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Le Président

How much transparency does the Rule of Law need?

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First of all, I would like to thank the organisers for inviting the CCBE to participate at the 2023 European Presidents Conference. It is always an honour being here.

For those who probably do not know, the CCBE (Council of Bars and Law Societies of Europe) is the voice of the profession of lawyer in Europe, representing the national bars and law societies of 46 countries, and through them more than 1 million European lawyers.

I will try to give on their behalf the answer to the question of today's Conference: How much transparency does the Rule of Law need?

It is not so easy to say. Because for many years, our law system protected secrets. And it still does.

It would be tedious to list all of the secrets which law protects: professional secrecy, secrecy of investigations, secrecy of certain procedures, manufacturing secrecy, secrecy of correspondence, secrecy of assets, state secrets, national security secrets, defence secrets, etc. Those secrets are ingredients of our legal civilisation.

According to the dictionary, secrecy is "*knowledge, information that the holder must not reveal.*" Secrecy conveys silence, intimacy, discretion; it can be a very reassuring word, or to the contrary a worrying one, meaning something opaque, clandestine, and mysterious.

Transparency is quite the opposite. According to the dictionary, transparency is "*the quality that allows the complete reality to appear*". It seems to get mixed up with truth, clarity, even purity. But it also could be rudeness, indiscretion, and disrespect.

Total transparency has even a totalitarian component. As some modern intellectuals reminded us discussing transparency[1], in the late 18th century the British jurist and philosopher Jeremy Bentham proposed the so-called "*panopticon*". Panopticon is a Greek word, meaning something that sees everything. The concept was to allow a watchman to observe all the persons in an institution (in a prison mainly), without them being able to recognise whether or not they were being watched. The panopticon became a symbol of power, as control over individuals or groups. Knowing everything is the government's absolute power and the ideal of any totalitarianism. George Orwell's "*1984*" is a good example of such a nude, transparent, society, in which the government has the capacity of total control. Michel Foucault viewed the panopticon as a symbol of the repressive, disciplinary society, of the modern "*society of surveillance*".

1 Ivan Krastev, "Does More Transparency Mean More Trust?"

If the idea of a transparent society is the dream of governments, the idea of a transparent government – a reverse panopticon, according the above mentioned intellectuals – represents a strong political movement of our time. It is not the government that will monitor the society but the society that will monitor those in power.

It is undeniably true that transparency helps people to be informed. Informed people can keep governments accountable.

A combination of new technologies, strict rules and publicly accessible data, can more effectively assist people to hold their representatives to account, which, probably, could rebuild trust in democratic institutions. And, it is true, the advancement of the transparency movement in many areas has demonstrated impressive results. It contributes to the proper functioning of institutions and to the prevention of corruption.[2]

There are in addition other fields where transparency is also needed, like Artificial Intelligence; transparency regarding its ownership, the origins of its content, its structure, the rules of its functioning and its decision-making proceedings.

But while the virtues of transparency are obvious, the risks should not be ignored.

They come from the antagonism and sometimes the conflict between transparency and secrecy. Are they able to tolerate one another, share roles, and live together under the rule of law? And at what extend? This will lead to the answer of today's question.

I will refer to three points which illustrate that some limits to transparency are necessary.

Point 1: Limits to reporting requirements imposed on lawyers in the field of cross-border arrangements (DAC6)

I would like to start by citing a recent judgment of 8 December 2022 of the CJEU regarding the directive on administrative cooperation in the field of taxation (DAC6) imposing reporting obligations on lawyers. The ruling regarded the implementation of DAC6 in Belgium.

Under the provisions of this directive, each Member State may take the necessary measures to give intermediaries, and in particular lawyer-intermediaries, a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege – LPP – under the law of that Member State.[3] In such circumstances, where LPP was invoked, lawyers had an obligation to notify any other intermediary who is not his or her client of that intermediary's reporting obligations. The Court was asked whether this obligation to notify is valid in the light of Article 7 (the right to respect for his or her private and family life, home and communications).

2 EP briefing on transparency

3 The first subparagraph of Article 8ab(5) of amended Directive 2011/16

In its judgment, the Court ruled that Article 7 of the Charter necessarily guarantees the secrecy of legal consultation, both with regard to its content and to its existence. As the European Court of Human Rights has pointed out in its case law in the past, individuals who consult a lawyer can reasonably expect that their communication is private and confidential. Therefore, other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.

The obligation to inform other intermediaries entails the consequence that those other intermediaries become aware of the identity of the notifying lawyer-intermediary, of his or her assessment that the arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement. It also leads, indirectly, to the disclosure, by the third-party intermediaries thus notified, to the tax authorities of the identity of the lawyer-intermediary and of his or her having been consulted. Therefore, the Court found an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter.

Then the Court examined whether this interference was justified in the light of the objective pursued. Combating aggressive tax planning and preventing the risk of tax avoidance and evasion is an objective of general interest. However, an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure, by properly balancing the objective of general interest against the rights at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued.

The Court found that the notification obligation is not strictly necessary in order to attain those objectives. Indeed, the reporting obligation on other intermediaries not subject to legal professional privilege and that obligation on the relevant taxpayer ensure, in principle, that the tax authorities are informed of reportable cross-border arrangements.

Moreover, I would like to highlight that crucially, the Court rejected an argument that the disclosure of the identity of the lawyer-intermediary and of his or her having been consulted would be necessary to enable the tax authorities to ascertain whether that lawyer-intermediary is justified in relying on legal professional privilege. The Court said that the purpose of the reporting and notification obligations of DAC6 is not to check that lawyer-intermediaries operate within those limits, but to combat potentially aggressive tax practices and to prevent the risk of tax avoidance and evasion, by ensuring that the information concerning the reportable cross-border arrangements is filed with the competent authorities. That directive ensures that such information is provided to the tax authorities, without the disclosure to them of the identity of the lawyer-intermediary and of his or her having been consulted being necessary for that purpose.

The Court found that the provisions infringe the right to respect for communications between a lawyer and his or her client, guaranteed in Article 7 of the Charter.

Point 2: Limits to the Beneficial Ownership transparency

My second example will regard beneficial ownership transparency in the field of anti-money laundering. The CCBE has always expressed its support for beneficial ownership registers. These registers are useful tools for lawyers and allow them to conform to their AML obligations and facilitate their job. The CCBE has always argued that data in these registers must be accurate and up to date. The CCBE would also support a European or global beneficial ownership register.

It is because of our support for beneficial ownership registers, that the CCBE decided to take part last year in the project conducted, amongst others, by Transparency International and upon its invitation – the project called Civil Society Advancing Beneficial Ownership Transparency. The CCBE had the opportunity to be part of a network of experts and to contribute with a practitioners' view to papers that were then communicated to the European Commission.

On 22 November 2022, the CJEU gave a ruling in which it stated that the provisions of the AML Directive regarding information on the beneficial ownership to any member of the general public are invalid.

The Court considered that the regime introduced by the directive "amounts to a considerably more serious interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, without that increased interference being capable of being offset by any benefits which might result from the latter regime as compared against the former regime, in terms of combating money laundering and terrorist financing."

Therefore, it is clear that transparency that serves the fight against money-laundering must be balanced with other fundamental rights concerns such as respect for private and family life and protection of personal data.[4]

That being said, the CCBE monitors carefully the effects of this judgment as we have had signals that as a result of the ruling some countries have shut the access to the register for the public and therefore, lawyers were not able to access them either.

Another aspect regarding the beneficial ownership transparency, is the question of thresholds for the identification of beneficial owners by lawyers as obliged entities. The CCBE cannot support a total removal of thresholds as this would mean that lawyers would need to identify all the beneficial owners. Such a task would be very difficult for small law firms and we are not sure whether it is workable or indeed, effective. Consequently, due to the burden and number of checks to be done, it might actually reduce the chance to carry out meaningful checks and hence, reduce the effectiveness of the legislation.

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4 Under the previous regime, the 4th AML Directive, access to the beneficial ownership registers was required for those who could show legitimate interest. However, under pressure from civil society, the Commission decided to open it further – this was enacted under the 5th AML Directive. These provisions were challenged successfully. Public access to the beneficial ownership data was also criticised by the European Data Protection Supervisor.

Point 3: Professional secrecy of lawyers as a fundamental principle necessary for the rule of law

This is the most important point, that shows that some limits to transparency are necessary to strike the right balance that achieves and ensures respect for the rule of law.

I would like to recall what is the rationale of professional secrecy or legal professional privilege more generally. We have recently seen that legal privilege is very often contested, misunderstood and criticised and there seems to be high political pressure to redraft the rules governing the professional privilege of lawyers. We have seen these attempts, for example, during the work of legislators on the new AML package. I find it therefore important to recall that LPP is protected by the EU Charter of Fundamental Rights and by the European Convention of Human Rights. It is part respectively of Article 7 CFR and Article 8 ECHR.

It has been confirmed by both Courts that exchanges between lawyers and their clients should be protected. The protection covers not only the activity of defence but also legal advice. The protection afforded to LPP is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants.[5]

That fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other hand, the correlative duty of the lawyer to act in good faith towards his or her client.

Contrary to a common misconception, the existence of professional confidentiality is intended not to protect lawyers but to protect their clients. Indeed, once a client steps into a law firm, they have the guarantee that they are allowed to say anything to their advisor. This is the condition upon which the advisor will be able to provide them with the best advice or representation. It would be impossible for lawyers to provide such advice or representation if the client, for fear of betrayal of that essential precondition of confidentiality, withheld information from his or her lawyer. This relationship of confidentiality is so essential to the rule of law, that there cannot be a fair trial without it. It is also attached to the protection of general interest, as it contributes to the proper administration of justice. [6]

It is therefore clear that LPP is part of fundamental principles that are part of and compose the rule of law.

The CCBE is therefore concerned that there are attempts to contest this fundamental principle in the name of transparency.

I would also like to remind that the privilege has its limits. For example, in the field of AML, LPP cannot

5 ECtHR, Michaud v. France ; CJEU, AM & S Europe Limited v Commission

6 https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Statements/EN_DEON_20170915_Statement-on-professional-secrecy_LPP.pdf

be invoked as a basis for exemption from reporting when lawyers know that legal advice is being sought to enable criminal activities of their clients.

Therefore, LPP cannot be seen as a barrier to investigations because it cannot be invoked if a lawyer is complicit in a crime or providing advice for that purpose. In other words, instead of questioning the confidentiality between lawyers and their clients in general, we suggest investigating what mechanisms could be promoted to enable authorities to deal appropriately with situations when the right to confidentiality does not apply because of complicit behaviour of the individual lawyer.

Conclusion:

Yes, transparency plays an important role in a democratic society and it is one of the prerequisites of the rule of law. However, complete transparency would not work in favour of the rule of law. In some cases, transparency aims can be disproportionate or can negatively affect other fundamental principles or rights protected by EU law.

Therefore, a balance is needed between the different fundamental rights at stake. After all, this is democracy, a system of checks and balances.

So the answer to the question "*how much transparency does the Rule of Law need?*" is simple: it needs transparency insofar as it serves and does not antagonise any other of its key components.

Legal professional privilege is one limit. There are more, as private and family life and personal data. But for us, LPP is the first border line.

In the beginning of my speech I referred to a philosopher. I will finish by referring to another science, pharmacology. Pharmacology teaches us that medicines save from diseases. But if we exceed the correct dose they become poison, sometimes deadly.

Thank you for your time.

Panagiotis Perakis