



The obligation on lawyers to report suspicions in the context of the fight against money laundering did not interfere disproportionately with professional privilege

In today's Chamber judgment in the case of [Michaud v. France](#) (application no. 12323/11), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

The case concerned the obligation on French lawyers to report their "suspicions" regarding possible money laundering activities by their clients. Among other things, the applicant submitted that this obligation, which resulted from the transposition of European directives, was in conflict with Article 8 of the Convention, which protects the confidentiality of lawyer-client relations.

The Court held that it was required to rule on this question, since the "presumption of equivalent protection" was not applicable in this case.

The Court stressed the importance of the confidentiality of lawyer-client relations and of legal professional privilege. It considered, however, that the obligation to report suspicions pursued the legitimate aim of prevention of disorder or crime, since it was intended to combat money laundering and related criminal offences, and that it was necessary in pursuit of that aim. On the latter point, it held that the obligation to report suspicions, as implemented in France, did not interfere disproportionately with legal professional privilege, since lawyers were not subject to the above requirement when defending litigants and the legislation had put in place a filter to protect professional privilege, thus ensuring that lawyers did not submit their reports directly to the authorities, but to the president of their Bar association.

Principal facts

The applicant, Patrick Michaud, is a French national who was born in 1947 and lives in Paris (France). He is a member of the Paris Bar and of the Bar Council (*Conseil de l'Ordre*).

Since 1991 the European Union has adopted a series of directives² seeking to prevent the financial system being used for the purpose of money laundering; these have been transposed into French law. This has resulted, among other things, in an obligation on lawyers to report possible suspicions in this area in respect of their clients where, in the context of their professional activities, they assist them in preparing or carrying out

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

² Most recently, Directive no. 2005/60/EC of 26 October 2005.

transactions concerning certain defined operations, take part in financial or property transactions or act as trustees. They are not subject to this obligation where the activity in question is related to court proceedings and, in principle, where they provide legal advice. They must submit their reports, as applicable, to the president of the Bar of the *Conseil d'État* and the Court of Cassation or to the president of the Bar of which they are members, it being for the latter to transmit them to the "national financial intelligence unit" (*Tracfin*).

On 12 July 2007 the National Bar Council (*CNB*) took a decision adopting a professional regulation which, in particular, reiterated this obligation and imposed on lawyers a duty to put in place internal procedures in respect of the steps to be taken where a particular operation seemed to call for a "declaration of suspicion". Failure to comply with this regulation renders lawyers liable to disciplinary sanctions.

On 10 October 2007 the applicant applied to the *Conseil d'État* to have the decision set aside, arguing that it touched on the freedom to exercise the profession of lawyer and the rules governing it. Emphasising that the concept of "suspicion" had not been defined, he alleged that the requirement of precision inherent in compliance with Article 7 (no punishment without law) of the European Convention on Human Rights had not been met. He also alleged an infringement of professional privilege and the confidentiality of lawyer-client relations, protected by Article 8 (protection of private life). In addition, he requested the *Conseil d'État* to refer the question to the Court of Justice of the European Union (CJEU) for a preliminary ruling, so that the latter could rule on whether the obligation to "report suspicions" was compatible with Article 6 of the Treaty on the European Union and Article 8 of the Convention.

By a judgment of 23 July 2010, the *Conseil d'État* dismissed Mr Michaud's application and refused to refer the question to the CJEU for a preliminary ruling. With regard to Article 8, it held that, given the public interest attached to the fight against money laundering and the fact that the information received by lawyers in the course of judicial activities or, in principle, when providing legal advice did not come within the scope of the obligation to report suspicions, the obligation did not excessively interfere with professional privilege.

Complaints, procedure and composition of the Court

Relying, in particular, on Article 8 (protection of private life), Mr Michaud complained that the obligation to report suspicions was incompatible with the principles of protection of lawyer-client relations and respect for professional confidentiality.

The application was lodged with the European Court of Human Rights on 19 January 2011. On 8 December 2011 the Court communicated it to the French Government and requested the parties to submit their observations to the Court. A Chamber hearing was held on 2 October 2012 (see [webcast](#)).

The Council of Bars and Law Societies of Europe (CCBE), the *Ordre français des avocats du barreau de Bruxelles* (French Association of Lawyers of the Brussels Bar) and the European Bar Human Rights Institute (EBHRI) were granted leave to submit written observations³ as third-party interveners (Article 36 of the Convention).

Judgment was given by a Chamber of seven judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Mark **Villiger** (Liechtenstein),

³ §§ 75-89 of the judgment.

Boštjan M. **Zupančič** (Slovenia),
Ann **Power-Forde** (Ireland),
Angelika **Nußberger** (Germany),
Helen **Keller** (Switzerland),
André **Potocki** (France),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 8

The Court reiterated that Article 8, which guaranteed, in particular, everyone's right to respect for his or her correspondence, protected the confidentiality of all exchanges in which individuals might take part for the purpose of communication. It followed that the obligation on lawyers to transmit to an administrative authority (*Tracfin*) information gathered in the course of exchanges with their clients constituted an interference with their right to respect for their correspondence. It also amounted to an interference with their right to respect for their "private life", a concept that covered activities of a professional or business nature.

The Court noted, firstly, that the impugned interference was "in accordance with the law" within the meaning of Article 8, and that, intended as it was to combat money laundering and related criminal offences, it pursued one of the legitimate aims set out in Article 8, namely the prevention of disorder and the prevention of crime.

With regard to the necessity of the impugned interference, the Government argued that the obligation imposed on lawyers resulted from the European directives that France had been required to transpose into its national legislation. Referring to the judgment "*Bosphorus Airways*" v. *Ireland*⁴ and citing the "presumption of equivalent protection", they considered that it ought to be presumed that France had complied with the requirements of the Convention, given that it had merely discharged obligations arising from its membership of the European Union, a body which afforded fundamental rights equivalent protection to that guaranteed by the Convention.

The Court reiterated that the States remained responsible under the Convention for the measures taken by them in pursuance of international legal obligations, including where those obligations arose from their membership of an international organisation to which they had transferred part of their sovereignty. However, a measure taken in pursuance of such obligations must be deemed to be justified as long as the relevant organisation protected fundamental rights in a manner at least equivalent to that for which the Convention provided. If such equivalent protection was considered to be provided by the organisation, the presumption would be that a State had not departed from the requirements of the Convention when it did no more than implement legal obligations flowing from its membership of the organisation.

This presumption was intended, in particular, to ensure that a State Party was not confronted with a dilemma when it was required to rely on the legal obligations incumbent on it as a result of its membership of an international organisation that was not a Party to the Convention and to which it had transferred part of its sovereignty in order to justify, under the Convention, its actions or omissions arising from that membership. It also served to determine those cases where the Court could, in the interests of international cooperation, reduce the intensity of its supervisory role, as

⁴ "[Bosphorus Airways](#)" v. *Ireland* (Grand Chamber), judgment of 30 June 2005, no. 45036/98.

conferred on it by Article 19 of the Convention, with regard to observance by the States Parties of their engagements arising from the Convention. It followed from these aims that the Court was willing to accept such an arrangement only in so far as the rights and protections in respect of which it monitored observance had been subject to a review comparable to that which the Court itself would conduct. Failing this, the State would evade any international review of the compatibility of its actions with its engagements undertaken under the Convention.

The Court further noted that it had held in the "*Bosphorus Airways*" v. *Ireland* judgment that the protection of fundamental rights by the European Union was in principle equivalent to that of the Convention system.

It noted, however, that the present case differed from the "*Bosphorus Airways*" v. *Ireland* case. The CJEU had not had an opportunity to rule on the question concerning fundamental rights currently before the Court: on the one hand, the *Conseil d'Etat* had refused to submit a request for a preliminary ruling on the issue of whether the obligation to "report suspicions" was compatible with Article 8 of the Convention; equally, that question had never previously been examined by the CJEU, either in a preliminary ruling delivered in the context of another case, or on the occasion of one of the various actions open to the European Union's member States and institutions.

The Court was therefore obliged to note that, in deciding not to request a preliminary ruling, in spite of the fact that the Court of Justice had not yet examined the question concerning Convention rights that was before it, the *Conseil d'Etat* had ruled before the relevant international machinery for supervision of fundamental rights - in principle equivalent to that of the Convention - had been able to demonstrate its full potential. In the light of this choice and the importance of what was at stake, it concluded that the presumption of equivalent protection was not applicable. The Court was therefore required to determine whether the interference had been necessary.

The Court reiterated in this respect that, while Article 8 protected the confidentiality of all "correspondence" between individuals, it afforded strengthened protection to exchanges between lawyers and their clients. This was justified by the fact that lawyers were assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers could not carry out this essential task if they were unable to guarantee to those they were defending that their exchanges would remain confidential. This additional protection conferred by Article 8 on the confidentiality of lawyer-client relations, and the grounds on which it was based, led the Court to find that, from this perspective, legal professional privilege was specifically protected by the above provision.

It further reiterated that the concept of necessity implied that the interference corresponded to a pressing social need and, in particular, that it was proportionate to the aim pursued. In this connection, the Court concurred with the *Conseil d'Etat's* analysis in its judgment of 23 July 2010.

As previously indicated, legal professional privilege was of great importance, both for the lawyer and his or her client and for the proper administration of justice. It was one of the fundamental principles on which the administration of justice in a democratic society was based. It was not, however, inviolable. In the present case, it was necessary to weigh its importance against that of the fight against the laundering of the proceeds of unlawful activities, themselves likely to be used in financing criminal activities.

In the Court's opinion, two elements were decisive in assessing proportionality:

- firstly, as the *Conseil d'Etat* had noted, the fact that lawyers were subject to the obligation to report suspicions only in two cases: where they took part for and on behalf of their clients in financial or property transactions or acted as trustees; and where they

assisted their clients in preparing or carrying out transactions concerning certain defined operations⁵. Thus, the obligation to report suspicions concerned only activities which were remote from the role of defence entrusted to lawyers and which resembled those carried out by the other professionals who were also subject to this obligation. Furthermore, the legislation specified that lawyers were not subject to the obligation where the activity in question was related to court proceedings and, in principle, when they were providing legal advice. The obligation to report suspicions did not therefore go to the very essence of the defence role which underlay legal professional privilege.

- further, the fact that the legislation had introduced a filter which protected professional privilege: lawyers did not transmit reports directly to *Tracfin* but, as appropriate, to the president of the Bar of the *Conseil d'Etat* and the Court of Cassation or to the president of the Bar of which they were members. It could be considered that at this stage, when information was shared with a professional who was subject to the same rules of conduct and elected by his or her peers, that professional privilege had not been breached. The president of the relevant Bar transmitted the disclosure of suspicions to *Tracfin* only after ascertaining that the conditions laid down by the law had been met.

The Court concluded that the obligation to report suspicions did not represent a disproportionate interference with lawyers' professional privilege and that there had been no violation of Article 8 by France.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

⁵ Buying and selling of real property or business entities; managing of client money, securities or other assets; opening of bank, savings or securities accounts; organisation of contributions necessary for the creation of companies; creation, operation or management of companies; creation, operation or management of trusts or similar structures; creation or management of endowment funds.