PROTECTION OF ATTORNEY-CLIENT PRIVILEGE IN CRIMINAL PROCEEDINGS IN THE EU

Marbella, 3-4 October 2024

FACE-TO-FACE

EXCELLENCE IN EUROPEAN LAW

Speakers

Lorena Bachmaier Winter, Professor, Complutense University, Madrid

Luis Batlló, Attorney-at-Law, Barcelona

Linas Belevičius Attorney-at-Law, Partner, LEXIMUM Law Firm, Vilnius

Elżbieta Hryniewicz-Lach, Professor, Chair of Criminal Law, Faculty of Law and Administration, Adam-Mickiewicz-University, Poznań

Matthias Jahn, Judge, Professor for Criminal Law and Criminal Procedural Law, Johann Wolfgang-Goethe University, Frankfurt

Petr Klement, Deputy European Chief Prosecutor, European Public Prosecutor's Office, Luxembourg

Holger Matt, Attorney, Honorary Professor, Johann Wolfgang-Goethe University, Frankfurt

Iain G. Mitchell KC, Vice-Chair of CCBE Surveillance Working Group, Advocate in Scotland, Barrister in England

Mayte Requejo Naveros, Of Counsel Squire Patton Boggs, Madrid

Salvador Guerrero Palomares, Partner of Guerrero Abogados, Member of the CCBE Criminal Law Committee, Marbella

Laura Valković, Attorney-At-Law, Zagreb

Key topics

- The European legal framework
- The case law of the ECtHR
- The role of the prosecution
- The situation in practice in selected EU Member States, especially regarding attorney-client communication
- Procedural protection for lawyers
- Internal investigations of companies
- Ideas for joint principles
- The need for minimum standards in the EU?

Language
English

Event number
324DT108

Organisers
Cornelia Riehle (ERA) in cooperation with Salvador Guerrero Palomares

Co-funded by
the European Union

Thursday, 3 October 2024

09:00 Arrival and registration of participants

09:30 **Welcome and introduction to the programme**
María Ángeles Muñoz Uriol (Mayor Marbella) & Cornelia Riehle

I. The European legal framework

Chair: Salvador Guerrero Palomares

09:45 **Cornerstones based on the European Convention of Human Rights**
This presentation will demonstrate the development of the jurisprudence of the ECtHR including the most recent case law.
Iain Mitchell

10:30 Discussion

10:45 Break

11:15 **Relevant principles for future legislation**
This presentation will illustrate the different practices in the EU Member States and analyse the need of EU minimum standards based on Article 82 TFEU.
Holger Matt

11:45 Discussion

II. Gaps in the protection of legal professional privilege and attorney-client-privilege in practice

Chair: Holger Matt

12:00 **The scope of legal privilege from a comparative point of view**
This presentation will address the different scope of legal privilege in the EU Member States as well as the differences between common law and civil law countries. Practical examples of cases dealing with disclosure of documents, in-house lawyers, and computer searches will be given.
Lorena Bachmaier Winter

13:00 Discussion

13:15 Lunch

III. The perspectives of the EU Member States

Chair: Lorena Bachmaier Winter

The following presentations will give short overviews on the respective national laws and legal practice regarding the protection of the legal professional privilege.

14:30 **The Lithuanian example**
Linas Belevičius

14:55 **The German example**
Matthias Jahn

15:20 **The Spanish example**
Luis Batlló

15:45 Coffee break

Objective

This conference will analyse legal professional privilege and attorney-client privilege in criminal proceedings across the EU.

Communication between lawyers and their clients is vital, but it is under permanent pressure. In the EU, there is no common definition of what constitutes an immunity or privilege, so the precise meaning is left to national law. Differences in legal privilege are especially evident in cross-border cases, where different EU instruments of mutual recognition require automatic execution of requests, with no option not to recognise or execute the request on the grounds of breach of immunity or privilege.

This conference will look at the landscape for legal professional privilege in criminal proceedings in the EU, outline gaps in protection, present the perspective of the prosecution, and discuss the need for minimum standards in the EU.

You will learn about…

- the legal situation regarding legal privilege in criminal proceedings under the European legal framework
- the relevant case law of the ECtHR
- the situation seen from the prosecutorial side
- the practice in selected EU Member States and possible gaps
- possible ideas for joint principles
- the question whether minimum standards are needed in the EU

About the project

This seminar is part of a large-scale project co-financed by the European Commission entitled “European Criminal Law for Defence Lawyers”. Fifteen interactive, practice-oriented activities will be implemented within this project ranging from face-to-face seminars and conferences to webinars and eLearning tools. For more information, see: https://training-for-defence.era.int/

Who should attend?

Defence lawyers, judges and prosecutors, who are citizens of eligible EU Member States (Denmark does not participate in the EU Justice Programme) and Kosovo.

16:15 **The Polish example**
Elżbieta Hryniewicz-Lach

16:40 **The Croatian example**
Laura Valković

17:10 Discussion

17:30 End of first day

20:30 Dinner offered by the organisers

Friday, 4 October 2024

IV. The role of the prosecution

Chair: Matthias Jahn

09:30 **Best practices for the protection of the legal professional privilege during criminal investigations and prosecution**
Petr Klement

10:15 Discussion

10:30 Coffee break

V. The need for minimum standards?

Chair: *Holger Matt*

11:00 **Panel discussion: Potential EU legislation in order achieve better protection of legal professional privilege in theory and practice**

Lorena Bachmaier Winter, Elżbieta Hryniewicz-Lach, Matthias Jahn, Mayte Requejo Naveros, Petr Klement, Iain Mitchell

13:00 End of conference

For programme updates: **www.era.int**
Programme may be subject to amendment.

In all sessions, special attention will be paid to the following issues:

- Attorney-client communication and confidential documents in defence cases (Art 6 ECHR, Art 4 Directive (EU) 2013/48)
- Attorney-client (as damaged party or witness etc.) communication and confidential documents in criminal cases (Art 8 ECHR)
- Attorney-client communication and confidential documents in (other) legal cases (Art 8 ECHR)
- Protection of legal professional privileges in general (Art 8 ECHR)
- Protection of LPP and ACP in the clients' sphere
- Disposition of client (waiving of ACP) and consequences
- General exceptions for lawyers under suspicion (degree of suspicion, protection of clients)
- Procedural protection of lawyers and LPP/ACP against (unjustified) investigation or prosecution of lawyers
- Rules for illegally collected evidence (exclusion of use, fruits of the poisoned tree, the example of the EncroChat case)
- Special issue: internal investigations of companies.

Venue

Hospital Real de la Misericordia
"Hospitalillo"
Plaza Practicante Manuel Cantos
29601 Marbella
Spain

CPD

ERA's programmes meet the standard requirements for recognition as Continuing Professional Development (CPD). Participation in the full programme of this event corresponds to **9 CPD hours**.
A certificate of participation for CPD purposes with indication of the number of training hours completed will be issued on request. CPD certificates must be requested at the latest 14 days after the event.

Your contacts

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Save the date

Summer Course on European Criminal Justice
Online, 17-21 June 2024

Co-funded by the European Union.

Application

Protection of Attorney-Client Privilege in Criminal Proceedings in the EU

Marbella, 3-4 October 2024 / Event number: 324DT108

Terms and conditions of participation

Selection

1. Participation is only open to lawyers in private practice, judges and prosecutors from eligible EU Member States (Denmark does not participate in this EU Justice Programme), Albania and Kosovo*.

   The number of open places available is limited (50 places). Participation will be subject to a selection procedure. Selection will be according to professional eligibility, nationality and then "first come, first served".

2. Applications should be submitted before 15 May 2024.

3. A response will be sent to every applicant after this deadline. We advise you not to book any travel or hotel before you receive our confirmation.

Registration Fee

4. €110 including documentation, coffee breaks, lunch and dinner.

Travel and Accommodation Expenses

5. Participants will receive a fixed contribution towards their travel and accommodation expenses and are asked to book their own travel and accommodation. The condition for payment of this contribution is to sign all attendance sheets at the event. The amount of the contribution will be determined by the EU unit cost calculation guidelines, which are based on the distance from the participant's place of work to the seminar location and will not take account of the participant's actual travel and accommodation costs.

6. Travel costs from outside Spain: participants can calculate the contribution to which they will be entitled on the European Commission website (https://era-comm.eu/go/calculator, table 2). The distance should be calculated from their place of work to the seminar location.

7. For those travelling within Spain, the contribution for travel is fixed at €52 (for a distance between 50km and 399 km). Please note that no contribution will be paid for travel under 50km one-way. For more information, please consult p.10 on https://era-comm.eu/go/unit-cost-decision-travel

8. Accommodation costs: international participants will receive a fixed contribution of €117 per night for up to two nights' accommodation. National participants travelling more than 50km one-way will receive a fixed contribution of €117 per night for one night accommodation For more information, please consult p.14 on https://era-comm.eu/go/unit-cost-decision-travel.

9. These rules do not apply to representatives of EU Institutions and Agencies who are required to cover their own travel and accommodation.

10. Successful applicants will be sent the relevant claim form and information on how to obtain payment of the contribution to their expenses. Please note that no payment is possible if the registered participant cancels their participation for any reason.

Participation

11. Participation at the whole seminar is required and participants will be asked to sign attendance sheets daily.

12. A list of participants including each participant's address will be made available to all participants unless ERA receives written objection from the participant no later than one week prior to the beginning of the event.

13. The participant will be asked to give permission for their address and other relevant information to be stored in ERA's database in order to provide information about future ERA events, publications and/or other developments in the participant's area of interest.

14. A certificate of attendance will be sent electronically after the seminar.

*This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

Apply online for "Protection of Attorney-Client Privilege in Criminal Proceedings in the EU": **www.era.int/?132867&en**

Venue

Hospital Real de la Misericordia
"Hospitalillo"
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Spain

Language

English

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324DT108

BACKGROUND DOCUMENTATION

PROTECTION OF ATTORNEY-CLIENT PRIVILEGE IN CRIMINAL PROCEEDINGS IN THE EU

Marbella 3-4 October 2024

Co-funded by the European Union

Background documentation

A) Legal Framework

A.01	Directive EU 2013/48 of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294/1, Brussels, 22 October 2013
A.02	Council of Europe, European Convention on Human Rights

B) Case Law of the ECHR

B.01	Case of Särgava v. Estonia (No. 698/19, Third Section), Strasbourg, 16 November 2021
B.02	Case of Big Brother Watch and Others v. United Kingdom (Nos. 58170/13, 62322/14 and 24960/15, Grand Chamber), Strasbourg, 25 May 2021
B.03	Case of Saber v. Norway (No. 459/18, Fifth Section), Strasbourg, 17 December 2020
B.04	Case of Laurent v. France (No. 28798/13, Fifth Section), Strasbourg, 24 May 2018
B.05	Case of Dudchenko v. Russia (No. 37717/05, Third Section), Strasbourg, 07 November 2017
B.06	Case of M. v. the Netherlands (No. 2156/10, Grand Chamber), Strasbourg, 25 July 2017
B.07	Case of Brito Ferrinho Brexiga Villa-Nova v. Portugal (No. 69436/10, Fourth Section), Strasbourg, 01 December 2015
B.08	Cases of Vinci Construction and GMT genie civil and services v. France

	(Nos. 63629/10 and 60567/10, Grand Chamber), Strasbourg, 02 April 2015
B.09	Case of Yuditskaya and others v. Russia(No. 5678/069 Strasbourg, 12. February 2015
B.10	Case of Pruteanu v. Romania (No. 30181/05, Third Section), Strasbourg, 03 February 2015 (only available in FR)
B.11	Case of Michaud v. France (No. 12323/11, Fifth Section), Strasbourg, 06 December 2012
B.12	Case of Wieser and Bicos Beteiligungen GmbH v. Austria (No. 4336/01, Fourth Section), Strasbourg, 16 October 2007
B.13	Case of Sallinen and Others v. Finland (No. 50882/99, Fourth Section), Strasbourg, 27 September 2005
B.14	Case of Kopp v. Switzerland (No. 58144/97, Grand Chamber), Strasbourg, 25 March 1998
B.15	Case of Niemitz v. Germany (No. 13710/88, Grand Chamber), Strasbourg, 16 December 1992

C) Statements, Articles and Papers

C.01	"Proposals for Legal Professional Privilege in EU Competition Proceedings", Etsuko Kameoka, Market and Competition Law Review, Volume VI, No. 1. April 2022, pp. 15-47
C.02	European Commission, Communication from the Commission on the protection of confidential information by national courts in proceedings for the private enforcement of EU Competition Law (OJ C 242/1), Brussels, 22 July 2020
C.03	"Legal Professional Privilege in the European Union", Probono Institute and Latham&Watkins, April 2019
C.04	Note by the European Union to the OECD, "Treatment of legally privileged information in competition proceedings", 26 November 2018
C.05	Privilege – European Union, Gibson, Dunn&Crutcher, Patrick Doris and Steve Melrose, published November 2016
C.06	Court of Justice of the European Union (CJEU), Case of Akzo Nobel Chemicals and Akcros Chemicals v. the European Commission (C-550/07 P), Judgement of the Court (Grand Chamber) of 14 September 2010

D) Useful Links

D.01	Factsheet ECHR on Legal Privilege, List of relevant Cases, Strasbourg, November 2021
D.02	Norton Rose Fulbright, "Germany: Legal Professional Privilege and Implied Undertaking", November 2021

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ERA Seminar Marbella
03/04 October 2024

Prof. Dr. Holger Matt
Rechtsanwalt
Honorary Professor at Goethe-Universität
Frankfurt am Main

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the European Union

Relevant principles for (future) common standards to secure protection of LPP and ACP

- Legislation Art 82 TFEU
- Reform of EPPO-Regulation (EU) 2017/1939
- Best Practises
- Jurisprudence by ECtHR and CJEU
- Council of Europe
- Other Options

I. Aspects of discussion (analysis and questions)

1. General systematic approach (LPP and ACP)

• Confidential attorney-client communication and confidential documents/data (simplifying: there are two legal approaches - difference of LPP/ACP according Art 8 ECHR in general and in defence cases according Art 6 ECHR protection)

• Confidential attorney-client communication and confidential documents/data: LPP (professional protection of lawyers) and ACP (protection of confidentiality between lawyers and clients – professional secrecy as right of the client)

LPP:

- **Legal and professional duties correspond with** confidential attorney-client communication and confidential documents/data **protection**
- **Rule of law**
- **Role of lawyers for justice systems** – recognised by Art 6, 8 ECHR and EU law
- Balancing of legal interests (**no absolute protection**)
- **Owner of LPP is the lawyer dependent on clients'** disposal regarding entrusted secrets
- **Procedural safeguards** to secure role of lawyers (cf. CJEU)
- **Differences between common law** (privileged material by definition and declaration) **and civil law systems** (privileged legal sphere and consequently privileged material originated and stored in privileged legal sphere)
- Exception: Duties of disclosure (in contradiction to LPP, e.g. money laundering suspicion, cf. CJEU)

ACP:

- Confidential attorney-client communication and confidential documents/data protection is a **right of the client that refers to LPP** – "same medal, two sides" (but not identical)
- Recognized by Art 8 ECHR and EU law
- Additionally [1] opens confidentiality for **clients' disposal (owner of ENTRUSTED secrets)**
- [2] better/stronger/more/absolute protection by **procedural safeguards in criminal proceedings** – Art 6 ECHR – Art 47, 48 CFR - Art 4 Directive (EU) 2013/48 - Art 7 Directive (EU) 2016/343) - rights of the client and
- [3] should be protected **also in clients' sphere**, not only in law firms, at least in defence cases)

- LPP/ACP - Confidential attorney-client communication and confidential documents/data: **Mandatory relation of lawyers' obligation** (should be substantive criminal law and professional duty) **and privilege** (procedural law) not to testify on clients' issues or to disclose anything (protection of professional secrets and confidentiality and against supervision).

- LPP/ACP - Confidential attorney-client communication and confidential documents/data – **Question to MS: Protection against search and seizure in law firms**, does it **correspond to the legal obligations and privileges** of lawyers to protect professional secrets and confidentiality? Differences (and justification)?

• LPP/ACP-Questions: **Protection of clients as witnesses** by privileges (not to testify) in any legal proceedings (diff. criminal, civil, other proceedings)? Any obligations to disclose facts as witness in general ? Or in certain proceedings, e.g. insolvency? Consequences for criminal proceedings (exclusion of use)?

• **No obligation** to keep secrets of LPP/ACP => **no privilege** as witness **=> no protection** of LPP/ACP in client's sphere?

• **Thesis:** Privileges as witnesses and protection of LPP/ACP in clients' spheres are necessary to make LPP/ACP effective and to avoid circumvention of protection or infringements of LPP/ACP.

• Special issue (independent of LPP/ACP): **Right to remain silent** as witness in legal proceedings (**right not to incriminate oneself**)

• Special issue: client as **suspect in criminal proceedings**
(Art 6 ECHR – Art 47, 48 CFR - Art 4 Directive (EU) 2013/48 - Art 7 Directive (EU) 2016/343)

2. Legal protection in law firms – two approaches: Art 8 and Art 6 ECHR (and EU law) – Thesis and Questions

- Thesis or Consent on LPP/ACP?

Professional secrecy should be a legal obligation **protected both by substantive criminal law and by professional rules with disciplinary consequences)**.

Confidential attorney-client communication and confidential documents/data in **defence cases** (Art 8 plus Art 6 ECHR, Art 47, 48 CFR, Art 4 Directive (EU) 2013/48, Art 7 Directive (EU) 2016/343) **should be protected absolutely by procedural safeguards.**

- **Any MS with lower standards?**

- Confidential attorney-client (as damaged party or witness etc.) communication and confidential documents/data **in criminal cases** (Art 8 ECHR, Art 7 CFR, Directive 2012/29/EU):

Are communication and confidential documents/data absolutely protected if the clients are **not suspected or accused?**

Third parties "secrets" (e.g. internal investigations)?

Victims' Protection by Directive 2012/29/EU?

• Confidential attorney-client communication and confidential documents/data in **(other) legal cases** (Art 8 ECHR, Art 7 CFR). Are communication and confidential documents/data absolutely protected if the **clients are not suspected or accused in a criminal case**? Third parties "secrets"?

• Remember: Protection of LPP/ACP in general (Art 8 ECHR, Art 7 CFR) – correspondence of obligation/privilege – interest of judicial authorities (e.g. EPPO) to respect legal privileges – rule of law

• **Relation of search and (following) seizure**: if seizures could be permitted (because documents/data are potentially not protected by legal privileges), are searches in law firms allowed? If seizures are prohibited, are searches also prohibited?

• **Protection by Procedure (procedural safeguards) in concreto** against potential factual infringements of LPP/ACP through investigators:

How should LPP/ACP be protected during searches and after seizures?

Involvement of the bar?

Exclusion of use (especially in the case against the client)?

Necessary consent regarding **IT-tools and/or AI?**

3. Scope of protection in law firms – Consent and Questions

• Consent: Law firms are not “safe houses” for ***instrumenta et producta sceleris*.**

• Consent: Limited protection regarding possession of **pieces of evidence** (created outside of confidential attorney/client-relationship). **However, what are the limitations (criteria), any common standards in the EU?**

• Consent: **No supervision of communication** (verbal and written), but **reliably guaranteed in all EU MS?**

• Consent: **Absolute protection of data and both products of lawyers’ work and material produced by clients for defence** cases (ACP: opinions, drafts, notes, letters, other communication, everything without approval for release), but **reliably guaranteed in all EU MS?**

• Consent: **Exclusion of use** of legally privileged pieces of evidence, illegally collected in law firms, but **reliably guaranteed in all EU MS?**

- **Products of lawyers' work in other cases** (opinions, drafts, notes), are they reliably guaranteed in all EU MS?

- **Protection** of LPP/ACP (in non-criminal cases) against search and seizure in law firms, does the scope **correspond with the legal obligations and privileges of lawyers to protect professional secrets and confidentiality** (e.g. right to refuse testimony as witness)? Reliably guaranteed in all EU MS?

- Law firms as employer and client of service providers (e.g. IT), are all **employees and assisting persons covered by the LPP/ACP?**

• Products of lawyers' work (opinions, drafts, notes) concerning **third parties?**
• Special issue: **Internal investigations (versus right of the defence to collect evidence)**

• Products of clients to be found in law firms? **Is it consent**: (Absolute) protection of law firms concerning data and both products of lawyers' work and material produced by clients for **non-defence cases** (ACP: opinions, drafts, notes, letters, other communication, everything without approval for release)? **Which level is reliably guaranteed in all EU MS?**

• Consent: **Protection by Procedure (specific procedural safeguards for law firms)** in concreto against potential factual infringements of LPP/ACP through investigators. **Which measures exist, which level** is reliably guaranteed in all EU MS?

• Consent: **Loss of protection after criminal activities of the lawyer**, but what are the consequences for the client and his right to secrecy and confidentiality (exclusion of use against client)? Is the lawyer allowed to defend without limitations including the "violation" of LPP/ACP consequences for the client and his right to secrecy and

- **Disposition of client (waiving of ACP)** and consequences

- **Disposition of lawyer** (with/without consent of client - consequences?)

⇒ Self-Defence legitimate without consent of client (but exclusion of use against client because client continues to have right to ACP)

⇒ Legitimate interests in civil or criminal cases of lawyer against client (e.g. remuneration, criminal complaint against client's threats)

⇒ In general: violation of substantive criminal law and professional duties with disciplinary consequences

- **Protection of LPP key elements** as fundamental professional right of the lawyer (cf Art 12 German Constitution, Art 7 CFR) – independent of client, no waiver by client possible, remains on disposal of lawyer

- Special issue: disposition of **company clients** (which natural person is legally necessary/sufficient to waive ACP => Mueller case ECHR)

4. Legal protection outside of law firms – two approaches: Art 8 and Art 6 ECHR (and EU law) – Consent and Questions

- **Protection of LPP and ACP in clients' sphere as suspects' rights in criminal proceedings** (Art 6 ECHR, Art 47, 48 CFR, Art 4 Directive (EU) 2013/48, Art 7 Directive (EU) 2016/343), **consent: Absolute protection** of data and both products of lawyers' work and material produced by clients for defence cases (ACP: opinions, drafts, notes, letters, other communication, everything without approval for release), **but reliably guaranteed in all EU MS?**

- **Consequences for the client and his right to secrecy and confidentiality should be exclusion of use against client in self-defence-cases of the lawyer and investigations against the lawyer, but reliably guaranteed in all EU-MS?**

- Key element: **Right to confidentiality and ACP** (Art 6 ECHR, Art 47, 48 CFR, Art 4 Directive (EU) 2013/48)

- Key element: **Right to remain silent as witness** in legal proceedings (**right not to**

• How to protect LPP/ACP in clients' sphere if the **client is not a suspect** (i.e. no defence rights, same or less scope of protection or none)?

• **Option**: Protection of LPP and ACP in clients' sphere (**"material is privileged" – common law approach** – protection by definition and declaration - disposition of lawyer on LPP (with consent of client - two categories: confidential and disposable)?

• **Option**: **Protection of clients as witnesses by privileges** (not to testify) in any legal proceedings (diff. criminal, civil, other proceedings)? Any obligations to disclose facts in certain proceedings, e.g. insolvency, and consequences for criminal proceedings (exclusion of use)?

• Repetition: **No obligation** to keep secrets of LPP/ACP => **no privilege** as witness => **no protection of LPP/ACP in client's sphere?**

• **Thesis: Privileges as witnesses and protection of LPP/ACP in clients' spheres are necessary to make LPP/ACP effective and to avoid circumvention of protection or infringements of LPP/ACP.**

- (No?) **Protection of communication and documents/data (LPP) outside of attorney-client relation (third parties)?** Disposition of lawyers on LPP by declaration (two categories: confidential and disposable)?

- **Special issue: Internal investigations** of companies and the option to distinguish between originally lawyers work and company's work outsourced to service providers (lawyers, consultants etc.)?

- **Protection by Procedure** against factual infringements of LPP/ACP through investigators: How should LPP/ACP be protected during searches and after seizures? (Mandatory) Presence of a lawyer? Exclusion of use?

5. Further issues

• General exceptions (exclusion) for **lawyers under suspicion**

• Issues: **degree of suspicion**, protection of legally privileged **clients** – danger of **circumvention of LLP/ACP** by investigation against lawyers

• **Procedural protection of LPP/ACP** against (potentially unjustified) investigation measures – interest of judicial authorities (e.g. EPPO) to respect legal privileges – rule of law

• **Rules for illegally collected evidence** (exclusion of use, fruits of the poisoned tree)

- **Difference between litigation and advice privilege and/or exclusion of services not covered by legal privileges?**

- **Definition** of a lawyer, who is privileged?

- Special issue:

Option to distinguish between originally **lawyers work** and

(for example 1.) company's work outsourced to service providers (lawyers, consultants etc., e.g. for internal investigations) or

(for example 2.) asset manager's work or

(for example 3.) real estate business?

• **EPPO and transnational issues** for lawyers as witnesses in other EU MS:

- Are legal obligation and privilege not to testify on clients' issues recognised everywhere?
- Potential conflict of duty to testify and duty to keep confidentiality?
- Missing common standards and partly low standards of LPP/ACP protection in single MS lead to danger of forum shopping and to factual infringements of LPP/ACP.

• Practical issue when **third persons are involved**, e.g. interpreter: Reliability of confidentiality

• Instruments of EU law: **EIO, EPOC, EPOC-PR**

II. Principles for protection of LPP and ACP to be considered as common standards in the EU

- cf. CCBE recommendations of 2016, 2019

- cf. draft EC-Convention on protection of lawyers (2024/2025)

Preamble:

- Independence of advocacy (definition of “lawyer” = “attorney” and “client”)
- Clarification of definitions (professional secrecy, LPP, ACP)
- Substantive law and professional rules protecting confidentiality of LPP/ACP
- Confidentiality as condition for a trustful relation and effective legal advise or legal assistance
- Confidentiality is protected in all respects (verbal, written, electronic etc)

Principle One (perspective of legal profession and all clients Art 8):

2-Step-Correspondence

(1) lawyers **obligations** and legal **privileges** and

(2) right to refuse to testify for professional secrecy holder(s) and **protection of LPP/ACP** against supervision of communication or search and seizure of confidential documents/data (in possession of lawyer)

=> otherwise the legal obligation to confidentiality would not correspond with the protection of confidential documents/data and against supervision (LPP/ACP).

Principle Two (perspective of **citizen as suspect** Art 6 ECHR, Art 47, 48 CFR, Art 4 Directive (EU) 2013/48, Art 7 Directive (EU) 2016/343):
Absolute protection of confidentiality in defence cases both in clients' and in lawyers' area
(e.g. documents/data protected in possession of client and lawyer, supervision or tapping etc prohibited, such evidence excluded).

No exception for imprisoned clients: free and private communication should be guaranteed by appropriate measures (no camera, no security, no glass-door, no control of letters or phone calls etc)

Any illegally collected evidence (privileged material) should be excluded from any use (also regarding other investigations against other persons?).

No consequences for the client and his right to secrecy and confidentiality (**exclusion of use against client**) **in self-defence-cases of the lawyer and after collection of evidence against the criminally suspected lawyer** which is privileged in relation to the client.

Principle Three:

Disposition of clients regarding LPP is limited, waiver is only possible in the field of ACP.

(1) Disposition of the client as a **general rule**: Release from the obligation to maintain secrecy regarding all information and secrets delivered by or disclosed to the client lead to release from protection of ACP.

(2) Exception: No disposition of the client regarding "core inner area" of lawyers' activities (e.g. documentation of thoughts, meetings/talks with colleagues, prosecutors, judges if not disclosed to client) both regarding right to refuse to testify for professional secrecy holder(s) and protection of LPP regarding search and seizure of confidential documents/data

Principle Four: Protection of lawyers' independence and integrity must correspondent independent legal privileges (also partly independent from clients' decision to release ACP, i.e. LPP is more extensive (covers more) and is an essential part of the justice system. Inhouse lawyers might not be privileged in the same way.

Therefore belong in this category of legal privileges (principle four) also a **better/stronger and more effective protection**:

a. Stronger requirements in substantive criminal law for **prosecution of lawyers**

b. **Higher degree of suspicion** before starting any criminal investigation, but definitely for coercive measures against lawyers in order to avoid abuse by state.

c. Any investigation needs **procedural protection of LPP/ACP (safeguards)** against (potentially unjustified) investigation measures – this is in the interest of justice (including judicial authorities e.g. EPPO) and consequence of the rule of law, **examples for potential practical measures concerning law firms**: presence of bar representative during searches, participation of law firm and their lawyer when classification regarding evidential relevance is being conducted (Sichtung vor Beschlagnahme), sealing before any look (at privileged material) until classification and/or final decision on seizure, exclusive competence for judges, effective remedies (special chambers?) etc.

Principle Five:
(1) Clients as witnesses should have a **right to silence about legal advise and all secrets protected by LPP/ACP** (independent of status as suspect: protection of legal profession and client) **and regarding self-incrimination**, beside other witnesses' rights e.g. to be accompanied by a lawyer, refusal of testimony in cases of relatives etc.

(2) The **right** to refuse any testimony regarding LPP/ACP in legal proceedings should **correspond the protection of confidential documents/data in the area of clients against searches and seizure.**

=> Principle Five is the **consequence of the clients' right to ACP** which **refers to** the lawyers professional duties and the mandatory relation of **lawyers' obligation** (to be secured by substantive criminal law and professional duty) **and privileges** (in procedural law) not to testify on clients' issues or to disclose anything (protection of professional secrets and confidentiality and against supervision of Confidential attorney/client-communication).

Principle Six:

If lawyers are acting as lawyers with all the legal and professional **obligations of lawyers** (i.e. not: acting as private businessmen or acting as a criminal) **all legal privileges** (right to refuse testimony and corresponding protection of LPP/ACP against supervision and search and seizure) **should apply completely and absolutely.**

Same protection should be guaranteed for employees and other assisting persons (including interpreters, IT provider etc) in the specific capacity – warnings (cautioning) necessary by lawyers (preferred in writing with approval signature) – optional: warning/cautioning legally necessary by court/PPO/police who conduct the interview.

⇒ no relativizing consideration or proportionality according Art 8 ECHR jurisprudence.

⇒ Exception Principle Three: Disposition of client.

More details about **gaps in theory and practice** in the EU MS, a **comparative view**: Lorena Bachmaier

National examples with more details will follow: today afternoon

EPPO perspective: Friday morning

Panel on Friday 11-13 at the end of the seminar:

LPP/ACP - The need for better protection in theory and practise - Minimum standards under EU law and for EPPO proceedings ?

My legal conviction and for a better Europe is: Yes!

THANK YOU FOR YOUR ATTENTION!

The scope of legal privilege from a comparative point of view

Prof. Dr. Lorena Bachmaier Winter

Co-funded by the European Union

Concept and aim

- ECtHR: the lawyer's professional secrecy is the basis of trust between lawyer and client

- "This secrecy encourages open and honest communication between the client and his lawyer (…) and confidential communication with the lawyer is protected by the Convention as an essential guarantee of the right of defence. In fact, if a lawyer could not consult with his client and receive confidential instructions from him without being listened to, that assistance would lose much of its usefulness."

- *Andre and another v. France* (Appl. no. 18603/03, July 24, 2008); *Xavier Silveira v. France* (Appl. no. 43757/05, January 21, 2010).

Concept and aim

- ECtHR:

- "The right of the accused to communicate with his lawyer without being heard by third parties is one of the basic requirements of a fair trial in a democratic society and is derived from art. 6.3 c) of the Agreement"

- *Marcello Viola v. Italy*, (Appl. no. 45106/04, of October 5, 2006); *S.v. Switzerland*, (Appl. no. 12629/87 of November 2, 1991)….

Concept and aim

Instrumental to the right to defense

Right enshrined in the right to legal assistance

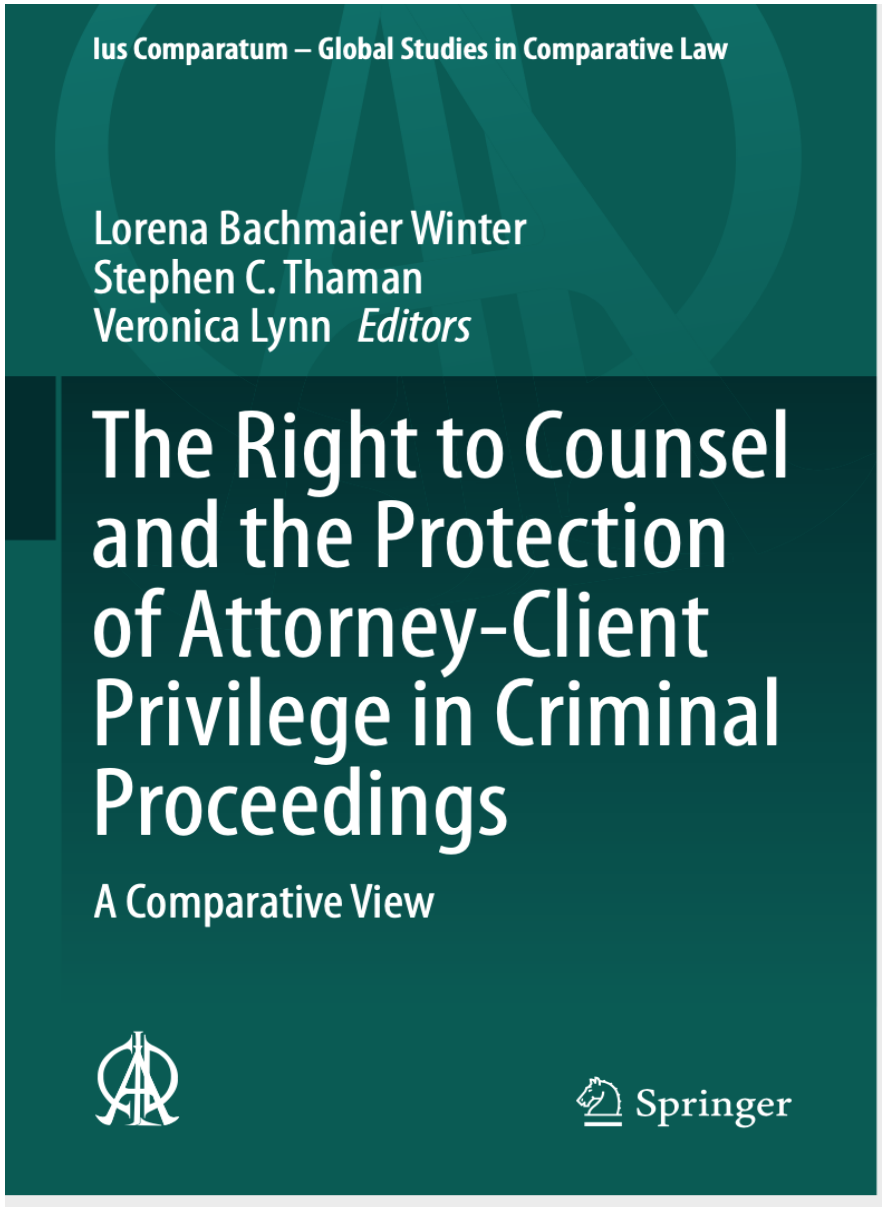
Two aspects:

1) obligation of the lawyer to keep secret (horizontal); and

2) protection of attorney-client communications against state interference (vertical)

Scope: professional obligation, or a right of the client?

Comparative approach



Comparative approach

- The European landscape (EU +UK):
- Different scope civil law countries versus common law countries
- Differences among civil law countries

- The broader scenario
- EU versus USA
- Asia

- Some examples

Interference of the State into the lawyer-client confidentiality

- Diverse issues

1) Lawyer summoned to testify as a witness against his client: who is the owner of the right to professional secrecy?

2) Protection against computer searches and interception of communications
  - What are privileged/confidential communications?
  - Communications, but in which capacity?
  - How to filter/select privileged communications?

3) *In-house lawyer* and legal privilege with respect to the accused legal person in CCL cases?

5) Lawyer-client privilege and *mass surveillance (*Case of *Big Brother Watch and others v. The United Kingdom* (Appl. nos. 58170/13, 62322/14 and 24960/15)

Lawyer as witness

- Most countries: prohibition to summon lawyer as a witness, not the USA, frequent, and if lawyer appears before the grand jury, he will no longer be able to continue with the defense, due to conflict of interest.

In the European landscape:

- ECtHR *Klaus Müller v. Germany*, Appl. No., 24173, of November 19, 2020.
  - Lawyer sanctioned for refusing to testify against a company in bankruptcy case, although the present executive director waives the right to legal privilege.

Production orders

- Against production orders
- No lawyer-client privilege in case of instruments or proceeds of crime
- *Work product*, broader than the lawyer-client privilege in the USA. A physical person can invoke the Fifth Amendment (right not to incriminate oneself), but a legal person does not enjoy that right (Hale v. Henkel 201 U.S. 43 (1906).

Production orders

- In the United Kingdom, obligation to deliver if not confidential (10 of PACE 1984)

- **Legally privileged material** (communications, advice, and information attached to it)
- **Excluded material** (Its protected status arises from the fact that it is held in confidence, and that it consists either of personal records, human tissue or tissue fluid, or journalistic material)
- **Special procedure material** (acquired or created in the course of a person's work, or for the purposes of a paid or unpaid office)
- Access to items which are subject to legal privilege cannot be obtained at all. Excluded and special procedure material cannot be obtained by means of an ordinary search

- In most other EU civil law countries: the entire folder is protected, regardless of the type of information it contains about the client, exception within tax information and money laundering prevention communication

Search and seizure

- **Search and seizure**
- General requirement: judicial authorization, legal provision, legitimacy, necessity and proportionality
- Search of a law firm when neither the lawyer nor the firm are suspects: as a rule it is prohibited in all EU legal systems
- Search of a law firm, when lawyer is suspect:
- ECtHR: requirements in addition to general criteria for interferences with Article 8 ECHR

Search and seizure in law firm (ECtHR)

- Limitation of the scope of the search and seizure
- Presence of an impartial witness, representative of the bar association and the lawyer of the firm
- Supervision of the documents to be seized

- ECtHR: e.g. *Brito Ferrinho v. Portugal*, (Appl. no. 69436/10, of Dec. 1, 2005); *Robathin v. Austria*, (Appl. no. 30457/06 of July 3, 2012); Saber v. Norway (Appl. no. 459/18 of 17 December 2020).

- Need to establish standards filtering search and seizure: *Sérvulo & Associados v. Portugal* (Appl. no. 27013/10, September 3, 2015. (35 keywords, more than 89,000 files), no violation despite excessive because the record was made by the judge, and the filtering was also done by a different judge.

Search and seizure ECtHR

- 1) Whether the search conforms to the provisions of the judicial warrant and the court order is duly delimited and grounded upon reasonable suspicion.
- 2) Whether in the development of the search and seizure adequate safeguards were adopted to protect professional secrecy, separating documents or materials covered by it, in such a way that they were not seized and preventing that the officers had access to their content.
- 3) Whether the execution of the search has been carried out in the presence of the affected lawyers and these had the chance to supervise the search and identify the documents protected by the right to confidentiality and ensure that the seized elements comply with the principle of proportionality.
- 4) Whether an independent observer has also been present who can control that the material protected by professional secrecy is not seized. This independent authority is often a representative of the bar association.
- 5) Sometimes the Court has also assessed whether a judge had been present during the search, supervising that it complies with the court order and ensures that the search is not disproportionate or infringes the right to professional secrecy.

Search of computers

ECtHR

Saber v. Norway, Judgment of 17 December 2020

Not enough that safeguards are complied with, but it requires that the law provides for them and clearly determines how the search and seizure of privileged communications is to be carried out.

Lawyer-client privilege and CCL

- Criterion to safeguard professional secrecy: that the lawyer is independent,
- and the *in-house lawyer* as an employee considers that the CJUE is not.

- Not independent: duty to collaborate fairly in crime prevention/clarification cooperation

- Proposals:
- differentiate on the basis of the functions performed by the company lawyer, and not so much on his/her status as an employee

- Duty of secrecy would be limited by its status as obliged subject or cooperator

- And if he/she does not exercise defence functions, but rather acts as manager, not professional secret protection, but a quasi official function.

Lawyer-client privilege and corporate criminal liability

- Up to now: confidentiality rules mainly for the suspect/defendant, natural person
- Different approach towards fundamental rights of legal persons. E.g. in Spain: extension of the defendant's rights to to legal person as accused.

- However, changing scenario (not sufficiently clarified):

- Special position of legal persons as defendant
- prevention/investigation cooperation: tendency to limit scope of professional secrecy
- confidentiality of corporate lawyers communications;
- special in-house counsel position
- internal investigations and role of the lawyer

Lawyer-client privilege and CCL

- Internal investigations
- In the USA: lawyer-client privilege generally applies to the "control group": protection of communications between defense attorney and people who exercise control or decide legal strategy within the company.

Since the ruling in ***Upjohn and Co. v. United States*** 1981, confidential communications with other employees outside the control group, if it relates to the defense, are also protected,

because otherwise, important information for the defense would be lost. Extension of the "control group" criterion to communications with other employees. (not in all US States)

Need to clarify at the EU level.

Lawyer-client privilege and CCL

Case law

- CJEU, 26 June 2007 (C-305/05), case *Ordre des Barreaux francophones et germanophone and Others v. Council of Ministers*
- CJEU judgment 14 September 2010, (C-550/07 P.), Case of *Akzo Nobel chemicals Ltd. et al.*
- CJEU judgment 8 December 2022 (C-694/20), case van Vlaamse Balies and Others (Grand Chamber)
- ECtHR *Michaud v. France*, 6 December 2012, (Appl. no. 12323/11)
- German Constitutional Court Judgment, July 6, 2018: Search of offices of Jones Day in Munich (Volkswagen Diesel affair).

CJEU case law: Judgment 26.9.2024

- *Ordre des avocats du barreau de Luxembourg*
- *v*
- *Administration des contributions directes*

- JUDGMENT OF THE COURT (Second Chamber), 26 September 2024
- 'Reference for a preliminary ruling – Administrative cooperation in the field of taxation – Directive 2011/16/EU – Exchange of information on request – Instruction to a lawyer to provide information – Lawyers' professional secrecy – Article 7 and Article 52(1) of the Charter of Fundamental Rights of the European Union'
- In Case C-432/23,
- REFERENCE for a preliminary ruling under Article 267 TFEU, from the Administrative Court (Luxembourg), made by decision of 11 July 2023, received at the Court on 12 July 2023, in the proceedings F SCS,

Judgment 26.9.2024

- Proceedings between F SCS, a law firm incorporated as a limited partnership in Luxembourg, and the Ordre des avocats du barreau de Luxembourg ('the OABL') and the Administration des contributions directes (Luxembourg) concerning an **injunction** decision addressed by the latter to F so that it provides information and documents, and a fine imposed on F for not having complied with that injunction decision.

- Spanish Tax Administration, on 28 June 2022, issued an injunction ordering F to provide all available documents and information concerning the services provided by it to K, a company incorporated under Spanish law, in the context of the acquisition of a company and the acquisition of a majority shareholding in a company, both also incorporated under Spanish law.

- The requested company invokes professional secrecy and the tax administration imposes a tax fine on F for not having followed up on the injunction decision and questions the conformity of the contested injunction with EU law before the Luxembourg court seeking the annulment of the injunction

Judgment 26.9.2024

- COUNCIL DIRECTIVE 2011/16/EU
  of 15 February 2011
  on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

- Limits
- *Article 17*
- 1. A requested authority in one Member State shall provide a requesting authority in another Member State with the information referred to in Article 5 provided that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives.
- 4. The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.
- 5. The requested authority shall inform the requesting authority of the grounds for refusing a request for information.

- *Article 7 Charter*
- *"1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Judgment 26.9.2024

- **Article 177 of the AO (Abgabenordnung):**
- "(1) The following may [...] refuse access:
- 1. Defenders and lawyers, to the extent that they have acted in criminal matters,
- [...]
- 3. Lawyers, on what is entrusted to them in the exercise of their profession,
- 4. employees of the persons referred to in points 1 to 3 above with regard to facts of which they have become aware in their capacity.
- (2) This provision does not apply to the persons referred to in points 3 and 4 to the extent that these are facts of which they have become aware during advice or representation in tax matters, unless these are questions whose affirmative or negative answer exposes their principals at risk of criminal prosecution.'

- “1) Does a legal consultation by a lawyer in corporate law – in this case with a view to setting up a corporate investment structure – fall within the scope of the enhanced protection of exchanges between lawyers and their clients granted by Article 7 of the [Charter]?

- Article 7 of the Charter must be interpreted as meaning that a legal consultation by a lawyer in matters of company law falls within the scope of the enhanced protection of communications between a lawyer and his client.

- Article 52(1) of the Charter must be interpreted as precluding an injunction such as that described in paragraph 52 of this judgment (Article 177 of the AO Abgabenordnung), based on national legislation under which advice and representation by a lawyer in tax matters do not benefit, except where there is a risk of criminal prosecution for the client, from the enhanced protection of communications between a lawyer and his client guaranteed by Article 7.

4) When does the lawyer have to communicate/reveal confidential/privileged communications?

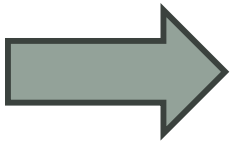
Crime-fraud exception

- USA: Sarbanes-Oxley Act of 2002:The attorney has a duty to report material violations of the securities laws to the chief legal officer and chief executive officer nand this is deemed not to violate corporate confidences.

- Reveal perjurious testimony of client
- Compelling waiver in plea agreements negotiations

Lawyer-client privilege

- Increasing number of cross-border proceedings or proceedings with a transnational element
- Main reasons: globalization, electronic data, money laundering
- Within the EU: Area, Freedom, Security and Justice
- Article 82.1 TFEU



TFUE Treaty of Lisbon

- Article 82 TFEU
- 1. Judicial cooperation in criminal matters in the Union shall be based on the **principle of mutual recognition** of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

- The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:
- (a) lay down rules and procedures for **ensuring recognition** throughout the Union of all forms of judgments and judicial decisions;

- (d) **facilitate cooperation** between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

TFUE Treaty of Lisbon

- Article 82.2 TFEU:
- To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of **directives** adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

- They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

TFUE Treaty of Lisbon

- Need for common standards
- This is coupled with the rules on admissibility of evidence: breach of lawyer-client confidentiality not as exclusionary rule of evidence in most EU member States.
- Need for EU legislative action ensuring rights of defence!!!

LEGAL PROFESSIONAL PRIVILEGE AND ATTORNEY-CLIENT COMMUNICATION IN LITHUANIA: REGULATION AND PRACTICE

PHD. LINAS BELEVIČIUS, ATTORNEY-AT-LAW

Co-funded by
the European Union

Case-law of the Constitutional Court of the Republic of Lithuania

- the right of defence enshrined in the Constitution of the Republic of Lithuania implies that the accused must be guaranteed sufficient procedural safeguards enabling him to defend himself against charges pressed;

- the right of defence is one of the guarantees for establishing the truth in proceedings;

- the right of defence, including access to a lawyer, is absolute, cannot be denied or restricted on any grounds or under any conditions;

-public authorities have a duty to ensure that there is a real possibility of exercising those rights.

Main principles

A defence lawyer can only properly exercise his duty if the client is able to fully trust and disclose information to the defence lawyer without the fear that information will be subsequently disclosed to other persons, or that the information may be intercepted by public authorities or third parties.

The attorney-client privilege must be ensured, preventing public authorities from any interference in that relationship.

The attorney's duty of confidentiality and the protection of the client's secrets entrusted to him is among the preconditions for mutual trust between the attorney and client and one of the fundamental duties of the attorney.

Legal professional privilege covers anything that an attorney has learnt from a client, from the moment he was contacted by the client seeking legal assistance.

The procedural guarantees for the lawyer should be understood as the attorney's duty to ensure the confidentiality rather than the legal privilege, and they are intended to protect the interests of the client.

Provisions laid down in Lithuanian laws (CCP, Law on the Bar):

- the attorney's right to meet and communicate with his client without obstruction, the prohibition of obstruction in the exercise of this right;

- the prohibition to use the data from meetings or communications between an attorney and his client as evidence;

- the prohibition to summon an attorney as a witness and to interview him about circumstances which came to his knowledge in the performing of his professional duties;

- prohibition to inspect, examine or seize documents or media containing the attorney's professional data, to inspect mail, to wiretap or record telephone conversations, to monitor other information transmitted by telecommunication networks and other communications or actions, except where the attorney is suspected or accused of having committed a criminal offense;

- the prohibition of public or secret access to information constituting an attorney's professional secrecy and its use as evidence;

- the obligation for an attorney to protect the professional secrecy of information entrusted to him as part of his legal practice and the obligation to ensure that information constituting the attorney's professional secrecy is not used against the client, made public or otherwise disclosed.

Case- law of the Supreme Court of Lithuania

- the regulation established in national law grants immunity to attorneys and excludes any exceptions to the prohibition to hear as a witness the defence lawyers in relation to circumstances which came to their knowledge in the exercise of their duties as a defence lawyer or representative;

- legal regulation ensures the prohibition of monitoring communications between an attorney performing his professional duties and his client, but not any communications between an attorney and other persons in general;

-a client and an attorney agree on legal services by signing an agreement. Legal assistance is always provided with regard to a specific matter requiring legal expertise;

- immunity does not apply to communications if the attorney deal with a person in the absence of agreement for legal services or in absence an agreement for the defence in a specific criminal case;

- immunity can only apply to the lawful activities of an attorney. Criminal conduct of an attorney is not compatible with the legal professional practice, in such cases the use of surveillance measures are not contrary to the guarantees of the legitimate activities of an attorney.

Breaches of the requirement to protect the confidentiality- case law

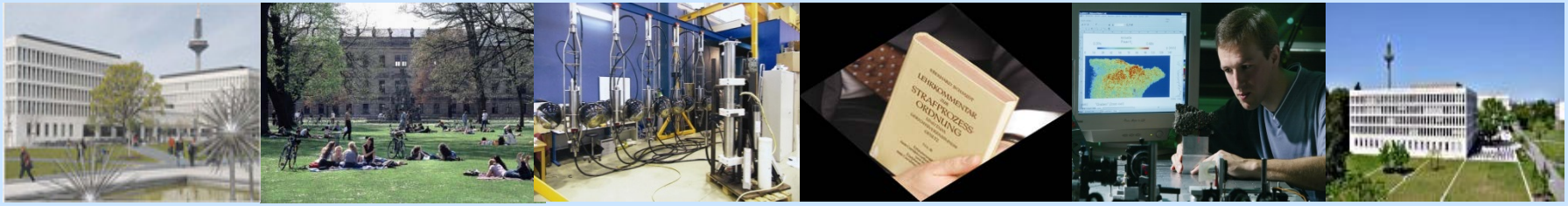
The defence lawyer of the convicted persons was summoned by the Special Investigation Service and questioned, as a witness in a pre-trial investigation concerning corruption-related offences, with regard to the circumstances which came to her knowledge while acting as a defence lawyer in the case pending on court. The lawyer did not inform either her client or the court hearing the case of the examinations given, and continued as a defence lawyer until the proceedings concluded.

During the break in the court session defence lawyer and his client were not allowed to communicate in private, they could only speak in the courtroom, convoy officers were also present and could hear the exchanges between the attorney and his client.

The attorneys were wrongly identified as their clients, who were suspected of illicit dealing in narcotic substances, court issued the orders authorising the extensive undercover action against the attorneys. Records of communications were made and officers became aware of the attorneys' communications not only with their clients who were subject to the investigation, but also with a number of other clients.

Legal professional privilege does not apply to the information communicated by an attorney to his client in the presence of a pre-trial investigation officer at the time of any investigative action taken in a pre-trial investigation office.

Thank you for your attention



PROTECTION OF ATTORNEY-CLIENT PRIVILEGE IN CRIMINAL PROCEEDINGS IN THE EU

The protection of the legal professional privilege (LPP) in practice – … *and it's gaps*

– The German Example –

Judge at the Higher Regional Court
Professor Dr. *Matthias Jahn*
Director of *Forschungsstelle für Recht und Praxis der Strafverteidigung*
@ Goethe University Frankfurt

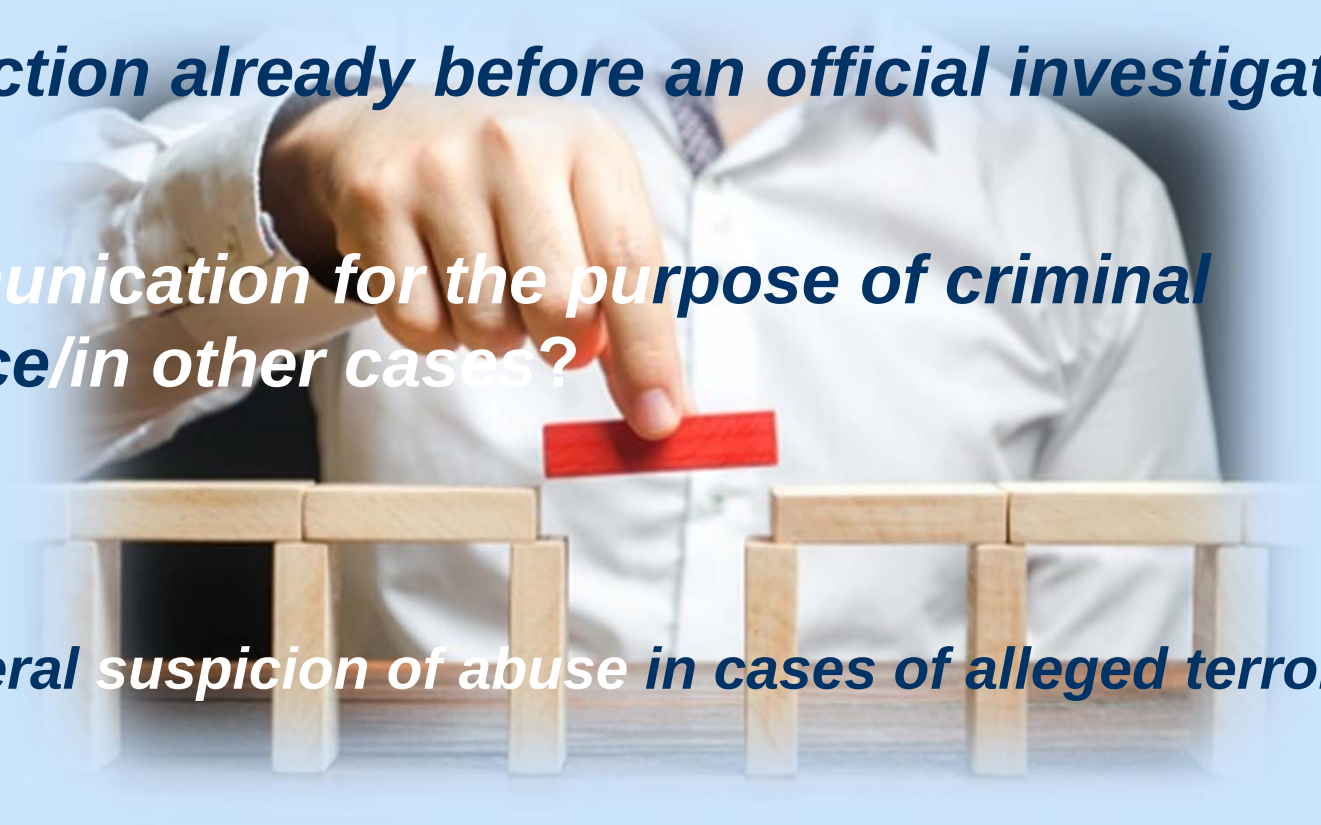
3rd-4th October 2024, Marbella/ES

30 YEARS ERA

Co-funded by the European Union

German Gaps in the protection of the legal professional privilege (LPP) and attorney client privilege (ACP) in practice

Protection already before an official investigation?



Communication for the purpose of criminal defence/in other cases?

General suspicion of abuse in cases of alleged terrorism?

Arcane area Internal Investigations?

Background of the Jones Day/VW judgement, the FCC (*BVerfG*) landmark case on our topic:

In March 2017, the **Munich prosecution service** raided the Munich offices of the **US law firm *Jones Day*** (➔ »General partnership« by Ohio Law) that had previously been conducting an internal investigation on behalf of Volkswagen into emissions manipulations at **VW subsidiary Audi**, whose headquarter is located near Munich. They seized documents from ***Jones Day*'s internal investigations** @ Audi.

The **Federal Constitutional Court** (*BVerfG*) **dismissed** a total of five **constitutional complaints** (Verfassungsbeschwerden) in this case.

German Gaps in the protection of the legal professional privilege (LPP) and attorney client privilege (ACP) in practice

The New York Times | https://nyti.ms/2m6ChC1

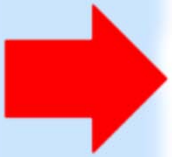
BUSINESS DAY

German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry

By JACK EWING and BILL VLASIC MARCH 16, 2017

FRANKFURT — German authorities searched the offices of the American law firm Volkswagen hired to conduct an internal investigation of its emissions fraud, the carmaker confirmed on Thursday, raising questions about the credibility of the company's efforts to uncover wrongdoing in its ranks.

German Gaps in the protection of the legal professional privilege (LPP) and attorney client privilege (ACP) in practice



In the United States, communications between lawyers and their clients are usually off limits to the government. But rules on lawyer-client privilege are less absolute in Germany, said Matthias Jahn, director of the Institute for Economic Crimes Law at the University of Frankfurt.

Still, Mr. Jahn said, it was unusual for prosecutors to seize documents from a law firm in an investigation of the firm's client. He noted that investigators searched Audi headquarters on Wednesday as it was holding a news conference there to discuss its annual financial results, an acute embarrassment for one of Volkswagen's most important brands.

"That is a signal that 'We don't have any fear of big corporations — we're going in,'" Mr. Jahn said.

(Threefold) **Structure** in 25 mins.

A. Introduction and overview of the German legal framework

B. The protection of the communication of client with counsel and confidential documents in criminal defence cases/other cases

C. *Special issue*: Internal Investigations of Companies

A. Introduction and overview of the legal framework

- The accused may avail himself of the **assistance of defence counsel at any stage of the proceedings**, section 137 German Code of Criminal Procedure (CCP)

- Framed by the right to unsupervised communication with defence counsel, guaranteed by
  - **Art. 8 ECHR** (International law, but *applicable also on state level*)
  - **Art. 49 subsect. 2 EU Fundamental Rights Charter** and
  - **Art. 4 Directive (EU) 2013/48**

- The freedom of legal profession is guaranteed by **Art. 12 of the German Constitution**, it is affected when a client relationship is burdened with the uncertainty of confidentiality from the outset due to the risk of surveillance

Wider framework

A. Introduction and overview of the legal framework

- ACP is underpinned by the ***nemo tenetur*** **principle** and the ***fair trial*** **principle, guranteed also under the German Constitution**

- The **secret sphere** between the defence counsel and client in German criminal procedural law **on a state level** is protected by
  - the **defence counsel`s right to refuse to testify**, section 53 CCP
  - the (wider) **protection of the suspect`s communication with defence counsel**, section 148 CCP
  - **prohibition of seizure of documents from a legal mandate** (only when) in custody of a counsel, section 97 CCP (less protective)
  - **prohibition to collect evidence by measures directed against a counsel**, section 160a CCP (℗ applicable for searches and seizure?)

Focussed framework

A. Introduction and overview of the legal framework

Section 148
Accused's communications with defence counsel

(1) The accused shall be entitled to communicate with defence counsel in writing as well as orally even when he is not at liberty.

(2) If an accused who is not at liberty is strongly suspected of having committed an offence under section 129a, also in conjunction with section 129b (1), of the Criminal Code, the court shall order that in communications with defence counsel any papers or other items shall be rejected if the sender does not agree to their being first submitted to the court competent pursuant to section 148a. If no warrant of arrest has been issued for an offence under section 129a, also in conjunction with section 129b (1), of the Criminal Code, the decision shall be given by the court which would be competent to issue a warrant of arrest. If the written correspondence referred to in sentence 1 is subject to surveillance, devices which rule out the possibility of handing over papers and other items shall be put in place in respect of conversations with defence counsel.

Section 97
Prohibition of seizure

(1) The following objects shall not be subject to seizure:

1. written correspondence between the accused and the persons who, under section 52 or section 53 (1) sentence 1 nos. 1 to 3b may refuse to testify;

2. notes made by the persons referred to in section 53 (1) sentence 1 nos. 1 to 3b concerning confidential information confided to them by the accused or concerning other circumstances covered by the right of refusal to testify;

3. other objects, including the findings of medical examinations, which are covered by the right of the persons referred to in section 53 (1) sentence 1 nos. 1 to 3b to refuse to testify.

(2) These restrictions shall only apply if these objects are in the custody of a person entitled to refuse to testify, unless the object concerned is an electronic health card as defined in section 291a of the Fifth Book of the Social Code (*Sozialgesetzbuch V*). The restrictions on seizure shall not apply if certain facts give rise to the suspicion that the person entitled to refuse to testify participated in the offence or in handling stolen data, aiding after the fact, obstructing prosecution or punishment, or handling stolen goods, or if the objects concerned were derived from an offence or have been used or are intended for use in committing an offence or if they emanate from an offence.

(…)

A. Introduction and overview of the legal framework

Section 160a
Measures directed at persons entitled to refuse testimony on professional grounds

(1) An investigation measure directed at a person designated in section 53 (1) sentence 1 no. 1, 2 or 4, a lawyer or a non-lawyer provider of legal services who has been admitted to a bar association shall be inadmissible if it is expected to produce information in respect of which such person would have the right to refuse to testify. Any information which is obtained nonetheless may not be used. Any recording of such information is to be deleted without delay. The fact that the information was obtained and deleted shall be included in the records. If information about a person referred to in sentence 1 is obtained through an investigation measure which is not aimed at such person and in respect of which such person may refuse to testify, sentences 2 to 4 shall apply accordingly.

(2) Insofar as a person designated in section 53 (1) sentence 1 nos. 3 to 3b or no. 5 might be affected by an investigation measure and it is to be expected that information would thereby be obtained in respect of which the person would have the right to refuse to testify, this shall be given particular consideration in the context of examining proportionality; if the proceedings do not concern an offence of substantial significance, then, in principle, no overriding interest in prosecuting the offence is to be presumed. Insofar as is expedient, the measure should be dispensed with or, to the extent possible for this type of measure, restricted. Sentence 1 shall apply accordingly to the use of information for evidential purposes. Sentences 1 to 3 shall not apply to lawyers and non-lawyer providers of legal services who have been admitted to a bar association.

(3) Subsections (1) and (2) shall apply accordingly insofar as the persons designated in section 53a would have the right to refuse to testify.

(4) Subsections (1) to (3) shall not apply if certain facts give rise to the suspicion that the person who is entitled to refuse to testify participated in the offence or in handling stolen data, aiding after the fact, obstruction of prosecution or punishment, or handling stolen goods. If the offence may be prosecuted only upon request or only upon authorisation, sentence 1 shall apply in the cases under section 53 (1) sentence 1 no. 5 as soon as and insofar as the request to prosecute has been filed or the authorisation granted.

(5) Section 97, section 100d (5) and section 100g (4) shall remain unaffected.

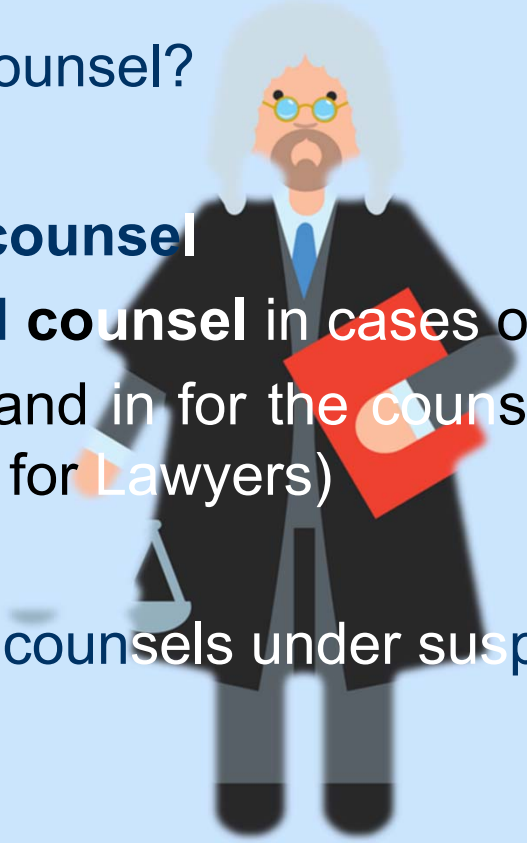
B. The protection of the communication of client with counsel and confidential documents in criminal defence cases/other cases

- Requirements of **section 148 CCP**
  - Defence counsel-client-relationship: **Who? When?**
  - Protected forms of communication: **What?**
  - For the **purpose of the defence**: **How** to draw the line**?**

- Assessment of the requirements is crucial because **if not** protected by section **148 CCP**, in principle, **only sections 97 and 160a CCP do apply**
- (*and they would do, in these cases, only rarely*)

Defence counsel – client relationship

Who is a defence counsel?



- ✓ **Privately hired counsel**
- ✓ **Court appointed counsel** in cases of mandatory defense
- ✓ The deputy to stand in for the counsel in his absentia (section 53 Federal Code for Lawyers)

☝ Controversial for counsels under suspicion

B. The protection of the communication of client with counsel and confidential documents in criminal defence cases/other cases

Defence counsel – client relationship

Who is a defence counsel?

- ✓ The **attorney of a corporation** which is an **accessory party in a criminal proceeding**,

  e.g. because a **regulatory fine** can be imposed **on the legal entity** pursuant to section 30 of the Act on Regulatory Offences (section 444 CCP, section 428 subsection 1 sentence 2 CCP refers directly to section 148) or because a decision is to be given concerning the **confiscation of an object** (section 438 CCP)

  (Note ➲ under German law, a legal entity nowadays cannot be suspect of *criminal* proceedings)

→ Important in the **practice of white collar crime**, because the authorities in almost every proceeding in the last years in cases of corruption and antitrust violation, imposed fines and confiscated illegaly earned pecuniary benefits

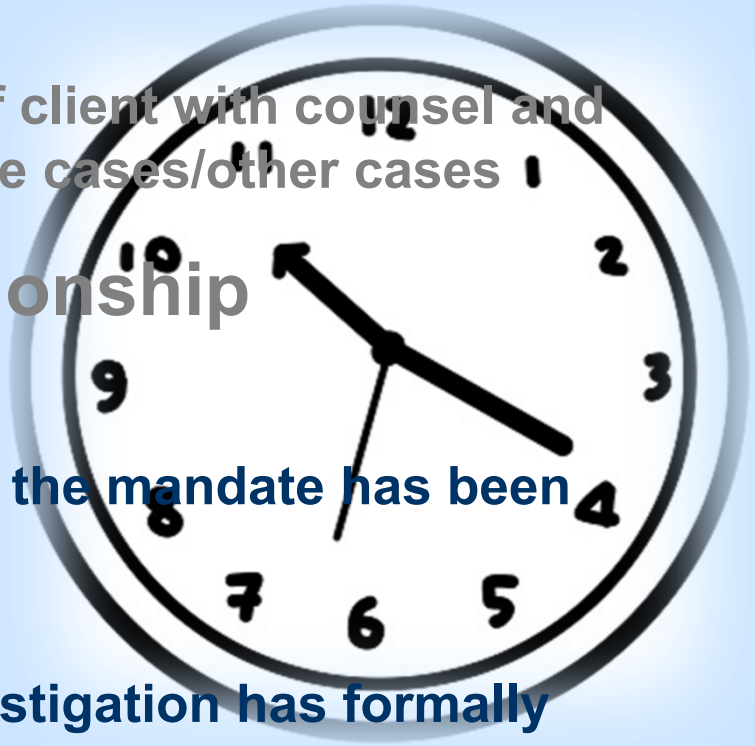
Defence counsel – client relationship

Who is **not** a defence counsel?

- The **in-house lawyer**, at least **with regard to the company for which he or she is working**, if the subject of the criminal or administrative fine proceedings is a **company-related offence**

- This follows directly from section 46c subsect. 2 sentence 2 Federal Code for lawyers: in-house lawyers may not act as defence counsel or representative in criminal or regulatory fines proceedings directed against the employer or ist employees

Defence counsel – client relationship



When does it begin?

- In principle **only** – but also already – ***after*** **the mandate has been granted**

- **Outer limits**: initiation phase, **before investigation has formally begun?** Can be relevant when the suspect (not in a technical sense yet) recognizes reasons for suspicion, f.e. because of accusations made against him to the authorities by third parties or in public

→ **Early protection** is the only way to ensure **effective defence**, especially taking into account that the status of a suspect in preliminary proceedings in Germany depends on large discretion of the authorities (*finaler Inkulpationsakt*), this tends to be the prevailing opinion in the German jurisdiction by now

B. The protection of the communication of client with counsel and confidential documents in criminal defence cases/other cases

Defence counsel – client relationship

When does it begin?

- Already protected: a **written request** to the defence counsel to **take over the mandate**, because this can typically already contain messages concerning the accusation

- **Not protected: cases of *chumming up*** (*Anbiederungsfall*), where the counsel contacts the suspect on behalf of family members or on the basis of dubious recommendations from fellow prisoners or even out of selfish or purely economic interests of his own accord, esp. in cases that have attracted public attention (this is against professional law, section 43b Federal Code for Lawyers)

Protected Forms of Communication

- **Oral communication** and visits in custody
- Phone calls and all forms of **telecommunication**
- Handover of **defence documents**
- **Written communcation** and mail, WhatsApp a.s.o.

For the purpose of the defence: How to draw the line? (Unmittelbarkeits- vs. Untrennbarkeitspostulat)

- **One opinion**: only correspondence **directly related to the defence** is covered by the defence counsel privilege (*Unmittelbarkeitspostulat*)

→ **Federal Constitutional Court (*BVerfG*)** Chamber-judgement from **2009**

→ **Too narrow!**

B. The protection of the communication of client with counsel and confidential documents in criminal defence cases/other cases

For the purpose of the defence: How to draw the line? (Unmittelbarkeits- vs. Untrennbarkeitspostulat)

- Prevailing opinion: The **separation** between an existing non-criminal mandate and a criminal mandate is **not always possible**

→ **Federal Constitutional Court** (*BVerfG*) in a judgement from **2011** (BVerfGE 129, p. 208 at 264 margin 262) on telecommunication surveillance and also

→ **Legislator** in the explanatory memorandum on the prohibition of collection of evidence in section 160a CCP, BTDrucks. 17, 2637, p. 6 et seq.: "This **differentiation** is often **considered inappropriate** … especially since the **transition from attorney to defence counsel mandate can sometimes be fluid in practice**"

B. The protection of the communication of client with counsel and confidential documents in criminal defence cases/other cases

Own opinion – further criteria:

Matters of civil law may be relevant in criminal proceedings, f.e.

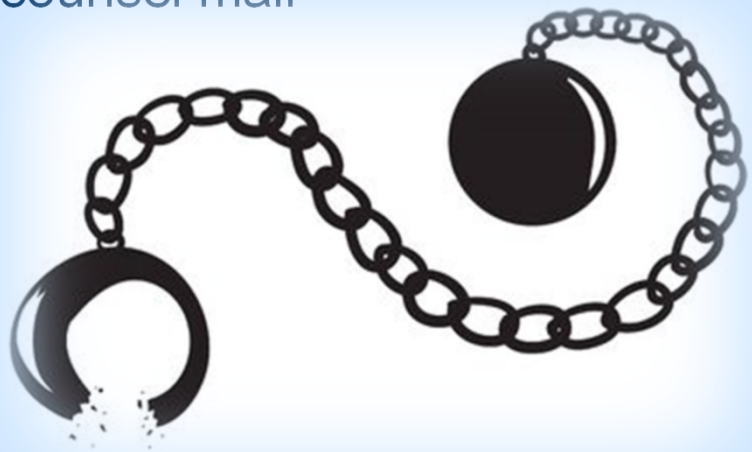
- efforts to **obtain or retain employment** (section 56c subsection 2 number 1 CC)

- **efforts to take housing** (section 116 subsection 1 number 2 CCP), to **take a loan or to sell valuables in order to post bail** (section 116 subsection 1 number 4 CCP) may affect the **grounds for detention** and the **sentencing decision …**

→ The defence counsel privilege of section 148 CCP also **includes all communications from other legal proceedings to the extent that they are intrinsically and inseparably related to the defence against the present criminal charge**

What does protection under section 148 CCP mean?

- **No control of the contents of the communication:** control must be limited to whether, according to the external characteristics, the sufficient identification as defence counsel mail
- **No searches** (in principle)
- **No seizures** (in principle)



Limitations under section 148 subsection 2 CCP

- Section 148 subsection 2 CCP contains a **general suspicion of abuse in proceedings under sections 129a, b of the Criminal Code** that penalize forming of terrorist organisations like – historically – the German **„Rote Armee Fraktion (RAF)“**

- But the **political situation** in the Federal Republic of Germany today has **nothing to do with that** which confronted the legislature in **1977**

Limitations under section 148 subsection 2 CCP

- Now as much or as **little reason for a general suspicion of abuse in proceedings under sections 129a, b CC**, e.g. in the area of Islamist activities or the militant „new right“ in Eastern Germany as in proceedings for gang-organized narcotics trafficking, arms smuggling or forced prostitution

- The **legal basis** for the measures legislation of Section 148 subsection 2 CCP has been **eliminated**

- Should be **abolished** (as announced by former Minister of Justice *Maas* in 2015)

C. Special Issue: Internal Investigation of Companies

Cases that Brought so-called "Internal Investigations" to the Attention of the Public in Germany

- *Siemens corruption affair*: Inquiry into company slush funds used by industrial conglomerate *Siemens* to bribe local officials in a number of countries incl. US/SEC/DoJ (2006-08)
- *"Dieselgate":* Inquiry into an emissions scandal at German carmaker *Volkswagen* and other companies (still ongoing)
- *Awarding of the 2006 FIFA Football World Cup*: Inquiry into allegations of bribery against senior representatives at the German FA (DFB, 2015-16)

The Emergence and Proliferation of "Internal Investigations" in Germany

- "Internal investigations" are still a **comparatively new phenomenon** and a legal implant of adversarial origin (US) from the perspective of German law of criminal procedure

- Still **unclear** which set of procedural rules apply

C. Special Issue: Internal Investigation of Companies

- In order to prevent gaps in the legal privilege, findings from internal investigations of section 148 CCP **should fall within the broader scope of protection if they are part of the defence of the corporation**

- If they are not part of the **defence of the corporation**, they can only be protected by section 97 CCP

- Section 160a CCP does not apply for searches and seizures, see Constitutional Court [*BVerfG*] in the *Jones Day*/*VW*-case)

C. Special Issue: Internal Investigation of Companies

- The **attorney of a corporation** and the corporation fall within the protection of section 148 CCP if the corporation is an **accessory party of the criminal proceeding** (section 428 subsect. 1 sentence 2 CCP refers to section 148), as above already mentioned

- This requires that the documents are made **for the purpose of the defence,** f.e. containing a summary of facts and an assessment of the legal situation made by the counsel

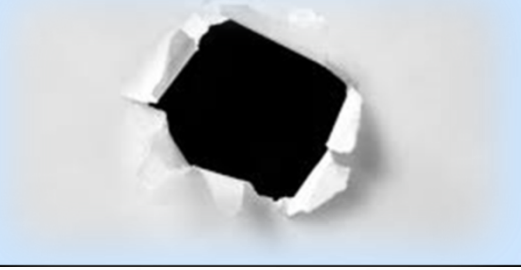
- This can be the case for documents that have been made within internal investigations if they **aim to effectively counter the imposition of a regulatory fine on the corporation** pursuant to sections 30, 130 of the Act on Regulatory Offences or the confiscation of an object (section 438 CCP)

C. Special Issue: Internal Investigation of Companies

- According to the rather prevailing opinion, the protection of section 148 CCP already applies **prior to the formal initiation of preliminary proceedings**

- The Federal Constitutional Court (*BVerfG*) ruled in ***Jones Day/VW***, that the protection of **section 97 subsection 1 CCP** (prohibition of seizure of documents in the custody of the attorney) for documents of internal investigations that are **conducted in advance of the investigation** is **not required by the constitution**

- But the Federal Constitutional Court in this decision did **not refer to section 148 CCP**



C. Special Issue: Internal Investigation of Companies

- The FCC (*BVerfG*) has **not accepted the complaints for decision**
- *VW* was not violated in its right to informational self-determination and its right to *a fair trial* and on the other hand, *Jones Day*, as an Ohio law firm, is not entitled to appeal
- The decision left various questions unanswered and problems remaining: the Court has **only interpreted specific constitutional law** (*spezifisches Verfassungsrecht*); yet, this does **not promote legal certainty**

C. Special Issue: Internal Investigation of Companies

… and what about *Straßburg*?

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Published on 14 June 2021

THIRD SECTION

Applications nos. 1022/19 and 1125/19
Martin KOCK and Others against Germany
and JONES DAY against Germany
lodged on 20 December 2018 respectively
communicated on 28 May 2021

C. Special Issue: Internal Investigation of Companies

… and what about *Straßburg*?

KOCK AND OTHERS v. GERMANY AND JONES DAY v. GERMANY – SUBJECT MATTER OF THE CASES AND QUESTIONS

QUESTIONS TO THE PARTIES

1. Has there been an interference with the applicants' right to respect for their private life and/or their home and/or their correspondence respectively, within the meaning of Article 8 § 1 of the Convention, by the search of the law firm and the seizure of documents and electronic data?

To what extent did the search and seizure in question affect an attorney-client relationship, notably the attorney-client relationship between the law firm and the Volkswagen stock corporation concluded in the United States of America, or the attorney-client relationship between the law firm and any other client? Had the Audi stock corporation been included in the attorney-client relationship between the law firm and the Volkswagen stock corporation and thus been covered by the protection afforded to such relationships?

C. Special Issue: Internal Investigation of Companies

Peculiarities of a *Jones Day*/*VW* judgement:

The decisions concern a **threefold special case**

(1) an international investigation which took place in a group of companies-structure at an **independent subsidiary** (Audi) **of** the **contracting company** (VW)

(2) that was carried out in order to be disclosed to a third party (UD Department of Justice), therefore in the German debate on the ruling sometimes called ***external* investigation**,

(3) which was conducted by a law firm organized under the **laws of the State of Ohio** …

Ambivalent learnings:

- It would be welcomed if the Federal legislator concerning **corporate criminal law** in Germany – as announced in the former coalition agreement and drafted in 2020, but failed politically – would **create clear regulations for investigations in Germany**

- However, this has not happened yet (and presumably **won‘t happen** in this election period **until October 2025**)

… and if you're still interested in a *deeper dive*:

DE GRUYTER

Löwe/Rosenberg. Die Strafprozeßordnung und das Gerichtsverfassungsgesetz
Band 4/2
§§ 137-150
Bearb. v. Matthias Jahn

Der Löwe-Rosenberg enthält die grundlegende, umfassende Kommentierung des deutschen Strafprozessrechts und gibt dem Benutzer eine Hilfe zur Lösung nicht nur häufig auftauchender, sondern auch entlegener Sachfragen. Der Großkommentar erläutert die StPO, das GVG, das EGGVG sowie die das Strafverfahren betreffenden Vorschriften der EMRK und des IPBPR. Der gegenwärtige Erkenntnisstand und der Stand der rechtlichen Kontroversen sind vollständig dargestellt.

Der Löwe-Rosenberg ist als Großkommentar der Praxis angelegt, bei Darstellung und Gewichtung wird stets auf Praxisbezug und Praxistauglichkeit geachtet. Auch für die Neuauflage konnten wieder besonders fachkundige Herausgeber und Autoren aus Wissenschaft und Praxis gewonnen werden, die für eine wissenschaftlich fundierte und zugleich praxisorientierte Erläuterung stehen.

Band 4 2. Teil enthält die umfassende Kommentierung der Vorschriften zur Verteidigung (§§ 137 ff. StPO), inkl. des reformierten Pflichtverteidigungsrechts.

Matthias Jahn, Frankfurt a.M.

Großkommentare der Praxis

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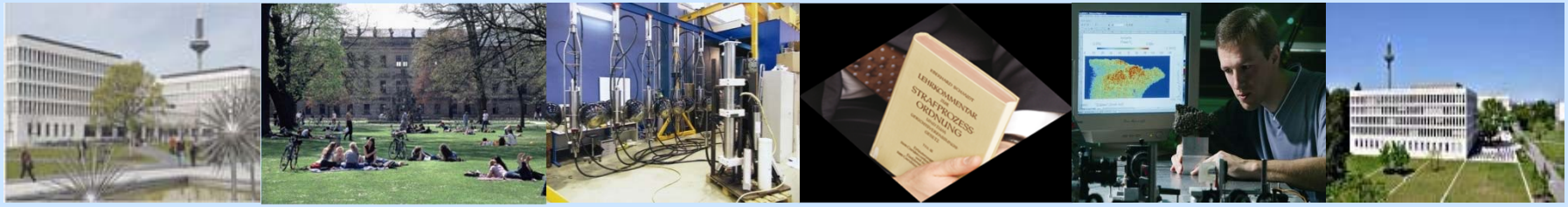

THE PROFESSIONAL SECRET OF THE LAWYER

(SUMMARY)

To date, professional secrecy was only regulated in the deontological rules of bar associations, as an obligation.

Therefore, it is especially interesting in light of the new law in Spain on the RIGHT OF DEFENSE, which is about to be enacted.

Article 15 of this bill regulates the confidentiality of communications between lawyer and client and PROFESSIONAL SECRET

In fact, the Constitution (Art 24) already stated in 1979 that “the law would regulate cases in which due to professional secrecy one is not obliged to declare.” It turns out that this law will appear now…

In Spain there have been recent cases where this duty has been breached, not by a lawyer, but by a Prosecutor who had entered into negotiations with the defense lawyer. Obviously, the Prosecutor is also subject to the duty of secrecy, and a complaint has been filed by the Madrid Bar Association against the Prosecutor's Office for violation of said obligation. We'll see how the matter ends.

Professional secrecy is usually defined as the secrecy of someone who practices a profession regarding the knowledge they have about another person's secrets.
The legal good of this right is, on the one hand, the protection of the fundamental right to privacy but, on the other, the right of defense.

The lawyer has this obligation which at the same time is a right

In fact, the CP punishes the revelation of secrets in its article 199.2 with a prison sentence of one to four years, a fine and disqualification.

This right/duty also extends, according to our LECRIM, to the exception that applies to lawyers regarding the obligation to report crimes about which their clients have informed them (Article 262 LECRIM). Here, we are talking more about a right, although it is also an obligation and also, the exemption from the obligation to testify as witnesses, which lawyers have regarding the facts that their clients have explained to them (Article 416).

The condition of the right-duty of secrecy has been regulated, until now, in the Statute of the Legal Profession (Art 21)

This Statute dedicates an entire chapter to the duty of secrecy, but currently it will be the organic bill (to which we were referring) that will elevate this right to duty to the rank of law (Art 15).

The content of the professional secret will have three aspects:

- The inviolability of all documents and communications of the lawyer, related to the right of defense.
- The dispensation from giving a statement before any authority.
- The protection of professional secrecy in the entry and registration of offices.

Keep in mind that the information exchanged between attorney and client are not only statements about facts but will also contain possible defense strategies or facts that are not known during the investigation of the case.

Even the most important information that the client can reveal to the lawyer is precisely his CONFESSION about the commission of a crime.

It is important to talk about the COLLISION BETWEEN RIGHT TO EVIDENCE AND PROFESSIONAL SECRET.

Deontological norms protect private correspondence between lawyers, as we have seen

The contribution of said correspondence to the court is prohibited (without consent or authorization of the bar association): Art 23 Legal Statute.

This prohibition clashes with the fundamental right to use all relevant means of evidence for the defense.

¿Is evidence that consists of private correspondence and therefore prohibited by the code of ethics admissible?

Jurisprudence has said that the right to evidence is MORE IMPORTANT, admitting it and alleging that the provision of private correspondence is “simply” a deontological violation.

We do not agree because PROFESSIONAL SECRET, although it is not a fundamental right in itself, IS LINKED WITH THE RIGHT OF DEFENSE, which is a fundamental right.
Therefore, the fact that private correspondence can be admitted in court is a flagrant violation of the lawyer's right to confidentiality.

The question we can ask ourselves is ¿DOES THIS BILL SOLVE THIS PROBLEM?

First of all, we can say that this bill elevates to the rank of law the right to professional secrecy, which until now, as we said, was only specially regulated in the Statutes and, therefore, now THE RIGHT TO PROFESSIONAL SECRET WILL BE AS IMPORTANT AS THE RIGHT TO PROOF (from the point of view of legal status).

We can reach the same conclusion with communications between lawyers and other parties to the procedure, such as prosecutors. In this sense, article 62 of the Public Prosecutor Statute includes the duty of secrecy of the Prosecutor's Office.

Therefore, we can say that the approval of a law on the right of defense is URGENT, so that the right-duty of professional secrecy acquires the status of law and, therefore, the provision of correspondence between lawyers will be inadmissible.

One of the situations in which I have been immersed on more occasions, during my professional practice, in relation to the matter we are dealing with, is when two people who are a couple come to the office to explain to me a specific situation in which they go in unison in their intentions but, later, these two people end up separating and disagreeing with the first idea of proposing the same strategy.

This often happens in cases of domestic violence. As it is a public crime, if the abuse or fight has taken place in front of third parties, it is very possible that the police will come and open a report of what happened, which will later be judicialized.

It may be, and this is the case or cases to which I am referring, that the couple considers that the events have been an independent chapter but that they want to continue together and not complicate their lives, much less end up with the husband having a conviction or that the judge decrees a measure of distancing the husband from the wife and complicates cohabitation beyond the couple's own intentions.

In these cases, the “normal” strategy is for the man to deny the facts and the woman to take advantage of the right not to testify, which she has since she is a partner of the accused.

In these cases, if there are no witnesses who can be considered "prosecuting", the normal thing is that the judge ends up acquitting the husband, due to lack of evidence, since the wife has not testified against him and the forensic medical report (the only evidence that there usually is in these cases) is usually not enough to convict.

The problem, from the point of view of the issue at hand, is that the couple first comes to the office to propose a common defense strategy but, later, the wife regrets it and wants to go against the husband. I understand that, in this case, I as a lawyer have received information (that the event happened) that I could not use against the husband (because I am his lawyer) but neither could I use it against the wife (who has the right to change her mind at any time of the procedure) and want to continue the process against your partner.

……

Article 466 dictates that the lawyer or attorney who reveals procedural actions declared secret by the judicial authority will be punished with a fine of twelve to twenty-four months and special disqualification for employment, public office, profession or trade of one to four years.

If the disclosure of the actions declared secret were carried out by the Judge or member of the Court, representative of the Public Prosecutor's Office, Judicial Secretary or any official at the service of the Administration of Justice, the penalties provided for in article 417 in its upper half will be imposed.

If the conduct described in the first section is carried out by any other individual involved in the process, the penalty will be imposed in its lower half.

Finally, article 467 tells us that the lawyer or attorney who, having advised or taken the defense or representation of any person, without the latter's consent defends or represents in the same matter someone who has contrary interests, will be punished with the penalty fine of six to twelve months and special disqualification from his profession of two to four years.

Protection of attorney-client privilege

in Polish law & legal practice

Elżbieta Hryniewicz-Lach

Marbella, October 3, 2024

Co-funded by
the European Union

I. Attorney-client privilege

The scope of attorney-client confidentiality – an attorney is to…

- keep secret everything learned in connection with providing legal assistance

However:

- **requested** use of an information for the benefit of a client
- **statutory** exclusions (counteracting ML & financing of terrorism, tax schemes)
- criminal liability for not reporting reliable information about listed offences
- **the court** may waive ACP in criminal proceedings
- right to defence /or of a party/ of the attorney in legal proceedings

I. Attorney-client privilege

The attorney:

- **cannot be released** from the A-C confidentiality with regard to facts learned while providing legal assistance or conducting a case (statutory prohibition)
- must assess what falls under A-C privilege & bears the risk of erroneous evaluation

The consequences of disclosure of information covered by ACP:

- the attorney is subject to criminal & disciplinary proceedings
- …but the public prosecutor is not (if acted *solely in the public interest*)
- „fruits of the poisoned tree” can be evidence in criminal proceedings

II. Problems & gaps in protection of ACP

- **lack of efficient judicial control** over data obtained in operational control by surveillance bodies & tax authorities
  - an attorney has no legal possibility to appeal against a court decision releasing certain evidence from the protection provided by A-C confidentiality
  - an attorney cannot react effectively, e.g., to possible abuses in this regard
- **no direct prohibition to hearing persons other than attorneys and their trainees** by law enforcement and judicial authorities in reference to data covered by the ACP
- **different scope of protection** of ACP **in different legal proceedings**
- **controversial interpretation** of legal regulations referring to ACP, i.e., by courts
  - *is statutory regulation always a solution to gap in protection / controversial matter?*

III. Current issues:

- **the Pegasus / Hermes – case** (Polish version of EncroChat; 2015-2023):
  - illegal wiretapping of smarfone conversations of politicians (also with attorneys) by Polish secret service with an invigilation system bought for victims' support funds
- **ECtHR's judgement** of 28.05.2024 r. in case ***Pietrzak, Bychawska-Siniarska & oth. v. Poland*** (applications nos. 72038/17 & 25237/18):
  - case about Polish law authorising **secret-surveillance's operational control** and **retention of communications data** for possible future use by national authorities
  - no remedy available under domestic law for individuals to complain about that fact and to have its lawfulness reviewed (by an independent body)
  - by the **abstract** existence of legislation PL violated right to privacy (Art. 8 ECHR), separate examination of right to effective remedy (Art. 13 ECHR) not necessary

IV. Problems & gaps in protection of ACP

Recommendations from Polish perspective:

- most threats for A-C secrecy result from wrong interpretation of existing provisions / circumvention of existing rules / criminal activity of politicians & secret service
- **clarification** of the scope of secrecy (*as secret-related and not person-related issue*) & the **consequences** of its violation for proceedings *(not acceptable source of evidence)*
- **lack of criminal liability** for protecting A-C secrecy (only disciplinary liability within attorney chambers), e.g., for not informing about an offence revealed by a client
- safeguarding attorney's right to **appeal** against court's decision releasing from secrecy
- **reporting** & **analysing** the cases of violation of A-C secrecy within the EU in order to idenfity problematic issues & assess the scope of threat to professional confidentiality

Thank you for your attention!

hryniew@amu.edu.pl

&

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PROTECTION OF ATTORNEY-CLIENT PRIVILEGE IN CRIMINAL PROCEEDINGS IN THE EU

THE CROATIAN EXAMPLE

Laura Valković, Ph.D

Co-funded by the European Union

ATTORNEY - CLIENT PRIVILEGE

Introduction

- The defendant's right to defend himself with the help of a defense attorney is the basic premise of the protection of the human rights of persons who have been accused or persons for whom there are grounds for suspecting that they have committed criminal offenses - represent the backbone of a fair trial
- The confidentiality of communication with the defense attorney gives true meaning to the defense in criminal proceedings
- it is necessary that it extends to all stages of the criminal proceedings, and even before its formal commencement

ATTORNEY - CLIENT PRIVILEGE (2)

- the relationship of trust between lawyer and client is the essence
- however, the right to confidential communication is not absolute (according to ECHR practice)
- the importance of this topic in a broader sense is related to lawyer's secrecy, regardless of the procedure: criminal or civil
- is often equated with attorney's secrecy, although it is not the same, because there is an important difference between confidential communication and attorney's secrecy, which is especially visible in criminal proceedings, but also in other proceedings
- attorney confidentiality is incorporated into Directives, Conventions, Laws and the Attorney’s acts

ATTORNEY - CLIENT PRIVILEGE (3)

The Croatian example

- In Republic of Croatia legal profession is independent
- providing everyone legal assistance in accordance with the law (Article 27 of the Constitution of the Republic of Croatia)
- in accordance with this constitutional provision, attorney confidentiality in Croatia is incorporated into national criminal legislation and the attorney’s acts

ATTORNEY - CLIENT PRIVILEGE (4)
SCOPE AND PROCEDURAL GUARANTEES

In terms of the legal rules, attorney-client privilege in Republic of Croatia is regulated under;

- the **Attorney's Act**
- the **Attorney's Code of Ethics**
- the **Criminal Procedure Act**

ATTORNEY’S ACT

- the privilege covers ***everything that a client has entrusted to an attorney***

  or that an attorney has learned about the client when representing it

- in other words, everything that the attorney has learned or gotten from the client is covered by the privilege
- the privilege covers all kinds of documents, audio, computer, visual and similar records as well as any client’s deposits located in the lawyer's office
- the lawyer is obliged to protect the lawyer's secret under the threat of disciplinary liability during the provision of legal assistance, but also after that as long as its disclosure could harm the client

ATTORNEY'S ACT (2)

Croatian case law

- It has been confirmed that the scope of the client-attorney privilege should be interpreted broadly in a way that the privilege was violated when revealing the strategy of the defence used in the criminal proceedings and expressing the attorney's personal attitude on the client's personality in the interview for a daily newspaper
- a search of the attorney's business premises must be conducted only in the presence of the authorized representative of the Croatian Bar Association and the judge who issued the warrant, which rule is aimed for securing that no document covered by the privilege is extracted and handed over to the prosecution

ATTORNEY'S CODE OF ETHICS

- attorney can disclose the attorney-client privilege only in cases where the client unequivocally permits it
- when necessary for the defence of the lawyer in criminal or disciplinary proceedings or for the protection of their rights and interests in proceedings where the lawyer is a party and which arise in connection with the representation of the client
- if necessary to justify their decision to terminate the representation
- in cases where the lawyer represents multiple parties in the same legal matter, the disclosure of attorney-client privilege is permitted if all parties unequivocally permit it

CRIMINAL PROCEDURE ACT

- ***the defendant has the right to communicate freely, undisturbedly and confidentially with the defense counsel***
- this right extends to the entire criminal procedure
- In 2017. completely transposed *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings ....*
- *Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law* (article 4.)

CONSEQUENCES OF BREACHING THE ATTORNEY-CLIENT PRIVILEGE

- the evidence obtained in breach of the mentioned rules will be ***illegal and cannot be used in the proceedings against the client***
- illegal evidence is also evidence about which the prosecution found out based on the illegal evidence (theory of the fruit of the poisonous tree)
- depending on the stage of the criminal proceedings, the request for extraction should be filed to the investigation judge, indictment council or to the trial council

CONSEQUENCES OF BREACHING THE ATTORNEY-CLIENT PRIVILEGE (2)

- if the request is brought in investigation phase or in the phase before the indictment council, the decision on the request is to be rendered immediately and is subject to the separate appeal
- if the request is brought in the course of trial, the trial council may decide on the request immediately by a separate decision (subject to a separate appeal),
- or wait until the end of the trial and decide on the request together with rendering judgment on the indictment, in which case the judgement on the indictment should include the reasoning on the illegality of evidence.

CONSEQUENCES OF BREACHING THE ATTORNEY-CLIENT PRIVILEGE (3)

- the timing of the request for extraction of the illegal evidence is a matter of the defence strategy and the request does not have to be filed immediately once the evidence is taken away by the prosecution
- however, when reaching the decision on timing for filing the request, it should be taken into account that the illegal evidence will remain in the possession of the prosecution all until the competent authorities renders a final decision on the request (after the appeal)

CONSEQUENCES OF BREACHING THE ATTORNEY-CLIENT PRIVILEGE - CONVALIDATION

- Illegal evidence can nevertheless become valid under Croatian law if the following three conditions are cumulatively fulfilled:

  (i) It must involve serious forms of criminal offenses

  (ii) it must involve acts within the jurisdiction of the county court

  (iii) the interest of criminal prosecution and punishment of the perpetrator must outweigh the infringement of rights

CONSEQUENCES OF BREACHING THE ATTORNEY-CLIENT PRIVILEGE – CONVALIDATION (2)

- whether the conditions for convalidation of the initially illegal evidence are met is decided by the court in each individual case, after balancing the interest of criminal prosecution and the need for punishment on the one side, and the strength of the violation of the defence's rights, on the other side
- only if the court determines that the interest of criminal prosecution and punishment outweighs the violation of rights of the defence, the evidence obtained in breach of the client-attorney relationship can be used in the proceedings (balancing test)
- the balancing test is also used by the ECRH when deciding whether the evidence obtained under the national law violated the rights of fair trail guaranteed under the Article 6 of the Convention.

THANK YOU FOR YOUR ATTENTION

LAURA VALKOVIĆ, PHD

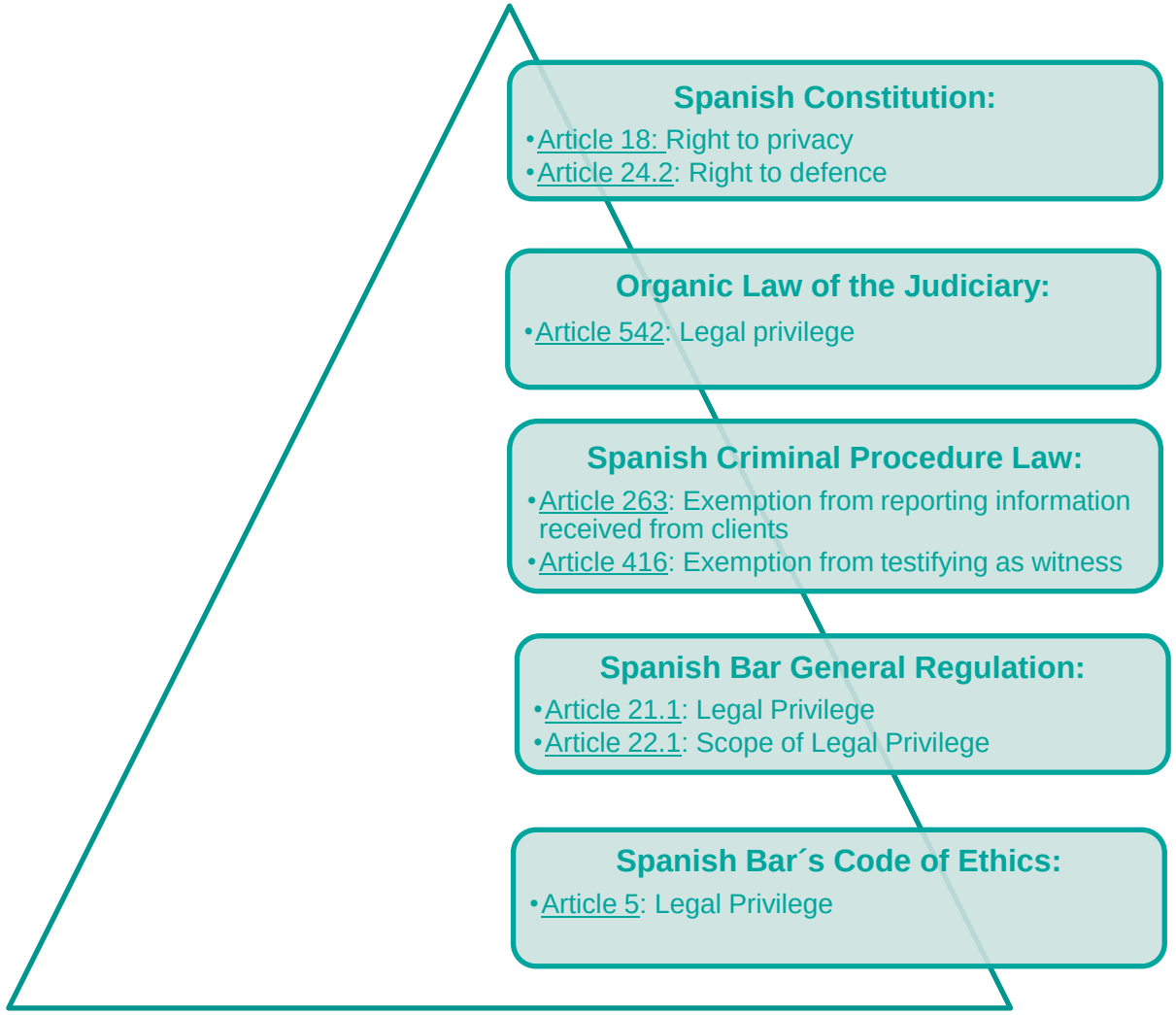
SQUIRE PATTON BOGGS

Legal Privilege

Communication between Lawyers and its use in Court

Co-funded by the European Union

Legal Privilege: Legal Framework



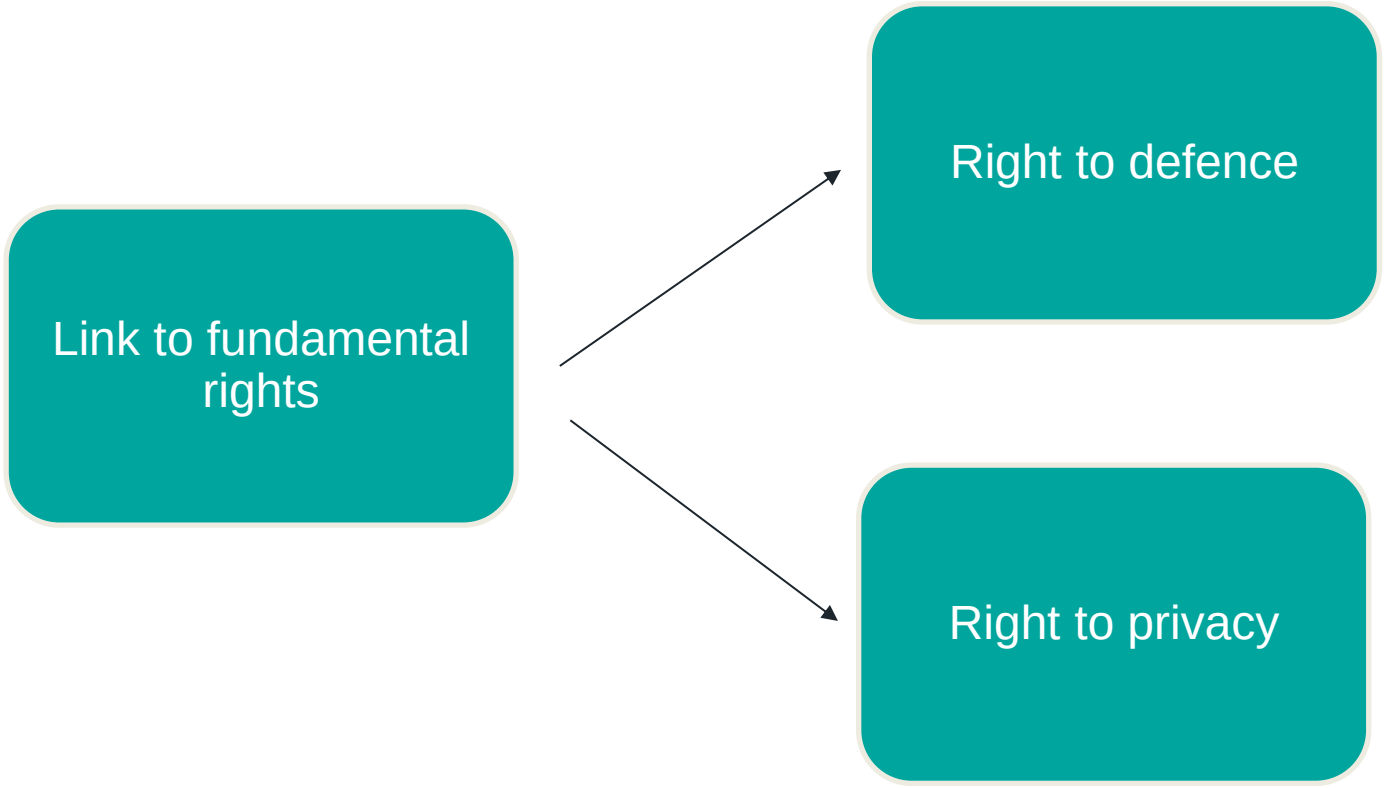
Judicial Rulings

- **Provincial Court of Madrid (2015):** "*the alleged violation of the ethical rules of certain professions is not sufficient to support a claim of procedural nullity, without prejudice to the consequences under the ethical regime, in the event that such a violation occurred.*"

- **Superior Court of Justice of Madrid (2023):** Although the submission of correspondence between lawyers infringes professional secrecy, the right of the referring lawyer to use evidence relevant to his defense prevails.

- **Constitutional Court (1984):** the right to evidence, given its constitutional status, allowed the judge to admit and assess evidence obtained in violation of a non-constitutional regulation.

Personal Perspective



Current situation in Spain

BOLETÍN OFICIAL
DE LAS CORTES GENERALES

CONGRESO DE LOS DIPUTADOS

XV LEGISLATURA

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PROYECTO DE LEY

121/000006 Proyecto de Ley Orgánica del Derecho de Defensa.

- Article 15: grants the highest level of legal protection to the ethical duties outlined in the regulations governing the legal profession, including Legal Privilege.

Communications between legal professionals and other parties

14.03.2024

- Spanish Public Prosecutor´s Office issued a statement revealing the timeline of confidential conversations held between the defence lawyer and the prosecutor in charge.
- Madrid Bar Association issued a statement, deeming the events extremely serious and constituting a breach of professional secrecy.

16.03.2024

- Madrid Bar Association Governing Board:
  - Filed a complaint to initiate administrative disciplinary proceedings.
  - Instructed the Madrid Bar Association Legal Services to file a criminal complaint.

20.05.2024

- Dean of the Madrid Bar Association filed a criminal complaint against the Public Prosecutor´s Office official.

Thank you!