THE LEGAL PROFESSIONAL PRIVILEGE IN COMPETITION LAW CASES – A KEY ELEMENT IN PROTECTING THE PROPER ADMINISTRATION OF JUSTICE

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The legal professional privilege is an important principle underpinning the EU judicial system as it ensures the proper administration of justice, procedural efficiency and protects fundamental rights such as a client's defence rights and the right to privacy enshrined in Articles 47 and 7 of the Charter. In competition cases, the European Commission has relied on an old ruling from the Court of Justice of the European Union (the ECJ), and only acknowledged one of these aims – the protection of the client's defence rights. While the ECJ has recently received the chance to align the EU standard to that of the ECHR by broadening the scope of protection, the Commission appears unwilling to abandon its previous stance.

It is important that the Commission shoulders the responsibility to ensure a procedure that is fair, and which acknowledges the basic principles underpinning a society governed by the rule of law. The current approach breathes life into questions on the legitimacy of its actions and the appropriateness of letting it take on the roles of enforcer, prosecutor and judge in competition cases, where companies not only risk having to pay fines of up to ten percent of their annual turnover, but now also appear to have to face the threat of divestitures should the Commission find that they are infringing the EU competition rules.

1 INTRODUCTION

The legal professional privilege protects correspondence between lawyer and client. As will be discussed in this article, protecting legal advice and correspondence is a key element in any legal system as it ensures not only the proper administration of justice and procedural efficiency but also the respect for fundamental rights such as the right of defence and the right to privacy. If a company receives an unexpected visit from a competition authority, it should therefore not have to fear that the inspectors peruse or make copies of documents containing legal advice from the company's external counsels.

This article analyses the scope and content of the protection afforded under EU law and concludes that the European Commission (the Commission) has chosen to give the privilege an unnecessarily narrow frame in competition cases by only acknowledging one of its aims, the protection of targeted companies' defence rights. This somehow seems to allow the Commission to exclude from the privilege both correspondence with non-EU lawyers and correspondence that is not directly related to the subject-matter of the investigation, or which was drafted before the investigation was initiated.

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The Commission's practice does not meet the standard set by the European Court of Human Rights (the Strasbourg Court), nor is it in line with the case law from the Court of Justice of the European Union (the ECJ). This is very unfortunate as the Commission's approach breathes life into questions on the legitimacy of its actions and on the appropriateness of letting it wear so many hats in the enforcement of the EU competition rules.

2 THE RATIONALE BEHIND THE PRIVILEGE

2.1 FROM THE LAWYER'S STANDPOINT TO THE CLIENT'S

With its roots in common law, the legal professional privilege was initially seen from the lawyer's standpoint and aimed at protecting the lawyer's honour or interests.[1] Lawyers should not be forced to betray a secret with which they had been entrusted. There has been a gradual shift towards the client's perspective and, today, it is generally considered to belong to the client and serves to protect the client's freedom from apprehension in consulting legal advice.[2] If a client withholds relevant information from his or her lawyer for fear of disclosure, the lawyer will not be able to effectively secure the full measure of the client's rights under the law.

The privilege does not only serve to protect the rights of individuals at the stage where there is an infringement but may also ensure compliance with the law. By encouraging candour in before-the-event consultations, this helps keep individuals within the law.[3]

2.2 ENSURING PROPER ADMINISTRATION OF JUSTICE

In *AM & S*, Advocate General (AG) Slynn pointed out that all Member States recognised that the public interest and the proper administration of justice demand that clients should be able to speak freely, frankly and fully to their lawyers. Slynn argued that the privilege springs not only from the basic need of a person in a civilised society to be able to turn to a lawyer for advice and help; it also springs from the advantages to a society, which evolves complex legislation extending into all the business affairs of persons, real and legal, that persons should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly and where they run risks.[4] This was in 1982. The legislation has not become less complex since then.

Slynn referred to the proper administration of justice.[5] The privilege is often said to serve this purpose. It is thus not necessarily, or only, the rights of the individual that form

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[1] H L Ho, 'Legal Professional Privilege and the Integrity of Legal Representation' (2006) 9(2) Legal Ethics 163, 165, Edward J Krauland and Troy H Cribb, 'The Attorney-Client Privilege in the United States: An Age-Old Principle under Modern Pressures' (2003) 37 The Professional Lawyer, American Bar Association 1; and Eric Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the Cursory Glance' (2004) 28(4) Fordham International Law Journal 967, 977.
[2] Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013) 397; Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* (American Bar Association 2007) 4, Ho (n 1); and Krauland and Cribb (n 1).
[3] Ho (n 1) 169.
[4] Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:17, Opinion of AG Slynn.
[5] ibid 1654.

the basis for or the rationale behind the privilege, but rather the greater interest of ensuring a proper administration of justice. In the UK case of *R v Derby Magistrates' Court ex parte B*, Lord Taylor of Gosforth CJ captured the essence of this theory when he declared that legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. According to him, it is a fundamental condition on which the administration of justice rests. It is not for the sake of the applicant alone that the privilege must be upheld; it is in the wider interests of all those thereafter who might otherwise be deterred from being forthright with their solicitors.[6] There are also considerations of efficiency, as lawyers need full information from their clients to perform their duties effectively with minimum cost and delay. While the state provides machinery for the resolution of legal disputes, this machinery is expensive and time-consuming to run. There is therefore a public interest in the establishment of rules, such as legal professional privilege, which allow these mechanisms to function as cost-effectively as possible.[7]

2.3 ENSURING PROTECTION OF FUNDAMENTAL RIGHTS

The privilege does not only serve the interests of proper administration of justice or procedural efficiency, but it also protects the clients' defence rights as well as their right to privacy. This is ensured by Articles 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms (the ECHR) and therefore, by necessity, also by Articles 7 and 47 of the Charter of Fundamental Rights of the European Union (the Charter) which mirror the ECHR.

3 THE ECHR LAYS THE FLOOR TO EU FUNDAMENTAL RIGHTS PROTECTION

3.1 FUNDAMENTAL RIGHTS HAVE NOT ALWAYS FORMED PART OF THE EU LEGAL ORDER

While the Treaty of Rome was silent on the issue of fundamental rights protection, focusing entirely on market integration and the establishment of a common market, the legal landscape has gradually been redesigned over the years, as fundamental rights protection has gradually been woven into the EU legal system through the hands of the ECJ. Today, these rights do not only derive from the ECJ's case-law but are firmly established also in statutory legislation.

Article 2 TEU declares that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Article 6 TEU protects fundamental rights under three diverse and complementary perspectives: as general principles of EU law, as defined by the Charter and as protected by the ECHR. The Charter contains all the rights encompassed in the ECHR, together with some additional, third generation, rights, such as the right to good administration, laid down in Article 41 of the Charter.

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[6] *R v Derby Magistrates' Court ex parte B* [1996] AC 487, 508. See also Gippini-Fournier (n 1).
[7] Dennis (n 2) 398.

3.2 THE ROLE OF THE ECHR IN THE EU LEGAL ORDER

An important feature of the Charter is its Article 52(3), which stipulates that, to the extent that the Charter affords rights that correspond to ECHR rights, the meaning and scope of those rights shall be the same as those laid down by the ECHR. EU law may only derogate from the ECHR standard if such derogation means more extensive protection. As a result, the ECHR and the case law of the Strasbourg court now lay a floor to EU fundamental rights protection.[8] More or less through the back door, the EU has thus committed itself not only to ensuring a minimum standard of protection but has left it to the ECHR to determine what that standard should be. While the ECJ first showed some hesitance towards acknowledging that the Charter was linked to the ECHR,[9] references to the ECHR standard are now frequent.[10]

According to Article 52(1) of the Charter, the EU institutions shall always respect the Charter. This means that, in the absence of any explicit statutory legislation or any relevant case law from the ECJ, the EU institutions must themselves ensure that their practices meet the ECHR standard. As will be discussed below, this required the Commission to abandon its narrow application of the privilege several years ago. However, with the ECJ's ruling in *Orde van Vlaamse Balies*,[11] the Commission's practices now also run counter of the case law from the ECJ.

4 PROTECTING LEGAL PROFESSIONAL PRIVILEGE UNDER THE ECHR

4.1 PROTECTING LEGAL ADVICE UNDER ARTICLE 8 ECHR

By now, there is well-established case law from the Strasbourg Court acknowledging that confidentiality of communications between lawyer and client is necessary to guarantee the effectiveness of the right to legal representation. In cases such as *S. v Switzerland*[12] and *Modarca v Moldova*,[13] the Strasbourg Court declared that if lawyers were unable to confer with their clients and receive confidential instructions from them, their assistance would lose much of its usefulness. This line of reasoning suggests that the privilege may be enforced under Article 6 ECHR, which ensures the right to a fair trial, and it is thus linked to the right of the defence. In *Campbell v United Kingdom*, the Strasbourg Court did recognise that any interference with the correspondence between a lawyer and his client is in violation of Article 6 ECHR if it prevents the lawyer from effectively safeguarding the client's rights.[14]

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[8].; Case C-400/10 PPU *JMcB v LE* EU:C:2010:582

[9] Eg Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, where the ECJ referred to its own ruling in *Bonda* rather than the Strasbourg's Court's ruling in *Engel v the Netherlands*;; Case C-489/10 *Bonda* EU:C:2012:319; *Engel and Others v the Netherlands*, Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 08 June 1976).

[10] Case C-682/20 P *Les Mousquetaires SAS and ITM Entreprises SAS v European Commission* EU:C:2023:170 para 41.

[11] Case C-694/20 *Orde van Vlaamse Balies and Others v Vlaamse Regering* EU:C:2022:9638.

[12] *S v Switzerland* Apps nos 12629/87, 13965/88 (ECtHR, 28 November 1991).

[13] *Modarca v Moldova* App no 14437/05 (ECtHR, 10 May 2007).

[14] *Campbell v United Kingdom*. See also *Modarca v Moldova* (n 13), para 87, where the Strasbourg Court declared that one of the key elements in a lawyer's effective representation of a client's interests is the principle that

That said, the Strasbourg Court is more prone to apply Article 8 ECHR protecting the right to privacy to cases dealing with legal professional privilege.

This choice has two important implications. First, by applying Article 8 ECHR to cases dealing with legal professional privilege, the Strasbourg Court may ensure a much broader scope of protection than had it applied Article 6 ECHR. This is because the latter article primarily concerns the right to a fair trial. Relying solely on Article 6 ECHR and allowing the privilege to serve the aim of encouraging candour in before-the-event consultations, as a way to ensure compliance with the law, might be stretching the scope too far. By applying Article 8 ECHR, the Strasbourg Court ensures that the privilege may serve its aim and cover all forms of client-lawyer correspondence, irrespective of whether the advice has been given in an ongoing investigation or not.

Second, the fact that Article 8 ECHR is applied carries the logical consequence that the ECHR does not allow absolute protection from interference with communications between lawyer and client, as, unlike Article 6 ECHR, Article 8 allows for derogations from the rights provided therein. However, in *Foxley*,[15] the Strasbourg Court noted 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. This is a rather bold and all-embracing statement suggesting that all correspondence between lawyer and client, whatever its purpose, should be treated as confidential and that interferences with such correspondence would thus not be considered necessary in a democratic society.

4.2 THE APPLICATION OF THE PRIVILEGE IN COMPETITION CASES

While many of the cases brought before the Strasbourg Court concern criminal cases involving natural persons, the Strasbourg Court has also had the opportunity to give its view on the application of the privilege in cases concerning dawn raids at corporate premises. The case of *Vinci Construction* concerned the lawfulness of the measures taken by the French Competition Authority at the premises of the two companies, Vinci Construction France and GTM Génie Civil et Service, in October 2007.[16] Here, the central question was, according to the Strasbourg Court, the weighing up of interests relating, on the one hand, to the legitimate search for evidence of offences under competition law, and, on the other, respect for home, private life and correspondence, and particularly for the confidentiality of lawyer-client exchanges.[17]

During the inspections carried out at the premises of the two companies, numerous documents and electronic files were seized, along with the entire mailboxes of certain employees. The companies challenged the inspections, alleging that they had been widespread and indiscriminate, as thousands of electronic documents and entire mailboxes

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the confidentiality of information exchanged between them must be protected. The Strasbourg Court declared that the privilege encourages open and honest communication between clients and lawyers, and that confidential communication with one's lawyer is protected by the ECHR as an important safeguard of one's right of defence.

[15] *Foxley v United Kingdom* App no 33274/96 (ECtHR, 20 June 2000) para 43.

[16] *Vinci Construction et GTM Genie Civil et Services v France*, App no 63629/10 and 60567/10, (ECtHR, 2 April 2015).

[17] See the Strasbourg Court's press release issued on 2 April 2015, <https://hudoc.echr.coe.int/eng-press?i=003-5055260-6217032> accessed 01 June 2024.

had been seized by the authority, and many of these documents either lacked connection with the business covered by the inspection decision or were protected by legal professional privilege. Having no success before the French courts, the applicants eventually turned to Strasbourg.

In its ruling, the Strasbourg Court noted that the seizures had concerned numerous documents and contained correspondence exchanged with lawyers. It also noted that the applicants had been unable to discuss the appropriateness of the documents being seized, or inspect their content, while the operations were being conducted. Having been unable to object in advance to the seizure of documents covered by the confidentiality of lawyer-client exchanges or which were unrelated to the investigation, the applicants ought to have been able to obtain, after the inspection, a review of its lawfulness. As there had been no such possibility, the Strasbourg Court concluded that the inspections and seizures carried out in the applicants' premises had been disproportionate to the aim pursued, in breach of Article 8 ECHR.[18]

4.3 THE VIEW OF THE STRASBOURG COURT – CONCLUDING REMARKS

To conclude, the Strasbourg Court takes the view that correspondence between client and lawyer is, in principle, privileged and protected by Article 8 ECHR, but also by Article 6 ECHR in those cases where it serves to protect the client's defence rights. Since the ruling in *Vinci Construction*, there is no doubt that the privilege applies to companies targeted by the competition authorities' investigations and that those authorities have a duty to make sure that correspondence between the company and its outside counsels is excluded from the scope of the investigation. This is the case no matter if it is related to the subject matter of the investigation or not.

5 THE DEVELOPMENT OF THE LEGAL PROFESSIONAL PRIVILEGE UNDER EU LAW

5.1 THE PRIVILEGE WAS INITIALLY GIVEN A NARROW SCOPE

While the Strasbourg Court has taken a broad view and declared that both Articles 6 and 8 ECHR may come into play in cases dealing with legal professional privilege, the EU Courts have, up until recently, chosen a narrower path. This choice is not surprising given the fact that the privilege is not laid down in any written legislation and that it has therefore been the task of the EU Courts to establish the privilege under EU law. When this was first done in 1982, there was still no case law from Strasbourg. Instead, the ECJ had to frame the privilege upon those features that were common to the laws of the Member States. This meant that it came to cover only correspondence between the client and external lawyers, and provided that the lawyer was admitted to an EU Member State bar association. In principle, no objections can be made against the ECJ adopting this limited approach in 1982. Had the ECJ chosen a wider definition, it could easily have been argued that it was resorting to judicial

[18] *Vinci Construction et GTM Genie Civil et Services v France*, App no 63629/10 and 60567/10, (ECtHR, 2 April 2015)., paras 77-81.

activism. However, whether the limited scope is desirable and still justifiable is another matter. Fortunately, the ECJ has recently had the chance to adapt its view to the developments in this field, aligning it to that of the Strasbourg Court.

5.2 THE EMERGENCE OF THE PRIVILEGE UNDER EU LAW

The privilege was first recognised by the ECJ in the now-classic case of *AM & S*.[19] In February 1979, the Commission carried out unannounced inspections at the premises of American Mining & Smelting Europe Ltd (AM & S). At the conclusion of the inspection, the Commission officials left AM & S with a written request for further specified documents. AM & S refused to make some of these documents available, claiming that they were protected by legal professional privilege. The Commission's answer was to carry out a new dawn raid and seek access to the documents in question. AM & S refused to cooperate and lodged an application with the ECJ. The application was based on the submission that, in all the Member States, written communications between lawyer and client were protected by virtue of a principle common to all those states.

In its ruling, the ECJ did recognise that it must consider the principles and concepts common to all Member States in respect of the confidentiality of lawyer–client communication. It also acknowledged that written communication between lawyer and client was protected throughout the EU.[20] As far as the protection of written communication between client and lawyer was concerned, the ECJ recognised that, although all Member States provided protection, the scope of such protection varied. However, the ECJ was able to establish certain features that were common to the laws of all Member States, namely:

1. although some Member States did not protect communications with in-house counsels, they all recognised that communications with independent lawyers should be protected; and
2. as for the nature of the documents deserving protection, all Member States recognised that communications made for the purposes and in the interests of the client's right of defence should be privileged.[21]

Thus, the ECJ concluded, under EU law, legal professional privilege protects communications between a client and an independent lawyer that are made for the purpose and in the interests of the client's right of defence. This, it stated, was also in line with Regulation 17/62 itself,[22] as the regulation aimed at ensuring that the defence rights may be exercised in full.[23] In order to ensure this, the ECJ concluded, the protection must cover all written communication exchanged after the initiation of the administrative procedure under Regulation 17/62. However, it declared that it must also be possible to extend the protection to earlier communications which have a relationship with the subject matter of that

[19] Case 155/79 *AM & S Europe Ltd v Commission of the European Communities* EU:C:1982:157.
[20] ibid para 18.
[21] ibid para 21.
[22] Council Regulation (EC) No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13 was the predecessor to Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1.
[23] *AM & S* (n 19) para 23.

procedure.[24] Furthermore, the privilege would only apply to communications with independent lawyers entitled to practise their profession in one of the Member States, regardless of the state in question, but could not be extended beyond that limit.[25]

While the ECJ has since then been given the possibility to fine-tune the scope of the privilege in a few subsequent cases dealing *inter alia* with the protection of correspondence with in-house counsels, it was not until recently that it had the possibility to fully align its case law with that of the Strasbourg Court and to acknowledge that the privilege mainly serves to protect a client's right to privacy under Article 7 of the Charter.

5.3 APPLYING ARTICLE 7 OF THE CHARTER TO THE PRIVILEGE

In a recent Grand Chamber ruling,[26] the ECJ now takes a step closer to the ECHR by explicitly acknowledging that the privilege not only serves to protect the right of the defence, but also the right to privacy.

The case before the Belgian court concerned the obligation imposed on lawyers acting as intermediaries to report certain cross-border tax arrangements to the competent authorities. More specifically, lawyers were exempted from this reporting duty where it would infringe the legal professional privilege. In those cases, they were instead required to notify any other intermediaries of the fact that they were unable to report the arrangement and also provide reasons for this.[27] The applicants had challenged this order before the Belgian courts arguing that this would also infringe the legal professional privilege. Under Belgian law, the mere fact of having recourse to a lawyer was covered by legal professional privilege and the applicants argued that the same applied, *a fortiori*, as regards the identity of a lawyer's client.[28]

The provision in question followed from an EU directive,[29] and the case concerned the validity, in the light of Articles 7 and 47 of the Charter, of the provision requiring Member States to ensure that lawyers acting as intermediaries – where they were exempt from the reporting obligation on account of the legal professional privilege – notified any other intermediaries of the reporting obligation and why they themselves were prevented from reporting. This made the Belgian court turn to Luxembourg.

In its preliminary ruling, the ECJ confirmed that Article 52(3) of the Charter lays a floor to EU fundamental rights protection and acknowledged its obligation to ensure consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR.[30] The ECJ then declared that Article 8 ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. Like Article 8 ECHR, the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to

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[24] ibid.
[25] ibid para 26.
[26] *Orde van Vlaamse Balies* (n 11).
[27] ibid paras 10-13.
[28] ibid para 14.
[29] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, as amended by Council Directive (EU) 2018/822 of 25 May 2018, Article 8ab(5).
[30] *Orde van Vlaamse Balies* (n 11) para 26.

its content and to its existence, the ECJ declared further. Referring to the Strasbourg Court's ruling in *Altay v Turkey*,[31] it then acknowledged that individuals who consult a lawyer should be able to expect that their communication is kept private and confidential, and that other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.

According to the ECJ, the specific protection afforded to legal professional privilege by Article 7 of the Charter and Article 8 ECHR is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Citing its ruling in *AM & S*, the ECJ then continues to declare that this fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client.[32]

The obligation for a lawyer-intermediary to notify other intermediaries who are not his or her clients of their reporting duty necessarily entails that those other intermediaries become aware: of the identity of the notifying lawyer, of his or her assessment that the arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement. In those circumstances the obligation to notify entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter, the ECJ declared. Furthermore, the ECJ continued, that obligation leads, indirectly, to another interference with that right, resulting from the disclosure, by the third-party intermediaries thus notified, to the tax authorities of the identity of the lawyer-intermediary and of his or her having been consulted by the taxpayer.[33] The provision constitutes a limitation of the rights laid down in Article 7 of the Charter, the ECJ concluded.

It then assessed whether such a limitation may be justified under Article 52(1) of the Charter. Here it acknowledged that the limitation is provided for by law and that the obligation in question only entails to the lifting of the confidentiality of client/lawyer communication to a limited extent, as the contents of any such communications will not have to be revealed. Moving on to the proportionality assessment, the ECJ declared that this requires it to ascertain whether the reporting obligation meets an objective of general interest recognised by the EU. If so, it would also have to ascertain that: (i) the obligation is appropriate for attaining that objective; (ii) interference with the fundamental right to respect for communications between lawyers and their clients is limited to what is strictly necessary, and, if so; (iii) interference is not disproportionate to the objective pursued.[34]

When assessing this, the ECJ acknowledged that combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute objectives of general interest recognised by the EU. Moving on to the second criterion, the ECJ was not equally convinced, declaring that the obligation imposed on lawyer-intermediaries cannot be regarded as strictly necessary to attain those objectives, and that it was thus disproportionate. On this ground the ECJ declared that the provision in the directive infringes the right to respect for

[31] *Altay v Turkey* (No 1), judgment of 9 April 2019, Application No 11236/09.
[32] *Orde van Vlaamse Balies* (n 11) para 28.
[33] ibid para 31.
[34] ; Joined Cases C-37/20 and C-601/20 *Luxembourg Business Registers and Sovim* EU:C:2022:912, para 66.

communications between a lawyer and client, guaranteed in Article 7 of the Charter, in so far as it provides, in essence, that a lawyer-intermediary, who is subject to legal professional privilege, is required to notify any other intermediary who is not his or her client of that other intermediary's reporting obligations.[35]

The ECJ also assessed the validity of the provision in the light of Article 47 of the Charter. According to the ECJ the provision serves to protect, *inter alia*, the rights of the defence, the principle of equality of arms, the right of access to the courts and the right of access to a lawyer, both in civil and criminal proceedings. Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients if they were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations, the ECJ declared. This means that the requirements implied by the right to a fair trial presuppose, by definition, a link with judicial proceedings, the ECJ continued. As the obligation to notify arises in an early stage, the lawyer is not acting as the defence counsel for his or her client in a dispute. The mere fact that the lawyer's advice or the cross-border arrangement, which is the subject of his or her consultation, may give rise to litigation at a later stage does not mean that the lawyer acted for the purposes and in the interests of the rights of defence of his or her client, the ECJ declared further. In those circumstances, the obligation to notify other intermediaries does not entail an interference with the right to a fair trial, the ECJ concluded.[36] Thus, the provision in the directive was declared invalid in the light of Article 7, but not in the light of Article 47 of the Charter.

5.4 THE SCOPE OF PROTECTION AFFORDED UNDER EU LAW: CONCLUDING REMARKS

Nearly four decades have passed since the ECJ first declared that there is indeed a principle of legal professional privilege under EU law, and that it protects communications made between a client and an independent lawyer admitted to an EU bar association for the purpose and in the interests of the client's right of defence.

The ECJ has not had the chance to revisit its view on the application of the privilege to correspondence with lawyers admitted to bars outside the EU. This is unfortunate, as the Commission still appears to, at least formally, follow the lines adopted by the ECJ in *AM & S*. Thus, to the extent that a client consults with his external lawyer in the US or any other country outside the EU, there is a risk that such correspondence is not considered to be protected by the privilege during the course of a dawn raid.

Although it may be difficult to determine the standards of a bar association of a third country, and although the legal advice sought by a lawyer outside the EU will not necessarily deal with matters of EU law, it is difficult to accept this requirement. Indeed, when it comes to suspected infringements of EU competition rules, it is not uncommon that such alleged practices have effects or originate from countries outside the EU, such as the US. If the privilege is considered to belong to the client rather than the lawyer, and if its aim is to ensure the client's right of defence and/or the greater interest of ensuring a proper administration

[35] *Orde van Vlaamse Balies* (n 11) para 59.
[36] ibid para 65.

of justice, then it should cover any correspondence with outside lawyers which can have a bearing on the case at hand. Otherwise, there is an apparent risk that the client may not be able to properly exercise the right of defence. The problems created by a limited scope of protection became even more apparent with the ECJ's ruling in *Nexans*, where the ECJ confirmed the right of the Commission to review and copy documents related to projects with effects outside the EU.[37]

However, while there still appear to be some questionable limitations to the privilege, the referral by the Belgian court in *Orde van Vlaamse Balies* has allowed the ECJ to align its case law to that of the Strasbourg Court in another important aspect, as the ECJ now acknowledges that questions regarding the scope of the privilege will have to be determined in the light of both Articles 7 and 47 of the Charter. The legal privilege thus no longer applies only to communications that have been drawn up for the purpose and in the interests of the client's defence rights but to all communications between a lawyer and his/her client. However, this also means that, in those situations where only Article 7 of the Charter applies, the privilege is not absolute but can be limited to the extent allowed by Article 8(2) ECHR.

6 LEGAL PROFESSIONAL PRIVILEGE: WHAT CONCLUSIONS MAY BE DRAWN?

The legal professional privilege is an important principle underpinning the EU judicial system as it ensures the proper administration of justice, procedural efficiency and protects fundamental rights such as a client's defence rights and the right to privacy enshrined in Articles 47 and 7 of the Charter. It is therefore important that the EU institutions acknowledge the privilege and the interests that it serves to protect. By only acknowledging one of its aims, to protect the right of the defence, the Commission gives the privilege a scope that is too narrow to meet the ECHR standard.

This is especially troublesome given that the Commission may impose substantial fines on companies that obstruct its investigations and that the consequences of disclosure are irreversible – what has once been seen cannot be made unseen. This was acknowledged by the President of the General Court in *Akzo* who pointed to the irreversible consequences which would result from improper disclosure of documents protected under legal professional privilege.[38]

It is therefore important that the Commission shoulders the responsibility to ensure a procedure that is fair, and which acknowledges the basic principles underpinning a society governed by the rule of law. The current approach breathes life into questions on the legitimacy of its actions and the appropriateness of letting it take on the roles of enforcer, prosecutor and judge in competition cases, where companies not only risk having to pay fines of up to ten percent of their annual turnover but now also appear to have to face the threat of divestitures should the Commission find that they are infringing the EU competition rules.[39] In addition, if the Commission adopts the same narrow approach also

[37] Case C-37/13 P *Nexans France SAS and Nexans SA v European Commission* EU:C:2014:2030.
[38] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* EU:T:2007:287, para 47.
[39] On 14 June 2023, the Commission sent a statement of objections to Google in the Google Ad tech case proposing a structural remedy, Case AT.40670.

in investigations under neighboring pieces of legislation, such as the Digital Markets Act,[40] this may have a hugely negative impact on the rights of companies targeted by the Commission's investigations under such legislation. It is therefore crucial that the Commission revises its policy and brings its practices into line with the ECHR standard.

[40] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

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