Confidentiality in the 

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This section focuses on the protection of correspondence between lawyers under the rules of professional conduct and not by rules of law. In two Member States (the UK and Ireland) the protection is achieved by the same rule of law which also applies in the other countries. In the remaining Member States, the State guarantees its citizens such fundamental rights as the right to a fair trial, the inviolability of the home, of letters and of telecommunications, and the right to individual privacy.

For purposes of description and analysis, the Member States can be divided into two main groups:

- the original Six, where the central legal concept is 'the professional secret'; and
- the 'common law countries' (including for this purpose Scotland), where the central legal concept is 'legal professional privilege'.

The Original Six

In the original Six, the primary source of law is an article of the Penal Code which provides that it is an offence punishable by imprisonment of a fine or both to reveal another person's secret. This provision of the Penal Code is the source of the lawyer's duty and, since breach of that duty is a criminal offence, the duty is not simply a professional or contractual duty, but a matter of public order. The State is therefore seen as having rule to enforce it.

The duty of the lawyer carries with it corresponding rights. In particular (i) the right to refuse to give evidence on matters covered by the professional secret, and (ii) the right to withhold from seizure by the police and judicial authorities information which contains information covered by the professional secret. These rights are in some cases expressly conferred by the Codes of Criminal and Civil Procedure.

The secret thus enjoys both positive and negative protection: positive protection, in that the lawyer is bound to keep the secret and not to divulge it; negative protection, in that the courts and other authorities cannot force him to divulge it.

The extreme strictness of the lawyer's obligation to preserve the professional secret can be judged by a Belgian case which involved a young lawyer who worked in the same office as her father. For some weeks her father had been receiving telephone calls from an unknown person who wished to obtain his assistance in extorting 5 million francs by blackmail from a large store. One evening when she was alone in the office the daughter received a visit from an intending blackmailer, who repeated his proposal to her. Being afraid of him, she tried to get in touch with her father, but failed and rang the police. Her visitor was arrested as he left the office. In consequence of disclosing to the police the fact that her visitor had said, she was charged with professional misconduct and it was only on appeal that she was acquitted on the ground that, on the facts, her visitor had been seeking to make her an accomplice in crime rather than consulting her as a lawyer. The significance of the case lies in the eventual ground of acquittal as in the fact that the circumstances were regarded as justifying a charge of professional misconduct in the first place.

Except in France, the law of the professional secret only protects information communicated to the lawyer. It does not protect advice or information communicated by the lawyer to his client, since the law of the professional secret is only concerned with the duties and corresponding rights of the person to whom a secret has been communicated. Freedom of communication between accused persons and their defence lawyers is protected in other ways. (In France, the law of the professional secret has been held to cover advice given by a lawyer to his client.)

In no State of the Six does the professional secret protect the confidentiality of correspondence between lawyers except (in some States) in so far as such correspondence contains information which is itself protected by the professional secret. Protection of correspondence between lawyers is achieved partly by the fact that, in civil litigation at least, there is only a very limited obligation to produce, or right to recover, documents, and partly by professional rules which (except in Germany) treat all communications between lawyers as being in principle confidential as between the lawyers concerned.

In none of the Six is the obligation of professional secrecy imposed upon lawyers. The law of the professional secret makes no basic distinction between:

- a secret entrusted to a person to whom the citizen turns for help in a particular situation affecting his physical or moral well-being — e.g. the lawyer, the doctor or the priest; and
- a secret which the citizen is required by law to communicate to persons in authority — e.g. the police or the public prosecutor.

In general, the obligation of secrecy is imposed upon any person who, by reason of his office, status or profession, may become the recipient of another person's secret. So, too, the right to refuse to give evidence is conferred generally upon those who are bound by an obligation of secrecy.

The Common Law

In the common law countries, a basic distinction is made between:

- 'the official secret' — i.e. information entrusted to persons in authority; and
- 'legal professional privilege', which protects communications to and by lawyers.

The law of official secrets is not unlike that of the professional secret on the Continent. (S.2(1) of the Official Secrets Act 1911 is closely comparable in its terms with the Articles of the Penal Codes of the Six which make it a criminal offence to reveal a professional secret. The law of legal professional privilege, on the other hand, is part of the common law of evidence.)
The common law rules of evidence protect all aspects of the relationship between the lawyer and client. This is to say, they protect advice given by the lawyer to his client as well as information communicated by the client to the lawyer. Application of the same set of rules protects the confidentiality (in certain cases) of correspondence between the lawyers.

In general, the rules of evidence involve asking three distinct questions:

(a) (i) May this witness be required to give evidence?
(ii) May this document be produced in court?

(b) (i) May this question be addressed to this witness, and, if so, may his answer be used as evidence?

(c) (i) What is the value as evidence of the witness's answer to the question?
(ii) What is the value as evidence of the contents of the document?

The rules relating to 'legal professional privilege' are essentially rules relating to question (b). In other words, these rules presuppose that the witness is already in the witness-box, or that the document has already been produced in court. Question (b) is therefore a question which the judge, rather than the advocate or the witness, must ask. It is, however, presupposed that there is a basic distinction between what is said by a witness or what is contained in a document, on the one hand, and what is 'evidence', on the other hand. This distinction, which is self-evident, is extremely difficult to explain to a Continental lawyer, as is the common law distinction between 'evidence' and 'proof'.

Although the primary source of law consists in rules of evidence, it is possible to derive from these rules of evidence a framework, rules of which are based, a framework of rights and duties giving positive and negative protection, analogous to those which existed on the Continent. But these rights and duties belong to the lawyer. With very few exceptions, no other person may refuse to give evidence or refuse to produce a document when required to do so by the courts and it is ultimately the judge who must protect the client's rights and duties against unwarranted disclosure of his 'secrets'.

The lawyer's duty is a duty to his client. Breach of duty may give rise to disciplinary sanctions or to an action of damages, but not to criminal prosecution. If the client authorises the lawyer to give evidence or to produce a document, the lawyer's rights and duties cease to exist. The privilege, it is said, is the 'privilege of the client'. Moreover, the client may lose that privilege—for example, where he has communicated information to a lawyer for the purpose of communicating it to another lawyer. The Belgian Code would therefore have been solved in the same way in this country.

Denmark

Danish law is in some respects like the law of the original Six Member States, and in some respects like the common law. The essential difference between Denmark and the other eight Member States is that, in the latter, the test of whether confidential information must be revealed is essentially that of the individual's right, whereas in Denmark it is in a sense subjective. In the UK and Ireland, the question is, 'Is the communication privileged?'; in the original Six, the question is, 'Does the professional secret apply?' In either case, if the answer to the question is 'Yes', that is the end of the matter. In Denmark, however, the court is bound to consider whether the evidence may be decisive for the outcome of the case, whether it is important to the party concerned or to society, and whether the loss of secrecy has 'essential importance'. Danish law therefore relies on the discretion of the judge to an even greater extent than the common law.

From this brief summary, it will have been apparent that, while the nine Member States have the basic principle in common, the source and application of the law is different. This gives rise to problems in the legal system of the future.

But, quite apart from the Community, the national governments of Member States have taken steps to restrict the protection given to communications from the lawyer to the client. Recent fiscal legislation in Britain has overridden the normal rules of professional privilege, and, in the so-called 'Lex Baader-Meinhof' in Germany, there has been a significant restriction on the activities of defence lawyers, which for many years have been far-reaching restrictions were eventually dropped. It may also be remembered that, at one stage in the Meehan case, some Members of Parliament questioned the right and duty of a Scottish solicitor to tell the authorities of a confession made by a client.

Problems of Community Law

(a) Approximation of Law

Art 3 of the Treaty of Rome provides: 'For the purposes set out in art 2, the inhabitants of the Community shall include ... (b) the approximation of the laws of Member States to the extent required for the proper functioning of the Common Market.' Does the proper functioning of the Common Market require the approximation of the laws relating to secrecy, confidentiality and privilege as they affect lawyers?

It can be argued that the activities of lawyers are intimately connected with the legal systems of the different Member States, and that the Treaty of Rome does not envisage approximation of legal systems. On the other hand, the activities of lawyers are also intimately connected with the economic activities of their clients; and the rights, duties and privileges of lawyers are important to their clients. It is therefore reasonable to expect that, in the long term, the proper functioning of the Common Market may require the approximation of laws relating to secrecy, confidentiality and privilege.

The difficulty about approximation or harmonisation of the civil law is that the laws of each Member State is bound up with its system of judicial procedure and, ultimately, with the relationship which is assumed to exist between the citizen, the lawyer and the court. Two legal systems may appear very similar on paper, but they may do so by quite different routes.

In the short term, the solution to the problem appears to lie in 'mutual recognition of principles' rather than in enforced approximation of laws. The purpose of the law is the same in both countries, and it is reasonable to ask that, in applying their own laws to lawyers from other Member States, the authorities of each Member State should respect that purpose. Should a principle which is recognised by the law of every Member State be overridden by a principle that the confidentiality of the lawyer-client relationship is entitled to protection. It has been suggested that the necessary protection is to be found in art 164 of the Treaty of Rome, which requires that 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed'. In accordance with recent decisions of the court, 'the law' in this context includes general principles of law protecting fundamental rights which are recognised by the Member States, or at least by a majority of them. It may, however, be questioned whether the law of the UK and Denmark protect all advice given by the lawyer to the client to be applied.

(b) Equality of Treatment of Lawyers from Different Member States

Whether or not the laws of the Member States are approximated or harmonised, it is apparent that cross-frontier practice will continue, and that the Community requires that lawyers from different Member States will receive equal treatment in the protection of professional confidentiality.

It is fair to say that no problems of a serious nature appear to have arisen since 1965 in relation to the rights of visiting lawyers. But since the enlargement of the Community, and the presence of lawyers from outside the UK, Ireland and Denmark, and with the growth of cross-frontier activity, the problem is likely to become more acute. Many UK lawyers, for example, are particularly worried by the fact that, except in Ireland and probably France, written advice to a client is not 'privileged' in other Member States as it is in the UK.

Further, in the context of the Directive on the Provision of Services and any future Directive on Establishment, it is necessary to ensure that in those States where the Codes do not expressly protect a lawyer from disclosure, full protection is afforded to him. It seems probable that this will be achieved by application of the formula adopted in the Services Directive, which treats those persons listed in art 1(2) as beneficiaries of the Directive and, where entitled to be treated as 'lawyers' in the host Member State. On the other hand, problems will remain, for the time being at least, in connection with those lawyers who have offices in other Member States and who are not expressly employed lawyers. In general, the law of the UK and Ireland treats employed lawyers as being no different from other lawyers. The law of some other Member States does not.

(c) The Investigative Powers of the European Commission

The European Commission has very wide powers of investigation under Regulation 17, which contains no protection for the professional secret, confidentiality or legal professional privilege in the sense discussed in this article. The Regulation was drawn up by the Parliament in the context of the making of Regulation 17, and it was specifically recommended that the professional secret should be protected. It is therefore reasonable to expect that, in the long term, the proper functioning of the Common Market may require the approximation of laws relating to secrecy, confidentiality and privilege.

There is no doubt necessary that the Commission should have wide powers of investigation in order to fulfil its functions under the Treaty, and that those powers must not be restricted in the same way as those of commercial undertakings. It is nevertheless objectionable that the Commission should have powers which are not restricted in principle to the principle which is recognised by the law of every Member State. The principle that the confidentiality of the lawyer-client relationship is entitled to protection. It has been suggested that the necessary protection is to be found in art 164 of the Treaty of Rome which requires that 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed'. In accordance with recent decisions of the court, 'the law' in this context includes general principles of law protecting fundamental rights which are recognised by the Member States, or at least by a majority of them. It may, however, be questioned whether the law of the UK and Denmark protect all advice given by the lawyer to the client to be applied.

Problems affecting the Rights of the Lawyer and the Citizen

Quite apart from action by the organs of the Community, the traditionally protected confidentiality of the lawyer-client relationship is threatened in the Member States themselves. Terrorism, tax evasion and the abuse of the advice privilege by governments have made the age-old problem of preserving a proper balance between the interests of the State and the liberty of the individual. Moreover, the conduct
of some lawyers has led (rightly or wrongly) to
the suspicion that they are abusing their legal
privileges and acting as accomplices, rather than
advocates or advisers of their clients. The 'Lex Baader-Meinhof' in Germany is an
example of legislative action affecting the rights
of the defence, although a proposal that written
and oral communications between an accused in
custody and his defence lawyer should be
supervised was dropped. Recent fiscal legislation
in the UK and Ireland is an example of measures
against tax evasion which expressly limit legal
professional privilege.

Even the routine inspection of a lawyer's account
books for tax purposes may lead to covert
infringement of the lawyer-client relationship. In
some Member States lawyers not only advise
their clients but manage their affairs, and lawyers
throughout the Community hold money on behalf of clients. Only by exercising the
greatest care can the lawyer ensure that his books
do not disclose to the inquisitive official
information confidential to the client.

There is equally very little express protection of
communications between lawyer and client
against secret supervision through interception
of letters and wire-tapping, and the law of the
UK is particularly weak in this respect.

It is to be expected that such threats to the
confidential nature of the lawyer-client
relationship will increase rather than diminish.
Measures infringing that confidentiality may,
indeed, be provoked and apparently justified by
the unscrupulous abuse of privilege by lawyers
themselves. But it is also to be expected that as
the law becomes more complex, so the individual
will become increasingly dependent upon the
advice and assistance of the lawyer.

Community and national authorities (and the
media, who sometimes use this as a stick to beat
the profession) should recognise that the rights,
duties and privileges of lawyers are not simply a
peculiarity of the law relating to lawyers but are
specifically designed to protect the liberty and
privacy of the individual, the proper
administration of justice and the right to a fair
trial. The Bars of the Member States have a right
and duty to protest against any infringement or
curtailment of that protection. They stand, in
this respect, between the citizen and the State.
Abuse of privilege by individual lawyers acting as
accomplices of their clients should be punished
by professional and, if appropriate, by penal
sanctions directed against them as individuals,
rather than by withdrawing protection from the
innocent. If abuse cannot be proved against
individuals, it is not to be presumed to exist.

In so far as it is necessary to find new methods to
preserve a proper balance between the interests
of the State and the interests of the individual, a
model is to be found in the practice of those
states where the Bâtonnier (the elected leader of
the Bar, like the Dean of Faculty in Scotland) can
be called in as a kind of 'referee' to ensure that
professional secrecy is preserved. If, for
example, the authorities propose to conduct a
search for documents in a lawyer's office, he can
call upon the leader of the Bar, or a delegate
nominated by him, to witness the search and, in
practice, the authorities almost always accept his
ruling as to whether a document is protected or
not. The problems are not insoluble, given a
proper working relationship between the
authorities of the Community and Member-
States on the one hand, and the Bars and other
professional organisations on the other.

The greatest problem in a country like Scotland,
where personal freedom tends to be taken for
granted, is to make lawyers and the public
generally aware that a problem exists. It is easy
to say that, of course, a lawyer should
tell the police when a client confesses to a murder
for which someone else has been convicted. But
where does one stop? Is this acceptable?

'A lawyer must keep matters confided to him
secret unless the Party relieves him of his
obligation. He is not bound to testify about these
matters before a court or an agency of the State
unless the Minister of Justice for an important
State reason, relieves him of this obligation. A
lawyer cannot invoke his obligation to keep
secrets if under the provisions of the Criminal
Code, he is bound to inform the authorities of a
committed crime'.

That quotation is not invention. It is taken from
a Law of one of the Eastern European countries.
And it is precisely because the law of the ancien
regime required a lawyer to disclose 'anything
menacing to the King' that the law of France is as
strict on this subject as it is.

The European Community has many obvious
defects. One of its merits is that it forces lawyers
brought up in different legal systems to look
more closely at their own system to see what
really matters and, perhaps, preserve it before
it is too late.

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