Working towards a more flexible approach to French attorney–client confidentiality - May 2018

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Under the French rules of professional conduct, the duty of confidentiality is a general, timeless and absolute rule.[1] The duty applies to all correspondence between a lawyer and the client, regardless of the content.[2] This *in personam* approach is shifting as more judges take into account the content of correspondence to determine whether it falls within the scope of the duty of confidentiality.

The duty of confidentiality under French law: an absolute privilege

Because lawyers appear as 'the natural confidants'[3] of a client and the necessary condition to an effective defence, the French rules of professional conduct provide a strong legal framework that aim to uphold the duty of confidentiality. Because of the attorney–client privilege, a court may not order a lawyer to reveal information that they obtained within the scope of their representation.[4] The French concept of the duty of confidentiality goes beyond this mere privilege, as the lawyer must refrain from disclosing any information related to the representation of their client and/or discuss elements of the case with third parties. Hence, Article 66-5 of the law of 31 December 1971 provides:

> 'A consultation between a lawyer and its client, correspondences exchanged between both of them, or with an associate, with the exception of the certified letters, attorney work product and more generally all the documents contained in the client's file are protected under the attorney–client privilege – whether it is a contentious or non-contentious matter'.

The French rules of professional conduct replicate and divide this provision into two articles aiming at guaranteeing the respect of the attorney–client privilege (Article 2) and the duty of confidentiality (Article 3).

Article 2 of the National Rules of Procedure is even more meaningful as the scope of the attorney–client privilege is broad. Indeed, Article 2 encompasses a variety of matters (contentious and non-contentious) and mediums (paper, fax, email).[5] Correspondences between a lawyer and their client, interview notes, information requested by an external auditor or a lawyer's calendar are therefore privileged.[6] As long as the information is relevant to the representation of a client, lawyers shall not disclose it. The Cour de Cassation (French Supreme Court) even held that a mere discussion over the telephone could not be admissible in court as it violates attorney–client privilege.[7]

To guarantee the right to an effective defence, the legislator has enacted other safeguarding mechanisms. Because the duty of confidentiality is not limited to the information exchanged between a lawyer and their client, Article 3 of the National Rules of Procedure also protects correspondence between lawyers.[8] The protection granted to such correspondence is as wide as the one provided in Article 2. Under this article, all correspondences exchanged between lawyers are confidential – regardless of the medium – and are not admissible in courts.[9] Thus, the Cour de Cassation excluded from the debates an agreement made between two lawyers as it was part of a confidential correspondence.[10] This protection also extends to correspondence between French and foreign lawyers.[11]

In addition to its wide scope, as the French duty of confidentiality is a public order provision,[12] lawyers must not reveal information, even if the client gives their informed consent.[13] This provision differs from the common law approach. Indeed, under the Model Rule of the American Bar Association, lawyers may disclose information if their clients waive their attorney–client privilege.[14]

Whereas the duty of confidentiality is absolute and general, the legislator enacted some exceptions to guarantee the right of the defence and due process. Like the American Bar Association Model Rules, French legal provisions allow lawyers to disclose information relating to the representation of their clients in order to establish a claim or defence in a controversy between the client and the lawyer, or to prevent substantial harm.[15] Regarding communication between lawyers, Article 3 authorises lawyers to disclose information contained in certified letters.[16] The use of certified letters is strictly limited to procedural acts or non-confidential information and shall be used diligently.[17]

An *in personam* approach

Under the French rules, if communication took place between a lawyer and their client, the information is privileged. Hence, scholars have defined the French duty of confidentiality as an *in personam* duty.[18] To determine whether a document is privileged, the judge will mainly focus on the parties involved, and not on the content.[19] In its decision of 15 June 2010, the trade chamber of the Cour de Cassation held that correspondence between a lawyer and his client's accountant did not fall within the scope of the attorney–client privilege, since the law only refers to 'attorney' and 'client'.[20] To be privileged, the lawyer would need to send the letter to the client, who then needs to send it to the accountant.[21] This requirement also applies to clients. Indeed, the Cour de Cassation has already refused to uphold the attorney–client privilege for a conversation between a lawyer and his former client.[22]

In that sense, the French approach differs from the interpretation made by common law jurisdictions. Defined as the '*in rem* approach', common law jurisdiction puts the stress on the content of the communication rather than on the authors.[23] Although under Model Rule 1.6 of the American Bar Association, attorney–client privilege requires a communication that was made by the client to a lawyer in confidence and for the purpose of obtaining professional legal advice,[24] the Supreme Court recognised communications between in-house counsel and employees as privileged.[25] To fall within the scope of the attorney–client privilege, communications need to be made in order to secure legal advice from counsel, thus putting emphasis on the content instead of the author.[26] The *in rem* approach, tailored to face the process of discovery, appears as more flexible than the French approach.[27] Scholars have often criticised the rigidity of the *in personam* approach and its inability to adapt to particular situations.[28]

Such rulings highlight how the protection of communications between a client and their counsel is *sacrosanct*. In France, only a prosecutor or an investigating magistrate may issue a search warrant.[29] The *Bâtonnier* – the title given to the head of the local Bar in France – or one of their delegates must attend the search to guarantying the respect of attorney–client privilege.[30] In the United States, the US Assistant Attorney General Office must consult with the Criminal Division before authorising a search of a law firm.[31] Furthermore, a 'privilege team' of agents and lawyers not involved in the underlying investigation also ensure that privileged materials are not improperly viewed, seized or retained during the course of the search.[32] However, french courts have recently construed the duty of confidentiality differently by adopting an *in rem* approach.

Towards more flexibility: the enlargement of the duty of confidentiality's scope

On 8 November 2017, the Court of Appeal of Paris issued a ruling considered a paradigm shift. In 2017, the French antitrust authorities conducted a search at the Whirlpool French headquarters.[33] During this search, agents seized letters written by the one of the legal team's in-house counsel, addressed to another department within the company.[34] Whirlpool then sought to remove these letters from the record, arguing that they were protected under attorney–client privilege.[35] The Court of Appeal had to determine whether antitrust agents violated attorney–client privilege by seizing these documents.

Such protection is not easily granted. In 2010, the Court of Justice of the European Union refused to apply attorney–client privilege to communications between in-house counsel and employees. Indeed, to be privileged, the documents needed to be related to the defence strategy and provided by 'independent lawyers'.[36] The Cour de Cassation also refused to apply attorney–client privilege to communications between in-house counsel, as they are not entitled to the same protection as lawyers.[37]

The Court of Appeal rejected this interpretation. Because the in-house counsel mentioned the company attorneys' defence strategy, the letters fell within the scope of the attorney–client privilege and were therefore not admissible.[38] The Court of Appeal did not follow the traditional *in personam* approach as it sought to determine whether the letters were related to the representation of the client. By prioritising the content, the Court of Appeal of Paris made a step towards the recognition of a legal privilege for in-house counsel – privilege that already exists in common law jurisdictions.

Despite their differences, both systems converge on the necessity to find balance between the needs of corporate crime investigations and attorney–client privilege.

[1] Art 2.1, National Rules of Procedure: 'The attorney-client privilege lawyer is of public order. This privilege is general, absolute, and unlimited in time.'

[2] Art 2.2, National Rules of Procedure: 'The scope of the attorney-client privilege covers all matters, from contentious to non-contentious issues, and all material and immaterial medium (paper, fax, electronic way)'.

[3] Art 2.1, National Rules of Procedure: 'The lawyer is the necessary confidant of the client.'

[4] Art 2.1, National Rules of Procedure: 'A lawyer shall not reveal information which are protected under the attorney-client privilege, unless for information relating to his own defense and legislative exceptions.'; Art 326, Criminal Procedure Code: 'When subpoenaed, a witness must testify unless cases provided by Article 226-13 and 226-14 of the Criminal Code'.

[5] Art 2.2, National Rules of Procedure: 'The scope of the attorney-client privilege covers all matters, from transactional to litigation issues, and all material and immaterial medium (paper, fax, electronic way...): consultations sent by a lawyer to his client or addressed to him; the correspondence exchanged between a client and his lawyer, or between a lawyer and other lawyers, unless the correspondence is certified; the interview notes and, more generally, the entire file including all the information and confidences received by the lawyer in the exercise of his duties; the clients' names and the lawyer's calendar; fee sand monies management as it is prescribed by Article 27, paragraph 2, of the aforementioned law of December 31, 1971; information requested by the external auditor or any third party (this provision only encompasses information which may be shared by a lawyer to his client)'.

[6] *Ibid*.

[7] Crim, 18 January 2006, No 05-86.592: '[t]he conversation between a lawyer and one of his client cannot be recorded and added to the file unless its content suggests that the lawyer participated in a criminal offense'.

[8] Art 3.1, National Rules of Procedure: 'All exchanges between lawyers, verbal or written whatever the medium (paper, fax, electronic way...), are confidential by nature. Correspondences between lawyers, whatever the medium, in no case shall be produced in court or disclosed'.

[9] *Ibid*.

[10] First Civil Division, 13 November 2003, No 01-17.180: '[c]orrespondences between lawyers, without exceptions, fall within the scope of the attorney-client privilege; far from misunderstanding the meaning and the scope of this text, the Court of appeal applied this rule by dismissing a letter from the counsel of Ms. X… from April 1, 2018 which established an agreement between himself and Mr. Y's counsel'.

[11] Art 3.4, National Rules of Procedure: 'When working with a lawyer registered at a bar outside the European Union, the lawyer must, before exchanging any confidential information, make sure of the existence, in the country where the foreign lawyer practices, of rules ensuring the confidentiality of the correspondence. If such rules do not exist, the lawyer must enter into a confidentiality agreement or asks his client whether he accepts the risk of a non-confidential exchange of information'.

[12] Art 2.1, National Rules of Procedure: 'The attorney-client privilege lawyer is of public order. This privilege is general, absolute, and unlimited in time'.

[13] First Civil Division, 24 January 2004, No 01-13.976: '[t]hen, the Court of Appeal was right when it reminded the absolute and general component of this privilege and did not violate Article 6.1 of the European Convention on Human Rights'.

[14] Rule 1.6.a, Model Rules of Professional Conduct: 'A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph.'

[15] Art 4 of the decree No 2005-790, 12 July 2005: 'Unless the lawyer needs to prepare its own defense before any courts or in the event of a case falling within the scope of a legal provision, the lawyer will never, and for any matter, disclose documents, exhibits, letters relevant to an investigation or an on-going proceedings.'

[16] Art 3.2, Rules of National Procedure: 'The following certified documents do not fall within the scope of the duty of confidentiality defined in Article 66-5 of the law of December 31, 1971'.

[17] Advisory Opinion No 20.2387, 2 March 2010; No 20.0173, 12 March 2010; No 122/21.4317, 4 February 2011.

[18] T Baudesson and P Rosher, 'Professional secrecy versus legal privilege', 1 RDAI/IBLJ (2006).

[19] *Ibid*.

[20] Commercial Division, 15 June 2010, No 09-66.688: 'But considering that pursuant to Article 66-5 of the law of December 31, 1971, only correspondences exchanged between a lawyer and his client or between a lawyer and another lawyer are privileged; because of this pure legal argument, which replaces the challenged rationale, the judgment is justified; the argument is rejected'.

[21] First Civil Division, 14 January 2010, No 08-21.854: 'But considering that the Court of Appeal was right when it ruled that the correspondences sent by the attorney to Mr. X, its client, was confidential; that the fact that the letter was sent to the accountant thanks to the initiative of its author who could not allow the disclosure, is not relevant'.

[22] Criminal Division, 22 March 2016, No 15-83205: 'No legal provisions forbid the capture, the recording and the transcript of statements made by a lawyer in a taped conversation with a third party as long as, first, this lawyer does not defend the third party under surveillance, like it is the case here; second, his statements, which are not related to the right of defense, and even with a regular client, show its involvement in a potential criminal offense'.

[23] See n 18.

[24] See E Podgor and J Israel, *White Collar Crime in a Nutshell* (5th edn, West Academic Publishing, 2015) 461.

[25] See *Upjohn Co v United States*, 449 US 383 (1981).

[26] *Ibid.*

[27] *Ibid*.

[28] *Ibid*.

[29] Art 56-1, Code of Criminal Procedure: 'Search in a law firm or at the lawyer's domicile shall not be conducted without a magistrate and the Bâtonnier or his delegate, A search may be ordered only if the magistrate issues a written and reasoned warrant which defines the nature of the offense(s) which are being investigated. The warrant issued by the magistrate should also indicates the reasons and the object of the search. As soon as the decision has been issued, it must be brought to the Bâtonnier or his delegate by the magistrate. Only the magistrate, the Bâtonnier and his delegate may review documents or objects before they are seized. Objects and documents which do not fall within the scope of the warrant cannot be seized. Any action contrary to this paragraph will be void.'

[30] *Ibid*.

[31] E Podgor, 'Law Office Searches – Nothing New Except the President's Lawyer this Time' (White Collar Crime Prof Blog, 9 April 2018), see **http://lawprofessors.typepad.com/whitecollarcrime_blog/2018/04/law-office-searches-nothing-new.html (http://lawprofessors.typepad.com/whitecollarcrime_blog/2018/04/law-office-searches-nothing-new.html)**, accessed 30 April 2018.

[32] *Ibid.*

[33] See Paris, 8 November 2017, No 14/13384.

[34] *Ibid*.

[35] *Ibid*.

[36] Court of Justice of the European Union, 14 September 2010, C-550/07: 'It must be recalled that, in *AM & S Europe v Commission*, the Court, taking account of the common criteria and similar circumstances existing at the time in the national laws of the Member States, held, in paragraph 21 of that judgment, that the confidentiality of written communications between lawyers and clients should be protected at Community level. However, the Court stated that that protection was subject to two cumulative conditions. In that connection, the Court stated, first, that the exchange with the lawyer must be connected to "the client's rights of defence" and, second, that the exchange must emanate from "independent lawyers", that is to say "lawyers who are not bound to the client by a relationship of employment". As to the second condition, the Court observed, in paragraph 24 of the judgment in *AM & S Europe v Commission*, that the requirement as to 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 as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart to that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest. The Court also held, in paragraph 24, that such a conception reflects the legal traditions common to the Member States and is also to be found in the legal order of the European Union, as is demonstrated by the provisions of Article 19 of the Statute of the Court of Justice'.

[37] First Civil Division, 3 November 2016, No 15-20.495: 'Considering, in a second time, that the judgment hold that business secret and duty of confidentiality do not prevent the application of Article 145 of the code of civil procedure and underlines that the only limit to the disclosure of seized documents is the confidentiality of lawyer's correspondences or the attorney client privilege as it is provided under Article 66-5 of the law No 71-1130 of December 30, 1971'.

[38] Paris, 8 November 2017, No 14/13384: 'Even though this email does not come from a lawyer, or is not addressed to a lawyer, it mentions the defense strategy defined by the law firm Cleary Gottlieb and violates the legal privilege'.

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May 23, 2018

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