The legal profession under the Trias Judica : issues under Primary Union Law when transposing DAC 6 reparations and supervision on the self-regulatory bodies of the legal profession for Anti-Money-Laundering purposes.

***

RESUME[1]

A provision of the DAC 6 Directive[2] was invalidated by the Court of Justice in its judgment of 8 December 2022 rendered in case C-694/20[3]. Article 8 ab (5) of the Directive on Administrative Cooperation "DAC" [4] as modified by DAC 6 is held in violation of Article 7 of the Charter for imposing, in a context of legal advice regarding cross-border arrangements, an obligation on lawyers to notify other persons than their clients when invoking their legal profession privilege against their obligation to report.

The article focuses on the modifications that DAC 8[5] subsequently made in October 2023 by its Article 1 (4). Article 8 ab (5) and (14) a and c DAC was modified in response to the judgment of 8 December 2022 of the Court of Justice. It is now upon the Member States to transpose these modifications.

There are however issues that can be raised under Primary Union law regarding the effects of these modifications on the proper functioning of the Rule of law and on the protection granted under the case-law of the ECJ and the ECtHR under Article 7 of the Charter / Article 8 ECHR for the confidentiality of communications between lawyers and clients. By introducing the concept of 'Trias Judica'[6] that relates to the effectiveness of the protection of self-regulation by three professions against interferences with their independence, the article refers to the values the case-law it reviews seeks to protect for the proper functioning of the Rule of law.

The article also considers the implications of the Trias Judica for the legislation the Council adopted on 18 January 2024. In the fight against money-laundering, the Anti-Money-Laundering Directive (AML) was updated by introducing, amongst other things, the obligation

---

[1] This article is the result of the presentations the author gave on 16 January 2024 in the conference organised by the Cyprus Bar Association regarding the 'Update on Legal Privilege under EU Law' and the exchange of views during that conference. The author is a Director and general mandatee of the factual association Belgian Association of Tax Lawyers (BATL) and a lawyer with the Dutch speaking Bar Association of Brussels (NOAB). In his capacity as a representative of BATL the author was involved in two proceedings regarding DAC 6 before the Court of Justice (the cases C-694/20 and C-623/22). He writes this article in his own name.

[2] Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, *O.J.*, 5 June 2018, L 139

[3] ECJ [GC], 8 December 2022, case C-694/20, *Orde van Vlaamse Balies and Belgian Association of Tax Lawyers*, EU:C:2022:983.

[4] Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, *O.J.*, 11 March 2011, L 64

[5] Directive (EU) 2023/2226 of 17 October 2023 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, *O.J.*, 24 October 2023, L series

[6] Psalm 43 '*Judica me, Deus'* refers to claiming for justice, so it be rendered.

for Member States to organize a supervision on AML-reporting by self-regulated bodies[7], targeting also the self-regulatory bodies of the legal profession.

Case C-694/20 that lead to the judgment of 8 December 2022 by the Grand Chamber of the Court of Justice, concerned the implementation of DAC 6 in the Belgian Flemish region's law. Under a summary proceeding, the Belgian Constitutional court had questioned the validity of the obligation for lawyers to notify other persons than their clients in its judgment 117/2020 of 17 December 2020[8]. Almost two years later, the Belgian Constitutional Court rendered its judgment 103/2022 on 15 September 2022[9] regarding the merits of the proceedings against the Belgian Federal transposal of DAC 6. Some of the provisions of the federal law were annulled. For some provisions, the Belgian Constitutional Court decided to wait for the answer of the Court of Justice in case C-694/20 and to submit five more preliminary questions to the Court of Justice before ruling over various other arguments[10]. Three of these five preliminary questions relate to the validity of DAC6 in part or in whole. This is the pending case C-623/22.

Under the old and the modified Article 8 ab (5) DAC, it is left to the Member States to deal with the issue of the legal profession privilege. It is understood to be "optional" for Member States to exempt lawyers from the obligation to report a cross-border arrangement where such reporting would be contrary to the legal profession privilege applicable under the national law of the Member State[11]. The Member States shall then take the necessary measures to ensure that the lawyer is required to notify his or her client of that waiver, and the reporting obligation incumbent on him or her is transferred to the client when no other intermediaries remain.

By imposing obligations to report on lawyers and requirements for invoking their waiver, there is a double interference with the self-regulation of the legal profession that prohibits on principle reporting to authorities and notifying non-clients.

---

[7] On 18 January 2024 the Council found a consensus on the Proposal of 20 July 2021 for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (European Commission Staff document {SEC(2021) 391 final} - {SWD(2021) 190 final} - {SWD(2021) 191 final}) and on the Proposal of 20 July 2021 for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849 (European Staff document{SWD(2021) 190, 191} - {SEC(2021) 391}).

[8] C.C., 17 December 2020, n°167/2020, BE:GHCC:2020:ARR.167.

[9] C.C., 15 September 2022, n°103/2022, BE:GHCC:2022:ARR.103.

[10] These five preliminary question can be summarized as relating to (1) Is DAC 6 applicable outside corporate income taxes? ; (2) Are multiple definitions in DAC 6 compatible with both the requirements of the rights of defense and the general legal principle of foreseeability of the effects of norms (Article 49 Charter) and the requirements for the protection of private life against arbitrary or ineffective state action (Article 7 Charter)? ; (3) Is there a clear definition of the commencement for the 30-day reporting period under the protection granted by Articles 7 and 49 of the Charter ? ; (4) Extension of the question for a preliminary ruling in C-694/20 to all intermediaries with professional secrecy that is sanctioned by a criminal law, but limited to the sole protection under Article 7 of the Charter. ; (5) As regards the protection which Article 7 of the Charter *and Article 8 ECHR* confer on private life, are the reporting obligations which DAC 6 imposes justified and this also regarding their necessity for the proper functioning of the internal market, and this specially in the presence of reportable arrangements that can be genuine in all aspects, that are not motivated by a tax advantage or no other tax advantage than the one organised by a national tax law ?

[11] All 27 Member states transposed the obligation to report for lawyers; only Italy did not allow lawyers to invoke their legal profession privilege against an obligation to report cross-border arrangements.

The reviewed case-law of the ECtHR that protects the confidentiality of all communications between lawyers and clients imposes a change in the national laws of Member states that interfere with that confidentiality. Transposals of other Union law that interferes with that confidentiality face a similar review on organizing either waivers or first instance reporting to the self-regulatory bodies of lawyers and reinforcing the effectiveness of the protection of confidentiality on the side of the client.

The article finds that (1) the modified Article 8 ab (5) requires an interpretation that the waiver for reporting is mandatory under the ECHR for all actions falling within the scope of the self-regulation of the legal profession under the national tradition and that (2) the modified Article ab (14) c requires a transposal that always allows the client not to report the existence and the content of communications with his or her lawyer, thus, effectively protecting the confidentiality of that communication.

The article ends by pointing out why the new set of AML obligations that entails supervising self-regulatory bodies of the legal profession, that still are to be adopted in the European Parliament before the 2024 elections, is to be held in violation of the ECHR and Primary Union law.

THE TRIAS JUDICA

1. The Rule of law is based on the balance that follows from the combination of three branches of government that are independent from one another: legislation, administration and jurisdiction. This is often referred to as the concept of the Trias Politica. The proper functioning of that Rule of law under its judicial branch requires in turn a minimum level of protection of the independence of three professions: judges, lawyers and journalists.

That independence is safeguarded from state-controlled interferences by an increased protection for both their self-regulation and fundamental rights. For the judiciary, that independence is to safeguard their impartiality, for the journalists their freedom of expression (Article 11 of the Charter / Article 10 ECHR) and for the lawyers, their loyalty towards their clients, this also outside the context of litigation (Article 7 of the Charter / Articles 6 and 8 ECHR).

2. According to the case-law[12] of the ECtHR, questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest thus calling for a high level of protection of freedom of expression, with a *particularly narrow margin of appreciation* accordingly being afforded to the authorities.

Moreover, in view of the specific status of lawyers and their position in the administration of justice, the ECtHR takes the view that lawyers cannot be equated with journalists. Their respective positions and roles in judicial proceedings are intrinsically different. Journalists

[12] ECtHR, 28 April 2015, *Morice v. France* [GC], 29369/10, §§ 125, 128 and 148; 14 February 2018, *July and SARL Libération v. France*, 20893/03, §§ 67, 148 and 168

have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party[13].

In an October 2017 report regarding self-regulation in the media[14], one of the definitions cited to describe that concept states:

> *"Self-regulation in any profession or sector entails the development and enforcement of rules by those whose conduct is to be governed, with the ultimate aim of improving the service offered to consumers, claimants or – in the case of the media – the public at large. It requires standards to be set and agreed on by the individuals and institutions to which they will apply and the development of procedures and mechanisms for enforcing them.* ***Fundamental to self-regulation is the principle of voluntary compliance****. Law courts play no role in adjudicating or enforcing the standards set and those who commit to them do so not under threat of legal sanction, but for positive reasons, such as the desire to further the development and credibility of their profession. Self-regulation relies first and foremost on a common understanding by members of the values and ethics at the heart of their professional conduct."*

Self-regulation is the opposite of statutory regulation. When organising a legal base for the self-regulation of a profession by recognising or organising its body, Member States venture into co-regulation. When imposing obligations under their laws, Member States also co-regulate that profession.

As a matter of principle, under the Trias Judica protection of the independence, Member States are to limit their interference through co-regulation to recognising the public interest of the entities that self-regulate these three professions. Member States should abstain from interfering in their codes of conduct and refrain from co-regulating in general unless overriding reasons of general interest are involved. A higher level of protection by organising public legal entities is only achieved insofar as the autonomous functioning of that self-regulatory body remains guaranteed and is explicitly recognised under that national law.

3. In reaction to policies that seek to exert control over the national press as have been observed since 2010 in Poland and Hungary[15], the European Commission issued in 2021 recommendations on ensuring the protection, safety and empowerment of journalists and other media professionals[16].

Such protection is considered to be a key component of democratic systems and the rule of law (recital 1). The involvement of self-regulatory bodies (media and press councils) is recommended when organising effective protection (recital 14). Recommendation # 24 states

---

[13] ECtHR, Guide on Article 10 of the European Convention on Human Rights, Freedom of expression (updated on 31 August 2022), § 488, p. 84 and § 472, p. 82

[14] Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX), 'European Co-Regulation practices in the media. Comparative analysis and recommendations with a focus on the situation in Serbia.', J.F. Furnémont and Tanja Kersevan Smokvina, p. 19

[15] See for instance the posts and country reports on Hungary and Poland on the website of the organization 'Reporters without borders'.

[16] Commission recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union.

for instance that '*Member States should promote a regular dialogue between such authorities and media self-regulatory bodies, journalists' associations (..) to enable them to take self-protection measures.'.*

On 24 January 2024, the Committee on legal affairs in the European Parliament adopted a directive that seeks to protect journalists against unlawful proceedings[17]. The legal base for that directive is Article 81(2) f TFEU on judicial cooperation in civil matters having cross-border implications, and in particular relating to '*the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules of civil procedure applicable in the Member States'.* The importance of that profession and its self-regulation for the proper functioning of the Rule of law is to be shortly enshrined into Union law.

4. After gaining economic or political control or both over their national main media, various interferences were documented in Member States with regard to controlling their judiciary.

The Court of Justice stepped in by identifying a legal base for an *effective judicial protection* under Articles 2, 4 and 6 TEU and Article 19 (1) of the TFEU[18]. National legislation that may affect the independence of the judiciary was found to be in violation of Primary Union law and the objective of the proper functioning of the Rule of law.

The European Commission recommended sanctions to the Council against Hungary that were adopted by the Council on 15 December 2022 [19]. Under recital (12) that decision states :

> *"In particular, there is a lack of effective judicial remedies by an independent court against decisions of the prosecution service not to investigate or prosecute alleged corruption, fraud and other criminal offences affecting the Union's financial interests, a lack of a requirement to give reasons when such cases are attributed or reassigned, and an absence of rules to prevent arbitrary decisions in their regard."*

On 15 December 2023[20] the European Commission found that various measures undertaken by Hungary had sufficiently remedied the lack of independence of the judiciary :

> *"These measures to strengthen judicial independence include, in particular:*
>
> - *increasing the powers of the **independent National Judicial Council**, to limit undue influence and discretionary decisions, and ensure a more objective and transparent administration of courts;*
> - *reforming the functioning of the Supreme Court to limit risks of political influence;*

[17] The final adoption of that directive by the plenary of the European Parliament is to take place by the end of February 2024.

[18] Spieker LD (2019), 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis', *German Law Journal*, 2020, p. 1182 – 1213 ; Peter Van Elsuwege en Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice.', *European Constitutional Law review*, 16:8)32, 2020, Cambridge University Press.

[19] The Council implementing decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, *O.J.*, 20 December 2022, L 325/94.

[20] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465

- *removing the role of the Constitutional Court in reviewing final decisions by judges on request of public authorities; and*
- *removing the possibility for the Supreme Court to review questions that judges intend to refer to the European Court of Justice."*

Against Poland, the European Commission recommended on 20 December 2017[21] various measures to restore the independence of the judiciary. One measure related to the National Council for the Judiciary (NCJ) :

> *"Amend the law on the **National Council for the Judiciary**, to not terminate the mandate of judges-members, and ensure that the new appointment regime continues **to guarantee the election of judges-members by their peers**;"*

On 28 October 2021, the European Network of Councils for the Judiciary decided to expel the NCJ from their organisation, essentially for its lack of independence and failure to defend judicial independence against attacks.

On 5 July 2023, the European Commission observed[22] that this specific measure had still not been implemented, despite the fact that both the Court of Justice[23] and the ECtHR[24] had confirmed since 2017 that there were legitimate doubts as to the independence of the NCJ.

5. Impartiality and independence are of such utmost importance for the judiciary that the Constitutions of Member States must protect it. All their actions should be in turn organised by a procedural law for avoiding arbitrary decisions or the appearance of arbitrary decisions in the administration of Justice.

These formal requirements that in large part constitute co-regulation seem to leave little to no space for self-regulation of the judiciary. There is however a part of that profession that must be self-regulated to shield it from interference by lawmakers, government, the public or parties.

This relates to an independent national judicial council with a decisive influence on decisions affecting the appointment or career of judges. Under the more recent requirements for becoming a Member State of the European Union, organising such an independent national judicial council is an objective that should meet five minimum requirements that result in installing a sort of 'self-government by judges' regarding the control on their functioning[25] :

1. Judicial councils should have constitutional status.

---

[21] https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367

[22] COMMISSION STAFF WORKING DOCUMENT of 5 July 2023 - Rule of Law Report - Country Chapter on the rule of law situation in Poland - Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2023 Rule of Law Report.

[23] ECJ, 15 July 2021, C-791/19, *Commission v Poland,* § 108, EU:C:2021:596; ECJ, 6 October 2021, C-487/19, *W.Ż.,* § 150, EU:C:2021:798

[24] ECtHR, 6 October 2022, *Juszczyszyn v. Poland*, Application No. 35599/20

[25] ECtHR, Opening speech of 25 January 2019 of the Judicial Year by Jasna Omejec in the Seminar on Strengthening Confidence in the Judiciary Appointment, promotion and dismissal of judges and ethical standards, p. 10 - 11

2. At least 50% of the members of the judicial council must be judges, and these judicial members must be selected by their peers, that is, by other judges.
3. Judicial councils should be vested with decision-making and not merely advisory powers.
4. Judicial councils should have substantial competences in all matters concerning the careers of judges, including selection, appointment, promotion, transfer, dismissal and disciplining.
5. The judicial council must be chaired either by the President or the Chief Justice of the highest court or by the neutral Head of State.

Among the 27 Member States such judicial councils exist in various forms and with various competences that rarely meet all five of these requirements at once. Also, the formal creation of such a judicial council is no guarantee for self-government when the government can appoint its members directly or indirectly.

The case-law of the Court of Justice and the ECtHR related to direct interferences by the Polish government with its judiciary led in turn to the recognition of a need for a Rule of law check on Polish court decisions by the judiciary in the other Member States[26]. That was unsettling and the need for such a check, however necessary, forms a serious threat to the proper functioning of the Internal Market and the Rule of law throughout the European Union.

6. This evolution has had the effect of putting the focus on the legal profession and its key role in the proper functioning of the Rule of law since they are the only profession that is able to identify and document infringements against the Rule of law. These infringements can be opposed in other jurisdictions of the European Union against the effects of judicial decisions from corrupted jurisdictions.

In a speech given on 20 January 2023 that was later on published in October 2023 in a Belgian law review[27], the President of the Court of Justice, M. K. Lenaerts, pointed at case-law[28] that recognized the need to protect the independence of lawyers by shielding them from the influence of authorities, other agents and third parties. This to allow them to act in the sole interest of their clients. Hence, there is a *fundamental right for an effective judicial protection* that is granted under Union law that recognizes the need for assistance by a lawyer.

This fundamental right is broader in scope than the fundamental right to a fair trial under Article 6 ECHR and basically covers the assistance provided through all communications between lawyers and their clients. Anti-money-laundry obligations to report can only be imposed on lawyers when related to financial or real estate operations or when they act as economic agents in a context outside of litigation and therefore fall outside the scope of the fundamental right *to a fair trial*[29].

---

[26] for instance : ECJ [GC], 17 December 2020, C-354 & 412/20, *PPU, L. and P.*, EU:C:2020:1033

[27] K. Lenaerts, 'L'avocat et l'État de droit dans la jurisprudence de la Cour de Justice de l'Union européenne.', *Le Pli juridique,* n° 65, October 2023, p. 3-7 (The lawyer and the Rule of Law in the case-law of the ECJ).

[28] ECJ, 19 February 2002, C-309/99, *Wouters a.o.*, EU:C:2002:98 and ECJ [GC], 8 December 2022, C-694/20, *Orde van Vlaamse Balies and Belgian Association of Tax Lawyers*, EU:C:2022:983, § 28.

[29] ECJ [GC], 26 June 2007, Case C-305/05, *OBFG v Belgium*, EU:C:2007:383.

In several decisions, the Grand Chamber of the Court of Justice considered that individuals could not reasonably be expected to be able to challenge the validity of judgments from other jurisdictions under the Rule of law without the assistance of a lawyer[30]. This relates to the active role of the lawyer in identifying and collecting evidence of the facts based on which the national court may then give reasons for the applicable infringements of Union law - possibly raised in its own motion - without the national court having to be regarded as having an active duty to gather those facts itself for the purposes of the application of Union law.

The lawyer has also a passive role under the proper functioning of the Rule of law, insofar as the legal profession is entitled to *a fundamental right to an effective judicial protection* under Article 47 of the Charter that was later applied under Articles 19 TEU and 47 of the Charter on the profession of the judiciary[31].

The judgment of 8 December 2022 extends this fundamental right to an effective judicial protection for the legal profession outside the context of litigation, no longer based on Article 47 of the Charter, but on Article 7 of the Charter and Article 8 ECHR that protects the *confidentiality* of both the existence and the content of a consultation between a lawyer and a client. That confidentiality was expanded by that judgment of 8 December 2022 of the Grand Chamber of the Court of Justice to a safeguard for the effectiveness of the right to a fair trial to which citizens are entitled in a democratic society.

7. The self-regulation of the legal profession is intertwined with Community law, and this was the case long before the Treaties that founded the European Union and the Charter of Fundamental Rights (the Primary Union law).

Soon after the creation of the European Economic Community in April 1957, the self-regulatory bodies of the legal profession created in 1960 the Council of Bars and Law Societies of Europe (CCBE) as a supranational self-regulatory body. The CCBE subsequently issued the Code of conduct for European lawyers in 1998 and the Charter of core principles of the European legal profession in 2006. The self-regulation of the legal profession therefore holds both a national and a supranational dimension in the European Union. That supranational dimension is a common constitutional tradition under Article 6 TUE that comes into play when the Court of Justice has to settle a conflict between norms regarding the legal profession.

Several Member States had claimed that they could restrict lawyers that are established in other Member States from also establishing themselves in their national territory. The Court of Justice considered in a judgment of 21 June 1974 that[32]:

---

[30] ECJ [GC], 22 February 2022, cases C-562/21 and C-563/21, *X and Y*, EU: C:2022:100 and ECJ [GC], 8 November 2022, cases C-563/21 and C-562/21, EU: C:2022:100). C-562/21 and C-563/21, *X and Y*, EU:C:2022:100 and ECJ [GC], 8 November 2022, cases C-704/20 and C-39/21, *Secretary of State for Justice and Security v. C and D; X v. Secretary of State for Justice and Security*, EU:C:2022:858.

[31] ECJ, 19 September 2006, C-506/04, *Wilson*, C-506/04, EU:C:2006:587 regarding independence for lawyers, that served later on for construing the case-law on the protection of the independence of the judiciary (note 26 of the Article of M. K. Lenaerts).

[32] ECJ, 21 June 1974, C-2/74, *Reyners v. the Belgian State,* § 52

- The most typical activities of the legal profession are, on the one hand, legal advice and assistance and, on the other hand, the representation and defence of parties in court.

- Since the function of lawyers is broader than the mere representation of a client in court, the exercise of the freedom of establishment is to be granted to lawyers.

- However, this freedom must be exercised in compliance with both the legal rules and the ethical (or deontological) rules governing the profession in the other Member State.

A Directive of 22 March 1977 enshrined the Reyners-judgment into Union law[33] in its Articles 4 (2) and (4) :

> *"A lawyer pursuing these activities (representation in legal proceedings) shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes."*
>
> *"A lawyer pursuing activities other than those referred to in paragraph 1 (representation in legal proceedings) shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, (..)"*

When the United Kingdom and Ireland joined the European Union, the Directive of 16 February 1998 subsequently recognised the activity of lawyers as economic agents as organised under the self-regulation of the legal profession in the United Kingdom and Ireland but exempted that aspect from the obligation of reciprocity under the Directive of 22 March 1977[34].

The rules of professional conduct are the fruit of the self-regulation for the legal profession. Hence, in the context of the exercise of fundamental freedoms, self-regulation under national tradition is a non-harmonised matter that is nonetheless explicitly recognised as mandatory for the legal profession by Union law and can therefore also be opposed to other Union law that interferes with the obligation for lawyers to observe self-regulation. The supranational component of self-regulation also counts, under Article 6 TUE as a common constitutional tradition for examining interferences with the self-regulation of the legal profession.

Self-regulation by the legal profession is recognised by the Court of Justice as a safeguard for the independence and the loyalty of the legal profession in the judgment of 18 May 1982[35]:

> *"(§ 18) : .. take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognized in all Member States, that any person must be able, without constraint,*

[33] Directive 22 March 1977, No. 77/249, CEE.
[34] Directive 16 February 1998, No. 98/5/CEE
[35] ECJ, 18 May 1982, C-155/79, *AMS* (§§ 18, 24 and 25)

to consult a lawyer whose profession entails giving of independent legal advice to all those in need of it.

(24) : .. is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interest of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers to that purpose. Such a conception reflects the legal traditions common to the Member States and is also to be found in the legal order of the Community.."

(25) : .. freedom of establishment and freedom to provide services (..) to written communications between lawyer and client must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member States in which the client lives."

It therefore confirms the need for independence and for shielding that profession from interferences, so the lawyers can be fully loyal by having only the client's interest at heart when rendering advice. Both independence and loyalty are safeguarded by the self-regulation of the legal profession.

The General Court referred in its decision of 12 December 2018[36] to the above-mentioned judgment of the Court of Justice of 18 May 1982 and other decisions of the General Court. It also decided that lawyers' advice given at a time when there was no contentious context is protected. The client cannot be compelled to disclose such advice at a later time. Confidentiality serves his rights of defence which may be invoked at a later time. This bond is now confirmed by the judgment of 8 December 2022 of the Grand Chamber of the Court of Justice.

8. The case-law of the ECtHR regarding the importance for the Rule of law of the confidentiality of the communications between lawyers and their clients outside the context of litigations has also evolved in no small manner.

While recognizing that the protection under Article 6 ECHR does not apply outside the context of litigations, two judgments of the ECtHR[37] consider that the protection under Article 8 ECHR for private life requires a reinforced protection regarding the confidentiality of information exchanged between lawyers and their clients. That confidentiality serves the double purpose of better allowing to organise one's private and professional life, which is protected under Article 8 § 1 ECHR, and at the same time acting as a safeguard for the right to remain silent and not to be forced to report information that would otherwise not be divulged. These procedural rights are in turn protected under Article 6 ECHR.

In the judgment of 17 April 2019 of the ECtHR, the protection under Article 8 § 1 ECHR for an interaction between a lawyer and a client is said to allow an individual to make informed

[36] General Court, 12 December 2018, Case T-705/14, *Unichem Laboratories Ltd. v. European Commission*, EU:T:2018:915, § 119.

[37] ECtHR, 9 April 2019, *Altay v. Turkey* (nr. 2) (11236/06 - §§ 49-52) and ECtHR, 17 December 2020, *Saber v. Norway* (459/18 - §§ 50 - 56).

decisions about his or her life. More often than not, the information communicated to the lawyer involves intimate and personal matters or sensitive issues. That person should be free to communicate such information under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged.

The right to confidential communication with a lawyer is not absolute but may only be subject to restrictions when these are (1) foreseeable for those concerned, (2) proportionate to the legal aims pursued in a democratic society, (3) with *a narrow margin of appreciation* relating to (4) preventing the commission of serious crime or major breaches of prison safety. The Court of Justice referred to these conditions in its judgment of 8 December 2022 as a *reinforced protection* of the fundamental right on private life for both the lawyer and the clients.

The judgment of 17 December 2020 of the ECtHR relates to the quality of the law that interferes with the confidentiality of communications between lawyers and clients. Under Article 8 § 2 ECHR, provisions that authorize such interference must comply with the requirements of sufficient quality and safeguards. The requirement for sufficient quality relates to the use of *particularly precise and clear terms* in the presence of serious interference with private life, home and correspondence, providing adequate indications as to the circumstances and conditions in which authorities can act (§ 51). Whereas sufficient safeguards relate to the *effective protection* of :

(1) the confidentiality of exchanges between lawyers and their clients :

> *'it is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour **full and uninhibited discussion** and that it is for that reason that the lawyer-client relationship is, in principle, privileged'*

and (2) the legal profession privilege (Article 6 ECHR) :

> *"avoiding coercion or oppression to obtain information that the concerned would not have presented willingly otherwise helps to uphold the principle of nemo tenetur, a procedural right protected under Article 6 ECHR"*

The law that organizes an interference with confidentiality must be explicit about it in clear and precise terms and organize an effective protection of that confidentiality. The lack of clear and specific procedural guarantees to protect the legal profession privilege in a general provision is an interference with Article 8 § 2 ECHR that constitutes a violation that is so severe that it has no further need for a test on proportionality. In other words, it hits the core of that fundamental right.

9. Under the reviewed case-law of the ECtHR and the Court of Justice and various decisions by the institutions relating to these three professions, both national laws and secondary Union law (directives and regulations) must refrain from interfering into self-regulation. This for the sake of ensuring an effective protection of the independence of that profession.

That independence is intertwined with the Union objective of the proper functioning of the Rule of law. The reviewed case-law and the article by K. Lenaerts also revealed a *fundamental right* for both the judiciary and the legal profession *to an effective judicial protection* of their independence on an individual level.

The effective judicial protection of the independence of the legal profession entails under Article 8 § 2 ECHR an effective foreseeability of both the interference and how a proportionate protection is organized. Under Articles 6 and Article 8 § 1 ECHR a reinforced level of protection are stricter requirements for interferences being appropriate, necessary and proportionate.

These protections are referred to by the author as the Trias Judica. For the legal profession, it shields their self-regulatory body from interferences with its independence and at the individual level of the lawyer, it protects the confidentially of all activities that fall under the rules of professional conduct they must observe, be it at the national (Bar Associations) or the supranational level (CCBE).

THE VALIDITY UNDER THE TRIAS JUDICA OF THE DAC 8 MODIFICATIONS TO ARTICLE 8 AB (5) AND (14) C DAC

10. When considering the requirements of the quality of the law under the Trias Judica, two modifications by DAC 8 to Article 8 ab DAC raise issues with regard to their compatibility with Primary Union law and therefore with regard to transposals by the Member States.

The modified Article 8 ab (5) DAC explicitly organizes the right to waiver for the legal profession only. In several Member States, the transposed original version of Article 8 ab (5) did not organize the right to waiver for other professions than the legal profession[38].

Given the context of the automatic exchange of the reported data, Article 25 DAC requires under Article 8 of the Charter a strict necessity and proportionality for the validity of the obligation to report. In light of the questions raised before the Court of Justice on the validity of the obligation to report in the presence of authentic arrangements, such a limitation of the right to invoke a waiver for the sole legal profession could well be found in violation of Primary Union law. It remains to be seen if the judgment of the Court of Justice in the pending case C-623/22 will recognise the right to waiver for other professions that are self-regulated and have a legal privilege that is sanctioned under criminal law. And on what legal basis.

From a strictly formal point of view, regarding the legal profession, by limiting the right to a waiver explicitly to that profession, it could satisfy the requirements under Article 8 § 2 ECHR for clear and precise words and under Article 8 § 1 ECHR of the foreseeability of its interference. The modified provision does however still use the word 'may' as if Member States could choose not to organize the right to waiver for the legal profession. There is no effective safeguard in clear and precise terms in the legal act because of that uncertainty.

[38] Italy did not organise the right to waiver for any profession, while Bulgaria, Cyprus, Denmark, Greece and Sweden limit the right to waiver to the legal profession, and the transposals by Croatia and Lithuania could be considered as open for interpretation on that matter.

The judgment of 8 December 2022 of the Court of Justice leaves no room for a provision that forces the lawyer to report the existence and the content of communications with clients :

- When acting within 'the limits of the relevant national laws that define their profession' (§ 24) or 'the legal professional privilege by which he or she is bound by national law' (§ 50) or also 'the limits of the legal profession privilege' (§ 59), the protection of Article 7 of the Charter to respect communications between a lawyer and his or her client, can be invoked by lawyers against their obligation to notify (§ 59).

- Interference to share content *with other intermediaries* does not hit the "core" of Article 7 of the Charter since the obligation to notify is not enforced on the lawyer-intermediary nor allowed *without his or her client's consent.* (§§ 39-40).

It is quite obvious that a transposal by a Member State that does not interpret 'may' as relating to activities that fall outside of the scope of self-regulation as organized in that Member State, and does not organise the right to waiver for all activities of lawyers that fall within the scope of that self-regulation, will be held in violation of Article 7 of the Charter and Article 52(4) of the Charter, combined with Article 8 ECHR.

Such action violates the requirement of the Trias Judica for a fundamental right for lawyers to effective judicial protection of their professional activities under Article 8 ECHR.

One could also raise the question as to whether an obligation to report is necessary at all for lawyers, since clients cannot be forced to report the existence or the content of their communications with a lawyer acting within the scope of his rules of professional conduct. The validity of that obligation forms part of the fifth preliminary question in the pending case C-623/22 on the validity of reporting obligations for all relevant taxpayers and intermediaries as organized by DAC 6. That obligation to report also interferes with self-regulation in Member States. No such reporting by the client is allowed as a matter of public policy in multiple Member States.

11. The modified Article 8 ab (14) c DAC also raises issues for the client that reports the arrangement. This regarding the effective protection of that confidentiality.

The term 'abstract' has been struck out with regard to the information that must be given on the reportable arrangement. An obligation has been added to describe the arrangement 'in full' together with 'any other information that helps in assessing the tax risk of the reportable arrangement'.

The judgment of 8 December 2022 of the Court of Justice leaves no doubt as to the question of whether a client can be forced to divulge the existence and the content of the communications with a lawyer regarding a reportable arrangement:

- The client has no *obligation* to reveal to tax authorities / third parties that a lawyer was consulted (§ 19).

- Article 7 of the Charter provides secrecy for both content and existence of the legal advice rendered by a lawyer (§§ 27 – 33).

Under the prior version of Article 8 ab (14) c DAC an interpretation was possible that allowed the client to report the arrangement in an *abstract* manner. That abstract could justify leaving out the existence and the content of all information exchanged with a lawyer.

12. When transposing, one could be tempted to consider interpreting the terms 'professional secret' in Article 8 ab (14) c DAC as relating to information regarding the existence and the content on exchanges with a lawyer that are protected under Article 8 § 1 ECHR.

In another case regarding DAC that is pending before the Court of Justice[39], one of the preliminary questions relates to how to interpret the term 'professional secret' under Article 17 (4) DAC. The context is a request from the tax administration of another Member State for the provision of all available information on a client, imposed on a Luxembourg-based law firm that acted under the rules of professional conduct as organized by the Luxembourg Bar Association when rendering advice on corporate law to their client. The Luxembourg Administrative Court wishes to know amongst other issues from the Court of Justice whether the reinforced protection for the legal profession privilege under the judgment of 8 December 2022 of the Court of Justice also applies in that other DAC context. And if it applies, given the lack of a specific provision in Article 17 (4) DAC that qualifies the legal profession privilege as 'professional secret', the preliminary question asks subsequently if Articles 7 and 52(1) of the Charter allow for lawyers to invoke this protection?

In other words : can the fundamental right of private life (Article 7 of the Charter) be invoked as confidentiality against the obligation to answer such a general request for information under DAC? Can that confidentiality be invoked as 'professional secret' in Article 17(4) DAC? Is there a context that triggers protection under Article 47 of the Charter?

Looking at this case from the angle of the Trias Judica, it can be expected that insofar as that activity falls within the scope of the self-regulation as organised by the Luxembourg Bar Association, the protection of confidentiality shall apply. The subsequent question is then whether the 'general provision' of Article 17(4) DAC holds sufficient quality and safeguards. The answer to that question may well be of interest for the modified Article 8 ab (14) c DAC that Member States are to transpose.

Considering the Charter, transposing Article 8 ab (14) c DAC must be refused if this leads to a violation of Primary Union law. Member States should organize in clear and precise terms a protection so that the reported information on the arrangement must not include information on the existence and the content of communications with a lawyer that acted within the scope of his rules of professional conduct.

This is preferable under the Trias Judica than interpreting 'professional secret' as including confidentiality outside the context of litigation. Such broad interpretation of the notion of professional secret outside the scope of Article 47 of the Charter may lead in turn to confusion when applying other Union law that refers to that same notion.

[39] ECJ, pending Case C-432/23, *Ordre des avocats du Barreau de Luxembourg*

Article 47 of the Charter provides a protection in full for activities of the legal profession relating to defence in the context of actual or possible litigation. It is a notion that is related to Article 6 ECHR, not Article 8 § 1 ECHR. But Article 8 § 2 ECHR protects both 'professional secret' and 'confidentiality' in turn.

SUPERVISION OVER SELF-REGULATORY BODIES OF THE LEGAL PROFESSION REGARDING AML REPORTING

13. Under the Trias Judica, an obligation for Member States to organize a supervision over self-regulatory bodies of the legal profession is simply unheard of.

The major difference between AML directives and the context of DAC6 is that in the fight against money laundering, one is prosecuting offences or crimes for which it is not possible to ask the accused to incriminate himself – for example, by means of some kind of reporting or declaration – which is prohibited by the 1789 Declaration of the Human Rights as well as by Article 6 of the ECHR.

It is in this context that some professionals, and in particular lawyers, have been asked to assist in the form of a "suspicious transaction report". The limits thereof are well-known: it puts both the lawyer's legal advice and his litigation activities off limits. Conversely, suspicions arising in the course of activities of support for the implementation of an operation or transaction are still reportable.

Although the context of fighting tax abuse in DAC 6 does not apply, it is of interest to take under consideration that at the hearing of the Grand Chamber in case C-694/20, it was argued by some Member States that the notification under Article 8 ab (14) a DAC to the revenue service of the lawyer's name that invoked earlier the legal profession privilege is justified by the need to ensure "effective control" of the behaviour of these lawyer- intermediaries when invoking their legal profession privilege. That argument is akin to the one now used in AML regarding the need to organise a supervision of the reporting by the self-regulatory bodies of the legal profession. In its judgment of 8 December 2022, the Court of Justice considered, by a balancing of the importance of the objective and the seriousness of the interference[40], that the objective of ascertaining whether that lawyer-intermediary is justified in relying on the legal profession privilege does not allow disclosure of the identity of the lawyer-intermediary (§§ 42 and 54-58). DAC 8 subsequently removed that obligation in Article 8 ab (14) a DAC. It can be doubted whether that obligation to supervise the self-regulatory bodies of the legal profession will stand after such a balancing of the importance of the objective and the seriousness of the interference with the independence of the legal profession.

14. Such an ambition in a directive is striking – controlling lawyers undermines the self-regulation and independence that are the corner stones of the legal profession privilege that serves the purposes under the Rule of law to enable lawyers to give their legal advice in full independence and loyalty.

[40] see also ECJ, 22 November 2022, *Luxembourg Business Registers and Sovim*, C-37/20 and C-601/20, EU:C:2022:912, § 66

The objective of organising a supervision over the self-regulatory bodies of the legal profession is to exert control over first instance reporting by lawyers and how and why the self-regulated body subsequently decided whether or not to report to the authorities.

Such an objective is at odds with the case-law of the ECHR and Primary Union law: only real estate and financial operations with the involvement of lawyers can be the object of the obligation to report. In that context suspicion may arise – a subjective notion – as to whether or not criminal money is being laundered. In order to avoid the lawyer being mistaken on the suspicion or the information being obtained in another context that is protected, the report is to be first presented to the Chair of the Bar Association only. Verifying whether or not the suspicion was founded entails examining confidential information.

The obligation to transpose supervision is itself based on a suspicion that the self-regulation by the legal profession fails. The basis for this is that there are so few reports. What is the evidence for that?

To start with, Bar Associations have organised over the years information sessions, sometimes mandatory, to alert lawyers to observe a set of safety measures before accepting the client's mandate to assist in financial and real estate operations. Without mandate, there is no risk of being further involved in operations that may trigger in turn an obligation of first instance reporting.

When the lawyer suspects and reports a possible criminal source of the money, he or she must also stop intervening. This conduct follows from the rules of professional conduct. When in doubt as to whether there is cause to report, the lawyer can also decide not to continue his involvement in that operation, just as a precaution as soon as he or she considers there is something abnormal without having actual clues about any criminal activities being possibly at the origin of the funds. Such logic of self-protection leaves few cases for first instance reporting. It should not be surprising that there are in turn few reports from the side of the self-regulatory bodies of the legal profession to the authorities.

Also, when a lawyer is suspected to be knowingly involved in a crime of money-laundering, his rights of defence (nemo tenetur) against such a suspicion are violated by an obligation of (first instance) reporting. A supervision over the self-regulatory body of the legal profession is not appropriate to deal with such active involvement. The person concerned ceases to be a lawyer and his actions are no longer covered under the rules of professional conduct.

How many criminal investigations show evidence that information that was first reported to the Chair of the Bar Association should have been subsequently reported to the authorities? How many first instance reports were filed in relation to the 'few cases' that were reported? What is 'few' to start with? The preparatory documents do not provide any hard information to work with. No debate is made possible on the necessity for that measure. This affects the importance of its objective. What can then rule out a purely politically motivated interference? And how do Member States expect to transpose this obligation without granting themselves the prerogative of checking the existence and the content of confidential information and interfere with the independence of the legal profession? What's more, on the basis of what seems to be no more than a mere hypothesis?

15. It is important to recall in that regard that the first AML Directive 91/308 of 10 June 1991 organized in its Article 6 (3) the principle of first instance reporting for notaries and 'independent legal professions' to 'an appropriate self-regulatory body', precluding the obligation to report information obtained in the course of ascertaining the legal position or assisting in legal proceedings.

In its judgment of 26 June 2007[41] the Court of Justice allowed for that first instance reporting to apply to the legal profession. The preliminary question being limited to a violation of Article 6 ECHR (Article 47 Charter), the Court of Justice did not examine the violation of Article 8 ECHR (Article 7 Charter) when deciding:

> *"(§ 32) Lawyers would be unable to carry out satisfactorily their task of **advising**, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained **in the course of related legal consultations**.*
>
> *(§ 33) .. As a rule, the nature of such activities (that qualify for reporting by lawyers) is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial.*
>
> *(§ 34) .. A lawyer is exempt, by virtue of the second subparagraph of Article 6(3) of the directive, from the obligations of information and cooperation."*

Obligations of first instance reporting can only be applied to activities of lawyers that do not fall within the scope of Article 47 of the Charter. In an article that was published in a Belgian law review in October 2023, K. Lenaerts points out in footnote 26[42] that the judgment of 26 June 2007 relates to activities that prepare or execute operations of a financial or real estate nature or when lawyers act on behalf of their client in such operations.

It is logical to limit the obligation to report to involvement in actions that may constitute the crime of money-laundering if the source of the money could be later on found to be criminal. The Directive of 10 June 1991 excluded from its scope the activities of legal professions concerning ascertaining the legal position. The judgment of 26 June 2007 of the Court of Justice also cites the activity of advising as protected against passing on information related to legal consultations. The question as to whether information obtained by rendering legal advice can justify the obligation to report suspicions of money-laundry by lawyers is now clearly settled under the protection of the judgment of 8 December 2022 of the Court of Justice. Logically, the scope of operations eligible for first-instance reporting should be limited to information, obtained from active involvement in financial and economical operations, that confirms or can reasonably point at underlying criminal activities as a source for the money that pays for that operation.

---

[41] ECJ, 26 June 2007, C-305/05, *Ordre des barreaux francophones et germanophone and Others,* EU:C:2007:383 (§§ 32 – 34)

[42] K. Lenaerts, 'L'avocat et l'État de droit dans la jurisprudence de la Cour de Justice de l'Union européenne.', *Le Pli juridique,* n° 65, October 2023, p. 3-7 (The lawyer and the Rule of Law in the case-law of the ECJ).

Legal advice that is rendered without involvement by the lawyer in subsequent operations of a real estate or financial nature should not trigger the obligation of first-instance reporting.

What if the client decides to abort an operation after the lawyer has ascertained the legal position of the client with respect to the general risk of being exposed to an investigation of money-laundering for that specific type of operation? There is no proportionate cause for obligations for lawyers to report suspicions if there is no subsequent action in which he or she risked being further involved. When the risk for committing the crime of money-laundering has become impossible, the protection of the fundamental right of private life should without question prevail for effectively protecting the proper functioning of the Rule of law.

16. Under the combined ECHR, Treaties and Charter, Member States should provide means and manners by which to achieve the protection of professional secrecy, confidentiality and privacy for lawyers and their clients, also when ascertaining the legal position of their client[43].

The ECtHR considered in a judgement of 6 December 2012[44] that the presence of the Chairman of the Bar constitutes a guarantee when it comes to protecting the legal profession privilege[45] :

> "*regard being had to the legitimate aim pursued and the particular importance of that aim in a democratic society, the obligation for lawyers to report suspicions (to their Chairman), does not constitute disproportionate interference".*

And that is what it is all about under AML : a suspicion that a crime is to be committed justifies the interference with confidentiality. Not proof. A suspicion is believing that something is wrong without proof or on the basis of slight evidence. It is therefore not unthinkable that

---

[43] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, O.J., 5 June 2015, L 141/73, recitals 39 and 40 :

(39) For certain obliged entities, Member States should have the possibility to designate an appropriate self-regulatory body as the authority to be informed in the first instance instead of the FIU. In accordance with the case-law of the European Court of Human Rights, a system of first instance reporting to a self-regulatory body constitutes an important safeguard for upholding the protection of fundamental rights as concerns the reporting obligations applicable to lawyers. Member States should provide for the means and manner by which to achieve the protection of professional secrecy, confidentiality and privacy.

(40) Where a Member State decides to designate such a self-regulatory body, it may allow or require that body not to transmit to the FIU any information obtained from persons represented by that body where such information has been received from, or obtained on, one of their clients, in the course of ascertaining the legal position of their client, or in performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.

[44] ECtHR, 6 December 2012, *Michaud v. France*, 12323/11 - §§ 130-133.

[45] with reference to ECtHR, 24 July 2008, *André and Another v. France* (18603/03) (§ 42-43), 25 February 2003, *Roemen and Schmit v. Luxembourg* (51772/99) ECHR 2003-IV (§ 69).

there was eventually no criminal origin to that money. In its judgment of 27 April 2017[46], the ECtHR recalled that vague and unspecific allegations of involvement of a lawyer in a crime cannot justify the disregard of the specific protection enshrined in the law concerning lawyers. Without specific protection of the legal profession privilege being applied, there was a violation of Article 8 ECHR for requesting information on that basis (all bank receipts for a consecutive period of two years). In a judgment of 24 May 2018[47], the ECtHR recalled that in the absence of plausible cause that a criminal act is perpetrated or being prepared, there is no legal cause for inferring with the confidentiality of a written note between a lawyer and a client.

17. The cause for organizing a supervision of the self-regulating bodies of the legal profession is clearly undocumented and in obvious violation of the Treaties and the Charter under the Trias Judica by suspecting the legal profession in a general manner of unlawful behaviour without plausible cause and thereby poses an illicit threat to its independence.

If authorities should refrain from interfering with the private life of an individual lawyer when there is no plausible cause or unspecific allegations relating to any involvement in criminal actions, what can one say more about this supervision in the absence of any evidence of a documented fault or even a mere shortcoming by the self-regulatory bodies of the legal profession?

It is the self-regulatory body as established and recognized under the law of that Member State, and only that body, that under the Rule of law may regulate in full independence the obligations flowing from all actions done within the perimeter of that profession and its legal professional privilege under the national tradition.

CLOSING CONSIDERATIONS

18. This article hopes, as countless other documents will undoubtably seek to do in the coming months, to create awareness regarding the extent to which the measure already adopted by the institutions and the measure that still is in the process of being adopted are incompatible with the values the European Union should stand for.

The transposals of DAC 8 by the Member States and the further exchanges of views of the representatives of the legal profession with the European Parliament, the European Commission and the Member States on that supervision and other issues may hopefully lead to a more balanced situation that will avoid years of proceedings. For the author, the outcome of such proceedings leaves little – if not any - doubt under the Trias Judica.

Brussels, 19 February 2024,

Paul Verhaeghe
Lawyer

Contact : paul@wanted.law

[46] ECtHR, 27 April 2017, *Sommer v. Germany* (73607/13 - §§ 56 and 61).
[47] ECtHR, 24 May 2018, *Laurent v. France* (28798/13 - § 36).