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# Protection of Attorney-Client Privilege in Europe

Professor Taru Spronken\* and Jan Fermon\*\*

## I. INTRODUCTION

This article sets out the European perspective on attorney-client privilege and confidentiality and is based on a presentation made at the Association of Professional Responsibility Lawyers' Fifth International Conference held May 5th to 8th, 2008 in Amsterdam. The aim is to provide a general overview of how attorney-client privilege is constructed, protected, and perceived in Europe.

The first remark that has to be made is that in the absence of a binding European regulation or statute, the protection of confidentiality of communications between attorneys and clients is primarily a matter of national law in the European states, whether belonging to the European Union<sup>1</sup> or to the larger Council of Europe<sup>2</sup> area.

In the national laws, the protection of confidentiality is assured through very different mechanisms with different consequences as to the scope and the degree of protection. In countries with a strong Napoleonic tradition such as France or Belgium the emphasis is on "professional secrecy." Violation of the obligation to professional

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1. See Eurunion.org, European Union Offices, [http://www.eurunion.org/eu/index2.php?option=com\\_content&do\\_pdf=1&id=57](http://www.eurunion.org/eu/index2.php?option=com_content&do_pdf=1&id=57) (last visited Sept. 19, 2008) (listing the twenty-seven EU member states: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom).

2. See Council of Europe, <http://www.coe.int> (last visited Sept. 20, 2008) (stating that the Council of Europe includes forty-seven member-states).

secrecy by a lawyer is a criminal offence<sup>3</sup>. The “right of non-disclosure” is considered as an accessory to professional secrecy.<sup>4</sup> Conversely, in other countries, like the Netherlands, the emphasis is on the “right of non-disclosure” explicitly protected by law.<sup>5</sup> In countries with an Anglo Saxon common law tradition, the protection of confidentiality is seen as part of a broader concept of “professional privilege,” being a fundamental principle of justice, that grants protection from disclosing evidence and is seen as a right that attaches to the client and not to the lawyer and so may only be waived by the client.<sup>6</sup> In other jurisdictions, the privilege is considered as belonging to the lawyer.<sup>7</sup> According to this difference in approach the lawyer—even without consent of the client—will in some jurisdictions be able to waive the privilege.<sup>8</sup>

In some European countries like Belgium the protection of confidentiality is strictly limited to independent advocates. In others like the Netherlands in-company lawyers benefit fully from the privilege of non-disclosure, in the same way as independent lawyers.<sup>9</sup>

The European Court of Justice<sup>10</sup> (hereinafter ECJ) recognized the existence of these differences in the following terms:

As far as the protection of . . . communications between lawyer and client is concerned, it is apparent from the legal systems of the member states that, although the principle of such protection is generally recognized, its scope and the criteria for applying it vary. . . . Whilst in some of the member states the protection against disclosure afforded to . . . communications between lawyer and client is based principally on a recognition of the very nature of the legal

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3. BELGIUM CRIMINAL CODE, art. 458 (2000).

4. Ph. Traest & J. Meese, *Het verschoningsrecht naar Belgisch Recht, in VERSCHONINGSRECHT IN HET STRAFRECHT VAN BELGIË EN NEDERLAND* (Wolf Legal Publishers, Nijmegen, 2006).

5. CODE OF CRIMINAL PROCEDURE (Wetboek van Strafvordering—“CCP”), art. 218 (1994); NETHERLANDS CODE OF CIVIL PROCEDURE (Burgerlijk Wetboek), art. 191 (1992); CODE OF ADMINISTRATIVE PROCEDURE, art. 8:33 (1992).

6. Michael Cosgrave, *Professional Secrecy, the position in England and Wales, in THE LAWYERS PROFESSIONAL SECRECY IN EUROPE* 31-33 (Larcier, Brussels-Ghent 2003).

7. Georges Albert Dal, *Le secret professionnel de l’avocat en Belgique, in THE LAWYERS PROFESSIONAL SECRECY IN EUROPE* 7 (Larcier, Brussels-Ghent 2003).

8. This is also the case in the Netherlands because of the wording of Article 218 of the Code of Criminal Procedure, Article 191 of the Code of Civil Procedure and Article 8:33 of the Code of Administrative Procedure. *See supra* note 5.

9. *Verordening op de praktijkuitoefening in dienstbetrekking van de Nederlandse Orde van Advocaten* (Directive on practice of in-house lawyers of the Dutch Bar Association), Nov. 27 1996, *Staatscourant* 1996, 239, last amended on June 26, 2008, *Staatscourant* 2008, 141.

10. The Court of Justice and the Court of First Instance of the European Communities are based in Luxembourg. Both Courts have jurisdiction over conflicts related to the interpretation and the implementation of the treaties establishing the European Union.

profession inasmuch as it contributes towards the maintenance of the rule of law, in other member states the same protection is justified by the more specific requirement (which, moreover, is also recognized in the first-mentioned states) that the rights of the defence must be respected.<sup>11</sup>

On the other hand, the ECJ said in the same decision:

Community law, which derives from not only the economic but also the legal interpenetration of the member states, must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client, that 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 the lawyer whose profession entails the giving of independent legal advice to all those in need of it. . . .<sup>12</sup>

Protection of confidentiality of communications between lawyers and clients is thus considered as part of “the principles and concepts common to the laws of the (member) states.”<sup>13</sup>

We will further see that the European Court of Human Rights (hereinafter ECtHR) has a similar approach, looking upon the matter as a specific aspect of the right to a fair trial and the right to privacy protected by Articles 6 and 8 of the European Convention on Human Rights (hereinafter ECHR).<sup>14</sup> The protection of professional confidentiality, in one form or another, is therefore a common feature of the national legal systems, and in the countries members of the EU, as in the Council of Europe member states.

The following paragraphs will focus on developments and case law that is relevant on a Europe wide scale and, particularly, the case law of the ECtHR established in relation to professional privilege.<sup>15</sup> The Court of Justice (ECJ) and the Court of First Instance (CFI) of the European Communities have also developed some case law but less abundant than the ECtHR and in relation to more peripheral aspects of the protection of

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11. Case 155/79, *AM & S Europe Ltd. v. Comm'n of the European Communities*, 1982 E.C.R. 1575, 2 C.M.L.R. 264.

12. *Id.*

13. *Id.*

14. The European Court of Human Rights is an institution established in the framework of the Council of Europe. The ECtHR has jurisdiction over violations of the European Human Rights Convention.

15. See European Court of Human Rights, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited Sept. 21, 2008) (displaying a database of all case law of the European Court of Human Rights); European Court of Justice and the Court of First Instance, <http://curia.europa.eu/> (last visited Sept. 2, 2008) (listing all case law of the Court of Justice and the Court of First Instance of the European Communities).

the confidentiality of lawyer client communications, such as in the recent *Akzo Nobel Chemicals and Akros Chemicals v. Commission* case.<sup>16</sup> At stake in this case was whether communications between clients and in-company lawyers could benefit from the protection of confidentiality in relation to investigations by the European Commission into the way companies apply the European competition rules.<sup>17</sup> The CFI decided that they could not.<sup>18</sup> One of the reasons for the CFI to decide so was that there is no text in European law on this matter and that practices vary between member states.<sup>19</sup>

Before looking into the case law of the ECtHR however it is necessary to briefly look into the texts.

## II. EUROPEAN LAW AND INTERSTATE INSTRUMENTS OF EU-MEMBERS STATES

Neither the EU treaties nor the ECHR refer explicitly to professional privilege for lawyers, but there are other regulations, most of them non-binding, that do contain provisions concerning professional privilege.

The right of a person charged with a criminal offence to communicate with defence counsel without hindrance is set forth within the Council of Europe, in Article 93 of the—non binding—*Standard Minimum Rules for the Treatment of Prisoners* (annexed to Resolution (73) 5 of the Committee of Ministers), which states that:

An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representative, or shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request he shall be given all necessary facilities for this purpose. In particular, he shall be given the free assistance of an interpreter for all essential contacts with the administration and for his defence. Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.

In another context, only relating to proceedings at the ECtHR, the *European Agreement Relating to Persons Participating in Proceedings*

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16. Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, 2007 E.C.R. (not yet reported).

17. *See id.*

18. *See id.*

19. *See id.*

of the *European Court of Human Rights*,<sup>20</sup> which is binding in 35 member states provides in Article 3 para. 2:

As regards persons under detention, the exercise of this right [the right 'to correspond freely with the Court'—see paragraph 1 of the Article, TS & JF] shall in particular imply that:

...

c. such persons shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to an application to the Court, or any proceedings resulting therefrom.

Article 41 of the Charter of Fundamental Rights of the EU, as far as relevant, reads:

#### Article 41

##### Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes . . . 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. . . .

Up to this point the Charter is however not binding. The Treaty of Lisbon<sup>21</sup> amends Article 6 of the EU treaty to provide recognition of the Charter of Fundamental Rights. The Charter will however only be binding when national governments implement EU law and Article 41 refers only to the handling of affairs by the institutions and bodies of the Union. Furthermore it is not very clear whether Article 41 is protecting privilege or stipulating exceptions to the right to access to the file. One can therefore conclude that professional privilege and the protection of it is not explicitly foreseen by European law, nor by EU-law nor by any other legal instrument that is binding to European countries in the framework of the Council of Europe.

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20. European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights, CETS No.: 161.

21. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, 2007/C 306/01. The Treaty of Lisbon is not yet ratified by all EU member states.

### III. EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

The ECtHR, however, did examine the question of confidentiality and professional privilege protecting the lawyer-client communication through various articles of the ECHR. More specifically the ECtHR related the issue of professional privilege to Article 6,<sup>22</sup> protecting the right to a fair trial, and Article 8,<sup>23</sup> protecting the right to privacy.

### IV. PROFESSIONAL PRIVILEGE AND RIGHT TO A FAIR TRIAL

Article 6 guarantees different rights, some of which have been considered as relevant to the confidentiality of the lawyer-client relation. In a landmark decision on professional privilege, the case of *Niemitz v. Germany*, the ECtHR states in general terms "where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the

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#### 22. Article 6. Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### 23. Article 8. Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

rights guaranteed by Article 6 of the Convention.”<sup>24</sup> The Court refers to Article 6 of the Convention as a whole and even broader to possible repercussions of an infringement of professional privilege “on the proper administration of justice.”<sup>25</sup>

In other decisions the ECtHR refers to specific rights guaranteed by Article 6. In order to be able to protect the confidentiality of lawyer client communications a suspect must of course have the possibility to contact freely a lawyer and vice versa. In the *Golder v. UK* case, the applicant was detained and was not allowed to consult a lawyer in order to seek advice to institute proceedings against a prison guard.<sup>26</sup> The applicant argued that this was a violation of Article 6 § 1 of the ECHR which guarantees the right to have access to a court.<sup>27</sup>

The Court stated:

40. . . . In these circumstances, Golder could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 para. 1.<sup>28</sup>

In the case of *Schönenberger and Durmaz v. Switzerland*, the Prosecution stopped a letter sent by M. Schönenberger, a lawyer, to his client M. Durmaz who was at that time in detention.<sup>29</sup> Schönenberger gave the advice in the letter to remain silent.<sup>30</sup> M. Durmaz, ignorant about the intervention of M. Schönenberger, appointed on the instigation of the Prosecutor another lawyer.<sup>31</sup>

To support their argument that the contested stopping of the letter was necessary, the Swiss Government before the ECtHR relied in the first place on the contents of the letter in issue: according to the Government, it gave Mr. Durmaz advice relating to pending criminal proceedings which was of such a nature as to jeopardize their proper conduct.<sup>32</sup> The ECtHR rejects that argument by reaffirming the right of a

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24. Niemietz v. Germany, App. No. 13710/88, 251-B Eur. H.R. Rep. 97 (1992).

25. *Id.*

26. *Golder v. United Kingdom*, App. No. 4451/70, 18 Eur. H.R. Rep. 524 (1975).

27. *Id.*

28. *Id.*

29. *Schönenberger and Durmaz v. Switzerland*, App. No. 11368/85, 137 Eur. H.R. Rep. 202 (1988).

30. *Id.*

31. *Id.*

32. *Id.*



suspect to remain silent, being a right enshrined in Article 6.<sup>33</sup> Although the applicant had only claimed a violation of Article 8, the ECtHR decided that the interference was therefore not necessary in a democratic society and in breach with Article 8.<sup>34</sup>

In *S. v. Switzerland*, the ECtHR defined the right to communicate confidentially with a lawyer as an aspect of Article 6, paragraph 3 (c) of the Convention which protects the right of a suspect to defend himself in person or through legal assistance of his own choosing.<sup>35</sup>

The ECtHR 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. 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.<sup>36</sup>

In conclusion to this point it can be stated that the ECtHR has related the protection of professional privilege to several rights protected by Article 6 of the Convention: access to a court when the suspect is hindered in his or her attempts to contact a lawyer,<sup>37</sup> access to a lawyer of his or her own choice when the contact with the lawyer is submitted to (excessive) surveillance,<sup>38</sup> and monitoring and the right to legal assistance.<sup>39</sup>

Surprisingly, the ECtHR has never examined the protection of professional privilege as an essential condition to make the *nemo tenetur* principle enshrined in Article 6, paragraphs 1 and 2 ECHR effective. Although the right to silence and the right not to incriminate oneself is not explicitly mentioned in Article 6 of the Convention, the ECtHR considers these rights generally-recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. According to the Court their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the

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33. *Id.*

34. *Schönenberger and Durmaz*, 137 Eur. H.R. Rep. 202.

35. *S. v. Switzerland*, App. No. 13325/87, 220 Eur. H.R. Rep. 670 (1991).

36. *Id.*

37. *See Golder v. United Kingdom*, App. No. 4451/70, 18 Eur. H.R. Rep. 524 (1975).

38. *See S.*, 220 Eur. H.R. Rep. 670.

39. *See Schönenberger and Durmaz*, 137 Eur. H.R. Rep. 202.

fulfillment of the aims of Article 6.<sup>40</sup> The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seeks to prove its case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (Article 6-2).<sup>41</sup>

The principle that the burden of the proof is on the Prosecution and that nobody has to contribute to his or her conviction requires that a suspect can communicate freely and confidentially with his or her lawyer and that whatever information given to the lawyer in whatever form, orally or written, will be protected from scrutiny by the authorities. Indeed if that would not be the case the suspect could be forced to incriminate him or herself because an effective defence requires that all information, even information that is unfavourable to his defence, should be shared with the lawyer. If that information would not benefit protection of confidentiality, the suspect would have to choose between sharing the information in order to benefit from an effective defense or benefit from the protection of the *nemo tenetur* principle. Such a choice is incompatible with a fair trial in a democratic society. Confidentiality of the lawyer-client communication is therefore essential. Until now no case in which information collected in breach of professional privilege and used by the prosecution against the suspect has yet been submitted to the ECtHR.

## V. PROFESSIONAL PRIVILEGE AND PRIVACY

The most important decisions in relation to the protection of confidentiality in the lawyer-client relation taken by the ECtHR are however based on Article 8 ECHR, protecting private life. In each of these cases the ECtHR applies its traditional checklist in order to establish whether there is a violation of the right to privacy:<sup>42</sup>

- Was there an interference with the right to privacy?
- Was the interference in accordance with the law? This refers not only to the existence of a legal regulation but also to the quality of the law: foreseeability and accessibility.
- Did the interference pursue one of the legitimate aims mentioned in Article 8 § 2 ECHR, e.g., was the interference

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40. See, e.g., *Funke v. France*, App. No. 10828/84, 256 Eur. H.R. Rep. 297 (1993); *Saunders v. U.K.*, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996).

41. See *Funke*, 256 Eur. H.R. Rep. 297; *Saunders*, 23 Eur. H.R. Rep. 313.

42. See *Kruslin v. France*, App. No. 11801/85, 12 Eur. H.R. Rep. 547 (1990).

necessary in a democratic society? Was there a pressing social need? Was the requirement of proportionality met?

## VI. INTERFERENCE IN PRIVATE LIFE APPLIES TO PROFESSIONAL RELATIONS

In *Niemietz v. Germany* the discussion was whether Article 8 applied to business premises at all.<sup>43</sup> The German State argued that there could be no question of an interference with the applicant's private life because the searches at stake were conducted in his professional premises, a lawyer's office.<sup>44</sup> The ECtHR however interpreted the words "private life" and "home" as including certain professional or business activities or premises and considered that the protection afforded by Article 8 extends to all business premises, including lawyer's offices.<sup>45</sup> In later decisions the seizure or withholding of letters from clients to lawyers and vice versa,<sup>46</sup> seizure of hard disks,<sup>47</sup> monitoring of lawyers telephone lines<sup>48</sup>, were all considered as interferences with Article 8 of the Convention.

In *Campbell v. U.K.*, the ECtHR reiterated that communications between lawyers and detained clients are in principle protected by Article 8 of the Convention.<sup>49</sup>

46. 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. . . . It was considered, in the context of Article 6, that if a lawyer were unable to confer with his client without such surveillance, and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.<sup>50</sup>

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43. *Niemietz v. Germany*, App. No. 13710/88, 251-B Eur. H.R. Rep. 97 (1992).

44. *Id.* at 105.

45. *Id.* at 112.

46. *See, e.g.*, *Schönenberger and Durmaz v. Switzerland*, App. No. 11368/85, 137 Eur. H.R. Rep. 202 (1988); *Campbell v. U.K.*, App. No. 13590/88, 233 Eur. H.R. Rep. 137 (1993); *Foxley v. U.K.*, App. No. 33274/96, 31 Eur. H.R. Rep. 637 (2000).

47. *See, e.g.*, *Sallinen v. Finland*, App. No. 50882/99, 44 Eur. H.R. Rep. 18 (2007); *Smirnov v. Russia*, App. No. 71362/01, Eur. Ct. H.R. 71362/01 (2007); *Wieser v. Austria*, App. No. 74336/01, 46 Eur. H.R. Rep. 54 (2008).

48. *Kopp v. Switzerland*, App. No. 23224/94, 27 Eur. H.R. Rep. 91 (1999); *Ass'n for Eur. Integration and Human Rights v. Bulgaria*, App. No. 62540/00, Eur. Ct. H.R. 62540/00; *Aalmoes v. Netherlands*, Eur. Ct. H.R. 16269/02 (2004) (regarding the decision as to admissibility).

49. *Campbell*, 233 Eur. H.R. Rep. 137.

50. *Id.* at 160-61, para. 46.

The Court then decided that the protection of Article 8 extends to all written communications between lawyers and detained clients:

48. . . . [T]he Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8.<sup>51</sup>

The case law of the ECtHR is thus very clear: the confidential relationship between lawyers and their clients is in principle protected by the right to privacy under Article 8 ECHR.

However not all interferences with the right to privacy amount to a breach of rights under Article 8. Interference can be legitimate under some circumstances if in accordance with the law and necessary in a democratic society.<sup>52</sup> This is no different for the privileged communications between lawyers and clients. The mere existence of professional privilege is not—as such—an absolute obstacle to interference with the right to privacy.<sup>53</sup>

#### VII. IN ACCORDANCE WITH THE LAW AND NECESSARY IN A DEMOCRATIC SOCIETY?

In order to decide whether the interference with communications benefiting from the professional privilege has led to a violation of the rights protected under Article 8, the ECtHR will apply first the set of standards mentioned above. The ECtHR will, e.g., look at the compatibility of the interference with the national law.<sup>54</sup> It will examine the quality of the law as to its foreseeability.<sup>55</sup>

Although the applicability in a specific case of professional privilege does not make a formal difference, the ECtHR will take the protection of professional privilege into consideration in different ways—mainly by applying the general criteria in a strict way. For example in *Foxley v. U.K.* the seizure of letters from and to a lawyer was considered not to be “in accordance with the law” because the seizure went on for a short period after the Court order allowing to do so expired.<sup>56</sup> Furthermore, when the national law has some provision on the

51. *Id.* at 161, para. 48.

52. *See, e.g., Kopp*, 27 Eur. H.R. Rep. at 105, para. 61; *Foxley*, 31 Eur. H.R. Rep. at 647, para. 43.

53. *See, e.g., Kopp*, 27 Eur. H.R. Rep. at 103, para. 38; *Foxley*, 31 Eur. H.R. Rep. at 643-44, para. 31.

54. *See, e.g., Kopp*, 27 Eur. H.R. Rep. at 114, para. 59; *Foxley*, 31 Eur. H.R. Rep. at 642, paras. 24-26.

55. *See, e.g., Kopp*, 27 Eur. H.R. Rep. at 114, para. 55; *Foxley*, 31 Eur. H.R. Rep. at 644, para. 34.

56. *Id.* at 645, para. 35.

protection of professional privilege, the ECtHR will interpret it in a strict way.<sup>57</sup> The Swiss law prohibits telephone tapping of a lawyer as a third party (when the lawyer is not a suspect in the case).<sup>58</sup> In *Kopp v. Switzerland*, the government argued that the monitoring in this particular case was not aimed at the applicant acting as a lawyer, but targeted in fact his wife.<sup>59</sup> It referred to the opinions of academic writers and the Federal Court's case law to the effect that legal professional privilege covered only matters connected with a lawyer's profession.<sup>60</sup> The ECtHR rejected that argument, stating that it did not have to speculate on the capacity in which Kopp was subject to surveillance and decided that the Swiss law was not clear and therefore not foreseeable.<sup>61</sup>

In *Petri Sallinen v. Finland*, where the lawyer was considered a suspect himself, the ECtHR went even a step further stating:

... The Court concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of applicable regulations specifying with an appropriate degree of precision the circumstances in which privileged material could be subject to search and seizure deprived the applicants of the minimum degree of protection to which they were entitled under the rule of law in a democratic society.<sup>62</sup>

And it decided also:

[T]he Court finds the text unclear as far as it concerns confidentiality. The above-mentioned domestic law does not state with the requisite clarity whether the notion of "pleading a case" covers only the relationship between a lawyer and his or her clients in a particular case or their relationship generally. The Court refers to a lawyer's general obligation of professional secrecy and confidentiality. In this respect the Court refers to the Recommendation of the Committee of Ministers, according to which states should take all necessary measures to ensure the respect of the confidentiality of the client-lawyer relationship.<sup>63</sup>

The Court does not reject in principle interferences with the communication between lawyers and clients but demands first of all that

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57. Cf. *Kopp*, 27 Eur. H.R. Rep. at 117, para. 75 (stating that "Swiss law, whether written or unwritten, does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter.").

58. *Id.* at 114, para. 56.

59. *Id.* at 100, para. 31(b).

60. *Id.* at 103, paras. 38-9.

61. *Id.* at 117, para. 75.

62. *Sallinen v. Finland*, App. No. 50882/99, 44 Eur. H.R. Rep. 18, 372, para. 92 (2007).

63. *Id.* at 372, para. 87.

the law should be particularly clear,<sup>64</sup> interpreted by the national courts in a way that is protective to the privilege,<sup>65</sup> and thirdly that special and sufficient safeguards exist to protect the legal privilege.<sup>66</sup> If not, the search and seizure is not “in accordance with the law” because the qualitative requirements of the law are not met.<sup>67</sup>

In most cases however where the ECtHR came to the conclusion that there had been a violation of Article 8, it decided that the interference with the professional privilege was not “necessary in a democratic society.”<sup>68</sup> The very notion of “necessity in a democratic society” implies an aspect of proportionality. The protection of private life in this framework is therefore a relative one, as expressed in the case of *The Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria*.<sup>69</sup> In this case, the ECtHR formulated general standards that apply to any case in which phone tapping has been used and that are not specific to communications protected by lawyer-client confidentiality.<sup>70</sup> The ECtHR ruled that in the context of covert measures of surveillance, the law must be sufficiently clear in its terms to give citizens an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.<sup>71</sup> In view of the risk of abuse intrinsic to any system of secret surveillance, such measures must be based on a law that is particularly precise.<sup>72</sup> The ECtHR continues:

76. To ensure the effective implementation of the above principles, the Court has developed the following minimum safeguards that should be set out in statute law to avoid abuses: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their communications monitored; a limit on the duration of such monitoring; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which data obtained may or must be erased or the records destroyed.

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64. *Id.* at 372, para. 90.

65. *Id.* at 374, para. 103.

66. *Id.* at 372, para. 92.

67. *Sallinen*, 44 Eur. H.R. Rep. at 372, para. 93.

68. *Id.* at 367, para. 57.

69. *Ass'n for Eur. Integration and Human Rights v. Bulgaria*, App. No. 62540/00, Eur. Ct. H.R. 62540/00, paras. 76-77 (2007) (citations omitted).

70. *See id.*

71. *Id.* at para 75.

72. *Id.* at para 75.

77. . . . [I]n the context of secret measures of surveillance by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection against arbitrary interference with art 8 rights. The Court must be satisfied that there exist adequate and effective guarantees against abuse. This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law.<sup>73</sup>

When professional privilege is at stake, the ECtHR seems however to demand for additional safeguards. In several judgments concerning professional privilege the ECtHR expressed that supervision of the surveillance should be done by an independent judge.<sup>74</sup> In *Niemietz v. Germany* the fact that the warrant was drawn in broad terms is mentioned as an element of appreciation by the Court.<sup>75</sup> A broadly formulated and imprecise warrant exposes the confidentiality of materials protected under professional secrecy to particular risks.<sup>76</sup> In the case of *Wieser and Bicos Beteiligungen GmbH v. Austria* the distinction between general and specific safeguards is clearly stated:

Elements taken into consideration are, in particular, whether the search was based on a warrant issued by a judge and based on reasonable suspicion, whether the scope of the warrant was reasonably limited and—where the search of a lawyer’s office was concerned—whether the search was carried out in the presence of an independent observer in order to ensure that materials subject to professional secrecy were not removed.<sup>77</sup>

In this case the Court decided that there had been a violation although the representative of the Bar was present during the search.<sup>78</sup> The fact that that representative was able to examine all written documents but not the electronic data led the Court to the conclusion that there had been a violation of Article 8 ECHR.<sup>79</sup> The fact that the law or practice provides for the presence of an independent observer is thus not enough. The observer has to be able—from a practical standpoint—to operate an

73. *Id.* at paras. 76-77.

74. *See, e.g.,* *Sallinen v. Finland*, App. No. 50882/99, 44 Eur. H.R. Rep. 18 (2007); *Kopp v. Switzerland*, App. No. 23224/94, 27 Eur. H.R. Rep. 91 (1999).

75. *See Niemietz v. Germany*, App. No. 13710/88, 251-B Eur. H.R. Rep. 97, paras. 30, 37 (1992).

76. *Id.*

77. *Wieser v. Austria*, App. No. 74336/01, 46 Eur. H.R. Rep. 54, 1353, para. 57 (2008).

78. *Id.* at 1354, para. 63.

79. *Id.*

effective selection of materials protected by professional secrecy. Also in *Smirnov v. Russia* the absence of independent observers is considered as an element of appreciation of the proportionality of the interference with Article 8 rights and is clearly distinct from the general safeguards required for every citizen.<sup>80</sup> Specific special safeguards to be taken into consideration by the Court are: “a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege.”<sup>81</sup>

In *Aalmoes a.o. v. Netherlands*—besides the role played by a representative of the Bar—the existence of a complex legal framework that is supposed to offer safeguards against violations of the professional privilege was the major reason for the ECtHR to declare the application inadmissible:

[T]he Court considers that 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. The suggestion that information conveyed by or to a lawyer in the latter’s professional capacity is susceptible to interception, particularly by criminal investigation authorities who may have a direct interest in obtaining such information, is not in keeping with the principles of confidentiality and professional privilege attaching to relations between a lawyer and his or her clients. It is for this reason that, in principle, lawyers have in their professional contacts with clients a reasonable expectation of protection and respect for their professional privacy.

In order to secure respect for this reasonable expectation, it is therefore required that the interception of telecommunications be subject to an adequate system of supervision. In this area, faced with evolving and sophisticated technology and the possibility of human error or abuse, the Court considers that it is in principle desirable to entrust the supervisory control to a judge.

It notes that, under the Netherlands domestic rules, judicial supervision takes place at various stages:

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80. See *Smirnov v. Russia*, App. No. 71362/01, Eur. Ct. H.R. 71362/01, para. 44 (2007).

81. *Id.* at para. 48 (citation omitted).



- when the investigating judge authorises the public prosecutor to issue an initial interception order and on each occasion when the investigating judge authorises a prolongation thereof;
- when the public prosecutor seeks authorisation from the investigating judge to add to the case file information not falling within the ambit of the privilege of non-disclosure under Article 218 of the CCP, but which information has been conveyed to or by a person enjoying the privilege of non-disclosure;
- when—a lawyer being the suspect—the public prosecutor seeks authorisation from the investigating judge to add to the case file information that has been identified by the public prosecutor—with the assistance of the competent member of the local Bar Association—as not falling within the ambit of the privilege of non-disclosure; and,
- when the suspect is committed for trial, in the proceedings before the trial court where an argument based on Article 359a of the CCP can be raised, claiming that information falling within the ambit of the privilege of non-disclosure had been unlawfully obtained and/or unlawfully retained.

In the light of these considerations and its detailed examination of the impugned legal rules on the interception of telecommunications, the Court is of the opinion that the possible interference with the exercise of the applicants' right to respect for private life and correspondence in this field can reasonably be regarded as falling within the limits of what is necessary in a democratic society for the prevention of crime, as envisaged by Article 8 § 2.<sup>82</sup>

#### VIII. EXCEPTIONS TO THE PROTECTION OF PROFESSIONAL PRIVILEGE

The question whether—and to what extent—the right to confidentiality in the lawyer-client relationship can be submitted to restrictions is another matter that has been discussed within the ECtHR. Several decisions seem to admit some forms of restrictions and of striking a balance between contradictory interests.

In the case of *S. v. Switzerland*, the applicant was detained.<sup>83</sup> He was not allowed to correspond freely with his lawyer; visits of the lawyer took place under the supervision of a police official.<sup>84</sup> Three of the

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82. *Aalmoes v. Netherlands*, Eur. Ct. H.R. 16269/02 (2004).

83. *See S. v. Switzerland*, App. No. 13325/87, 220 Eur. H.R. Rep. 670 (1991).

84. *Id.* at 672, para. 15.

applicant's letters to his lawyer were intercepted and were later used for the purpose of graphological reports.<sup>85</sup> On an appeal by the applicant, the Zurich Court of appeal upheld the restrictions imposed upon the free communication from the applicant with his lawyer with the following consideration:

As the accused represented by Mr. Garbade and Mr. Rambert are exercising their right to refuse to make any statements, one cannot ignore the risk that defence counsel will not only co-ordinate their tactical and legal way of proceeding but may also, intentionally or not, adversely affect the ascertainment of the material truth. In these circumstances, precisely in the case of offences of this type which must be regarded as attacks on public and social order, there are sufficient indications pointing to a danger of collusion in the person of defence counsel.<sup>86</sup>

Although the ECtHR decided that there had been violation of Article 6 ECHR, it also took the stand that not all restrictions to the confidentiality of the lawyer-client communication can be rejected in principle:

49. The risk of "collusion" relied on by the Government does, however, merit consideration. . . .

Such a possibility, however, notwithstanding the seriousness of the charges against the applicant, cannot in the Court's opinion justify the restriction in issue and no other reason has been adduced cogent enough to do so. There is nothing extraordinary in a number of defence counsel collaborating with a view to co-ordinating their defence strategy. Moreover, neither the professional ethics of Mr. Garbade, who had been designated as court-appointed defence counsel by the President of the Indictments Division of the Zürich Court of Appeal, nor the lawfulness of his conduct were at any time called into question in this case.<sup>87</sup>

Interesting is the discussion that developed within the Court as reflected by a dissenting and a concurring opinion. In a separate opinion, Judge Matscher said:

I voted with the majority in respect of the violation of Article 6(3)(b), but I wish to make the following points:

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85. *Id.*

86. *Id.* at 674, para. 24 (quoting Civil Division opinion).

87. *Id.* at 688-89, para. 49.

1. I acknowledge that, in principle, it must be possible for a defendant to communicate with his defence counsel freely and without surveillance.

2. However, this is not an absolute principle; there are exceptional situations where surveillance of the defendant's communications with his counsel may be necessary and hence compatible with the principle stated above. That this may be a real necessity is shown by the not so infrequent cases of serious collusion between lawyers and persons in custody which have occurred in several countries in recent years.

My criticism of the reasoning of the present judgment is that it—correctly—sets out the principle but—wrongly—does not explicitly allow for the possibility of exceptions, which in my opinion is an essential corollary of the principle, both being necessary in the interests of the proper administration of justice.<sup>88</sup>

In a concurring opinion, in total opposition to the opinion of Judge Matscher, Judge de Meyer stated:

I consider it advisable to emphasise that the freedom and inviolability of communications between a person charged with a criminal offence and his counsel are among the fundamental requirements of a fair trial. They are inherent in the right to legal assistance and are essential for the effective exercise of that right.

....

The same applies to communications between a lawyer and his colleagues. It is perfectly legitimate for him to act in concert with them. The fact that this may lead to a co-ordination of defence strategy cannot—even or especially in the case of serious offences—be used as a pretext for the restriction or surveillance of communications between a lawyer and his client.

I do not think that there can be any exceptions to these principles.<sup>89</sup>

In a terrorist case, *Erdem v. Germany*, the correspondence between the detained applicant and his lawyer was monitored under powers contained in Section 148(2) of the German Code of Criminal Procedure.<sup>90</sup> Section 148(2) reads:

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88. *S.*, 220 Eur. H.R. Rep. at 691 (Matscher, J., separate opinion).

89. *Id.* (de Meyer, J., concurring).

90. *Erdem v. Germany*, App. No. 38321/97, 35 Eur. H.R. Rep. 15 (2002).

If the accused is in custody and the investigation concerns an offence under Article 129a of the Criminal Code [membership of a terrorist organisation], access to written or other documents must be refused unless the sender agrees to their first being examined by a judge. . . . In cases in which correspondence has to be monitored . . . adequate measures shall be taken to avoid written or other documents being handed over at meetings between prisoners and their lawyers.<sup>91</sup>

Section 148(a)(2) of the German Code of Criminal Procedure provides that the judge with responsibility for such surveillance measures shall not have part in, and may not be assigned to conduct of the investigation and shall keep the information thus obtained confidential, unless it concerns a serious or very serious offence.<sup>92</sup> The ECtHR decided that professional privilege could be set aside in these specific circumstances, striking a balance between the necessity of combating terrorism and the protection of individual rights:

68. The Court reiterates that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.

69. Having regard to the threat posed by terrorism in all its forms, the safeguards attached to the monitoring of correspondence in the instant case and the margin of appreciation afforded to the State, the Court holds that the interference in issue was not disproportionate to the legitimate aims pursued.<sup>93</sup>

## IX. PROFESSIONAL PRIVILEGE UNDER PRESSURE

Despite the protective measures prescribed by the ECtHR in its case law, in general the tendency in Europe in relation to the confidentiality of lawyer client communications is towards erosion of the protection.

The emphasis put on the fight against terrorism and organised crime is largely responsible for this trend. The checks and balances that were carefully built over the years, established a difficult equilibrium between procedural safeguards necessary to guarantee a fair trial and the ascertainment of the material truth. That balance is now sometimes disrupted. Ascertainment of the material truth becomes a more overriding interest especially in matters of organized and trans-border crimes.

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91. STRAFPROZEBORDNUNG [StPO] (CODE OF CRIMINAL PROCEDURE), BUNDESGESETZBLATT [RGBl], I, 1074, as corrected on page 1319, § 148(2) (1987).

92. *Id.*

93. *Erdem*, 35 Eur. H.R. Rep. at 398, paras. 68-69 (citations omitted).

Legislation permitting new and very intrusive investigative methods have been adopted in many European countries.<sup>94</sup> Large-scale phone taps, secret searches of houses and premises, video and audio observation, infiltration in criminal groups, and monitoring of email exchanges have become part of the daily arsenal of police forces.<sup>95</sup> Each of these methods has consequences for the protection of the confidentiality of communications between lawyers and clients. Such methods are often facilitated by new technologies allowing massive surveillances. Phone taps for example are no longer recorded on a magnetic tape, but are recorded on data carriers that can be “scanned” later with modern software<sup>96</sup>.

The problem that arises for the professional privilege related to phone taps in the Netherlands is an eloquent example. The law on special investigative methods<sup>97</sup> allows phone taps and is used on a massive scale in criminal investigations.<sup>98</sup> All conversations on a tapped phone are registered automatically.<sup>99</sup> Conversations benefiting from the privilege of non-disclosure should be destroyed.<sup>100</sup>

94. *See generally* SUSPECTS IN EUROPE: PROCEDURAL RIGHTS AT THE INVESTIGATIVE STAGE OF THE CRIMINAL PROCESS IN THE EUROPEAN UNION (Ed Cape et al. eds., Intersentia Antwerpen, Oxford 2007).

95. *See id.* at 41-43, 66-68, 86-87, 111-12, 136-37, 163-65, 188-90.

96. *See* KIRSTIE BALL ET AL., A REPORT ON THE SURVEILLANCE SOCIETY (D.M. Wood ed., 2006), available at [http://www.ico.gov.uk/upload/documents/library/data\\_protection/practical\\_application/surveillance\\_society\\_full\\_report\\_2006.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf); A.H.Vedder, J.G.L. van der Wees, B. J. Koops en P. de Hert, Van privacyparadijs tot controlestaat? Misdaad- en terreurbestrijding in Nederland aan het begin van de 21ste eeuw. Den Haag: Rathenau Instituut, 2007; Studie 49.

97. Wet Bijzondere Opsporingsbevoegdheden, 1 Feb. 2000, Stb. 245.

98. *See* Memorandum van Hirsch Ballin, Minister of Justice to the Dutch Parliament, nr. 5546537/08 (May 28, 2008), available at [http://www.nrc.nl/binnenland/article1900270.ece/1.700\\_gesprekken\\_per\\_dag\\_afgetapt](http://www.nrc.nl/binnenland/article1900270.ece/1.700_gesprekken_per_dag_afgetapt) (stating that in the past half year 12,491 telephones were tapped in the course of criminal investigations which amounted to an average of 1,681 telephone taps a day; one telephone tap may last from a few weeks to several years).

99. *See* COLLEGE BESCHERMING PERSOONSgegevens (PERSONAL DATA PROTECTION AUTHORITY), ONDERZOEK NAAR DE WAARBORGING VAN DE VERTROUWELIJKE COMMUNICATIE VAN ADVOCATEN BIJ DE INTERCEPTIE VAN TELECOMMUNICATIE (2003), available at [http://www.cbweb.nl/downloads\\_rapporten/rap\\_2003\\_beroeepsgeheim\\_advocaten.pdf?refer=true&theme=purple](http://www.cbweb.nl/downloads_rapporten/rap_2003_beroeepsgeheim_advocaten.pdf?refer=true&theme=purple).

100. Article 126aa, paragraph 2 of the Code of Criminal Procedure (Wetboek van Strafvordering—“CCP”) provides:

2. To the extent that the written records or other objects contain information conveyed by or to a person entitled to rely on the privilege of non-disclosure by virtue of Article 218 [of the CCP] if he or she were to be questioned as a witness about the contents of that information, these written records and other objects shall be destroyed. Rules for this shall be given by Order in Council (Algemene Maatregel van Bestuur).

According to a formal step-by-step instruction to investigating officers contained in the “Destruction of intercepted conversations with persons enjoying the privilege of non-disclosure” issued by the Board of Procurators General on 12 March 2002, intercepted telephone conversations with lawyers are first transcribed by the police and are then submitted to the prosecutor who orders the destruction of the recordings if he considers that the privilege applies.<sup>101</sup> This entails that both the police and the public prosecutor become aware of the contents of each confidential communication between a lawyer and a client that has been intercepted by means of an investigative power. This in itself can be considered in breach of the attorney client privilege, because as a consequence it is the prosecutor who decides whether the transcripts should be destroyed or not and moreover he does so after reading the information contained in privileged conversations. The police and the prosecutor are then supposed to “forget” the information or at least to make total abstraction of it during the further investigation. It is patently obvious that no human brain could do so. Although this practice was before the ECtHR in the aforementioned case of *Aalmoes v. Netherlands*, the decision of the Court did not take into consideration the argument that the very essence of professional privilege is abolished if the police and the prosecutor are allowed to review confidential information before ordering its destruction.<sup>102</sup> Practice in the Netherlands proved to be even worse. Lawyers discovered transcripts of their conversations with clients in the case file. A series of Court decisions in serious cases of organized crime declared the prosecution inadmissible or excluded evidence because in the course of the trial it appeared that the prosecutor had not complied with the legal obligation to destroy privileged materials.<sup>103</sup> The Public Prosecution Office promised to do better in the future but argued at the same time that such “accidents” are inevitable and should be “understood” in the light of the necessity to discover the truth in serious criminal cases.<sup>104</sup>

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101. Memo from the Board of Procurators General on the Destruction of Intercepted Conversations with Persons Enjoying the Privilege of Non-Disclosure (Mar. 12, 2002).

102. See generally *Aalmoes v. Netherlands*, Eur. Ct. H.R. 16269/02 (2004).

103. Court of Appeals-Gravenhage, 9-2-2006, Nieuwsbrief Strafrecht 2006, 118; District Court Amsterdam, 7-6-2006, [www.rechtspraak.nl](http://www.rechtspraak.nl) LJN: AX7135; District Courts-Gravenhage 25-1-2007, [www.rechtspraak.nl](http://www.rechtspraak.nl) LJN: AZ7021; District Court Rotterdam 20-2-2007, Nieuwsbrief Strafrecht 2007, 145; Court of Appeals-Gravenhage 3-4-2007, [www.rechtspraak.nl](http://www.rechtspraak.nl) LJN:BA2127; Court of Appeal Amsterdam 20-6-2007, [www.rechtspraak.nl](http://www.rechtspraak.nl) LJN: BA7722; Supreme Court 2-10-2007, Nieuwsbrief Strafrecht 2007, 389; District Courts-Gravenhage 7-12-2007, Nieuwsbrief Strafrecht 2007, 468; Court of Appeal Amsterdam 13-2-2008, Nieuwsbrief Strafrecht 2008, 90.

104. See Written Reply of the Minister of Justice Hirsch Ballin (Jan. 28, 2008) (addressing questions put to him in Parliament regarding the telephone tapping of conversations with lawyers). Tweede Kamer 2007-2008 Aanhangsel van de

Other sources of erosion of the protection of confidentiality are the money laundering regulations. Directives to combat money laundering have been adopted on the level of the European Union and transposed into national law of the member states.

Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001,<sup>105</sup> amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering<sup>106</sup> extends to lawyers the obligation to inform the competent authorities of any suspicion of money laundering imposed earlier upon financial institutions.<sup>107</sup> The 2001 Directive does contain some provisions supposed to protect professional privilege.<sup>108</sup> However, several professional organizations of lawyers criticized the vague character of these provisions.<sup>109</sup> Belgian bar associations brought actions to the Belgian Arbitration Court (now Constitutional Court) for the annulment of various articles of the law transposing this directive into the Belgian legal order. The Constitutional Court referred the case for a preliminary ruling to the Court of Justice of the European Union (ECJ).<sup>110</sup>

In the center of the debate before the ECJ was the nature of the activities of lawyers that could benefit from the protection of confidentiality: is mere advice, not related to any litigation, protected by the privilege?<sup>111</sup> The bar associations argued that all activities of lawyers should benefit from the protection.<sup>112</sup> If not, the right to a fair trial would

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Handelingen, no.1048. In a speech to the annual meeting of the Dutch Bar Association on 19 September 2008, the Chair of the Board of Procurators General and head of the Public Prosecution Service admitted that it cannot be guaranteed that confidential material will be always destroyed and urged the government to look for other ways to protect privileged conversations.

105. Council Directive 2001/97, 2001 O.J. (L 344) 76 (EC).

106. Council Directive 91/308, 1991 O.J. (L 166) 77 (EC).

107. See Council Directive, *supra* note 105.

108. *Id.*

109. See, e.g., THE COUNCIL OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN UNION (CCBE), POSITION OF THE COUNCIL OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN UNION (CCBE) ON THE REQUIREMENTS ON A LAWYER TO REPORT SUSPICIONS OF MONEY LAUNDERING AND ON THE EUROPEAN COMMISSION PROPOSAL FOR A THIRD EU DIRECTIVE ON MONEY LAUNDERING REGULATIONS (2004), *available at* [http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/ccbe\\_position\\_paper\\_1\\_1183722651.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/ccbe_position_paper_1_1183722651.pdf).

110. See *Orde des barreaux francophones et germanophones a.o. v. Council of Ministers*, Belg. Const. Ct., Nrs. 3064 en 3065, (2008) (Belg.).

111. *Orde des barreaux francophones et germanophones v. the Council of Ministers*, C-305/05, 2007 E.J.C. (ruling in reference to a preliminary ruling under Article 234 EC from the Belgian Constitutional Court); Opinion of advocate general Poiares Maduro, paras. 51-53 (Dec. 14, 2006).

112. Opinion of advocate general Poiares Maduro, *supra* note 111, para. 53.

be endangered.<sup>113</sup> The ECJ decided—evading the question whether mere advice is covered by professional secrecy—that the Directive did not violate the right to a fair trial, because it excluded precisely from the obligation to inform the authorities, all activities related to litigation.<sup>114</sup> The question referred to by the Belgian Constitutional Court did not contain any reference to the right to privacy as a foundation of professional privilege as a result of which the ECJ did not take this aspect into consideration in its ruling.<sup>115</sup> Before the Belgian Constitutional Court, the scope of the discussion was broader and included also matters such as the right to privacy.<sup>116</sup> The Belgian Constitutional Court finally decided that all activities of lawyers, whether related to litigation or not, should benefit from the protection of the confidentiality of communications between lawyers and clients.<sup>117</sup> In other European countries, the question is still open.

In Spain, the implementation of money laundering directives led to the seizure of all files of a lawyer's cabinet in the city of Marbella, completely paralyzing the work of the lawyer and also the work of the local court because one of the main law offices simply did not have access to any of its clients' files.<sup>118</sup>

## X. FINAL REMARKS

It is important to keep in mind that there is no specific provision on the protection of professional privilege in the ECHR and that the protection of confidentiality of communications between lawyers and clients remains primarily a matter of national law. Nevertheless, it can be said that the ECtHR in general takes a protective stand on professional privilege, even in the absence of an explicit text. The ECtHR referred in a minority of cases to the right to a fair trial as protected by Article 6 of the ECHR in different of its aspects. The majority of the cases however have been decided on the basis of Article 8 of the ECHR.

Although the protection of confidentiality can be considered as being part of the principles and concepts common to the laws of the European states, the absence of explicit Europe-wide binding legislation has as a consequence that the mechanism established to protect the scope

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113. *Id.*

114. *Ordre des barreaux francophones et germanophones*, C-305/05, paras. 17-19 (ruling in reference to a preliminary ruling under Article 234 EC from the Belgian Constitutional Court).

115. *Id.*

116. *Orde des barreaux francophones et germanophones a.o. v. Council of Ministers*, Belg. Const. Ct., Nrs. 3064 en 3065, (2008) (Belg.).

117. *Id.*

118. Interviews with lawyers from the Malaga bar association to which Marbella belongs (on file with authors).



of the privilege vary significantly. This leads to serious differences in the degree of protection, and also to serious differences in the implementation of case law of the ECtHR with an impact on privilege.

Furthermore, national legislative developments as well new European legislation and regulations in relation to the fight against organized crime and terrorism have a negative influence on the protection of attorney client privilege. Generally, the balance is moving more in favor of the ascertainment of the material truth than in favor of the procedural safeguards guaranteeing a fair trial.

As long as there is no explicit provision protecting professional privilege to which the ECtHR can refer, it is preferable that cases involving professional privilege would be examined systematically under the right to protection of privacy *as well as* under the right to a fair trial. As the ECtHR stated itself in the case of *Niemietz v. Germany*, “encroachment on professional secrecy may have repercussions on the proper administration of justice.”<sup>119</sup>

Article 8 of the Convention allows for a balance between competing interests. The level of protection offered by Article 6 of the Convention is higher because it does not provide for exceptions, such as measures necessary in a democratic society or in the interest of public security. The concept of “fair trial,” in itself serves, after all, the interest of a democratic society. In the light of the stress put on the protection of legal professional privilege as a result of “crime fighting” policies, it would however be preferable to avoid such a “detour” and to adopt—in the framework of an additional protocol to the ECHR—a text explicitly protecting the lawyer client privilege. Sources of inspiration for such a text could be Article 93 of the Standard Minimum Rules for the Treatment of Prisoners (annexed to Resolution (73) 5 of the Committee of Ministers), as well as the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights mentioned above. Many member states of the Council of Europe signed these texts, which should facilitate the negotiation to include them in an additional protocol to the ECHR. However, the clearest text that provides for the best protection is the American Convention on Human Rights, which states in Article 8 § 2.4 the right of the accused to “defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.”<sup>120</sup>

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119. *Niemietz v. Germany*, App. No. 13710/88, 251-B Eur. H.R. Rep. 97, para. 37 (1992).

120. American Convention on Human Rights, Nov. 22, 1969, art. 8 § 2.4, 1144 U.N.T.S.123, 9 I.L.M. 673.

The adoption of a common text would not impede on the right of member states to develop their own mechanisms of protection of confidentiality of lawyer client communication. The present situation in which the national laws on this matter vary significantly should therefore not be an argument not to adopt such a text. The purpose of such a text would not be uniformity, but rather the setting of minimum standards that could be applied and developed in the case law of the ECtHR.

