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Council Directive (EU) 2018/822 and the Right to Privacy. An Attempt to Answer the Preliminary Question in Case C-694/20

Abstract: Through an action before the Court of Justice of the European Union (CJEU), the Belgian Constitutional Court intends to obtain an answer to the question related to the compatibility of Council Directive (EU) 2018/822 with the fundamental right to respect for private life. The mechanism provided by this Directive may violate this right because it consists in obliging the lawyer who has invoked the Legal Professional Privilege to provide information about the evasion of the obligation to inform the authorities about the cross-border arrangement. This arrangement may amount to tax avoidance by the client. I will try to predict the possible response of the CJEU by analyzing its previous case law. Interference with fundamental rights must be proportionate. The secrecy of the lawyer's communication with his client deserves special protection. The proportionality of the interference may be evidenced by filters such as judicial supervision, intermediation by an independent authority etc.

Keywords: right to respect for private life, tax avoidance, human rights, cross-border agreements

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Introduction

On 21 December 2020, the Court of Justice of the European Union[1] received a request for a preliminary ruling from the Belgian Constitutional Court (Grondwettelijk Hof) with the reference C-694/20. The Belgian Constitutional Court issued an order on 17 December 2020 to refer a question to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union[2] at the request of the Orde van Vlaamse alies (Flemish Bar Association), the unincorporated association "Belgian Association of Tax Lawyers," and others. This application concerned the compliance of Article 1(2) of Directive (EU) 2018/822[3] with Article 7 (right to respect for private life) and Article 47 (right to a fair trial) of the Charter of Fundamental Rights of the European Union[4] in so far as it imposes an obligation on an intermediary lawyer who intends to rely on his professional secrecy to inform any other intermediaries concerned of their obligation to notify.[5]

In this article I will attempt to consider a request for a preliminary ruling regarding the compatibility of Article 1(2) of the Directive 2018/822 with one of the fundamental rights listed in the application, namely the right to respect for private life. The question for preliminary ruling on this right seeks to determine whether Article 1(2) of the Directive 2018/822 violates the right to respect for private life guaranteed in Article 1(2) of the Directive 2018/822 violates the right to respect for private life guaranteed in Article 7 of the Charter, in that it imposes an obligation on intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations, in so far as that obligation has the effect of requiring a lawyer acting as

1 Hereinafter: the CJEU.

2 *Treaty on the Functioning of the European Union OJ.EU. C 326.*

3 Hereinafter: Directive 2018/822.

4 *Charter of Fundamental Rights of the European Union, OJ. EU C 326/391*. Hereinafter: the Charter.

5 *Council Directive (EU) 2018/822* of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements OJ. EU *L 139/1*.

an intermediary to disclose to other intermediaries, who are not his clients, information which he has obtained in the course of carrying out the essential functions of his profession, namely defending, representing a client in court or giving legal advice, even outside the context of any legal proceedings. This obligation arises when the intermediary invokes the obligation to maintain legally protected secrets, including the attorney-client privilege.

Two points should be noted at the outset. First, the mechanism described in the preliminary question need not appear in all transpositions of Directive 2018/822 into the national legal orders of the Member States. Article 1(2) of Directive 2018/822 provides only the possibility for Member States to adopt the necessary measures to allow intermediaries to be released from their obligation to provide information on reportable cross-border arrangements if such reporting would result in an infringement of professional secrecy under the national law of that Member State. If a Member State chooses to do this, it shall adopt the necessary measures to oblige intermediaries to inform without delay any other intermediary or, where there is no such intermediary, the relevant taxable person, of their obligations to notify cross-border arrangements. Intermediaries may be entitled to an exemption from the obligation set out in the first paragraph only to the extent that they act within the limits of the relevant national provisions relating to their profession. In my view, the very optionality of this option is a weakness of the Directive, especially in the context of the ruling and the Opinion of the Advocate General in the case of Ordre des barreaux francophones et germanophone.[6] While the Court of Justice found that Directive 2015/8492 of the European Parliament and of the Council (EU)[7] was compliant with the Charter's right to a fair trial, the Directive itself concerned serious crimes and threats to democracy. In addition, the CJEU pointed out that an important element of the compliance of the interference of the AML Directive with fundamental rights is, inter alia, a safeguard, in the form of an

6 *Ordre des barreaux francophones et germanophone v. Conseil des* ministers, case C-305/05, Opinion of the Advocate General, ECLI:EU:C:2006:788.

7 Hereinafter: AML – Anti-Money Laundering.

exemption from the obligation to cooperate with lawyers in relation to activities which are part of the essence of that legal profession.[8] If, in matters of far greater importance than the financial interests of the Member States, one of the conditions for finding the duty to inform compatible with fundamental rights is the limitation of that duty to professional secrecy, the optionality of that mechanism in Directive 2018/822 cannot be regarded as sufficient protection of fundamental rights.

The second question that requires explanation is the term intermediary. In practice, it often refers to legal professionals protected by professional secrecy, such as advocates or tax advisers. Article 1(1)(b) of Directive 2018/822 defines an intermediary as a person that designs, markets, organises or manages the implementation of a reportable cross-border arrangement. It goes on to further clarify the term as also including a person that, having regard to the relevant facts and circumstances and based on available information and the re evant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that this person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all the relevant facts and circumstances, as well as the available information and their relevant expertise and understanding.

The Belgian legislator has chosen to transpose the institution of the intermediary literally, and has also used a mechanism for the exclusion of the

8 *Directive (EU) 2015/849 of the European Parliament and of the Council* of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC OJ. UE *L 141/73.*

information obligation in order to protect the secrecy of public trust professions. It therefore decided to use a more literal method of transposition of Directive 2018/822, which is called the copy-out method.[9] In such circumstances, the Member State's domestic regulations were not challenged. In other words, the preliminary question did not concern the compatibility of Belgian regulations with European Union secondary law, but the compatibility of the Directive 2018/822 itself, i.e. secondary law, with EU primary law. The case therefore concerns the norms of EU constitutional rights, namely the right to respect for private life and to a fair trial.

The Right to Respect for Private Life in the EU Legal System

The right to respect for private life is contained in Article 7 of the Charter. According to this article, everyone has the right to respect for private and family life, home and communication. This right[10] is complemented by the right to protection of personal data contained in Article 8 of the Charter. According to this provision, everyone has the right to the protection of personal data concerning them. Paragraphs 2 and 3 of this Article contain limitation clauses that define the conditions for interference with this fundamental right. According to Article 8(2), personal data must be processed fairly for specified pur-

9 Jędrzej Maśnicki, "Metody transpozycji dyrektyw", *Europejski Przegląd Sądowy*, no. 8. 2017: 4.

10 The protection of private life should also be linked to the protection of personal data, in particular the limitation of the collection and access to databases created by states. The protection of private life also extends to protection from interference with the normal functioning of the environment. In turn, the protection of family life extends to relationships between spouses, between parents and children, as well as other interpersonal relationships. The protection of privacy within the meaning of the ECHR also refers to the protection of the home in the sense of, inter alia, the protection of the home. Privacy in the sense of the Convention also means the confidentiality of correspondence and the limitation of state interference in this area, Leszek Garlicki, "Komentarz do art. 8" in *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, vol. 1, *Komentarz do artykułów 1–18*, ed. L. Garlicki. Warszawa, 2010, 493, 498, 500, 501, 508, 515, 519, 521, 541, 542, 543.

poses and with the consent of the data subject or on other legitimate grounds laid down by law. Everyone has the right of access to data which has been collected concerning them and the right to have it rectified. However, in accordance with Article 8(3) of the Charter, compliance with these principles is subject to control by an independent authority.

All fundamental rights are understood through the perspective of Article 52 of the Charter. Paragraph 1 of this provision states the general principle of proportionality, according to which any limitation on the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

The principle of proportionality has also been described in the literature. It is argued that the measures adopted by the EU should not impose excessive burdens. Also, sanctions should be proportionate to possible violations. This principle applies regardless of the legal space in which the restriction occurs. The spheres of both domestic and EU law are subject to it. It should be noted that proportionality means examining whether the restrictive measure is appropriate and necessary. This means that if there is a less restrictive measure that would be less burdensome for the addressee, but would achieve the same goal, it should be chosen over the restriction in question. Finally, the restriction adopted should be proportionate, i.e. not interfere with the freedom in question beyond what is necessary.[11]

The principle of proportionality was initially developed by the case law of the CJEU. At first, it was not concretized. The freedom of action of individuals should not be limited beyond what is necessary in the public interest.[12] A more

11 Anna Wyrozumska, "Zasady działania UE" in *Instytucje i prawo Unii Europejskiej. Podręcznik dla kierunków prawa, zarządzania i administracji*, eds. J. Barcz, M. Górka, and A. Wyrozumska. Warszawa, 2015, 95.

12 Justyna Maliszewska-Nienartowicz, "Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym", *Studia Europejskie/Centrum Europejskie Uniwersytetu Warszawskiego*, no. 1, 2006, 61.

complex definition of the principle can be found in the Fromançais judgment[13] of 1983, which reads: "In order to establish whether a provision of EU law is compatible with the principle of proportionality it is necessary to establish, first, whether the means envisaged for achieving the objective correspond to the seriousness of that objective and, second, whether they are necessary for achieving it."[14]

The measures adopted by the EU should therefore not impose excessive burdens. Sanctions, too, should be proportionate to possible infringements. This principle applies irrespective of the legal space in which the restriction occurs. Both national and EU law spheres are subject to it. It should be noted that proportionality means examining whether the restrictive measure is appropriate and necessary. This means that if there is a less onerous measure for the addressee, but it achieves the same goal, it should be chosen over the restriction in question. Finally, the restriction adopted should be proportionate, i.e. not interfere with the freedom in question beyond what is necessary.[15]

The right to respect for private life is also derived from Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[16] The impact of this instrument has a significant impact on the application of the Charter itself. This is due to several factors. First, the axiology of the Convention and the case law of the European Court of Human Rights[17] ECHR inspired the drafters of the Charter. The content of the latter is therefore not something new, but is a creative complement to the acquis related to the Convention. For this reason alone it is impossible to separate the two acts from each other.[18] Secondly, the

13 *Fromançais SA v. Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*, case C-66/82, ECLI:EU:C:1983:42.

14 Maliszewska-Nienartowicz, 62 in fine.

15 Wyrozumska, 95.

16 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Rome 4 November 1950. Hereinafter: the Convention.

17 Hereinafter: ECHR.

18 Jerzy Jaskiernia, "Karta Praw Podstawowych Unii Europejskiej a Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności – konflikt czy komplementarność"

direct reference to the provisions of the Convention is found in Article 52(3) of the Charter. Pursuant to this provision, in relation to the rights recognised by both instruments, the Charter may not confer weaker protection than the Convention. Thirdly, even before the creation of the Charter, references to the Convention had appeared in successive treaties, and its rights, despite not being formally bound, were reflected in the judgments of the CJEU. Finally, another reason why the Convention is relevant to the internal law of the Union is that each of the Member States has acceded to the Convention.

The CJEU readily draws on the case law of the ECHR. The above-described mutual relations between two acts protecting human rights lead to the Charter being understood as a living instrument. The sense of this issue is expressed in the fact that the provisions of the Charter do not have a single, unchangeable content, but their scope is constantly evolving along with the changing social and cultural conditions.[19] The content of human rights should therefore be continuously decoded, taking into account the prevailing socio-cultural realities. Multicentricity in this sense is therefore not a burden on the system, but an advantage in that two independent bodies seek optimal solutions by inspiring each other.

Standards of Protection for the Right to Respect for Private Life

From the perspective of this paper, two aspects of the right to privacy should be noted.[20] The first is the protection of correspondence, especially between a member of the lawyers profession and his or her client. The second aspect of this right is the protection of personal data. Although it functions as a separate

in *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, ed. A. Wróbel. Warszawa, 2009, 157.

19 Marcin Górski, "Karta Praw Podstawowych UE jako living instrument" in *Unia Europejska w przededniu Brexitu*, eds. J. Barcik, and M. Półtorak. Warszawa, 2018, 91.

20 Garlicki, 493, 498, 500, 501, 508, 515, 519, 521, 541, 542, 543.

fundamental right in the Charter, this article recognizes that privacy and personal data are linked in the present case. Indeed, the very existence of the right to the protection of personal data is the result of a longstanding evolution of the approach to the right to privacy.[21]

The ECHR Niemietz ruling,[22] concerning the case of a police search of office premises belonging to a lawyer, held that "under certain conditions the right to privacy may extend to business premises." It was also acknowledged that there are no reasons why this right should exclude an individual's professional activity. In doing so, it pointed out that, especially in the case of freelancers, it is not always possible to separate the spheres of personal and professional life, and that most people can also develop their personal relationships through their work.[23] This ruling led the CJEU to adopt an approach to privacy protection that does not distinguish between private and business entities. In Roquette Frères SA,[24] it was held that the need to protect against arbitrary or disproportionate interference by a public authority with a person's private activities, whether natural or legal, is a general principle of EU law. In Nexans France SAS,[25] the CJEU stated the need to protect against arbitrary and disproportionate interference by the authorities, irrespective of legal subjectivity, derives from the principles of EU law and from Article 7 of the Charter.[26]

In contrast, the ECHR in 2002, in its Société Colas Est judgment,[27] developed the protection of privacy for legal persons. It then granted protection of privacy under Article 8 of the Convention during an administrative inspection. In doing so, it indicated that any restrictions on this right based on the public

21 Jacek Sobczak, "Komentarz do art. 8" in *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. A. Wróbel. Warszawa, 2013, 259, 260.

22 *Niemietz v. Germany*, Application No. 13710/88.

23 Jens Vedsted-Hansen, "A Commentary to Article 7" in *The EU Charter of Fundamental Rights. A Commentary*, eds. S. Peers, T. Hervey, J. Kenner, and A. Ward. Oxford, 2014, 154, 157.

24 *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des frauds*, case C-94/00, ECLI:EU:C:2002:603.

25 *Nexans France SAS and Nexans SA v.* Commision, case T-135/09, ECLI:EU:T:2012:596.

26 Vedsted-Hansen, 154.

27 *Société Colas Est v. France*, Application No. 37971/97.

interest must be accompanied by safeguards that effectively protect against abuse.[28]

According to the ECHR, protection of privacy does not extend only to the domestic sphere. It also covers some spheres of public space. In the ECHR decision *Gillan and Quinton v. UK*,[29] the ECHR stated that the state cannot justify random stops and searches in the street on the grounds that they are carried out in a public space. The ECHR noted that in such cases, the violation of Article 8 of the Convention may thus be even more severe. Indeed, a public, disproportionate interference by the authorities may prove much more severe than a private one, regardless of whether private documents were read during the search.[30] It cannot therefore be assumed that the automaticity of the transfer of data bound by the obligation in Directive 2018/822 does not violate the right to respect for private life. Such automatism may also serve the purpose of random control.

The right to privacy therefore also extends to legal persons, and to natural persons in professional activities. This includes the right to communicate, especially in the situation of professionals. However, this does not mean that this right is absolute. This is particularly relevant to this article, as it relates to the new information obligations imposed on legal professionals. Considerable controversy has arisen over the need to inform the authorities of the crime of money laundering. It has been argued that this is a disproportionate interference with the secrecy of communications.[31]

A restrictive understanding of the privacy of correspondence was applied. In the Klass ruling. It was considered that the violation of this right is independent of the actual use of wiretapping, since the mere possibility caused by the existence of relevant legislation negatively affects the freedom of com-

28 Vedsted-Hansen, 158.

29 *Gillan and Quinton v.* UK, Application No. 4158/05.

30 *Volker und Markus Schecke GbR and Hartmut Eifert v. Land* Hessen, joined cases C-92/09 and C-93/09, ECLI:EU:C:2010:662, pos. 87.

31 Adam Ploszka, "Tajemnica zawodowa prawników a przeciwdziałanie praniu pieniędzy w kontekście dialogu trybunałów europejskich" in *Wpływ Europejskiej Konwencji Praw Człowieka na funkcjonowanie biznesu*, eds. A. Bodnar, and A. Ploszka. Warszawa, 2016, 113.

munication.[32] Also in the cases of strategic call monitoring, the ECHR paid attention to the requirement of the predictability of law. The understanding here is that the norms should give sufficiently clear indications as to the conditions and circumstances under which the state may resort to such measures.[33] Secret surveillance measures, due to their extensive interference with fundamental rights, have received in the jurisprudence of the Court clarification of minimum safeguards against abuse. Among these were the statutory definition of the categories of persons potentially subject to wiretapping and the definition of the nature of the offences whose suspicion is a prerequisite for the use of wiretapping.[34] Meanwhile, Directive 2018/822 mandates the automatic transfer of taxpayer data. It is worth noting that this is a very far-reaching idea, as merely taking part in an arrangement within the meaning of Directive 2018/822 is not a crime. It does not even have to cause any negative social consequences.

There are spheres of life that involve strict privacy as well as personal data protection. There is not even a greater need to separate these rights, since the explanations to the Charter state that Articles 7 and 8 of the Charter are based on Article 8 of the Convention and should be interpreted in accordance with it.[35] One such sphere is business secrecy. In *Pilkington v. Commission*, the CJEU held that the protection of privacy should justify the prohibition of publication of certain business data which constitute business secrets.[36] It recognized then that the pooling of such data, even as a result of antitrust proceedings, could result in grossly egregious harm.

The ECHR has ruled that state authorities such as the police have the right to track citizens, but only if this is necessary to protect democratic institutions.[37] This does not mean, however, that the ECHR has not recognized the

32 *Klass and others v. Germany*, Application No. 5029/71.
33 *Weber and Saravia v. Germany*, Application No. 54934/00.
34 *The association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, Aplication No. 62540/00.
35 Vedsted-Hansen, 177.
36 *Commission v. Pilkington Group* Ltd, case C-278/13, ECLI:EU:C:2013:558.
37 Sobczak, 275.

threat to democracy posed by the creation of classified databases to ensure state security. Such an interference should be adequately protected against abuse.[38] First of all, the purposes for which databases are created should be legitimate and provide citizens with a guarantee against abuse. Furthermore, the relevant laws should precisely define the subject and object of the interference, as well as a system of effective and adequate safeguards, and appropriate supervisory authorities.[39]

The CJEU held that the criterion of necessity has its source in EU law and is an autonomous concept, independent of national legal orders. This means that different definitions of necessity in the Member States should not have a restrictive effect on data protection law. It also gives some criteria that have to be fulfilled for an intrusion to be considered necessary. Therefore, data processed within the scope of the register must be limited to what is necessary for the application of the EU rules, and the centralised nature of the register allows for a more effective application of the rules.[40] However, it is difficult to find in the obligation to provide information on cross-border arrangements an appropriate limitation which narrows the obligation to data necessary for the effective application of the legislation.

In ASNEF and FECEMD, the CJEU noted that the examination of the necessity of the processing is always linked to the weighing of the rights and interests of the controller and the data subject. Such an examination should always relate to the specific situation of the individual person and his or her rights. A distinction is also made between situations involving the processing of data which are publicly available and those which are not.[41] Data collected for automated processing require specific safeguards from the state to protect against misuse.

38 *Malone v. UK*, Application No. 8691/79; *Rotaru v. Romania*, Application No. 28341/95.
39 Sobczak, 277.
40 *Heinz Hubner v. Bundesrepublik* Deutschland, case C-524/06, pos. 52 and 66.
41 *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF), Federación de Comercio Electrónico y Marketing Directo (FECEMD) v. Administración del* Estado, joined cases C-468/10 and C-469/10, pos. 40, 43, 45.

The state must therefore ensure, inter alia, that data are processed only for essential purposes.[42]

An Attempt to Assess Directive 2018/822

The best oversight in the ECHR's view is judicial oversight. The ECHR ruled that, in the public interest of combating the most serious crimes, account must be taken of the prejudice that interference may cause to fundamental rights.[43] In addition, it has been indicated that the person subjected to interference must be able to have a judicial review in order to determine whether the interference is unlawful.[44] Transferring the above to the context of Directive 2018/822, it has to be stated once again that the automaticity of the obligation to inform public authorities does not meet the standard of protection of personal data protection law. The obligation to provide information on cross-border arrangements should at least be subject to the option of a court challenge. One would also expect this obligation to be narrowed down to activities that clearly indicate tax avoidance.

Protecting the tax base of Member States is itself a value worthy of recognition. The protection of competition is also a particularly protected value in the EU. However, it cannot justify a completely arbitrary interference with human rights, which are one of the pillars of the EU. Recitals 6 and 9 of Directive 2018/822 emphasize the need to effectively counter aggressive tax planning. However, no attempt is made to distinguish in detail between the value of creating fair taxation conditions in the internal market and the protection of fundamental rights. Only recital 18 informs that Directive 2018/822 does not infringe fundamental rights and is in line with the principles recognised in particular by the Charter.

42 Nowicki, 514.
43 *Segerstedt-Wiberg v. Sweden*, Application No. 623332/00.
44 Nowicki, 524.

In the Pharmacie populaire – La Sauvegarde SCRL judgment,[45] the CJEU took the view that the need to ensure the effectiveness of fiscal controls can constitute an overriding reason of general interest capable of justifying a restriction on the freedom to provide services[46] and thus one of the foundations of the functioning of the EU. However, it requires that the measures restricting the freedom to provide services should be suitable for securing the attainment of the objective which they pursue and that they do not go beyond what is necessary to attain it.[47] However, the CJEU has found unacceptable the sanction for failure to comply with a reporting obligation where that failure has not resulted in tax evasion.[48] The CJEU therefore recognizes the value of combating tax fraud, but differentiates it from the convenience of state authorities. Also important is the intended effect of the regulation in question. Tax fraud is a crime, while a cross-border arrangement is not, although member states may consider certain arrangements illegal.

Referring back to the Niemietz ruling, the ECHR stated that when a lawyer is involved in a search, a breach of professional secrecy may affect the proper administration of justice and thus the rights guaranteed by Article 6 of the Convention.[49] Furthermore, the ECHR noted that for this to be the case the publicity surrounding the search must have had a negative impact on the lawyer's professional reputation, both in the eyes of his existing clients and the general public. If a one-off incident can have a non-negative impact on lawyers' reputations, surely the legal injunction to provide information will have a dimension that is at least equal, and on all members of the profession.

It is worth recalling that interference with the right to respect for private life is possible provided that the interference meets the requirement of statutory definition. The ECHR understands this requirement not only as an obliga-

45 *Pharmacie populaire – La Sauvegarde SCRL v.* État belge, joined cases C-52/21 and C-53/21, ECLI:EU:C:2022:127.
46 *Pharmacie populaire – La Sauvegarde SCRL v.* État belge, pos. 34.
47 *Pharmacie populaire – La Sauvegarde SCRL v.* État belge, pos. 35.
48 *Pharmacie populaire – La Sauvegarde SCRL v.* État belge, pos. 46.
49 *Niemietz v. Germany*, pos. 37.

tion to establish an adequate legal basis, but also to maintain the quality of regulation. The ECHR takes the view that, even if it could be said that there was a general legal basis for the measures provided for in Finnish law, the absence of adequate provisions specifying with sufficient precision the circumstances in which privileged material may be subject to search and seizure deprived the applicants of the minimum degree of protection to which they were entitled under the rule of law in a democratic society.[50] Privileged material is understood here as evidence covered by professional secrecy.

Correspondence between a lawyer and his client, whatever its purpose (including strictly professional correspondence),[51] enjoys a privileged status in terms of confidentiality. This is undoubtedly essential to the effective practice of the legal profession, as well as to the proper administration of justice.[52] Although Article 8 of the Convention protects the confidentiality of all "correspondence" between individuals, it provides enhanced protection for the exchange of information between lawyers and their clients. This is justified by the fact that lawyers perform the fundamental role in a democratic society of defending litigants. Lawyers cannot perform this task without being able to provide guarantees of confidentiality in the exchange of information for those they defend. Indirectly but necessarily, everyone's right to a fair trial, including the right of defendants not to incriminate themselves,[53] depends on this, so it is not possible to fully distinguish between the right to respect for private life and the right to a fair trial. The enhanced protection of confidentiality may also prevent the contested regulation from being regarded as proportionate, since it seeks to circumvent professional secrecy.

50 *Sallinen and others v. Finland*, Application No. 50882/99, pos. 92–94; *Narinen v. Finland*, Application No. 45027/98, pos. 36.

51 *Niemietz v. Germany*, pos. 32.

52 Magdalena Matusiak-Frącczak, *Tajemnica adwokacka a obowiązek informowania o transakcjach podejrzanych na podstawie przepisów o przeciwdziałaniu praniu pieniędzy i finansowaniu terroryzmu. Glosa do wyroku ETPC z dnia 6 grudnia 2012 r*. LEX/el., 2013, access 24.02.2022, 4; Garlicki, 548.

53 *Michaud v. France*, Application No. 12323/11, pos. 118.

While the Michaud judgment concerns AML legislation, the similar mechanism of interference with the right to privacy and the right to a fair trial allows for some plausible conclusions. The ECHR considers that the obligation to report suspicions constitutes a "continuing interference" with the right to respect for private life, even if it does not concern the most intimate sphere of private life, but the right to respect for the exchange of professional correspondence with clients.[54] The safeguard mechanism has been introduced alongside the existing repressive mechanism, but their coexistence does not disturb the necessity of the interference.[55] For the purposes of Article 8 of the Convention, the concept of necessity means that the interference meets a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.[56] However, the requirement to report suspicions of money laundering and terrorist financing does not, in the ECHR's view, constitute an undue interference with the right to respect for private life, in view of the important general interest served by the fight against money laundering and the guarantee afforded by the exclusion from the obligation of information received or obtained by lawyers in the course of their litigation activities or in the course of their legal advice.[57] Thus, it can be assumed that the necessity to combat the most serious crimes threatening democratic societies is a sufficient reason to consider that this interference with the right to respect for private life is proportionate. Unfortunately, it is difficult to acknowledge the same seriousness of the tax avoidance that Directive 2018/822 is intended to counteract. It remains to be seen what interpretation the CJEU will adopt, but equating money laundering and terrorist financing with tax planning seems unlikely. In addition, it should be mentioned that the obligation to inform about suspicions related to AML regulations does not therefore concern the essence of the role of defense counsel, which, as stated earlier, is the basis of the professional secrecy of the

54 *Michaud v. France*, pos. 92.
55 *Michaud v. France*, pos. 124.
56 *Michaud v. France*, pos. 120.
57 *Michaud v. France*, pos. 121.

lawyer. In addition, the transmission of information takes place through the body of the professional self-government.[58]

It must also be determined whether the alternative obligation provided for in Directive 2018/822 of having to provide information, not about the arrangement, but about the mere evasion of the main obligation to the other actors involved in the arrangement, also constitutes a violation of the right to respect for private life. First, it should be noted that such an obligation redirects the information transmitted. The recipient of the information is no longer the authority but another participant in the arrangement. However, this does not fundamentally change the fact that Directive 2018/822 still forces legal professionals to share information with others. This can be seen as an interference with the right to respect for private life. Secondly, although the information transmitted is already of a different content, the lawyer is still obliged to inform another entity of the fact that a service has been provided to a particular individual. Moreover, if the duty to provide information to the other participants in the arrangement rests with the lawyer, it means that the lawyer has noted an emerging cross-border arrangement. In other words, the lawyer is compelled to inform others of at least some of the content of the relationship between him and his or her client. Thus, ultimately the state authorities will obtain the information, but from other individuals. This appears to be a circumvention of the right guaranteed by Article 8 of the Convention.

Professional secrecy is particularly protected, and appropriate filters are required when interfering with it. One is the aforementioned intermediation of an independent body when providing information. Another filter is the presence of a representative of the professional self-government during the search. Also, the transmitted information must not relate to the essence of the legal profession. It follows that the possible interference can never assume an automatic character in relation to the lawyer. The exact content of the information is irrelevant. Meanwhile, Directive 2018/822, in a situation where the obliga-

58 *Michaud v. France*, pos. 128, 129.

tion to provide information is evaded, forces the lawyer to inform others of the legal advice given, and of the existence of the cross-border arrangement. Thus, the legislator seems to recognize that professional secrecy applies only to state authorities and can be circumvented by ordering the communication of information covered by this secrecy to other entities that are not already covered by legal professional secrecy.

Attention should also be paid to the relevance of the data processing. I propose that the test of relevance should be based on the purpose of combating tax avoidance. However, I believe that a cross-border arrangement as such is not necessarily the same as tax avoidance. It is therefore very likely that information about cross-border arrangements will not always meet the relevance test.

Summary

Interference with the right to privacy must meet certain requirements. The case law of the CJEU emphasizes the principle of necessity or indispensability.[59] At this point, the question must be asked of whether these objectives could not be achieved by less intrusive methods. Recital 14 of Directive 2018/822 itself mentions that cross-border aggressive tax planning arrangements, the primary purpose or one of the primary purposes of which is to obtain a tax advantage contrary to the object or purpose of the applicable tax legislation, are subject to the general anti-avoidance provisions set out in Article 6 of Council Directive (EU) 2016/1164. It would therefore be necessary to explain why interference with fundamental rights is being undertaken despite the existence of other tools to combat aggressive tax planning.

Directive 2018/822 will not be compatible with the right to respect for private life until several amendments are made. First, the information obligation should not be absolutely automatic. In other words, there should be a way to challenge

59 *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) v. Administración del Estado.*

the obligation before a court under Article 47 of the Charter. Second, Directive 2018/822 should contain a clear balance between the objectives it pursues and the right to respect for private life. Simply stating that Directive 2018/822 does not infringe fundamental rights seems too weak a safeguard.

There is also no reason to exclude the professional activities of individuals from the protection of the right to respect for private life. Moreover, the activity of lawyers is particularly important from the point of view of the confidentiality of correspondence between a professional and his client. The contested mechanism leads to the mandatory receipt of information about the cross-border agreement by the state authorities. Thus, according to the solutions contained in Directive 2018/822, it is not possible for the relevant authority not to receive the said information. The side effect of this solution is that the other participants in the reconciliation have to be informed about the evasion of the information obligation, i.e. actually about professional activities regarding the client and the existence of the cross-border arrangement. This is a mechanism that circumvents the right to privacy and undermines its essence. The prevention of crime is a greater value than the mere acquaintance.

The fairly consistent view of the CJEU and the ECHR that there is no reason to exclude the professional activities of individuals from the protection of the right to respect for private life. Moreover, the activity of lawyers is particularly important from the point of view of the confidentiality of correspondence between a professional and his client. It is worth noting that the contested mechanism leads to the mandatory receipt of information about the cross-border agreement by the state authorities. The side effect of this solution is that the other participants in the reconciliation have to be informed about the evasion of the information obligation, i.e. actually about the performance of professional activities regarding the client and the existence of the cross-border reconciliation. This is a mechanism that circumvents the right to privacy and undermines its essence. The prevention of crime is of greater value than the mere acquaintance of state authorities with cross-border arrangements. It

seems that the CJEU should take a more restrictive approach to the notification of cross-border arrangements as they do not constitute a crime.

For the reasons set out above, it now appears doubtful that the contested legislation will be regarded by the CJEU as compatible with the right to respect for private life, including the right to confidentiality of correspondence between a lawyer and his client. The fact that particular importance is attached to such confidentiality also constitutes an obstacle to the contested mechanism being regarded as proportionate, since it in fact circumvents the protection of that confidentiality.

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