

EUROPEAN UNION

Valerio VALLEFUOCO

Studio Legale ValleFuoco
Viale Regina Margherita n. 294
00198 Rome
ITALY

Tel (+39) 06 44251509

Fax (+39) 06 8412205

Email: v.vallefuoco@studiovallefuoco.it

1. Definition- presentation

Every State in the European Union has a different application of the rule of Professional Privilege. This essay does not have the aim to summarize all the different rules applied by every single State, but it has the aim to put into evidence the main fundamental principles to which both the European Court of Human Rights and European Court of Justice believe apply to all European lawyers. Therefore, the following will be indicated by the main community sources and the most relevant and most recent judgments that apply those principles.

2.1 Relevant statutes

The European Code of Conduct in the number 2 of the general principles states that the confidentiality between attorney and client is of the essence of a lawyer's function, that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence.

As without the certainty of confidentiality there cannot be trust, confidentiality is therefore a primary and fundamental right and duty of the lawyer.

To better understand the importance of what just said, it is necessary to keep in mind the article 6(2) EU according to which The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Therefore, it is fundamental to art. 6 of the Convention of Protection of Human Rights which recalls art.47 of the charter of fundamental rights of the European Union referring to **Right to a fair trial** "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a

reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. “

The Recommendation (2000) 21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer provides, *inter alia*, as follows, completes the thought:

“Principle I - General principles on the freedom of exercise of the profession of lawyer

... 6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law.” It is clear from the second subparagraph of Article 6(3) of Directive 91/308 that the Member States are not obliged to impose the obligations of information and cooperation on lawyers as regards to information which they have received from a client, or obtained on one of their clients, in the course of ascertaining the client’s legal position or in the course of performing their task of defending or representing that client in, or concerning, judicial proceedings, including the giving of advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.

Attorney-client privilege is also owed to an ex-client and survives the client’s death. Non-disclosure duty also attaches to a person seeking legal advice or aid without obtaining it. Legal privilege includes lawyers and their employees.

This provision introduces a superior interest which overrules client’s non disclosure right and discharges the attorney from fulfilling in some specific hypothesis.

2.2 Relevant Case Law

There are different examples of the legal privilege:

Then, there are three important cases that without any doubt explain the essence of those guidelines that lead all the States in considering the professional privilege more or less in the same way:

The first one is the decision related to the cause *Xavier Da Silveira v. France (application no. 43757/05)* : The Court's task was to determine whether the interference with Mr. Da Silveira's rights, which was in accordance with the law and pursued a legitimate aim (the prevention of crime), was proportionate to the aim pursued, and whether the applicant had had the requisite effective remedy at his disposal.

The Court noted first of all that the search concerned had taken place at Mr. Da Silveira's place of residence as a lawyer and not as a private individual. This was an important distinction: searches and seizures at a lawyer's home might breach the professional confidentiality so essential to the relationship of trust between a lawyer and his client, so it was imperative that they should be attended by "special procedural guarantees". The fact that Mr. Da Silveira was a lawyer, as well as the tenant of the premises, had been clear from the start of the search. In spite of that, he had not been given the benefit of the special guarantees offered to lawyers by Article 56-1 of the Code of Criminal Procedure, even though – and this was worth stressing – a lawyer practising on an occasional basis was not required to register with a national Bar Association to qualify for that protection. The provision made no distinction between lawyers practising on a regular or an occasional basis and such a distinction would in any event not be justifiable for the purposes of Article 8 of the Convention. In the Court's opinion, even assuming that there had been any doubt as to whether Mr Da Silveira was a lawyer, the circumstances of the case should at least have led the authorities to proceed with caution and to verify his allegations as soon as possible, before searching

his home. Lastly, not only had the applicant not enjoyed the “special procedural guarantee” to which he was entitled but, in addition, the impugned search concerned matters that were entirely alien to him: at no time had he been accused or suspected of having committed an offence connected with the investigation.

The Court then verified whether Mr. Da Silveira had had an effective means of contesting the search and seizure of his possessions, and found that he had not, in so far as none of the remedies he had sought – in vain – had actually been available to him in law. The appeal to the “liberties and detention judge” applied only to objections raised by the President of the Bar Association or his representative when documents were seized during a search at a lawyer’s home or office. One of the issues in this case, however, was precisely the absence of the President of the Bar Association or his representative during the search. The appeal to the President of the Investigation Division was not admissible because the applicant was neither a party to the proceedings nor a witness assisted by a lawyer. Nor would an appeal to the Court of Cassation have succeeded, as in criminal cases such appeals were not admissible in respect of decisions not subject to appeal. Lastly, the authorities’ argument that Mr. Da Silveira could have obtained compensation by lodging a claim against the State failed to convince the Court: the outcome of such an action would have been uncertain and, above all, it would not have produced the desired result, which was to have the impugned search annulled.

The Court held unanimously that there had been a violation of Article 8.

The second judgement is no. C-550/07 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd vs. European Commission* and states the impossibility to enjoy the professional privilege for a lawyer that is not independent from the company for which he works: “...notwithstanding the professional regime applicable in the present case in accordance with the specific provisions of Dutch law, an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.....It

must be added that, under the terms of his contract of employment, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer..... it follows, both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer.”

The last judgment is the case *SMIRNOV v. RUSSIA (Application no. 71362/01)*, in this case the applicant is a lawyer; at the material time he was a member of the St Petersburg United Bar Association. The applicant alleged, in particular, a violation of the right to respect for his home and the right to peaceful enjoyment of possessions as regards the search at his place of residence and the retention of his computer. He also claimed that he did not have an effective remedy in respect of the latter complaint.

The applicant complained that the search carried out at his place of residence infringed Article 8 of the Convention, which reads as follows:

1. Everyone has the right to respect for his home...
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.”