

Case Comment

Legal Professional Privilege and the EU's Fight against Money Laundering

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Case C-305/05, *Ordre des barreaux francophones and germanophone & Others v Conseil des Ministres* (ECJ, Grand Chamber) (26 June 2007) (unreported)

The ambit of legal professional privilege (LPP) is a contested issue not only in England and Wales (England)¹ but also in other European countries and the European Union itself. In *Ordre des barreaux francophones et germanophones & Others v Conseil des Ministres* (*Ordre des barreaux*) the ECJ's Grand Chamber reviewed the legality of the obligation to inform and cooperate with competent authorities, which is imposed on the legal profession by Directive 91/308/EEC (the 1991 Directive) in respect of money laundering.² The ECJ in a decision based on a restricted understanding of LPP found the obligation to disclose information concerning money laundering consistent with LPP. It determined the protection offered by LPP to be limited by reference to the right to fair trial guaranteed by Article 6 of the European Convention on Human Rights (ECHR).

This case comment is divided into four sections. First, it gives a brief comparison of the scope of LPP provided by the English courts and by the ECJ's previous case law. Secondly, the context of the case is set out. Thirdly, it examines a particular problem that arose in the case, namely that too narrow a question was referred to the ECJ by the Belgian court. Because of this the ECJ was able to limit its review of the 1991 Directive's legality to its compatibility with LPP in light of the right to a fair trial and the respect of rights of defence. As a necessary corollary the ECJ did not examine other aspects of the rationale which underlies LPP i.e., that it protects rights, such as the right to privacy and serves to fulfil a number of different aims i.e., better administration of justice or compliance with law. As a consequence the ECJ has left the exact scope of LPP in the EU ambiguous. This could lead to further difficulties, since it is not clear whether e.g. United Kingdom's implementation of the Directive is compatible with its requirements.

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¹ See Neil Andrews, *Legal Advice Privilege's Broad Protection - The House of Lords in Three Rivers (No.6)* (2005) 24 C.J.Q. 185.

² Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (O.J. 1991 L 166, p. 77), as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (O.J. 2001 L 344, p. 76).

1) Legal Professional Privilege in England and in the European Union

The English courts have distinguished between two different types of LPP. First, legal advice privilege. This protects communications between lawyers and their clients where it is sought and given independently of any actual or potential legal proceedings. Secondly, and historically the first form of LPP recognised by the English court, litigation privilege. This protects advice and documents created for the purpose of litigation.³ This covers not just client-lawyer communication but also documents or advice given by third parties the dominant purpose of which is litigation.

The ECJ first dealt with LPP in *AM & S v Commission*; a case which concerned the Commission's ability to gain access to communications between an undertaking, that it suspected of anti-competitive behaviour, and its lawyers. It held that written communications exchanged between an independent lawyer (i.e., one who was not employed under a contract of employment) and his client, which were made for the purpose, and in the interests, of the client's rights of defence were privileged.⁴ Two factors were central to its judgment. First, for LPP to arise the lawyer must be independent of his client. Thus in-house lawyers are not covered by LPP. In placing this limitation on LPP Community law is therefore narrower than English law, which does not differentiate between legal advice given by independent or in-house lawyers. Secondly, Community law only permits communications which are relevant to a client's future defence to fall within the ambit of LPP.⁵ It is thus much narrower than LPP in England as it is confined solely to litigation privilege. It would not strictly speaking encompass legal advice privilege, where that is given for a reason other than "for the (purpose) and in the (interest) of the client's rights of defence".⁶ It is fair to say that the ECJ gives the concept of "relevance for client's future defence" a wide interpretation, which ameliorates the effect of this distinction to a significant degree.⁷

A further contrast between English and Community LPP can also be drawn. In contrast to the English litigation privilege, Community LPP protects communications that have been produced for purposes other than litigation. It thus encompasses a broader class of documents than English litigation privilege. At the same time however only those documents produced by an independent lawyer for his client are privileged. Third party communications are thus not protected as they would be under English litigation privilege.⁸ This difference between English and Community LPP has recently been confirmed by the ECJ in *Akzo Nobel Chemicals and Akcros Chemicals v Commission*.⁹

³ See *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 6)* [2004] 3 W.L.R. 1274 at 1277 ([10] by Lord Scott).

⁴ See Case 155/79 *AM & S v Commission* [1982] E.C.R. 1575 at [21].

⁵ Proceedings relevant for the scope of the privilege can also be administrative in nature: see *AM & S v Commission* at [23].

⁶ This was exactly at stake in *Three Rivers*, where the Court of Appeal sought to distinguish documents produced for merely "presentational" purposes, not concerning client's "legal rights and obligations", and did not recognize the privilege as regards them. The House of Lords reversed this and left the scope of "legal advice" wider.

⁷ C Kerse and N Khan, *EC Antitrust Procedure* (5th ed, Sweet & Maxwell, London 2005) at 144 et seq.

⁸ Such a wide scope of privilege has been criticized by Lord Scott in *Three Rivers* [29] at 1283.

⁹ *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (2007 unreported) (T-125/03 and T-253/03).

2) *Ordre des barreaux*: A lawyer's obligation to inform and to cooperate with competent authorities when there is an indication of money laundering

The 1991 Directive had a significant impact on Community LPP as it places a wide-ranging limit on the protection afforded to lawyer-client. This had led to controversy during the Directive's drafting process and when it was last amended.¹⁰

In *Ordre des barreaux* the ECJ reviewed the legality of the Article 2a (5) of the 1991 Directive. This specifies that some categories of legal professionals, when they take part in certain transactions specified by the 1991 Directive,¹¹ are under an obligation to, on their own initiative, inform competent authorities of any fact, which might be an indication of money laundering. It also imposes a further obligation to provide those relevant authorities, at their request, with all necessary information. The second indent of Article 6(3) of the 1991 Directive allows Member States, when they implement the Directive, to make an exception to these disclosure obligations. The exception covers:

“information [that members of the professions specified by Article 2a(5) of the Directive] receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning, judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.”

A number of advocate bars challenged the disclosure obligation in proceedings brought before the Belgian Constitutional Court. They did so on the grounds that it interfered with the principles of professional secrecy and the independence of lawyers, which (according to the wording of the preliminary reference) are a constituent element of the fundamental right to a fair trial and respect of rights of defence. The Constitutional Court presented the issue in this way, when it referred its preliminary question to the ECJ.¹²

3) A far too narrow preliminary reference: protecting the right to a fair trial and the need to respect rights of defence as the basis for LPP

The fundamental difficulty which arose from the judgment in *Ordre des barreaux* arose from the problematic nature of the preliminary reference's wording as framed by the Belgian Constitutional Court. It limited the question as to justification for LPP, and therefore its scope, to the client's right to a fair trial and to defence. It did not raise any other possible justifications within the preliminary reference, which might reasonably be said to have an important role in justifying LPP and defining its scope. In principle there are two broad categories of justification

¹⁰ For the history of the Directive's drafting see AG Maduro's, [6] – [21].

¹¹ Article 2a (5) of the Directive: when they “(a) [assist] in the planning or execution of transactions for their client concerning the (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets; (iii) opening or managing of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures; (b) or by acting on behalf of and for their client in any financial or real estate transaction.”

¹² See judgment No 126/2005 of 13 July 2005, available at (<http://www.arbitrage.be/public/f/2005/2005-126f.pdf>).

for LPP: *utilitarian* and *right-based*.¹³ Within these two groups further distinctions can be identified.

The utilitarian rationale stresses the importance of LPP in respect of a client's ability to consult a lawyer. This basis stresses the importance of the consequences which flow from the ability clients have to consult their legal representatives free from the fear that the content of those consultations might be subject to a disclosure obligation. Client confidence in freedom from disclosure has broad societal implications, which range from better observance of law, on the assumption that legal advice enables lay people to become properly aware of any applicable legal rules to facilitating the proper administration of justice. In contrast to such a utilitarian or consequentialist rationale, right-based justifications, as their name implies, rely on the need to protect individual rights as the justification for LPP. A rights-based justification need not rest on the right to a fair trial or defence, as the European Court of Human Rights (the ECtHR) has held; it has, for instance, held that LPP can also be justified by reference to the right to privacy enshrined in Article 8 of the ECHR.¹⁴

The distinction that can be drawn between the various potential justifications is by no means academic. It can determine LPP's scope and any possible exceptions to it.¹⁵ If, for instance, the privilege relies on the right to defence, then any lawyer-client communication, which is not relevant for those purposes, is excluded from the privilege's scope and will thus be potentially subject to a disclosure obligation. This is the case in respect of LPP as defined by the ECJ in *AM & S v Commission*, contrary to position in English law as to legal advice privilege. Similarly, if we take a utilitarian justification which contends that LPP increases better compliance with law, then any communication obtained for the purposes of circumventing applicable legal rules or avoiding sanctions could be excluded from the privilege's scope.¹⁶ This would arguably be contrary to any justification based on recourse to the need to protect the right to defence of fair trial, for which such considerations would be immaterial.

The applicants in the case before the Belgian Constitutional Court asked the ECJ to widen the scope of the preliminary reference. They submitted that

the reference to Article 6 of the [European Convention] [was] too narrow, and the review of conformity of the provision at issue should [have been] extended in the light, in particular, of the principle of lawyers' independence, the principle of professional secrecy, the duty to act in good faith, the principle of the rights of defence (the right to legal representation in court and the privilege against self-incrimination) and the principle of proportionality.¹⁷

¹³ For the distinction see Eric Gippini-Fournier, *Legal professional privilege in competition proceedings before the European Commission: beyond the cursory glance* (2005) 28 *Fordham Int'l L.J.* 967.

¹⁴ See AG Maduro's Opinion at [41].

¹⁵ AG Maduro's Opinion at [43].

¹⁶ See e.g. Proceeds of Crime Act 2002, Section 330(11), which excludes applicability of the exemption from the obligations imposed by the Act (that implements the Directive) if the "information or other matter [...] is communicated or given with the intention of furthering a criminal purpose".

¹⁷ AG Maduro's Opinion at [29].

AG Maduro in his opinion in *Ordre des barreaux* was sympathetic to this suggestion. He stated that the other principles invoked by the applicants “(could) easily be grouped together under one of them, that of lawyers’ professional secrecy”.¹⁸ He then carefully analysed this unitary principle, taking into account its various different bases. However, the ECJ disagreed with this approach. It referred to its previous case law which dealt with the division of powers between itself and national courts. It concluded that “the legality of (the 1991 Directive) should not additionally be appraised by reference to fundamental rights not specified by the referring court, such as the right to respect for privacy provided for in Article 8 of the ECHR”.¹⁹

There is no room for analysing the ECJ’s case law on the possibility of it changing the meaning or wording of preliminary references. It is sufficient to note for present purposes that this case law is at best unclear and at worst inconsistent. It is so to such a degree that it enables the ECJ to make apparently arbitrary distinctions.²⁰ The lack of clarity in this area is perhaps exemplified by AG Maduro’s Opinion, as he did not find any difficulty in examining LPP’s ambit by reference to principles not specified by the referring court, since the substance of the question consisted in the conflict between the obligation to inform and cooperate with competent authorities imposed on lawyers and the fundamental rules and principles which governed their profession. Unfortunately, the ECJ narrowed its review of the contested provisions of the 1991 Directive significantly; although it did expressly note that it was aware of a wider scope of the litigation occurring before the referring court.²¹

4) Lawyers’ obligations, the right to a fair trial and their clients’ rights of defence

Within the narrow framework of the preliminary reference the ECJ first defined the obligations the 1991 Directive imposed on lawyers. It then recalled the exemption from the obligations laid down by Article 6(3) of the 1991 Directive.²² In so doing it emphasised the significance of the Directive’s seventeenth recital.²³ The ECJ nevertheless admitted that the exemption “may lend itself to several interpretations, and consequently the precise extent of the obligations of information and cooperation incumbent on lawyers is not entirely unambiguous.”²⁴ In such a situation, member states are obliged to interpret the wording of secondary legislation consistently not only with Community law, but also with the fundamental rights protected by the Community legal order or with the other general principles of Community law.²⁵

¹⁸ AG Maduro’s Opinion at [34]. As regards the principle of proportionality, AG stated that “it constitutes an element in the attainment and review of the fundamental rights guaranteed by the Community legal order. On that basis, it will in any event have to be taken into account in connection with the implementation of those rights”.

¹⁹ Judgment, [19].

²⁰ See Gareth Davies, ‘Abstractness and concreteness in the preliminary ruling procedure: implications for the division of powers and effective market regulation’, in: N.N. Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar, 2006).

²¹ See Judgment, [17].

²² Cited above at [insert a page reference].

²³ As indeed did the Court of Appeal in *Bowman v Fels* at [73] & [77].

²⁴ Judgment, [27].

²⁵ Judgment, [28]. It is an interesting question as to whether the mere *possibility* that it is permissible for member states to enact the exemption in their Directive implementing legislations, as provided by Article 6(3)’s second indent, can properly be understood to be an *obligation*, given the need to respect fundamental rights protected by Community law. In other words, does the interpretation of the Directive, respecting fundamental rights protected by

The ECJ then noted its case law which established the importance of protecting fundamental rights and the significance of the ECHR,²⁶ in which respect it referred to the ECtHR's case law which:

“the concept of ‘a fair trial’ referred to in Article 6 of the [ECHR] consists of various elements, which include, 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 (see *Golder v United Kingdom*, judgment of 21 February 1975, Series A No. 18, §§ 26 to 40; *Campbell and Fell v United Kingdom*, judgment of 28 June 1984, Series A No. 80, §§ 97 to 99, §§ 105 to 107 and §§ 111 to 113; and *Borgers v Belgium*, judgment of 30 October 1991, Series A No. 214-B, § 24).”²⁷

In this respect, however, the ECJ failed to refer to the ECtHR judgments, where LPP was directly in issue. In those judgments the ECtHR based the privilege on two different grounds: the rights of defence and the right to privacy.²⁸ Instead, the cases cited by the ECJ concerned the right of prisoners to consult a lawyer while in prison (*Golder v United Kingdom* and *Cambell and Fell v United Kingdom*) or the role of a *procureur general* in proceedings before the French *Cour de Cassation* (*Borgers v Belgium*). It therefore cited cases which dealt with problems of a very different nature than the matter at hand. It is hard to understand why the ECJ took this approach, given that AG Maduro expressly discussed a number of directly relevant ECtHR cases at paragraph 41 of his Opinion. Its failure to refer to this jurisprudence left the ECJ free to depart from what the ECtHR had already held in respect of LPP.

In reaching its decision the ECJ recognised the importance of protecting the secrecy of lawyer-client communications. At the same time, however, it significantly limited the scope of LPP only to the context of judicial proceedings. In a crucial part of its judgment the court stated:

Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers 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. [Emphasis added.]²⁹

The ECJ went on to confirm that it was limiting LPP to judicial proceedings in two further paragraphs, where it explained that the 1991 Directive imposed a disclosure obligation on lawyers only outside the context of judicial proceedings and that these obligations were therefore in conformity with the guarantees enshrined in Article 6 ECHR. The ECJ stated that:

LPP, require the mandatory adoption of the exemption from the obligations imposed by the Directive? The ECJ did not need to consider this, since the Belgian legislator adopted the exemption, but the same question can arise in another context.

²⁶ Judgment, [30].

²⁷ Judgment, [31].

²⁸ See n. 14.

²⁹ Judgment, [32].

it is clear from Article 2a(5) of Directive 91/308 that the obligations of information and cooperation apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions – essentially those of a financial nature or concerning real estate, as referred to in Article 2a(5)(a) of that directive – or when they act on behalf of and for their client in any financial or real estate transaction. *As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial.*³⁰

Given that the requirements implied by the right to a fair trial presuppose, by definition, *a link with judicial proceedings*, and in view of the fact that the second subparagraph of Article 6(3) of Directive 91/308 exempts lawyers, where their activities are characterised by such a link, from the obligations of information and cooperation laid down in Article 6(1) of the directive, those requirements are respected. [Emphasis added.]³¹

In these paragraphs the ECJ gives LPP a significantly narrower ambit than English legal advice privilege. Moreover it seems to give it a narrower ambit than it had previously given it in respect of European competition law enforcement proceedings, where it is already respected at an administrative stage.³² In the case of investigations concerning the mere suspicion of money laundering, LPP comes into play only after the initiation of judicial proceedings.³³

Interim protection against forced disclosure of privileged information seems rather improbable, given a recent order of the ECJ's President in *Commission v Akzo and Akcros*.³⁴ The President decided on an interim measure sought by an undertaking, which had refused to disclose to the Commission, which was investigating its alleged anti-competitive behaviour, some communications it had had with its lawyers. The President refused to grant the interim measure. He did so, stating that if the documents were finally found to be privileged, the Commission would be simply barred from taking them into account. Interim protection against Commission was not therefore necessary. It is to be presumed that the ECJ would take a similar view if asked to rule on a similar question if one arose via a preliminary reference under the 1991 Directive.

5) Conclusions

The ECJ's decision in *Ordre des barreaux* has had a significant impact on the ambit of LPP in the European context. It has left a considerable amount of activities carried out by legal professions unprotected by LPP, as the ECJ put it:

. . . it must be recognised that the requirements relating to the right to a fair trial do not preclude the obligations of information and cooperation laid down in Article 6(1) of Directive 91/308 from being imposed on lawyers acting specifically in connection with the activities listed in Article 2a(5) of that directive, in cases where the second subparagraph of Article 6(3) of that directive does not apply, where those obligations are

³⁰ Judgment, [33].

³¹ Judgment, [35].

³² See n. 5.

³³ See Judgment, [34].

³⁴ Case C-7/04 P(R) *Commission v Akzo and Akcros* [2004] E.C.R. I-8739.

justified by the need – emphasised, in particular, in recital 3 of Directive 91/308 – to combat money laundering effectively, in view of its evident influence on the rise of organised crime, which itself is a particular threat to society in the Member States.³⁵

The ECJ left the question whether this was proportionate unexamined: as appears obvious from the last sentence of the quoted passage, “the need to combat money laundering effectively” was enough.

The unsatisfactory nature of the ECJ’s review of the 1991 Directive is clear in light of the more nuanced and detailed examination within AG Maduro’s opinion. As already noted above,³⁶ AG Maduro based his assessment of LPP’s justification, and hence ambit, on two fundamental rights, the rights to a fair trial and the right to privacy. According to his analysis,

upholding the twofold basis has the advantage of meeting all the concerns of the interveners. The protection of lawyers’ professional secrecy is a principle with two aspects, one procedural, drawn from the fundamental right to a fair trial, the other substantive, drawn from the fundamental right to respect for private life. It is easy to attach the rights of the defence, the right to legal assistance and the privilege against self-incrimination to its procedural basis. The requirements which correspond to its substantive basis are ‘that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it’ and the correlative duty of the lawyer to act in good faith towards his client. The principle of secrecy originates in the specific nature itself of the profession of lawyer.³⁷

AG Maduro found the core of the privilege in protecting the “relationship of trust between lawyer and client”, which covers not only activities connected to judicial proceedings, but also providing legal advice. On this reading he then had to find a way of interpreting the 1991 Directive consistently with respect for this and in a way which did not interpret it as inconsistent with the fundamental principles of Community law. The careful analysis given by AG Maduro in his examination of whether the obligations imposed by the Directive are proportionate to its aims and whether they respect the core principles which underpin LPP, appears in stark contrast to the ECJ’s brief statement, which it set out in one brief sentence within its judgment. It is to be regretted that post-enlargement brevity of judgment appears to have become the rule insofar as ECJ judgments are concerned.

Finally, it appears that the ECJ’s decision leaves open to question to UK’s implementation of the 1991 Directive. The wording of the exemption from the obligations, found in Proceeds of Crime Act 2002, Section 330, clearly covers situations that do not have *a link with judicial proceedings*: situations which the ECJ found crucial for granting the exemption.³⁸ The same seems to apply to

³⁵ Judgment, [36].

³⁶ See the text following fn. 18.

³⁷ AG Maduro’s Opinion at [43], footnotes omitted.

³⁸ See the Court of Appeal decision in *Bowman v Fels* [2005] EWCA Civ 226; [2005] 1 WLR 3083 for the approach taken by the English courts to the 1991 Directive and its relationship with LPP. Arguably, in this decision the Court of Appeal dealt only with the (English) litigation privilege (as it found that lawyers representing their clients in the legal proceedings do not fall within the scope of the obligations imposed by the Act at all - similarly as the ECJ in its judgment at [33], n. 30 - and did not examine in what situations the exemptions granted by s 330 (6) b) and (10)

the implementing legislation of other member states, such as French, German or Greek, as AG Maduro's opinion shows.³⁹ Because these member states have interpreted the scope of LPP in light of principles, which the ECJ, on questionable grounds, excluded from its review this difference in interpretation has arisen. The ECJ's exclusion of a consideration of those principles from its judgment predetermined its decision and predetermined the difference which now exists between the approach taken by the ECJ and member states to ambit of LPP.

would apply. It is an open question whether the understanding of the exemptions granted by Article 6(3) of the 1991 Directive, *linked to judicial proceedings* (see the ECJ's Judgment at [35], n. 31 above), would fit this provision, which is worded to cover wider situations.

³⁹ AG Maduro's Opinion at [57].