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# How much transparency do we need

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How much transparency do we need in the field of law in a modern Rule of Law state;

On the one hand, the public cries for more and more transparency but on the other, Courts try to curb this insatiable desire for complete transparency, as such a state of affairs may prove harmful to the individual rights and hence the public interest at large. Some practical illustrations I will refer to may prove the need to strike a balance and steer a middle course.

The matter is of considerable importance for us advocates as it affects important aspects of our practice and in general our role as officers of justice and gatekeepers. On the one hand, we have a duty to keep confidential information and documents given to us in confidence and to protect our clients invoking legal professional privilege and on the other as gatekeepers against money laundering and the prevention in crime we are duty bound under statute and case law to release some crucial information and

documentation. The matter came up in a recent case before the CJEU on 8 December 2022 concerning the directive on administrative cooperation in the field of taxation known as (DAC6).

This directive imposes reporting obligations on lawyers. Member states may take measures to waive the reporting requirement relating to tax matters on cross-border arrangements where this would breach legal professional privilege (LPP).

In such circumstances nevertheless lawyers had an obligation to notify any other intermediary of their reporting obligations. The European Court was asked (Belgium Case) whether this obligation to notify infringed the right to respect private and family life, home and communications. The Court ruled that Article 7 of the Charter on Fundamental Rights guarantees the secrecy of the legal consultation both as far as the content is concerned and its very existence. It was made once again clear that individuals who consult a lawyer can reasonably expect that their communication is private and confidential. Those persons have a legitimate expectation that their lawyer will not disclose to anyone without their consent that they are consulting a lawyer in the matter. This obligation leads further to the disclosure by the third-party intermediaries to the tax authorities of the identify of the lawyer consulted. The Court inevitably put an end to this type of obligation as it constituted an interference with the right to respect communications between lawyers and their clients guaranteed by Article 7 of the Charter. Furthermore, the Court put in the balance

the Public Interest against tax evasion combatted by the Directive on the one hand and fundamental rights on the other.

The objectives of the Directive could not in the balance override the need to protect individual fundamental rights. The reporting obligations and other intermediaries not subject to LPP and on the taxpayer ensure sufficiently that the tax authorities are informed of reportable cross-border arrangements.

The European Court of H.R. also has a very rich jurisprudence on Legal Professional privilege.

In the leading case of *Michaud v. France, judgment 6.12.2012*, it stressed the need to protect exchanges between lawyers and their clients. The Court stated that lawyers are assigned a fundamental role in democratic society. Confidentiality is of crucial importance. Trust is essential to accomplish their mission.

In a number of cases this was emphasised. Thus, in *Brito Ferrinho Bexiga Villa – Nova v. Portugal (2015)* Bank statements of a lawyer could not be released to the Police as this violated applicant's right to respect for professional confidentiality.

Interception of notes exchanged between lawyer and client was held impermissible in *Laurent v. France (2018)*. Monitoring of a applicant's law firm's telephone lines in the context of criminal proceeding to which he was a third party was also found to constitute violation of Article 8 of the Convention. Same in

*Dudchenko v. Russia (2017)* concerning the interception of a suspect's telephone communication with counsel.

In *Pruteanu v. Romania (2015)*, the interception of the telephone conversations of a lawyer and his inability to challenge the lawfulness of the measure and to request that the recording be destroyed constituted a violation of Article 8.

In *Saber v. Norway (2020)*, a smart phone was seized by the police in the context of a criminal investigation against two people for conspiracy to murder him. The applicant stated that the phone contained correspondence with two lawyers defending him in another case he was acquitted. The Court found a violation of Article 8.

In the well-known case of *Niemietz v. Germany (1992)*, a search of a lawyer's office in course of criminal proceedings for insulting behaviour against a third party, the Court again found for a violation of Article 8 of the Convention. The warrant of search was in broad terms.

In *Petri Sallinen and others v. Finland (2005)*, a violation was found where the search of the premises of the first applicant a lawyer ended in the seizure of certain materials including hard disks which contained amongst others private details of three of his clients.

In *Smirnov v. Russia (2007)*, the lawyers flat was searched, and documents and central unit of his computer was seized. It contained files of his clients. There was a violation.

Same in *Wieser and Bicos-Beteiligugen GmbH v. Austria (2007)*. Electronic data of lawyer general manager of Company seized in the context of criminal proceedings concerning illegal trade in medicine. Violation of Article 8 found. Again, search in the premises of lawyer and seizure of computer and floppy disks was struck down as violation Article 8.

In *Andre and Another v. France (2008)*, Tax authority searches of lawyers" offices to find incriminating evidence against a client company were held to violate Article 8.

Same again in *Robathin v. Austria (2012)*, search and seizure of documents and electronic data on suspicion of theft and fraud against his clients. The Court found that the seizure and examination of all the data had gone beyond what was necessary to achieve the legitimate aim, namely crime prevention.

A similar approach was taken by the Court in *Vinci v. France (2015), Leotsakos v. Greece (2018), Kirdok and others v. Turkey (2019), Sargave v. Estonia (2022)* (lack of procedural guarantees).

Nevertheless, legal privilege did not prevent a finding that there was no violation where the applicant lawyer was involved in the commission of an offence and there was an overriding need in

favour of preventing disorder – *Versini-Campinchi and Crasnianski v France (2016).*

Questions of national security override the private interest of professional privilege, relating to monitoring of telephone communications and correspondence, *Klass and others v. Germany (1978)*. In the above-mentioned case of *Michaud v France (2012)*, the case concerned the obligation of lawyers to report their suspicions regarding possible money laundering activities by their clients. The Court held that this reporting obligation does not violate Article 8 of the convention. The obligation pursued the legitimate aim of prevention of disorder or crime since it was intended to combat money laundering and related criminal offences and it was necessary in pursuit of that aim. The interference was not disproportionate with the LPP since lawyers were not subject to the above requirement when defending litigants. Further, the report was to the President of the Bar Association. Also, in *Klaus Muller v. France (2020)* Summoning a lawyer to testify in n Court in connection with his clients' affairs was regarded as necessary in a democratic society.

In *Tamosius v. the UK (2022)*, tax fraud investigation of clients. Search of lawyers office. The case was held to be inadmissible as the search was not disproportionate and the procedure had adequate safeguards attached to it. Supervision of a counsel to identify which documents were covered by legal professional privilege. Also, the removal of documents was open to legal challenge and possible damages.

Where the Investigations Judge from the Central Criminal investigation Court ordered the deletion of 850 private records covered by privilege or as irrelevant to the case the Court did not find a violation. The search in a law firms offices and seizure of data related to money laundering in connection with the purchase by the Portuguese Government of two submarines from a German consortium were not a disproportionate interference with the legitimate aim of the prevention of disorder – *Servulo & Associados v . Portugal (2015)*.

Similarly, in the context of tax investigations it was held that the measures were not disproportionate to the legitimate aim of the economic well-being of the Country – *Lindstrant v. Sweeden (2016)*, there was nevertheless a breach of Article 13 denial of access to justice.

As it can been seen from the above examples from the jurisprudence of the two Courts in Luxemburg and Strasbourg, Human Rights come into play when examining the question how much transparency do we need.

The Courts are the ultimate judge of that. They will take into consideration Human Rights issues very carefully, especially rights relating to fair trial, access to justice and above all the right to privacy. The protection of the LPP is at the core of the jurisprudence of these top European Courts. They have given us their enlightened answers to the question how much transparency. The answer therefore is not too much and not too little. Every case will have to

be examined on its own facts and merits and conflicting interests must be put is the balance and weighed carefully.

On the one hand is the public interest, frequently an unruly horse which takes form in protecting national order, security, health, economic activity etc., and on the other the need to protect individual rights and justice in a Rule of Law state. Only where it is necessary in a democratic society to serve the interests as a whole of the public would the need for transparency prevail. So, there are limits proportionate to the aims of transparency and the objectives in each case, that the Courts have placed in the idealistic but harmful on occasions need for full transparency. Inevitably national governments and Courts will take seriously into consideration the road map of this enlightened jurisprudence.

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