



Professional secrecy under EU law

Dirk Van Gerven

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Legal basis

- Attorney-client privilege or Professional secrecy

- * In relation to legal proceedings: the client needs to be able to speak freely with his or her attorney in order to ensure the best defense
- * Arts. 6 (fair trial) and 8 (privacy) of the European Convention on Human Rights
 - In the general interest for a party to be able to obtain good legal advice
- * Criminally sanctioned in certain countries, such as Belgium: Art. 458 Criminal Code
 - No legal basis; can be set aside in the context of legal proceedings or a parliamentary investigation
 - Contractual and disciplinary obligations remain applicable
- * IBA International Practices on Conduct for the Legal Profession

- In-house lawyers

- * Legal professional privilege of company lawyers
- * US - EU



Art. 6.1 – 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:
 1. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 2. to have adequate time and facilities for the preparation of his defence;
 3. 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;
 4. 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;
 5. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
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- Right to a fair trial in criminal proceedings

- * When a sanction is imposed
- * Also disciplinary sanctions

- Civil matters

- * When civil rights and obligations are determined
- * Dispute between two or more parties who are in relation to the rights or an obligation of one of the persons in the dispute
- * Dispute may concern the existence and the scope of the rights and obligations
- * The right to professional assistance is required to give a party “*a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent*” (20 May 2010)

- What does it mean

- * Access to court should be practical and effective
- * Equal weapons, which entails that each party should be in a position to present its defense in circumstances that does not put a party to clear disadvantage towards his adversary
- * The case requires assistance of a lawyer (always in criminal matters; in complicated cases in civil matters)

- Assistance must be effective

- * Entitled to speak freely with the lawyer in order to prepare her/his defense as best as possible
- * This implies that all information communicated is protected and cannot be used against her/him



Art. 8 – Right to private life 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.



- Interference is possible

- * But should be necessary in the interest of society
- * Must be proportional to a legitimate interest

- Correspondance with the lawyer

- * Privileged
- * Opening is only possible if strictly required to prevent abuse of the professional secrecy and there should be guarantees that they are not read
- * Advice of client is not a pressing reason to open mail

- Search of a lawyers office

- * Accompanied with measures which prevent violating professional secrecy
- * An independent observer who is bound by professional secrecy should be present
- * The search order should be sufficient limited and clear that the files which are relevant can be deduced from the order



- Searches and seizures of clients' home or offices

- * Clear basis in the law
- * The interference of authorities should be foreseeable (not a change in case law during proceedings)
- * Clear and specific procedural guarantees must be in place to prevent professional secrecy from being compromised in the search

For ex. home and phone permitting access to confidential exchange between lawyer and client



IBA International Principles on Conduct for the Legal Profession

“A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct”

- * A right of the client, and a duty for the lawyer
- * It is necessary for the protection of individual freedoms in a fair and democratic society: justice cannot be delivered if crucial information is not shared by clients for fear that their lawyers might divulge that information elsewhere and to other people
- * A balance needs to be struck between the need to protect this fundamental principle and the need to tackle illegal actions predicated on its misuse which already leads to the disapplication of the principle of lawyer-client confidentiality
- * Exceptions should be kept to a minimum and only applied in extreme cases



To be distinguished from confidentiality

- In relation between lawyers

- * In order for lawyers to speak open and free in order to find solutions or a settlement
- * in the interest of a good functioning of the legal system

- Regulated by the Bar

- * Linked to the ethical code
- * Violation = disciplinary sanctions
- * Supervision by the Bar
- * Jurisdiction of court

- Loyalty

- * Respect other lawyers
- * No abuse of confidentiality

- CCBE (Charter of core principles and Code of conduct)

- * To be indicated before sending letter
- * Correspondent should respond if the letter cannot be kept confidential (agreement is advisable)

(CCBE = Council of Bars and Law Societies of Europe)

Who can rely on legal professional privilege?



Lawyers but also others



Member of a bar association; independent
What if the lawyer works in house for a company?

Union representatives

Notaries

Auditors

(Art. 23 of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing)

Accountants

(Specific legal provision, such as Art. 728 Belgian Judicial Code)



Professional advisors

Advice rendered in return for payment in the context of a professional relationship, not when acting as a friend

Kruglov c. Russia: if the client may on basis of special legal framework assume that the advisor has to keep information confidential (4 Feb 2020)

Who can rely on legal professional privilege?

- What about company lawyers?

* US

- Emails or letters for the purpose of seeking legal advice (assistance)
- Only in relation to the person seeking advice

* Akzo decision (European Court of Justice)

- Employed lawyer does not benefit
- Not sufficiently: independent is required
- EEA lawyer
- Documents reporting the external legal advice are only protected
- Preparatory documents which are put together to seek legal advice from an external lawyer
 - Quid if passed by inhouse counsel?
 - Quid if inhouse counsel decides to call upon an external lawyer after having received the internal request?
- Quid non EEA lawyers? *Kruglov c. Russia* of the ECtHR

* Belgium: Institute of Company lawyers (law of 1 March 2000)



Who can rely on legal professional privilege?

- * High Council of Justice, 15 March 2013
 - Employed attorney
 - Advice to the board of directors may not be used in court

- * Explanation: due process
 - Scope? What about criminal matters? Competition authorities?
 - European Court of Human Rights



Scope

- Definition

- * Purpose is to help the client define his or her rights in relation to the court and other parties
 - Litigation (disputes)
 - Rights and obligations in law and in relation to others

- * Assistance in litigation and the provision of legal advice
 - Negotiations
 - Meetings
 - Due diligence



Scope

- Purpose defines scope

Professional secrecy is **necessary to help clients define their rights and obligations.**

Professional secrecy **may not be used for personal reasons or other purposes.**

Professional secrecy **may not be abused** (for example to cover up a crime).

- Judge decides



Scope

- Which information is covered?

- * Everything the lawyer is **informed** of during the performance of his or her role
- * The information a lawyer receives in the exercise of her or his profession, such as assistance to and defence of a client in court, and legal advice outside litigation (Belgian Constitutional Court, 23 January 2008)
 - Information from the client
 - Documents and notes prepared by the client for the lawyer
 - Quid information gathered by a company to prepare meeting for lawyer with inhouse counsel
 - Advice to the client
 - incl notes taken by client to prepare a meeting with the lawyer or during the meeting with the lawyer
 - Legal advice circulated in the company (ECJ, *Hilti*, 1990)
 - Information from third parties (e.g., detective) or a counterparty



Scope

- * Everything the advisor **learns** during the performance of his or her tasks
 - From the client
 - Own research (or by associates)
 - From detective or other non-lawyers working on instruction of lawyer
 - e.g., a due diligence, an audit report

- Important points

- * Only with respect to information relating to a person seeking legal advice
- * Does not apply to information that has become public
 - Included in the minutes of a meeting
 - Shared with other persons within the company or circulated widely



Scope

- Which information is covered?
 - * Only confidential information
 - Not information freely made available to third parties (the press or others)
 - Addressed to the client
 - Social media
 - * Diffusion of information
 - Minutes of meetings of the board of directors
 - Internal memos
 - * Information is protected not the document
 - Copying information does not make it lose its protection

Limits

- Professional secrecy cannot be raised in the event of a crime committed by counsel



The commission of a crime always falls **outside legal assistance**



Request by a client to assist in the commission of a crime, which counsel refuses, is **covered by professional secrecy**



Prosecution of the attorney

Prosecution may be nul and void if the attorney discloses this information to the police



Limits

- Lawyer can set aside professional secrecy to save human beings or prevent serious harm
 - * Best to speak to bar leader
 - * National law and Code of conduct can provide for special rules
- Professional secrecy is not an issue in claim to pay invoices of the lawyer or in a liability action against the lawyer
- Professional secrecy cannot be used to refuse to respond to bar leader or as part of disciplinary proceedings against the lawyer

Future

- Assistance of a lawyer is a pillar of the rule of law, and of any democratic society, where anyone can enjoy in an equal manner of his rights

- * Society and the law is too complex

- * Also outside the court



- Social media

- Artificial intelligence is the next step

- * Chat GPT

- * Protection of software against hacking

- * Who is the client?

Questions?



Dirk Van Gerven
NautaDutilh
Brussels

Partner
T +32 2 566 81 14
F +32 2 566 81 75
M +32 495 515 765
E: dirk.vangerven@nautadutilh.com