PROFESSIONAL SECRECY, LEGAL PROFESSIONAL PRIVILEGE, AND CONFIDENTIALITY: THE BELGIAN AND EUROPEAN PERSPECTIVE

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"Le secret professionnel est un sujet bien difficile: plus que tout autre, il résiste à la mise en formules. Tous les auteurs, sans exception, reconnaissent qu'il s'agit d'un principe de droit naturel, une vérité à l'abri des épreuves du temps, mais ils se contredisent dès qu'ils passent aux applications " [1].

"Professional secrecy is a difficult topic: more than any other, it withstands any definition. All authors, without exception, recognize it as a principle of natural law, a truth protected from the events of the time, but they contradict each other once they all have to apply it".

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I. Introduction and prospects of this contribution

1. Professional secrecy is a concept that many books have been trying to study widely for many years, and yet it remains at the centre of the public debate, as it finds itself at the crossroads of several fundamental values such as justice, social ethics, politics, privacy, and professional discipline [2]. It is however agreed that professional secrecy, even before being an obligation or a prerogative, firstly participates to the protection of the rights of private life and of the rights of defense of any person seeking justice, regardless its quality either as physical person or company, or as consumer or professional. Not defined in a strict and formal manner, no legal text or, at least, none having a binding force, captures this concept as such.

It is however commonly accepted that professional secrecy can be reasonably defined as the obligation leaning on some categories of professionals not to disclose any confidential information about their business or their customers, regardless their quality – enterprises, consumers, etc. [3] This obligation to remain silent mainly burdens on the custodians of any information regarding the private life of any person visiting professionals that are subject to that obligation of secrecy. So is it with doctors, priests, and many legal professions, among which judges, bailiffs, notaries and, in particular, lawyers.

Professional secrecy is differently apprehended by various texts of laws, by various ethical rules, and, of course, by the case law of both national and European courts and tribunals having jurisdiction regarding cases involving the observance - or the non observance - of this secret.

The conceptualization of professional secrecy and its scope are constantly evolving, as it often involves many other values, which often rise up against each other.

The present contribution does not aim at identifying and embracing all the complexities of this broad concept. Its purpose is rather to provide general information to the reader with a broad overview of the matter. It is addressed to consumers and people interested in having a first look into what professional secrecy is about and how it is apprehended. The reader desiring a deeper analysis is invited to consult the basic sources mentioned thoughout this contribution.

As a first step, we will give a brief introduction to the history, the social and ethical foundations of professional secrecy, as well as the professions that are traditionally subject to this obligation. This will be essentially done from a Belgian perspective. We will also mainly turn our attention to the profession of lawyer and legal adviser. The contribution also contains an overview of the sanctions attached to the breach of professional secrecy, as well as the various exceptions in respect thereof.

Finally, we will also look at the European perspective with regard to the "*professional-secrecy-emblematic*" lawyer profession. In this regard, we will comment on the recent decision of the European Court of Justice of 14 September 2010 regarding the status of in-house lawyers (hereafter referred to as corporate legal advisers) and the non-coverage by professional secrecy of legal opinions given by those legal advisers, such as enacted and motivated by the Court.

II. Foundations of professional secrecy

A. History

2. Professional secrecy is a notion that originated in ancient times. Although violation of professional secrecy only started to be punished from the 19th century, authors usually agree that one of the first expressions of professional secrecy is to be found during IXth century BC, in the verses 9 and 10 of Chapter XXV of King Solomon proverbs, which dictate:

> *"9. Debate thy cause with the neighbour himself; and not discover a secret to another. "*
>
> *"10. Ballast he that heareth it put thee to dispersing, and thine infamy turn not away".* [4]

At that time, the secret entrusted to a third part was clearly conceived as an obligation *in personam* [5] , and it implies the notion of confidence, which is extremely widely applied. These two verses of Solomon's Proverbs are almost the only written sources witnessing the existence of the value of the secret at the time, up to the Vth century BC.

It is precisely at that time that historians place the famous "*oath of Hippocrates*" in history, which is often quoted as the historical basis of professional secrecy, particularly regarding medical professions:

> *"I swear by Apollo the Physician and Ascleptius and Hygieia and Panaceia and all the gods and goddesses, making them my witnesses, that I will fulfill according to my ability and judgment this oath and this covenant :*
>
> *(...)*
>
> *What I may see or hear in the course of treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep myself holding such things shameful to be spoken about (...)""*[6].

Christian morality will resume the notion of the sanctity of the Confessional secret at the beginning of the IVth century, at the "*Council of Carthage*", reminding this principle later on during other Councils, and by recognizing its absolute character [7]. In the case of Northern European States, influenced by the Lutheran doctrine, the protection of the entrusted secret will rather result from social pressure [8].

In France, the first enunciation of a sanction attached to the breach of an obligation to professional secrecy obligation will appear for the first time in the French Criminal code of 1810, in its article 378:

> "*Doctors, surgeons and other health officers, as well as chemists, midwives, and any other person that is depositary (...) of secrets one entrusts him, who would have revealed those secrets, shall be punished (...), except in the case where a legal provision obliges them to denounce them*" [9] .

B. Etymology

3. Etymologically, professional secrecy comes from the latin verb *secernere (secretus, secretum)*, which means "*to split*". First of all, it involves the separation between what is known and what is not. Secondly, it involves a dimension of confidence surrounding the communication [10]. The "*professional*" aspect of professional secrecy implies then a third dimension: the one involving that this confidence has to be made to a *necessary* third party [11], who carries on a function requiring confidence.

Article 458 of the Belgian criminal code summarizes this last notion by defining persons subject to professional secrecy as the "*custodians, by status or by occupation, of secrets that are entrusted to them*".

C. Foundations

4. Professional secrecy involves many dimensions and has also many foundations. The concept of professional secrecy indeed refers to several values which intersect with each other.

i. Protection of private life

The respect of private life is the value that is traditionally and primarily invoked as the essential basis for the obligation of professional secrecy [12]. Indeed, the latter initially tends to protect individuals, against the moral damage that a revelation would cause them, and that would be detrimental for their reputation, or their honor [13].

In this matter, the Consultative Assembly of the Council of Europe adopted a recommendation, on 20 November 1985, in which the Assembly reaffirmed that "*the protection of professional secrecy is an essential element of the right to respect private life*."

Without giving it the exclusivity, this element of private life was also taken into account by the European Court of Human Rights in its way to approach professional secrecy. The Court has indeed embraced professional secrecy through its interpretation of article 8 of the Human Rights Convention, which regards the right to private life [14].

"*The interest of families*" is also often regarded as a basis of professional secrecy [15], though it may reasonably be considered that this interest is already part of the concept of individuals' privacy, which obviously includes the close and restricted family circle. The notion of families' interest can also be viewed from the perspective of social interest, which will be discussed below.

ii. Protection of one's rights of defense

5. As lawyers, we believe that the main foundation of lawyer's professional secrecy nowadays is the necessity of protecting anyone's rights of defense, and of ensuring the good administration of Justice. This point of view, which seems quite obvious, goes along with well-established and recently confirmed "*Akzo*" European case-law (see *infra*).

Belgian Courts have also stated that professional secrecy of lawyers firstly ensures the protection of the rights of defense that should be granted to anyone seeking justice, and is unlimited. It is through this principle that the Belgian Constitutional Court sanctioned important legal provisions regarding money laundering (case 10/2008) and debt mediation (case 46/2000).

iii. The will of the parties

Another conception of professional secrecy is based on the idea, coming from the French tradition, that this secret is in fact based on the common will of the parties, which respectively entrust and receive the secret that is subject to protection [16]. professional secrecy would therefore have a contractual basis, meaning that parties could agree to disclose the elements they want to [17].

Although this theory is interesting and has been supported by some authors for a long time, it has now generally been abandoned [18] on the old continent. The subordination of the disclosure of the professional secrecy to the "*victim*"'s will would lead to a situation in which parties would free themselves from any criminal provision regarding the disclosure of a piece of information which should normally be kept secret[19]. Indeed, as soon as the person entrusting a secret accepts his secret to be revealed, the notion of secrecy purely disappears. Furthermore, if the violation of professional secrecy is criminally apprehended, it is so in order to protect social and public policy, which no one can avoid.

iv. General interest and the social and public order

6. More generally, the general public interest and public order are invoked in order to support the obligation of professional secrecy. These notions are wide, but are taken up by many authors. In this respect, we can quote Belgian Professor H. de Page, a leading scholar who wrote that public order defines "*anything that touches the essential interests of the State or the Community, or which lays down the fundamental legal bases on which the economic and moral society order is based*" [20].

It seems that the Belgian Parliament also adopted this definition. In the preparatory works of the criminal code we find indeed that "*it is important for all citizens and the common good that everyone can be ensured of the discretion of the persons who carry on particularly important missions (...)*" [21]. Furthermore, the Parliament even wrote that professional secrecy "*protects the confidence of an individual as well as it guarantees a professional duty that is indispensable to anyone* "[22].

The Belgian Supreme Court – the "*Cour de cassation*" –acts along the same line. In its memorandum rendered before the Court's decision of 20 February 1905, the General Attorney – the "*avocat général*" - wrote that professional secrecy was based on an "*idea of social order, based on trust that certain professions must inspire to the public*" [23].

Going even further, the author R. Legros states that " *the true basis of the obligation to secrecy are in fact the professional honor, the morality of the professional orders and the medical profession in which a State should be particularly interested, because of the nature and the necessary prestige of the profession*" [24].

Indeed, one can consider that violation of professional secrecy reaches the whole society, as well as its basic and elementary workings. A lawyer or a doctor who would not respect their obligation of professional secrecy would create citizens' distrust towards them, and would inevitably raise questions regarding the proper administration of justice or public health [25].

The European Court of Human Rights also seems to have adopted this point of view, when it states that the confidentiality of relations between lawyers and clients guarantees the proper functioning of Justice and, that the respect of confidentiality regarding health information is vital to preserve the confidence of patients towards the medical profession [26].

v. Dealing with these foundations

7. Professional secrecy protects the confidence of an individual and its rights of defense. Also, it guarantees a professional duty that is essential to everyone [27].

Professional secrecy thus is intertwined with many other values. If these values seem to override any other, there are many cases in which it is sometimes difficult to give professional secrecy primacy to other values that would ethically and socially be considered as important, or sometimes even higher on the scale of values of collective consciousness [28].

Some authors have tried to prioritize [29] values. Yet, we have to notice that the importance of these values does not only fluctuate as much as it is impossible to objectively prioritize them, but also that these values constitute a network with each other, which configuration varies according to the cases. It is then the judge's mission to decide *in fine* which value seems the most important according to him [30].

The Belgian Parliament, supported by collective consciousness, gradually admitted some relative character to professional secrecy – by opposition to its former alleged "*absolute*" character. It acknowledged that professional secrecy sometimes has to give way to other values, regarded as more important [31].

Many provisions appeared then, allowing – and sometimes enforcing - professionals to make an exception to their obligation of professional secrecy, in order to ensure the proper administration of justice. Among these exceptions are found the possibility of disclosing confidential information during a testimony in court, criminal protection of minors, protection of money laundering policy, the protection of public health and public security, the State interests and tax requirements, etc.

It is generally admitted that these regulations are subject to control by courts and tribunals, by virtue of the general principle of proportionality [32].

III. The point in Belgian law

8. As mentioned in the introduction of this contribution, we do not envisage examining all legal aspects of professional secrecy in Belgium. Rather do we provide a general overview of this concept in Belgium and Europe, particularly regarding the lawyer's profession.

Consequently, right after a brief distinction between "*legal*" professional secrecy and "*disciplinary*" professional secrecy (*point A*), we will list the various professions subject to this obligation in Belgium (*point B)* and the sanction attached to its disrespect (*point C,* which includes the various exceptions that the legislator and case-law have enacted).

A. Distinction : Legal and disciplinary professional secrecy

9. Article 458 of the Belgian criminal code provides that "*Doctors, surgeons, health officers, chemists, midwives and all other people that are, by state or by profession, depositaries of secrets they are entrusted with, and who will have revealed those secrets, will be sentenced to 8 days to 1 month of imprisonment and to a fine going from 100 EUR to 500 EUR, except the cases where they have to testify before a Court or a parliamentary investigation commission, or where a legal provision obliges them to do so*".

This legal apprehension of professional secrecy is of public order. We will examine further in detail the exceptions that are permitted by this legal provision (point B.4).

10. On the other hand, professional ethical rules often provide that even when the exceptions provided for in article 458 of the Belgian criminal code are met, the professional still has no right to disclose information that is usually subject to professional secrecy.

Some exceptions do still exist though. We can then point 2 cases where professional secrecy can be lifted by a professional without being punished on a disciplinary point of view either: the conflict of values, and the state of necessity, which will also be further mentioned.

B. Professions subject to professional secrecy

i. Doctors and Health Professionals [33]

11. When mentioning doctors as professionals subject to a duty to respect professional secrecy, we have of course to give to the definition of professional secrecy a wide scope *rationae personae*. It is not just doctors who are subject to the respect of professional secrecy, but more generally all the [34] medical and healthcare professionals. This includes paramedics, chemists as well as the hospital staff, clerks, secretaries and receptionists, being all the *"obliged collaborators"* of professionals subject to this obligation of secrecy, which is, in these circumstances, shared [35].

As mentioned above, regarding the violation of professional secrecy, one has to make a distinction between *legal* professional secrecy, and *ethical* professional secrecy, as the latter may be seen, on the professional's perspective, to *"overrule"* article 458 of the Belgian Criminal Code regarding the exceptions that this article provide (see *infra*).

The medical profession is protected and surrounded by a large number of ethical rules, which have constantly been influencing practice, or have instead been dictated by it.

Regarding the obligation of professional secrecy, article 55 of the code of medical ethics [36] provides that "*professional secrecy to which the physician is required, is of public order. It is imposed in any circumstance to consulted practitioners or to practitioners required by a patient to give him care or advice*".

Article 56 provides that "*professional secrecy of the doctor includes both what the patient said or entrusted him with, and everything that the doctor will be able to know or discover in consequence of examinations or investigations to which he will proceed*".

Specifying the extent of the obligation of professional secrecy regarding the information received, article 58 of the same code stipulates that this secrecy "*extends to anything that the doctor has seen, has known, learnt, discovered or surprised in the exercise of his mission, or when performing his mission*".

In short, what the doctor learned outside the scope of the exercise of his profession can not be considered as covered by any professional secrecy [37].

It shall be noticed that the code of ethics of doctors raises professional secrecy to an almost absolute obligation. Article 64 of the code provides indeed that a patient's declaration by which he relieves the professional from its obligation of professional secrecy is not sufficient to free him of that obligation. This conception has been echoed by the Belgian Supreme Court in its decision rendered on 30 October 1978, stating that "*as it regards public policy, professional secrecy escapes to the patient's disposal; the doctor is not released from the secret by the fact that the patient would have given its consent for disclosure of confidences he told him*" ***[38]***.

This conception, however, is still controversial and criticized by many authors [39]. It was even later nuanced by the Supreme Court itself [40]. This controversy kept going on when the Belgian Parliament implemented the statute regarding the protection of private life for the treatment of personal data of 8 December 1992, which provides in its article 7 § 2 that data processed relating to health may lose their private character "*upon the written consent of the person concerned*" ***[41]***.

Further discussion on the sanctions attached to the breach of professional secrecy by medical practitioners, which may result in civil, criminal and disciplinary liabilities, will be further provided in *section C.*

ii. Legal professions

- Magistrates [42]

12. Judges are subject to an obligation of professional secrecy known as a "*duty of discretion*" [43]. Such a duty tends to avoid the magistrates to lack - at least in the eyes of the public – the impartiality they must demonstrate in the exercise of their function. This part of the magistrates' duties is regulated by ethical obligations surrounding the judicial profession.

The basis of the obligation of professional secrecy for magistrates can be found in the need of confidence in the judiciary system of the State that people demand and expect, guaranteeing the fundamental right to respect for the citizen's privacy.

It is obvious, however, that only the pieces of information that fall outside the public sphere of the trial are covered by professional secrecy, or at least the pieces of information that have not been made public [44].

Deliberative secrecy of magistrates is a particular application of professional secrecy in Belgium, and is not applicable everywhere else in Europe [45]. It is also incumbent to Assizes' juries.

For magistrates as well, sanctions are not only criminal [46]. Some exceptions to the secrecy of the magistrates exist, and will be discussed briefly in this contribution, under the point regarding those sanctions.

- Lawyers

13. Lawyers are obviously part of the professionals for whom the secret entrusted by a client to its counsel is primordial and imperative – if lawyers are not even the emblematic profession for which professional secrecy is imperative. Without this essential and indispensable pillar, even the simple exercise of this profession would not be possible [47], and the lawyer's client could not see his right to a fair defense fully respected.

Attorney-client privilege is the essence of this profession, and provides the necessary guarantee that the confidence given by the client to his lawyer can in no case be held against him. This fundamental value has been stressed on numerous occasions in the ethical rules applicable to the profession, which are also extremely severe, as they even prohibit lawyers to disclose information usually covered by professional secrecy, even after the demand of the lawyer's client to publicly disclose this same secret information[48] [49]. Belgian courts adopted the same position [50].

As it is the case for the other professions discussed here, the professional duty of secrecy which is the lawyer's responsibility is almost absolute, and may enter in conflict with other values, such as the "*state of necessity – l'état de nécessité*", or the need of prevention of money laundering, etc. [51]

Criminal and civil sanctions for a breach of this obligation of secrecy are identical to the other professions submitted to the same obligation. However, professional secrecy is not extended to the lawyers' activities that find themselves outside the lawyer's mission of legal representation and defense, as it was reminded by the Constitutional Court in its decision of 23rd January 2008 [52].

14. One aspect of the profession of lawyer in the protection of professional secrecy deserves particular attention and relates the case of a judicial investigation practiced in the hands of the lawyer, usually in his office.

This aspect, which has led to abundant European case-law, and which has also brought some regrets [53], leads to the fact that in Belgium, when an investigation is performed inside a law firm, the magistrate who ordered the investigation will have to be present himself on the place of the investigation, after inviting the President of the Bar which the investigated lawyer is member of to be also present [54]. This guarantees that information protected by professional secrecy will not be read by the judicial authorities and ensures the effective protection of the rights of defense of the lawyer's client.

As the correspondence between lawyer and client is protected by professional secrecy and therefore not seizable, as well as the lawyer's personal notes, the role of the President of the Bar association is precisely to ensure that such documents are not seized. This implies that if the investigation magistrate estimates that the body of the crime on which he is investigating is located in the folder of the lawyer, the President of the Bar association shall first examine himself this folder, and will then deliver the documents requested to the magistrate, provided that they are not covered by professional secrecy.

This prevents the investigating magistrate to have knowledge of any information or document that could hamper the defense of the lawyer's client, even if he was not meant to learn or read that information [55].

This rule is only a practice though, which means that if it is violated, this infringement will not be a cause of nullity or of procedural irregularity [56]. To mitigate this possibility, P. Lambert advocates, *de lege ferenda*, the institution of a "*professional secrecy judge*", who would be independent and impartial [57], somewhat following the example of the

independent counsel in common law, whose task it is to indicate to the attorney general which documents are covered by professional secrecy and may then not be seized. G-A. Dal, 1st Vice-President of the Council of Bars and Law Societies of Europe [58] shares this opinion.

15. Another "*traditional*" aspect of the profession of lawyer regarding the obligation of professional secrecy is the correspondence held between lawyers. It is taught that this correspondence is confidential [59]. This notion has however not the same coverage as the secrecy of correspondence which is exchanged between the lawyer and his client. Confidentiality is mainly an ethical rule implemented by the usual practice of the profession, particularly in the frame of negotiations occurring during a judicial dispute in order to eventually reach an out-of-court settlement.

Confidentiality attached to this correspondence means that none of the lawyers can disclose this correspondence before a court or a tribunal. The violation of this rule will however only lead to sanctions in ethical and disciplinary terms. Therefore, one can conclude that a mail that would be directly sent to a party by the other party's lawyer is not confidential and may be disclosed in the frame of a judicial procedure, or seized by a judicial authority, unless it contains elements that shall be covered by professional secrecy.

This brief overview of the attorney-client privilege in Belgium being raised, it is now appropriate to examine the situation of the legal adviser employed by a company, and the protection granted to his legal opinions [60] in Belgium. This is particularly relevant from a European perspective, regarding the latest developments brought by the European Court of Justice in this area.

- Corporate lawyers and legal advisers within a company

16. The statute of 1st March 2000 creating the Belgian Institute for company legal advisers gave to the latter the mission to, *inter alia*, establish ethical rules governing the activity of the corporate legal adviser. Article 5 of the statute provides that "*the opinions delivered by the company for the benefit of his employer and his activity of legal advice lawyer are confidential".*

The term "*confidential*" and its scope immediately became subject to harsh debates [61]. Although a reference to article 458 of the Belgian Criminal Code had been deleted from the text of the statute's project, the question arose if the statute of 1 March 2000 had the effect of submitting corporate legal advisers to professional secrecy?

Some argue that the legal adviser working within a company is as depositary of his company's secrets as the lawyer is depositary of his client's secrets, or the doctor towards his patient's ones. According this point of view, it might seem obvious that corporate legal notices are to be covered by professional secrecy [62], or at least that the confidentiality attached to such notices leads to the same result : the interdiction to

seize such documents [63]. Without this necessary protection, the independence of a corporate legal adviser *vis-à-vis* his employer could seem threatened.

However, we believe that this extended scope that corporate legal notices could benefit from, is not the one that the legislature meant to give to this statute, in its actual grinding [64]. European case law acts along the same line regarding this interpretation of the corporate legal adviser status.

All the opinions delivered by the corporate legal advisers, for the benefit of their employers and in the frame of their activity of legal adviser are thus protected by confidentiality – and then not by professional secrecy. Violation of this confidentiality may then only raise the issue of civil liability of the person violating this requirement, and is not subject to criminal proceedings.

Moreover, only legal opinions given by an "official" *corporate legal adviser* are affected by the statute of 1 March 2000, which means that only those of the legal advisers who satisfy the conditions laid down in article 4 § 1er of the statute are subject to it. Surely, theBelgian legislator did not envisage to grant professional secrecy protection only to the legal opinions of those advisers who satisfy the conditions laid down in article 4 § 1, and not the other ones.

As only a duty of confidentiality weights on legal advisers, it results that a legal opinion provided by a legal adviser within the meaning of the statute of 1 March 2000 might see its production ordered by a magistrate during legal proceedings [65].

European case-law on this question is interesting, although it often depends on legal provisions of each Member State. On 14 September 2010, the European Court of Justice confirmed its earlier position and ruled about the protection of legal notices rendered by corporate legal advisers. This will be discussed *infra.*

Eventually, it should be noted that regarding lawyers in Belgium, the correspondence exchanged between lawyers and corporate legal advisers is confidential - and can therefore still be produced during legal proceedings-, but only if it the corporate legal adviser expresses to the lawyer his will to keep such documents confidential [67]. In other cases, such a correspondence will not be considered as confidential.

iii. Other professions

17. Among other professions subject to an obligation of professional secrecy, we can also mention notaries, bailiffs, jury members, clerks and other judicial authorities - which, like paramedics, are the "*obliged colleagues*" of magistrates -, judicial experts, police services, agents of the State, company auditors, worship Ministers etc. [68] The media are subject to specific and special rules. Another contribution in this issue on confidentiality is more specifically dedicated to that matter.

iv. The duty of confidentiality

18. Eventually, other professions are not bound by professional secrecy but are submitted to a duty of observing *confidentiality* in the frame of their profession [69], such as the banker [70], the stockbroker, the architect, the insurer, the real-estate agent or the company administrator. This duty of confidentiality is not apprehended by criminal law in case of violation, unlike the violation of professional secrecy in Belgium, but is nevertheless likely to lead to civil and disciplinary liability [71].

Borrowing the definition expressed by J. Sarot [72], P. Lambert states that the duty of confidentiality means "*the obligation to refrain from certain behavior, incompatible with the function or the nature of the employment*". This reserve duty may in fact be applied to any profession.

The legal difference between the duty of confidentiality and professional secrecy boils down to the fact that only professionals who are subject to article 458 of the Belgian criminal code can "*hide*" themselves behind the Professional-client privilege to refuse testifying in Court (see *infra*). On the other hand, those professionals who are subject to a duty of confidentiality – and therefore *have* to testify before a Court - are not criminally punishable for the revelation of secrets of which they are the custodians in the exercise of their profession.

Regarding legal professions, one often compares the principle of confidentiality to the Anglo-Saxon concept of *legal privilege*. This principle of common law constitutes an exception to the rule of *discovery* which consists in the obligation leaning on the parties to produce all material in their possession relevant to the disposition of the case, including the elements which would support the opposing position. The *legal privilege* is a right recognized to both individuals and companies, in order to ensure that the confidentiality of the communications and legal notices between lawyers and their clients is preserved [66].

Even if the concept of *legal privilege* is attractive and may, in some way, be compared to the confidential nature of opinions delivered by corporate legal advisers, the Belgian legal system does not recognize this concept as such.

In fact, while the depositaries of secrets subject to professional secrecy are *necessary* confidents, those professionals dealing with data that must be covered by this duty of confidentiality are *voluntary* confidents [73]. According to us, a person shall only be considered as a professional subject to professional secrecy, if silence is a social necessity in the accomplishment of his profession.

Their functions are different in nature. For example, the banker's social function cannot be bonded with the exercise of a high moral mission such as the lawyer's or the doctor's

ones are. These occupations do not require the necessary divulgation of confidences, and do not constitute the "*most intimate service for private persons*" [74].

C. Sanctions attached to the violation of professional secrecy

19. It is generally accepted that the violation of professional secrecy by the person who is subject to it may engage his criminal, civil and disciplinary liability. Regarding legal proceedings, it is also admitted that any evidence advanced by a person who has obtained it by violating professional secrecy, shall be considered as void and inexistent [75].

i. Criminal sanctions

20. In Belgian law, article 458 of the criminal code punishes by eight days to six months imprisonment and by a fine varying from 100 to 500 € [76] the person subject to professional secrecy who would be recognized guilty of violating it.

If repression of the violation of professional secrecy may not seem very coercive [77] but rather lenient, it should be noted that this repression is even weaker in other European countries. In the UK, Spain and Norway, the violation of professional secrecy is not a criminal offence. In other countries such as Germany, Greece, Italy, the Netherlands or Switzerland, public prosecution regarding the violation of professional secrecy is subject to the filing of a complaint by the person who considers himself the victim of a breach of professional secrecy by his confidant [78].

In Belgium, in order to give rise to a conviction for breach of confidentiality [79], the professional must not only be a person whose profession is subject to an obligation of professional secrecy, but it is also required that the revealed fact has been collected by the professional in the frame of the exercise of his profession. This second condition is a necessary requirement, as otherwise the condition of the existence of professional secrecy would not be completed.

Moreover, it is necessary that the breach of professional secrecy is intentional in order to engage criminal liability of the relevant professional in Belgium [80].

ii. Civil remedies

21. As set forth by principles of liability law, the author of a breach of professional secrecy may engage its civil liability on the basis, *inter alia*, of article 1382 of the civil code, which stipulates that any harmful act caused by a person to another, and in a manner that any reasonable man - placed under the same conditions - would not have

adopted, implies the obligation for its author to repair the damages directly caused by his behavior. Rules on contractual liability are relatively similar and may also be initiated.

The scope of civil liability is obviously larger than the scope of criminal liability. Indeed, even involuntary behavior is likely to engage the civil liability of the professional who would by inadvertence - or negligence – disclose a secret that he was supposed not to disclose.

iii. Disciplinary sanctions

22. The different professions subject to the obligation of professional secrecy are generally subject to a strict ethic code of conduct. The violation of professional secrecy leads to professional liability, which often results in disciplinary proceedings.

One is then likely to ask himself the following question which has fuelled the controversy. Is a professional subject to a professional obligation of secrecy, but still authorized to lift it – within the context of a testimony in Court for example -, really allowed to do so when a standard of ethical nature prevents him to reveal his secret even in such a case? Some authors claimed that a corporatist obligation such as an ethical duty could not, in any way, override a legal provision that allows a professional to be released from its obligation of secrecy [81].

Sharing our point of view, P. Lambert believes [82] that, on the contrary, the obligations enacted by ethical regulations can restrict the freedom of the professional, as far as these restrictions can be permitted regarding the requirements of the practice of the profession and its proper exercise.

It is in this last trend that the relevant provisions on this subject are understood, regarding, among others, the profession of lawyer in Belgium [83]. professional secrecy of the lawyer is then almost absolute, even in cases where legal provisions allow the professional to disclose a secret. Other exceptions are still accepted by ethical rules though, such as the "*conflict of values*", in which case the lawyer will refer to the President of his Bar association, prior to any disclosure of any information covered by professional secrecy [84]. In any case, the lawyer summoned to testify in Court shall respond to the request expressed by the judge [85], even if he still must remain silent, due to his ethical obligation to respect professional secrecy.

iv. Exceptions accepted in Belgian law

23. While the various possibilities to see the protection of professional secrecy lifted have been briefly discussed, it has earlier been pointed out that some exceptions have been established by the Belgian legislature and Belgian Courts [86]. Some of these are purely legal - testimony in Court [87], testimony before a Parliamentary commission [88], minors' criminal protection [89], the declaration of contagious diseases [90], etc. Regarding

the prevention of money laundering, the Belgian legislator expressly enacted several rules with regard to the professions subject to the observance of professional secrecy, preserving it in some cases, lifting it in a mandatory way in some others [91]. Other exceptions have finally been dictated [92] - or tampered, or even prevented [93] - by case law. professional secrecy is of course also lifted in front of the disciplinary authorities who are specific to the professions in question [94]. However, professional secrecy will still have to be respected by the members of the disciplinary committees once outside the frame of disciplinary proceedings.

IV. Lawyer's professional secrecy in Europe

A. Internal rights of European States

24. It would be vain and too heavy for this contribution to examine the obligation of professional secrecy in relation to each national law of European countries separately in a precise and detailed way, since this contribution is not even able to embrace the entire analysis of professional secrecy in a single country like Belgium.

For a very brief –however interesting- overview of how Legal Professional privilege is dealt with in European countries, the reader may consult the table attached to the present contribution, which was established by the Council of the Bars and Law Societies of Europe in 2003 following the "*Edward ' s report*" on the matter[95].

As it is shown therein, although the legal basis for the protection of professional secrecy differs from one country to another, the achievements of the European States are very similar, mainly between continental law countries and countries of the *common law* tradition. The protection of professional secrecy is usually limited, like in Belgium, and the United Kingdom [96]. professional secrecy is however unlimited in other countries such as Iceland, Spain, Liechtenstein and Austria [97].

For this contribution, we believe that it would be more useful and relevant to study the European case-law regarding Legal Professional privilege - the European Court of Human Rights and the European Court of Justice.

B. The European Courts case law

i. The European Court of Human Rights case law

25. In the absence of any article in the European Convention on Human Rights guaranteeing the right to professional secrecy, the European Court of Human Rights has

had no choice but to rule about it in an indirect way. The Court mostly apprehends the Legal Professional privilege through the right to respect one's private life, as well as the right for anyone to get a fair trial, being enacted by respectively articles 8 and 6 of the European Convention on Human Rights.

26. Regarding article 8 of the Convention, the Court ruled for the first time on the issue of the Attorney-client privilege in the *Niemietz v. Germany* case [98], which concerned a judicial investigation held in a law firm. In this case, the Court enacted that "*respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings*", without excluding occupational activities or commercial privacy. In this case, if the intrusion in a lawyer's office by a magistrate was permitted in German law and had legitimate goals (i.e. the good administration of Justice), the Court considered however that such a harsh intrusion was not necessary in a democratic society [99]. The Court never changed its opinion on this point, and even widened the concept of professional secrecy later by extending it to electronic correspondence between a lawyer and his client [100].

The Court also stated that "*if domestic law may provide the possibility to conduct searches or home visits at a lawyer's office, it must be accompanied by specific guarantees*". Similarly, the Convention does not rule out the possibility to impose a number of obligations on lawyers that may affect relationships with their clients.

It is true that such measures have to be strictly regulated, though [101]. This position was recently confirmed by the Court in its decision of 21 January 2010, in the *Xavier Da Silvera v. France* case [102].

27. With regard to article 6 of the Convention and the right to a fair trial, the Court considered that discussions between the lawyer and his client had to remain unique, uncontrolled and unclosed [103]; and that without professional secrecy, no fair trial could take place.

Thus, the Court stated *inter alia* that "*if a lawyer was unable to confer with his client without such surveillance and receive confidential instructions from him, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective*" [104].

To summarize, the European Court of Human Rights recognizes the status and the privileged regime of the lawyer in the frame of his relations with his clients. The respect of professional secrecy regards the protection of private life and constitutes an effective guarantee of respect for the right to a fair trial. In cases of interference by public and judicial authorities, those must remain legitimate and proportional to their purpose. The task of the Court is then to estimate whether or not those conditions are fulfilled.

ii. The ECJ case law: The Akzo v. Commission case

28. Historically, the first decision of the European Court of Justice regarding professional secrecy is the famous *AM & S v. Commission* decision [105]. In this case, the European Commission had ordered the complainant to produce certain documents found during an investigation, and that AM & S had estimated covered by professional secrecy.

The Court expressly recognized the existence and the protection of professional secrecy by formulating two requirements in order for one or another correspondence exchanged between the company and its intern legal adviser to be covered by professional secrecy: (1) this communication must have been made in the interests of the client's rights to defense, and (2) must have come from an independent lawyer.

At that time already, the Court clearly supported the thesis that the lawyer should be seen as an auxiliary of Justice and a person collaborating to its proper administration. According to the Court, lawyers bring their skills to justice by providing legal assistance to any person applying for it, independently.

This position was based on article 19 of the Statute of the European Court of Justice, which provides that "*The Member States and the institutions of the Communities shall be represented before the Court by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer. (...) Other parties must be represented by a lawyer. Only a lawyer authorized to practice before a Court of a Member State or of another State which is party to the Agreement on the European Economic Area (EEA) may represent or assist a party before the Court*".

In the words of N. Forwood, Judge at the General Court of the European Union, "*for the next twenty years [following the decision], while peace in the full sense did not reign, there was at least a cessation of hostilities. For whatever reason, the issue of the status of employed lawyers and Legal Professional Privilege did not rear [the Court's] head*" [106].

29. On 14 September 2010, the great room of the European Court of Justice rendered an important and awaited decision, clarifying the rules regarding the protection of the confidentiality of communications made between legal advisers and clients in the context of competition law [107].

In the frame of a verification procedure at the premises of a Dutch company, officials of the European Commission were looking for evidence of any anti-competitive practices.

Among the seized documents taken by the authorities, some of them were subject to a discussion: were they likely to be covered by the protection of confidentiality between lawyers and clients?

The question regarded five documents:

- a typed memorandum emanating from the General Director of the company dedicated to one of his superiors, which contained information gathered from

internal discussions with other employees, in order to obtain legal advice in the frame of a compliance program related to competition law;

- copies of this memorandum with ink annotations referring to contacts engaged with a lawyer, with the particular mention of its name;

- handwritten notes written by the Chief Executive Officer of the company, on basis of discussions he had had with employees and used in drafting the memorandum;

- two e-mails exchanged between the General Director and the competition law company coordinator, i.e. a lawyer registered at the Dutch Bar, member of and employed by the company's legal service.

In its decision, the Court recalled that the confidentiality of communications between lawyers and clients should be protected at the European Community's level [108].

The Court recalled that to benefit from such protection the communications are subject to two cumulative conditions: that the exchange with the lawyer must be connected to "*the client's rights to defense*" and, second, that the exchange must emanate from "*independent lawyers*", i.e. "*lawyers who are not bound to the client by a relationship of employment*" [109].

The requirement regarding the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice and therefore being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. [110].

This protection is balanced by professional discipline, imposed and controlled in the general interest.

So, the correspondence that could get benefit from the protection of confidentiality has to be exchanged with an "*independent* lawyer", that is to say not related to the client by an employment link.

It follows, according to the Court, that *"the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers*" [111].

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 [112].

The Court thus confirmed its judicial precedents initiated more than 25 years ago[114] and the decision delivered by the Court of first instance in Luxembourg on 17 September 2007[113].

The evolution of competition law since then does not justify any overrule in case law, which is neither contrary to the principle of equal treatment nor to the free movement of services.

According to the European Court of Justice, messages exchanged with a member of a company's legal department, in particular if it concerns an employed legal adviser or even an employed in-house lawyer, are not covered by the confidentiality of communications between lawyers and clients, and consequently by professional secrecy.

This case law strengthens the duty of care of internal legal advisers who are not independent lawyers, in the drafting of their opinion and advice.

What can we then think of the example quoted from N. Forwood, in which one might see the legal advice of an independent lawyer protected by professional secrecy, but not that legal advise emanating from an in-house legal adviser, which would itself be inspired by this independent lawyer, or would have even copied-pasted the lawyer's advice?

One might wonder whether, subsequent to this decision, some lawyers and legal advisers will rather foster the use of verbal communications instead of written documents that might be seized...

As often - always? -, time will, hopefully – but when? - bring its inevitable re-work and trends to the principles recalled in the present contribution, confirmed and – for now - resolved by the European Court of Justice...

V. Conclusion

30. It is not easy to draw a conclusion that would present a perspective or propose a legal reflection about professional secrecy.

However, we can stress that we notice a clear tendency, nowadays, in all European countries, to work towards greater transparency of the actors of economic life [115]. New provisions are constantly enacted - often legitimate since they tend to protect rights that are considered as being very important by the society that creates them through its legislative. There is also a constant trend to reduce the scope of professional secrecy, and to limit the number of those Professionals who are its custodians. The rise and development of new technologies of communication, including e-mailing for example, also contributes to the loss of effectiveness of professional secrecy.

The role of the courts and tribunals is once again primordial. It is their duty to sanction a too severe legislative, and to protect the interests of society, having regard to the proper administration of Justice. It would also be wise for law-makers to legislate in a clear and

accurate manner regarding professional secrecy and to fulfill the lacks that time, social evolution and European Courts have revealed.

In such an unfavorable context for professional secrecy, we difficultly see how, in the short term, Parliaments would consent to an expansion of professional secrecy to, for instance, companies' internal lawyers and legal advisers. In our opinion, such expansion would in any case not be a good idea. In our opinion, only those professionals for whom silence is a social necessity and is inherent to their practice, should be protected by professional secrecy. Professionals protected by professional secrecy are the *necessary* confidents of their clients. Whenever secrecy is not absolutely necessary for the practice of a profession or for guaranteeing fundamental rights, its violation should not be criminally punished.

There is also an underlying danger of discrimination because of the variety of European laws regarding Professional secret, which frontiers often depend on (1) where legal services are provided and on (2) where a judicial case is held. This surely brings legal uncertainty, which should be avoided in the future.

Harmonization and an unequivocal definition of professional secrecy, professional legal privilege and confidentiality has not been achieved yet, despite the fact that some agencies are focusing on this matter with the means they have at their disposal – such as the Council of Bars and Law Societies of Europe [116]. We encourage and support initiatives in this direction. Consumers, as non-professionals, would be the first beneficiaries from such initiatives, as they often have less means at disposal than companies and professionals to know their exact rights, especially as they travel more and more abroad.

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* *

[1] E. REUMONT, "Le secret professionnel de l'avocat", *J.T.*, 1948, p. 585, quoted by G.-A. DAL, "Les fondements déontologiques du Secret Professionel", *in* Le Secret Professionnel, La Charte, Bruxelles, 2002, p. 95.

[2] The latter widely contributing to the determination of its frame, which often casts on the concept of professional secrecy a suspicion of corporatism; see P. MARTENS, "Secret Professionnel: divergences et convergences des droits continentaux et anglo-saxons", *in* Le Secret Professionnel de l'avocat, G.-A. DAL *dir.*, Larcier, Bruxelles, 2010, p. 12.

[3] On 20th February 1905, the Supreme Court – *Cour de cassation* - will specify that professional secrecy applies "*without distinction to all persons who are invested with a mission requiring trust, to all those who are constituted by law, tradition or morals, and who are the necessary depositaries of the secret people entrust them*"; *Pas.*, 1905, I, p. 141, and the Concl. of the Attorney General – "*Avocat Général*" - Janssens.

[4] M. HENRY & J.-B. WILLIAMS, Exposition of the Old and New Testament, vol. 2, London, 1828, p. 556.

[5] T. BAUDESON & P. ROSHER, professional secrecy v. legal privilege, *I.B.L.J.*, 2006, p. 37. This *in personam* conception of professional secrecy, as often opposed to the *in rem* Anglo-Saxon conception, tends more and more to get closer to each other, though they are still not covering the same notions, with for instance, the case of the lawyer who, in France, may now act as representative in real estate transactions (see P. MARSQUART, "L'avocat parisien autorisé à pratiquer la négociation immobilière", *in Les annonces de la Seine,* 23th and 24th September 2009). His activity as such is not covered by professional secrecy, which is to be only applied to the task he performs as a lawyer, when being the necessary depositary of secrets.

[6] L. EDELSTEIN, O. TEMKIN & C. LILIAN TEMKIN, Ancient medicine: Selected papers of Ludwig Edelstein, Baltimore, Johns Hopkins University press, 1987, p. 6.

[7] M. ROBIN, "Le Secret professionel du ministre du culte", *rec. Dall.* 1982, p. 221.

[8] G. CARCASSONNE, Le trouble de la transparence, *In* Le Secret, Pouvoirs, n. 97, 2001, p. 22, quoted by P. MARTENS, *op. cit.*, p. 13.

[9] This is a free translation. Belgium will later include a similar provision in its criminal code of 1967, article 458 (see *infra*).

[10] A. LEVY, Etymologie et sémantique du mot "secret", *in Nouvelle revue de psychanalyse*, n° 14, 1976, p. 118, quoted by M. VAN DE KERCHOVE, "Fondements axiologiques du secret professionnel et de ses limites", *in* Le Secret professionnel, *op. cit.*, p. 3.

[11] R. GARRAUD, Traité théorique et pratique du droit pénal français, t. VI, Paris, 1935, p. 69.

[12] The obligation to respect private life is enshrined in article 22 of the Belgian Constitution.

[13] P. LAMBERT, Secret Professionnel, Bruxelles, Bruylant, 2005, p. 18; see also P. LUCAS, Le secret professionnel du médecin vis-à-vis de l'assurance privée, *rev. Dr. ULB.*, 2000, p. 65.

[14] Case *Z. v. Finland*, 25th February 1997, § 95: "*the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by article 8 of the Convention (art. 8). Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of private life of a patient but also to preserve his or her confidence in the medical profession and in the health services in general*".

[15] COMBALDIEU, report under Cass., December 22, 1966, p. 124, quoted by M. VAN DE KERKHOVE, *op. cit.*, p. 8.

[16] A. PEYTEL, Le secret médical, Librairie J.-B. Baillière et fils, Paris, 1935, pp. 19 – 22.

[17] P. LAMBERT, *op. cit.*, no. 19.

[18] Although some authors argue for its maintenance, like Professor G.-A. DAL, *op. cit.*, p. 97, which considers that by breaking his obligation of secrecy, the professional also engages his contractual liability; see *contra* P. LAMBERT, *op cit,* nr. 22.

[19] See M. VAN DE KERKHOVE, *op.cit.*, p. 197 and F. WAREMBOURG-AUQUE, Réflexions sur le secret professionnel, *R.S.C.*, 1978, p. 246.

[20] Traité élémentaire de droit civil belge, 3 e ed., Bruylant, Brussels, 1962, no 91.

[21] See NYPELS, Législation criminelle de la Belgique, Bruylant-Christophe, Brussels, 1872, vol. III, p. 396, nr.45.

[22] *Ibidem.*

[23] *Pas.*, 1905, I, p. 141.

[24] R. LEGROS will extend his remarks to the bar associations as well as the clergy in considerations on medical confidentiality, see *Rev. Dr. pén.,* 1952-1958, p. 891. P. LAMBERT also writes that "*it is far to be demonstrated that honor and morality of professions would be less important in countries that do not grant to professional secrecy the same places that Belgian law does*". professional secrecy is indeed differently protected in Europe (see *infra*).

[25] See R. GARRAUD, *op. cit.*, p. 65; Cass. 30th October 1978, *Pas.*, 1979, I, p. 253, ECHR, , 25th February 1997.

[26] ECHR, Case *Niemetz v. Germany,* 16th December 1992, § 37; ECHR 25th February 1997, Case *Z. v. Finland* § 95.

[27] P. LAMBERT, *op. cit.*, no. 24.

[28] So is it, for example, with the proper administration of Justice, criminal protection of minors, interest of the State regarding tax recovery, imperatives of public health, scientific requirements, etc. See P. LAMBERT, *op.cit,* pp 41-146.

[29] Among others, M. DELMAS-MARTY, A propos du secret professionnel, Dalloz-Siney, 1982, p. 267; see Also P. LAMBERT, *op. cit.*, who writes that "*the value scale varies according the conceptions of life in public society*".

[30] The best example in Belgium being C.A., 3rd May 2000, where the Constitutional Court cancelled article 2 § 2 of the 5th July 1998 statute, which provided that lawyers could not prevail themselves of their professional secret when they were requested to provide information about a person being subject to a collective debt apportionment.

[31] See example by F. OST and M. VAN DE KERKHOVE, De la pyramide au réseau? Vers un nouveau mode de production du droit? *in R.I.D.J.*, 44, 2000, p. 1 and following.

[32] P. LAMBERT, *op. cit.*, no. 44.

[33] For deeper analysis, we would refer especially to the excellent article on the topic written by M. M.-N. VERHAEGEN & J. HERVEG, "Quand la communication du secret médical à des tiers est mise en cause", and published in the book written under the coordination of D. KIGANAHE & Y. POULLET, "Le secret professionnel, Brussels, La Charte, 2002. This last book also analyzes in detail the various aspects of professional secrecy in Belgium. We must here thank the authors of articles included in this collective book for the sources that they provided in order to write the present contribution.

[34] C. HENNAU & G. BOURDOUX, Le secret médical et la nécessité de l'information et de l'instruction judiciaire pénale, Droit et médecine, *C.U.P.*, 1996, p 108-109.

[35] L. KORNPROBST, G. JULLIEN & A. MATHIA, *Les auxilliaires médicaux,* Masson, Paris, 1966, p. 143, quoted by P. LAMBERT, *op. cit.*, p. 142.

[36] Developed by the National Council of the Doctors Order, pursuant to article 15 of the Royal Decreel Nr. 79 of 10th November 1967 regarding the Doctors Order.

[37] See thereon Liège, Ch. mis. acc., 25th anuary 1996, *J.L.M.B.*, 1996, p. 666.

[38] Cass., 30th October 1978, *B.I. – I.N.A.M.I.*, 1979, p. 55 – 70.

[39] See *inter alia* P. LAMBERT, "Le secret médical – questions pratiques" *in Les frontières juridiques de l'activité médicale,* ed. Jeune Barreau de Liège, 1993, p. 123 and following.

[40] So is it in its decision rendered on 20th October 1991, *Pas.*, 1992, I, p. 162; see also Pol. Nivelles, 2nd April 1993, *R.G.A.R.*, 1996, n ° 12.662.

[41] See here the excellent article written by C. TERWANGNE and S. LOUVEAUX, "Protection de la vie privée face au traitement de données à caractère personnel: le nouvel arrêté royal ', *J.T.*, 2001, p. 459.

[42] For a more detailed analysis see X. DE RIEMAECKER and G. LONDERS, "Statut et déontologie du magistrat", Bruxelles, La Charte, 2000.

[43] Or "*duty of confidentiality*" – "*devoir de* réserve", as written by X. DE RIEMAECKER in the book directed by D. KIGANAHE & Y. POULLET, *op. cit.*, p.153.
[44] This is controversial in doctrine; see P. LAMBERT, *op. cit.*, p. 256.
[45] Among others by the European Court of Human Rights regarding the "*dissenting opinions*". In Belgium, if the obligation to respect the secrecy of the deliberations is not stated as such by a statutory provision, the "*Cour de cassation*" enacted its existence it in its decisions rendered on 4th May 1953 and 6th July 1953, *Pas.*, 1953, I, pp 673 and 878.
[46] See thereon J.P. BUYLE and G. DEJEMEPPE, "La responsabilité des magistrats" *in* Droit de la responsabilité, domaines choisis, *C.U.P.*, Liège, 2010.
[47] P. HALLET, Le secret professionnel de l'avocat en Belgique, *in* Le secret professionnel de l'avocat dans la jurisprudence européenne, *op. cit.*, p. 72.
[48] Recent news in Belgium reminded it in the course of the year 2009 in the "*Fortis case*", when a parliamentary Committee of inquiry, created for the occasion, called the lawyer of a party suspected of having known a judicial decision before its rendering. The lawyer told the Committee that he was forbidden to tell them anything, due to his obligation of professional secrecy.
[49] To this respect, the ethical obligations of lawyers in Belgium generally forbid the communication of the name of a client by his lawyer. Pursuing a reflection recently launched, the Brussels bar has just been studying the question of the effective possibility for lawyers to represent or work for groups of interest - "*lobbies*", which necessarily involve public business communication, client's name disclosure, etc. If it is not the position of the Flemish Order of the Brussels bar, the Orders of French-speaking and German-speaking Belgian bars recently considered that a lobbying activity constituted a lawyer's activity as such. The Order held that the lawyer could reveal the names of clients looking for lobbying activities, provided that these clients express their agreement to this communication in a public register, the names of clients being actually already subject to communication (hearings, press conferences, on the website of law firms, in different directories, etc.), which behavior is in fact not sanctioned. In the frame of this reflexion, the question was again raised of whether the client's name was well covered by professional secrecy, or if it was merely a duty of confidentiality. That question is important because if it appears that a client's name is to fall within the scope of professional secrecy, it cannot be communicated, even with the agreement of the client, as the latter cannot relieve the lawyer from his obligation of secrecy. If it regards, however, more a duty of discretion – "*devoir de réserve*" -, it might then be communicated to the public with the client's agreement. Taking into account the Constitutional Court case law, the French Order of the Brussels bar believes that advisory activities undertaken outside the traditional legal perimeter of the advice and representation are not covered by professional secrecy. The Order held then that the advisory activity could be accompanied with proactive representations in front of the Commission, being included in the lobbying activity. From a practical point of view, it appears however difficult to operate a hyphenation between consulting and lobbying activity. The Order of French-speaking and German-speaking Belgian bars decided that the lobbying activity was not subject to professional secrecy. The Dutch-speaking order has not followed this position yet.
[50] Cass., 5th February 1985, Pas., I, 670; Cass., 23rd December 1998, *J.L.M.B.*, 1999, p. 61.

[51] See *infra* thereon. On the other hand, the authors refer to the inevitable note on the subject of P. LAMBERT, Le secret professionnel de l'avocat et les conflits de valeur, note under Cass., 9th June 2004, Larcier Cassation, 2004, nr. 797.
[52] N° 10 / 2008.
[53] Especially regarding legal advisers employed by a company.
[54] Regulation of French-speaking and German-speaking bars Order, 15th March 2004, *P.B.*, 9th April 2004.
[55] See P. LAMBERT, *Le secret professionnel*, *op. cit.*, p. 232.
[56] See Brussels, 26th February 2004, *Journ. Proc.*, 16th April 2004, p. 19 and note S. D'ORAZIO.
[57] *Op cit.*, p. 232.
[58] G.-A. DAL, *Conclusions générales, le secret professionnel, principe fondamnetal du droit européen, in* Le Secret professionnel de l'avocat dans la jurisprudence européenne, *op. cit.*, p. 241.
[59] See thereon O.B.F.G. Regulation of 8th May 1980; O.N.B. Regulation of 22nd April 1986 regarding the production of the correspondence exchanged between the lawyers, *in* Y. OSCHINSKY & M. WAGEMANS, Recueil des règles professionnelles, 2009, Barreau de Bruxelles, n° 233 and following.
[60] On 27th September 2010 the Orders of Flemish, French and German-speaking bars and the Institute of legal advisers – *"L'institut des juristes d'entreprise"* - officially signed the Protocol Agreement establishing ethical framework of the activity of the lawyer working in a company. It regards the lawyer who practices his legal profession, totally or partially in a company, in conditions involving some form of integration within the company. The objectives of this working figure can be varied: replacement of temporarily unavailable legal advisers, corporate legal assistance for extra work within a legal department, optimization of the external legal service delivery by familiarization of the lawyer with the operations, activities and the business of the company, etc... This Protocol lays down the rules and recommendations that we believe are necessary to the proper exercise of this activity. During the period of work within the company, both the detached lawyer and the the company legal adviser remain fully and exclusively submitted to their respective professional rules and code of conduct and their respective disciplinary regime. This Regulation is intended to open the lawyers' profession to the inside company business, which is wished by the author Jean-Pierre BUYLE, during his mandate as President of the French-speaking Order of the Brussels bar association.
[61] See J.-P. BUYLE & I. DURANT, La confidentialité des avis des juristes d'entreprise. *in* Le secret professionnel, *op. cit.*, p. 190.
[62] An amendment to the statute had been proposed in this regard, in order to reformulate article 5 of the statute, see. *Doc. Parl.*, Senate, sess. 1998-1999 &-45/5.
[63] See. J. VAN CAENEGEM, *Beroepsgeheim voor de bedrijfjurist*, *in Liber Amicorum* VCT , Brussels, Bruylant, 1998, p. 32.
[64] For a more complete statement of the opinion of the authors, will refer to the contribution of J.P. BUYLE and A. WILLEMS, *op. cit.,* pp. 206 to 211.
[65] In Belgian law, however, article 882 of the civil procedure code allows a party to refuse such disclosure regarding "*legitimate reasons*". If this assessment is a matter for the magistrate only, we believe that *"business secrecy"* certainly constitutes a respectable interest which protection can constitute a legitimate reason for the refusal to produce certain documents. See on this matter J-P. BUYLE, note *in Rev. Dr. ULB,* 2000, p. 120.

[66] L. WEBERMAN-ROUSSEL, "Legal privilege: an American perspective" *R.D.A.I.*, 2001, p. 843; with this regard, the concept of *legal privilege* conceives itself *in rem*, contrarily to professional secrecy, which conceives itself "*in personam*", as recalled at the outset of this contribution. See thereon T. BAUDESON and P. ROSHER, *op. cit.*, p. 37.

[67] See in Belgium the convention concluded between the OBFG and lawyers regarding the confidentiality of correspondence and talks of the company legal advisers on 12th June 2006.

[68] See in this respect the penetrating book of P. LAMBERT, *op. cit.,* Brussels, Bruylant, 2005.

[69] Which in fact is a rule of conduct which may not impair the dignity of the function exercised.

[70] J.-P. BUYLE & A. WILLEMS "La responsabilité professionnelle des banquiers dans l'établissement et l'utilisation de documents," *Rev. Dr. ULB,* 1992, p. 145; F. SWEERTS "Le Secret bancaire" *in* Le secret professionnel, *op. cit.*, p. 167 ; However, some European countries, such as Luxemburg and France, still consider that bankers are subject to professional secrecy.

[71] Some ethical codes also providing that the information learnt in the exercise of their function is covered by professional secrecy, even if on a criminal point of view, it will not be considered as such.

[72] La déontologie de la fonction publique – le devoir de réserve, *In Liber amicorum Prof. E. Krings* Story-Scientia, 1999, p. 295.

[73] P. LAMBERT, *op. cit.*, p. 323.

[74] P. LAMBERT, *op. cit.,* p. 326.

[75] Which however remains often hypothetical. This last aspect is not presented by the present contribution, for more information see P. LAMBERT, *op. cit.*, p. 148, and J. DU JARDIN, "De quelques aspects de l'évolution de la preuve en matière pénale", *Ann. Dr. Louvain,* 2000, p. 145, as well as Cass., 13th May 1987, *J.T.,* 1988, p. 165 and following, note c. HENNAU, and *J.L.M.B.*, 1987, p. 1165 and note Y. HANNEQUART, and *Rev. Dr. pén.*, 1987, p. 856, note, and *R.C.J.B.*, 1989, p. 588 and following, note A. NAUW.

[76] Multiplied by additional charges, which is equivalent in 2010 to a fine varying from about 500 € to 3.000 €. In reality, such punishment is equivalent to the penalty laid down by article 420 of the criminal code, which incriminates blows and unintentional injury – i.e. that is committed by simple imprudence.

[77] As wrote A. MASSET, Les sanctions de la violation du secret professionnel, *in* Le Secret professionnel, *op. cit.,* p. 65.

[78] It should be noted that in some cases, the Belgian legislature sentences more severely the breach of certain special secrets, like the violation of a factory secret by persons employed or having been employed in a company (article 309 of the criminal code: imprisonment of 3 months to 3 years), or persons violating the principle of secret communications and private telecommunications (article 314 *bis* of the criminal Code), etc. Also note that nothing provides, as legal sentence, professional ban, except regarding the violation of tax secrecy. Such a professional ban is in reality depending on disciplinary instances of each profession.

[79] Outside of the statutory exceptions applicable to all offences in general and obstructing the very existence of the infringement (self-defense, constrained, "*état de nécessité*" – "*emergency*", irresistible force, invincible error) or any conviction (suspension of conviction), which are equally apply in the case of violation of professional secrecy. See about this Cass., 26th September 1966, *Pas.* 1967, I, p. 89.

[80] Cass., 14th June 1965, *Pas.*, 1965 I, p. 1102 and Cass 26th September 1966, *Pas.*, 1967, I, p. 89.
[81] Among others A. MARECHAL, "*Le secret professionnel médical*", *Rev. Dr. pén.*, 1955-1956, p. 867, along with R. LEGROS, "Considérations sur le secret médical", *Rev. Dr. pén.*, 1957-1958, p. 867.
[82] *op. cit.*, p. 158.
[83] So is it in the case of a lawyer interviewed by a judge about the date and time at which a suspected person went to his office. See thereon M. WAGEMANS & Y. OSCHINSKY, *op. cit.*, nr. 220.
[84] As for instance the case of lawyer informed by its client that the latter is determined to commit a murder on a person in the hours following the consultation of the lawyer (M. WAGEMANS & Y. OSCHINSKY, *op. cit.*, no. 214-1).
[85] Articles 80, 157, 158, 189, 355 of the Criminal procedure code, and article 929 of the civil procedure code. On the other hand, in case of an investigation in a lawyer's office, the presence of the President of the lawyer's bar is required. See the OBFG recommendation of 12th February 2007, regarding the seizure, by a magistrate, of computer hardware, or in other circumstances.
[86] Notwithstanding the ethical obligations above, making professional secrecy an almost absolute value, subject to certain exceptions.
[87] Which leaves the Professional as the only judge of what he wishes to reveal or not, without punishing him because of revelation he would have made in this situation, subject to its ethical obligations which are still possibly subject to disciplinary sanctions.
[88] Statute of 30th June 1996, which leads to the same result regarding professional secrecy, making non-punishable the revelation of secrets that are usually subject to professional secrecy in the case of a testimony.
[89] Statute of 28th November 2000, born after the Belgian scandal of the "*Dutroux case*". The adopted text inserts an article 458*bis* in the Belgian criminal code, which provides that "*any person who, by State or by profession, is depositary of secrets and has therefore knowledge of an offence provided for in articles (...) [of the criminal code] which was committed in a minor, may, without prejudice to the obligations under article 422 bis , inform the [Procureur du Roi – Attorney General] provided that he has examined the victim or collected confidences, and that there is a serious and imminent risk of harm to the physical or mental integrity of the person concerned and that he is not able, himself or through third parties, to protect this integrity*".
[90] Decree of 18th July 1831.
[91] See statute of 18th January 2010 amending the statute of 16th January 1993 regarding the prevention of the use of the financial system for the purpose of money laundering and the financing of terrorism (M.B. 26th January 2010), transposing the third EU "*money laundering*" directive 2005/60/EC and the execution directive 2006/70/EC of 1st August 2006. The money laundering legislation lays down *inter alia* in article 23 that "*when agencies or persons referred to know or suspect that an operation about to be performed is related to money laundering or terrorism financing, they shall inform in writing or by electronic way the Financial Information Treatment Cell "CETIF" before executing the operation, and indicating, where applicable, the period in which it should happen*". Such a provision inevitably asks the question of the respect of professional secrecy. This obligation had previously been tempered for lawyers, which only had to notify suspicious transactions to the President of their Bar, the latter ensuring the notification to the CETIF when necessary. Lawyers are also exempted from such a report

if this information were received from one of their clients or obtained by one of their clients while evaluating their legal situation or in the frame of the exercise of their duties of defense or while representing the clients in judicial proceedings involving a suspicion of money laundering leaning on the clients, including the case of advices related to the way to engage or avoid such proceedings, no matter what such information is received or obtained before, during or after these proceedings. This derogatory regime has been extended to other financial professions subject to a criminally-sanctioned professional secrecy (notaries, auditors companies, external accountants and tax advisors). These professions are relieved from the requirement to report when suspicious information is received from one of their clients or obtained by one of their clients during their professional activity, and the evaluation of the legal situation of the latter. However, the statute now provides that the attorney-client privilege cannot be invoked by those professionals taking part themselves in money laundering or financing terrorist activities, or when providing legal advice for money laundering or terrorism financing purposes, or even when they know that their client has previously sought legal advice for money laundering capital or terrorist financing purposes. As such, the National Order of lawyers of Belgium has issued various rules of conduct (see *inter alia* the recommendation of the National Order about money laundering (Communic. 30/96, 2), or the OBFG recommendation of 19th May 2008 regarding the application by a lawyer of the statute of 12th January 2004 regarding the prevention of money laundering, *J.T.*, 2007, 283).

[92] Such as "*l'état de nécessité*", provided in article 71 of the Belgian criminal code, and taken up by the "*Cour de cassation*" in its decision of 13th May 1987, *J.L.M.B.* 1987, p. 1165 and note Y. HANNEQUART, *J.T.*, 1988, p. 165 and following, note C. HENNAU, in which the Court states that professional secrecy must give way to higher values, when the situation requires a necessary action from the professional who chooses, between two harms, the one that deserves more attention, privileging the defense, freedom or even the life of other people, compared to the maintenance of professional secrecy regarding the secrets of clients who appear to be the authors of a violent offence. So is it in this other example of a doctor denouncing the patient whose recidivism relating to rape of minors he fears.

[93] So is it with the Belgian Constitutional Court (formerly Arbitration Court), having sanctioned and cancelled by three times a legal provision that was aiming to see the Professional making a mandatory exception to his obligation of secrecy, having to reveal to a magistrate the operations performed by a debtor placed under a regime of a collective settlement of debts. See cases 46/2000, 100/2006 and 2006/129.

[94] For a full analysis of Belgian law on this topic, see P. LAMBERT, *op. cit.*, pp 41-145.

[95] See "*The professional secret, confidentiality and legal privilege in Europe*", Council of the bars and law societies of the European Union, CCBE, 2003.

[96] See case *Micosta SA v. Shetland Islands Council*, 1983 SLT 483 in parallel with *R. v Special Commissioner & Another, ex parte Morgan Grenfell & Co Ltd (* House of Lords, 16th May 2002), quoted by the CCBE, *op. cit.*

[97] For instance, in Austria, professional secrecy is only limited in extreme cases, being for example the one of a lawyer, himself convicted with a crime, and who is forced to forget his professional secrecy obligation, if this lifting participates to his own defense.

[98] 16th December 1992, A, B-251.

[99] In Germany, no "*independent accompanier*" was present at the criticized investigation. See the decision, § 37.

[100] See in this respect the case *Wieser and bicos*, 16th October 2007, n° 74336/01; also : *André and another v. France*, 24th July 2008, n ° 18603/03.
[101] Case *André and another v. France*, *ibidem*, § 42, free translation. The Court agrees with the aforementioned authors thereon, such as we do, also recognizing in *Turcon v. France,* 30th January 2007, n° 34514/02, cases where these *"safeguards"* were sufficient.
[102] No. 43757 / 05.
[103] Voy.D. SPIELMANN, *op. cit.*, p.40.
[104] §46. See case *S. v. Switzerland*, 28th November 1991, n° 220.
[105] No. 155 / 79.
[106] N. FORWOOD, European Court of Justice case law on legal professional privilege, *in* Legal privilege and European Case law, *op. cit.*, p. 48.
[107] Case *Akzo Nobel Chemicals and Chemicals/Commission*, C/550/07 P.
[108] § 40.
[109] § 41.
[110] § 42.
[111] § 44.
[112] § 47.
[113] Cases *Akzo Nobel Chemicals,* T-125/03and *Akcros Chemicals v Commission,* T-253/03.
[114] Case *AM & S v. Commission*, ECR 1982, I-1575.
[115] T. BAUDESSON & P. ROSHER, *op cit,* p. 38. So is it new recent statutes regarding money laundering, or bank secrecy.
[116] See the code of Ethics for EU lawyers, 1988.