty but no charges were brought against Mr Sallinen. He unsuccessfully requested the domestic courts to revoke the

seizure. The police kept back a copy of one of Mr Sallinen's hard disks which contained, among other things, private details of three of the applicants. They brought proceedings before the domestic courts and asked for the seizure to be revoked. All of the applicants complained that the search and seizure of privileged material had breached their rights. They relied *i.a.* on Articles 6 and 8. The Court found that Finnish law had not provided proper legal safeguards in that it was unclear about the circumstances in which privileged material could be subject to search and seized. The applicants were therefore deprived of the protection to which they were entitled. Therefore the interference in question had not been in accordance with the law and that there had been a violation of Article 8. In view of this finding it decided that there was no need to examine the complaint under Article 6. See also a similar finding in *Roemen and Schmit v Luxembourg* (25/02/2003); *André and others v France* (24/07/2008).

In *Wieser and Bicos Beteiligungen GmbH v. Austria* (16/10/2007) the applicants were a limited liability company (B) which among other things was the sole owner of another limited liability company (N). Mr. Wieser, a lawyer, was the sole owner of the first company. Both companies were based in his law office in Salzburg. A search was carried out of Mr Wieser's office in the context of criminal proceedings concerning illegal trade in medicine, notably with a view to finding invoices addressed to N. One group of police officers, in the presence of Mr Wieser and a representative of the Salzburg Bar Association, searched for hard-copies of files regarding Bicos or Novamed. Each time Mr Wieser objected to an immediate examination of a document, it was sealed and deposited at Salzburg Regional Court as required under Austrian Code of Criminal Procedure. All seized and sealed documents were listed in a report signed by Mr Wieser and the officers. Simultaneously, another group of officers examined Mr Wieser's computer equipment and copied several files to disk. An IT specialist and the representative of the Salzburg Bar Association briefly attended that search. A report was drawn up but only later that day. Mr Wieser was not informed of the results. The applicants subsequently lodged complaints about the search and seizure of electronic data, alleging a breach of Mr Wieser's right to professional secrecy under section 9 of the Lawyers Act. Those and subsequent complaints were all dismissed by the Austrian courts. Relying on Article 8 (right to respect for private and family life and for correspondence) of the ECHR, the applicants complained that Mr Wieser's office was searched and electronic data seized. The ECtHR found that there had been interference with the applicants' "right to correspondence" under Article 8 of the Convention concerning the search and seizure of their electronic data. It noted that the Austrian Code of Criminal

Procedure had specific rules on such searches and that Austrian case-law had also applied them to electronic data. Those safeguards had been complied with concerning the hard-copies of documents seized but had not been observed regarding the electronic data: notably, the member of the Bar Association had not been able to properly supervise that particular search because he was busy with the hard-copy search; the report had been drawn up too late; and, Mr Wieser had not been informed of the outcome. The Court therefore found that the police officers' failure to comply with certain procedural safeguards aimed at preventing "arbitrariness" and protecting lawyers' professional secrecy had made the search and seizure of Mr Wieser's electronic data disproportionate to the legitimate aim pursued. Consequently, the Court held unanimously that there had been a violation of Article 8 of the Convention in respect of Mr Wieser. Given that finding and the fact that Mr Wieser had represented companies whose shares were owned by Bicos Beteiligungen GmbH, the Court also held, by four votes to three, that there had been a violation of Article 8 in respect of the applicant company.

4. European Community Law

Although lawyer-client confidentiality under European Community law is not the topic here few words are warranted in order to give more general view on the situation in Europe. In this regard EC Directive 2005/06/RC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing should be mentioned (before the Council Directive 91/308/EEC). This directive imposes on notaries and other independent legal professionals the certain duty to cooperate with the authorities on issues relating to money laundering. In case 305/05 *Ordre des barreaux francophones et germanophones* the ECJ assessed the compatibility of the directive with the right to a fair trial as guaranteed by Art 6 of the ECHR and Art 6(2) EU. The ECJ found that advising clients in the preparation or execution of financial and real estate transaction have no link to judicial proceeding and fall outside the scope of the right to a fair trial.

As regards EU law and administrative proceedings case 155/79 *AM & S Europe Limited v Commission of the European Communities* (18/05/1982), is of interest. In the judgment the ECJ accepts that in order to ensure the observance of competition rules the investigative bodies must have extensive powers. According to the judgment written communications between lawyer and client, are protected if it is in the interests of the client's rights of defence and the defence counsel is an independent lawyer who is not bound by a

relationship of employment to his client. In the judgment the ECJ is mindful of the need to guarantee the rights of defence and has extended the protection of confidentiality of communications between a lawyer and his client to the inspection procedure over the observance of competition rules, which in essence is an administrative procedure.

5. Concluding remarks

From the foregoing it is clear that the protection of confidentiality of lawyer-client communication is an integral part of a fair trial. This is recognised both under the ECHR as well as under EU law. The confidentiality of communications between lawyers and his clients promotes trust between a lawyer and his client, which is a prerequisite of effective protection of a person's interests and rights. The national law must provide effective remedies for the prevention of abuse. Nevertheless, the requirement of confidentiality is not an absolute one and cannot be extended to all legal services. The confidentiality of communications first and foremost aims at guaranteeing that a person's rights of defence is effective and to ensure the client's right to receive legal advice with the aim of ascertaining his legal position.

References

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