Evaluating the Impact and Practical Operation of Client-Attorney Privilege in the Context of Tax and Financial transparency

Executive Summary[1]:

Lack of transparency, excessive secrecy, use of opaque instruments to hide proceeds of crime are all obstacles which prevent tax authorities, FIUs and other law enforcement agencies to conduct an effective investigation. The financial crisis of 2009 and data leaks reported in the media increased the demand for transparency. In recent years a number of countries have observed that a small minority of the legal profession have been misusing client attorney privilege (C-AP) to block investigations by tax authorities and FIUs. Differences in the interpretation of existing C-AP standards also frustrate cross border investigations and increase the time required to resolve cases which have been highlighted in cases involving leaks from Mossack Fonseca, paradise papers. C-AP standards have been evolved over the years by the international community and is linked to the fundamental need to protect the confidentiality of the communication between a client and his lawyer. E.g. Principle 22 to the UNs "Basic Principles on the role of lawyers" calls on all government to respect the confidentiality of communication between clients and lawyers. Article 8 of the European Convention on Human Rights (Right to respect for private and family life) protects C-AP as a fundamental human right in Europe (Michaud v. France). This right of privilege on communication between lawyers and clients is not contested. However, there are limitations e.g. in cases of criminal activities, there is scope for misuse of C-AP due to divergence in interpretation and scope of the privilege across jurisdictions. Experience in a few countries has shown that all these provide opportunities to those who wish to hide misconduct of there clients and misuse C-AP to frustrate genuine investigations. In this regard, this study aims to address the issue of misuse of C-AP through additional guidance and education to bring behaviour change in legal professionals. The issue is not to amend C-AP but to gain a better understanding of its implications. It focuses on the role of legal professionals who are now, increasingly, obligated to provide information identifying their clients, potential high-risk transactions, or the use of tax avoidance schemes.

[1] This is an initial draft prepared by the WU Team and will later include results from the survey on C-AP being carried out as part of the Tax Transparency and Corruption Project. Please do not cite or circulate this document without the permission of the WU Team.

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1. Introduction[2]

Opacity in the global financial system has exacerbated tax avoidance and evasion, money laundering, corruption and bribery, amongst other financial crimes. Recognising this, tax and financial transparency standards have, over the last twenty years, necessitated the lowering of traditional secrecy barriers. The OECD 1998 Harmful Tax Competition report first identified secrecy, in the tax context, as a harmful characteristic of a tax haven and underscored the role of 'protections against scrutiny by tax authorities' that prevented the effective exchange of information on taxpayers benefiting from a low tax jurisdiction.[3] The dangers of banking secrecy had, by then, already been recognised in various jurisdictions as exacerbating a variety of financial crimes and led to greater requirements for financial institutions to disclose financial account information. The consensus on the need for increased transparency has been strongly linked to the recognition of the difficulty in understanding or dealing with, 'situations that are hidden or clouded by complex mechanisms linking several countries in a chain of operations and a string of operators and intermediaries that obscure the situation and the tax base'.[4]

The misuse of corporate vehicles and opaque legal arrangements has consistently challenged the effectiveness of global and national tax systems enforcement efforts to curtail these activities. Since transparency has frequently been perceived as being 'proportionate to its purpose'[5] the pressure placed on policymakers following the global financial crisis and subsequent data leaks[6] led to an even greater awareness that cooperation on transparency and exchange of information is essential. This has largely been informed by changing perceptions of tax avoidance,[7] greater support for international reform and enforcement and strengthening of legal rules to curtail tax and financial secrecy. In addition, societies are demanding that their government's crackdown on abuses by large corporations that are exposed in media leaks and, globally, governments have undertaken investigations to identify clients of firms that promote tax avoidance or tax evasion through the use of offshore trusts, companies and accounts.[8] It has also underscored the importance for all law enforcement agencies to have access to better information to conduct investigations that are necessary to determine transactions, offshore accounts and/or entities controlled by nominee directors to hide the taxpayer's beneficial ownership.[9]

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2 This work was supported by the Siemens Integrity Initiative

3 OECD, *Harmful Tax Competition: An Emerging Global Issue*¸ OECD (1998), pg.23. Available online at: https://www.oecd-ilibrary.org/docserver/9789264162945-en.pdf?expires=1588934015&id=id&accname=ocid177428&checksum=A3BDDBDCDF2737089B209107ED0580DA

4 Cecile Remeur, 'Tax Transparency: Openness, Disclosure and Exchange of Information', European Parliamentary Research Service (September 2015), pg.4. Available online at: https://www.europarl.europa.eu/ReData/etudes/IDAN/2015/565902/EPRS_IDA(2015)565902_EN.pdf

5 Ibid, pg.25

6 Such as the Luxembourg Leaks and Panama Papers.

7 UNCTAD (2015) ix, 190. UNCTAD's simulation indicates that the amount of corporate profits shifted from developing economies is an estimated USD 450 billion and, at a weighted average effective tax rate across developing countries at 20 per cent, annual tax revenue losses of approximately USD 90 billion can occur. OECD data on FDI highlights that "Luxembourg and the Netherlands combined have more inward investment than the US, a substantial part of which has been in SPEs with no evident substantial economic activity, and that Ireland has more inward investment than either Germany or France; points out that according to its National Statistics Office, foreign investment in Malta amounts to 1 474 % of the size of its economy." (http://www.europarl.europa.eu/doceo/document/A-8-2019-0170_EN.html).

8 For example UK and European efforts at curbing offshore tax abuse: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802253/No_safe_havens_report_2019.pdf; http://www.europarl.europa.eu/doceo/document/A-8-2019-0170_EN.html.9 *Taylor Lohmeyer PLLC v U.S.*[SA-18-CV-1161-XR] 2. The IRS investigated the tax liability of certain clients of the law firm and sought information that may reveal the identities and international activities of such clients. The firm argued that the information is protected by C-AP and sought to rebut the summons. The court found that the law firm made a blanket assertion of privilege without producing a privilege log or similar devices that detail the foundation for each claim on a document by document basis.

9 *Taylor Lohmeyer PLLC v U.S.*[SA-18-CV-1161-XR] 2. The IRS investigated the tax liability of certain clients of the law firm and sought information that may reveal the identities and international activities of such clients. The firm argued that the information is protected by C-

As restrictions on secrecy have increased over time, requirements on transparency have increasingly infringed on the right to privilege. In response to governments' probing of their clients' affairs, companies and individuals often respond with blanket claims of C-AP (C-AP).

C-AP provides legal professionals and their clients with a far reaching duty of confidentiality in comparison to other institutions.[10] Breach of C-AP is protected by criminal sanctions in some countries, even in interactions with tax authorities.[11] A strict application of privilege follows the principle that 'once privileged, always privileged' and extends to the legal professionals.[12] However, in the vast majority of countries, whilst C-AP may be unlimited, waivers in respect of requests for information by tax authorities may still be permitted.[13] In addition, the mounting strain on tax authorities to monitor, identify and share information about the use of preferential tax regimes by taxpayers has led to increased adoption of rules that have indirectly bypassed the use of C-AP. For instance, mandatory disclosure rules (and similar regulations) override privilege by requiring that intermediaries, like legal professionals, involved in designing or promoting certain cross-border arrangements, report them to the tax authority. The objective is to monitor and address cases of aggressive tax planning.

This paper provides some background to the challenges posed by C-AP from the perspective of tax administrations and, to a limited extent, financial intelligence units (FIUs). The paper is structured as follows: a brief background on the elements of privilege is provided concerning its application in Common Law countries, notably Australia, South Africa, the United Kingdom and the United States, where after different forms of abuse of privilege are discussed. The paper then highlights the types of exceptions and waivers and discusses the potential for the abuse of privilege. This is followed by an analytical overview of the importance of C-AP in tax and financial transparency frameworks, mandatory disclosure regimes and other tax reporting standards. Some examples of the experiences of various regimes are provided with a specific view to identifying potential mechanisms to minimise the potential for abuse. The paper concludes with suggestions on improvements that can be made, including the potential for policy changes to address this issue.

2. Legal Framework of C-AP

Although seldom codified, C-AP is a unique legal doctrine.[14] It is the oldest privilege for confidential communication, dating back to the monarchy of the Queen of sixteenth-century England.[15] Initially, C-AP was intended to support the Attorney's honor and his oath to guard the secrets of his clients if called to be a witness against them.[16] The seventeenth-century however, brought a new utilitarian justification that continues to exist till the present day.[17]

AP and sought to rebut the summons. The court found that the law firm made a blanket assertion of privilege without producing a privilege log or similar devices that detail the foundation for each claim on a document by document basis.

10 Eleonor Kristoffersson & Pasquale Pistone, 'General Report', in Eleanor Kristoffersson et al., *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law Part 1*, Deutsche Nationalbibliothek (2013), pg.14

11 Ibid

12 Ibid

13 Kristoffersson & Pistone (2013), n.11, pg.14

14 1 McCormick On Evidence § 87, at page 386 (Kenneth S. Broun Ed., 6Th Ed. 2006); 8 John Henry Wigmore, Evidence In Trials At Common Law § 2290, at page 542 (John T. Mcnaughton Ed., Rev. Ed. 1961)

15 John William Gergacz, Attorney-Corporate Client Privilege § 1.04, At page 1-4(3D Ed. 2000); Wigmore, supra note 13, at page 542

16 McCormick, supra note 13, at page 387

17 Elizabeth G. Thornburg, Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, 69 NOTRE DAME L. REV. 157, page 160-61 (1993).

Today, it seeks to encourage "*full and frank communication*" between the client and the Attorney.[18]

2.1 Wigmore's Classic Definition

C-AP is a legal principle of the law of evidence that protects from admissibility of confidential communications between a client and their Attorney as evidence. The general contours of the C-AP, as defined by noted American jurist John Henry Wigmore in his famous treatise on evidence are: legal advice of any type sought from a professional legal adviser acting in that capacity; the communication relates to that purpose; is made in confidence by the client who claims permanent protection of the communication, and the client does not waive the privilege. The client is the holder of the privilege, and the Attorney has an ethical obligation to maintain the secrecy of the communication.[19] In addition to the preceding, the advice must not facilitate the commission of crime or fraud.[20]

That being said, C-AP is not of blanket application; not every communication between a client and Attorney is accorded protection. To give an example, C-AP does not apply when an attorney provides non-legal advice and acts as a business advisor or negotiator. The recent revelations on aggressive tax planning in the Paradise and Panama leaks have thrown light on the issue of C-AP where accused have been relying on C-AP during defence in court trials in reference to setting up shell companies.[21] Tax authorities continue to be troubled by large-scale claims for the privilege.[22]

Though C-AP exists in most jurisdictions, its scope and application vary widely based on the legal system adopted by the jurisdiction. Some of the difference in the Common Law and Civil Law jurisdiction have been enumerated below.

2.2 C-AP and Related Concepts

C-AP is often associated with and at times confused with other concepts such as the duty of confidentiality, litigation privilege, joint client privilege, or common interest privilege. It is therefore necessary to distinguish it from these concepts. This part examines the significant differences and overlaps between C-AP and these concepts.

Table 1: Distinguishing C-AP and related concepts:

C-AP	**Duty of Confidentiality**	**Litigation privilege**	**Joint Client Privilege**	**Common interest privilege**

18 McCormick, supra note 13, at page 388

19 Wigmore, supra note 13, at page 554;

20 Indicators of fraud can include the failure to register or report a potentially abusive tax shelter transaction, where its utilization would have the effect of misleading or concealing tax avoidance. Sub-indicators could include the fact that multiple levels of pass-through entities are used to avoid detection and that profit sharing agreements are in place to benefit from sham transactions (e.g., *BDO Seidman* case). See also *United States v Adams* which concerns waiver of privilege under the crime fraud exception where the State unsuccessfully argued that amended tax returns were prepared and filed in furtherance of the taxpayer's overall scheme to defraud.

21 The Paradise Papers are a set of 13.4 million confidential electronic documents relating to offshore investments that were leaked and made public on 5 November 2017. The documents originate from the legal firm Appleby, the corporate services providers Estera and Asiaciti Trust, and business registries in 19 tax jurisdictions (available at https://en.wikipedia.org/wiki/Paradise_Papers, accessed 26 May. 2020).

22 The Australian tax office (ATO) expressed its concerns on the use of C-AP to frustrate trials in courts; Accessed on: https://www.ato.gov.au/General/Consultation/In-detail/Stewardship-groups-minutes/National-Tax-Liaison-Group/National-Tax-Liaison-Group-key-messages-30-November-2018/?page=2

Only applies to confidential communications[23] between attorney and client	All information,[24]	communications of a non-confidential nature between Attorney and third parties	applies to client-attorney communications where more than one client retains the lawyer in a matter in which they share a common legal interest.[25]	applies where separately represented parties share a common interest in the outcome of the litigation[26]
Exists at any time	Duty of confidentiality triggered when there is an existing relationship between Attorney and client	Exists only in the context of litigation		
Rooted in the confidential nature of the client-attorney relationship		Rooted in the protection of privacy		In the absence of the common interest privilege, the sharing of the privileged information would constitute waiver of C-AP. Thus, common interest privilege is better conceived of as an exception to the waiver rules for C-AP.
Last forever		Ceases to exist upon the termination of litigation		So long as a "common legal interest" exists between the parties, the information is exchanged solely for obtaining and providing legal advice. The communications are intended to be kept confidential.[27]
Does not apply to tax advice/returns				

From the table above, it is evident that there is significant overlap between C-AP and the duty of confidentiality, and they are often mixed, at times used interchangeably or cumulatively. C-AP only applies to *communications* between clients and their lawyers. In contrast, the duty of

[23] The mere fact that there is a communication to a lawyer is not enough to make the communication privileged. In case the information gets revealed in public, the information loses its privilege. Australian High Court, in Glencore International AG held that once privileged communication is disclosed, relief can only be available under a confidentiality agreement between the Commissioner and the plaintiff.

[24] All information that is obtained by the lawyer about the client's affairs: if while representing a client, a lawyer read about the client's affairs in the newspaper or on a blog, the lawyer would still have an ethical obligation to keep that information confidential. The information is not, however, covered by C-AP because it is not a communication between the client and the lawyer. Similarly, if a client e-mailed information to his/her lawyer and copied her accountant, publicist, investment advisor and others on the e-mail that information is unlikely to be privileged but is still covered by the lawyer's duty of confidentiality

[25] The most common example is a single lawyer representing multiple criminal defendants, but the Joint Client Privilege frequently arises in the corporate context, especially in cases involving officers or employees and the companies or corporate parents and subsidiaries. In case of Joint client privilege, waiver of privilege by one party does not waive privilege over information.

[26] *Fraser Milner Casgrain LLP v MNR*, 2002 BCSC 1344, 2003 DTC 5048 (BCSC).

[27] Schaeffler v. the United States, 806 F.3d 34, 40 (citing the United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)); Katz v. AT&T Corp., 191 F.R.D. 433, 436 (E.D. Pa. 2000) ("The common interest doctrine is an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information with a third party.").

confidentiality applies to all *information* obtained by the lawyer about the client's affairs during the term of his professional service. Litigation privilege is more limited in scope and is designed to allow parties to investigate potential disputes without the worry that those investigations could be disclosed to the other side. While C-AP applies only to confidential communications between client and Attorney, litigation privilege applies to communications of a non-confidential nature between the Attorney and third parties and also includes material of a non-communicative nature. For litigation privilege to exist, the communications must have been made for the sole or dominant purpose of conducting that litigation; and the litigation must be adversarial.[28] Joint client and common interest privilege permit sharing of confidential information between parties.

3. Differences in treatment across Common law and Civil law jurisdictions

The legal systems of the world are divided into Common law and Civil law jurisdictions with some having a mix of both the systems. Though not completely different, there are few differences in treatment of C-AP in common law and civil law jurisdictions. This part examines the significant differences in the treatment of C-AP across Common law and Civil Law jurisdictions.

Table 2: Distinguishing C-AP across Common law and Civil Law jurisdictions[29]:

C-AP	**Common law**	**Civil law**
Starting Point	Protects from the production of confidential documents or communications that have been created either to obtain legal advice or in preparation for litigation.	Duty on a party to disclose not more than the documents which are required to support its case and upon which it wishes to rely. In some countries, disclosure is not even made to the other side but the court.
Discovery of documents[30]	Rather broad in comparison to civil law jurisdictions	Limited

[28] In *Bilta v RBS* , the high court of England and Wales upheld a claim to litigation privilege over documents (including interview transcripts) generated during an internal tax investigation undertaken co-operatively after a threatened adverse tax assessment by HMRC. In the tax context, litigation privilege is a useful defence which could be used by taxpayers to protect the information prepared/disclosed while contemplating for litigation. However, to assess whether litigation was the dominant purpose, courts generally seek explanations and materials from the party claiming privilege. Regulatory investigations and administrative procedures in South Africa are not automatically considered to be adversarial from the outset and thus may not necessarily attract litigation privilege.

[29] Privilege: A world Tour, by Diana Good, Patrick Boylan, Jane Larner and Stephen Lacey, Linklaters, Accessed from https://uk.practicallaw.thomsonreuters.com/2-103-2508 on 09.10.2020

[30] Discovery is a pre-trial procedure by which each parties to the case can obtain evidence from the other party or parties by means of discovery devices such as interrogatories, requests for production of documents, requests for admissions etc. Accessed from https://en.wikipedia.org/wiki/Discovery_(law) on 09.10.2020

Right to waive privilege	The right belongs to the client and only he/she may waive it	Lawyer is under a duty not to disclose the information in it. In some jurisdictions, even the client may not waive C-AP
Country Examples	• **Canada** treats Solicitor-Client Privilege and Litigation Privilege as separate doctrines with separate rationales, rules and exceptions, although they may overlap in the application at times. • In the **U.K**. and other Common Law jurisdictions that follow, both privileges are treated together under the rubric of Legal Professional Privilege. • In **Australia**, the boundaries to exceptions to C-AP concerning tax matters are dependant on the judicial decisions of various courts which creates uncertainty depending upon the developments in judicial precedents.[31] • In **South Africa,** C-AP is a substantive rule of law and not merely a rule of evidence.[32] • The **US** attorney/client privilege and work product doctrine are the approximate equivalents of legal advice privilege and litigation privilege in the UK.[33] • In **Kenya**, Attorney Client Privilege is anchored under section 134 and 137 of The Evidence Act, Chapter 80 Laws of Kenya.[34] Kenya prohibits lawyers from disclosing	• In countries such as **Italy and Sweden,** tax authorities can carry out inspections at the premises of attorneys (or tax advisors) subject to prior judicial authorisation.[36]

31 Tax Secrecy and tax transparency – the relevance of confidentiality in tax law, Eleonor Kristoffersson et.all, Part 1, page 15

32 Treatment of legally privileged information in competition proceedings – Summaries of contributions, OECD, Page 13

33 Accessed on : https://uk.practicallaw.thomsonreuters.com/2-1032508?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a270973

34 Input from 1st Focus Group Call on Client Attorney Privilege at Global Tax Policy Center, 3rd August 2020

36 Tax Secrecy and tax transparency – the relevance of confidentiality in tax law, Eleonor Kristoffersson et.all, Part 1, page 14

	privileged lawyer-client communication, unless with the express consent of the Client. It further extends to the court process where a client cannot be forced to disclose such communication unless as a witness in court to explain any evidence given but no others. • Similar to Kenya, Attorney Client Privilege exists in **Ghana**[35] in its Evidence Decree, 1975 (NRCD 323). However, for the communication to be privileged, the lawyer or client must have intentions to claim privilege on communication.	

From the above table, it is evident that the treatment of C-AP is not the same across common law and civil law jurisdiction. Both approach the concept from a very different starting point. Common law jurisdiction protects the discovery of communication between attorney and client made to obtain legal advice or for litigation. In contrast in civil law jurisdiction, the client is only required to disclose the documents which are necessary to support its case. Further in case of common law jurisdiction client may waive the C-AP whereas the same right to waiver may not be available in some Civil Law jurisdictions.[37]

4. Difference in the treatment of the in-house legal advice in selected countries

Often, lawyers are employed by companies or other legal entities as in-house counsel tasked with providing advice on various legal issues, including the applicability of selected tax laws. There are certain conditions which apply to such cases to determine the applicability of C-AP and these differ from one country to another. Few of them have been discussed below:

United Kingdom

The meaning of "lawyer" and of "legal advice" has attracted considerable judicial scrutiny, particularly within the context of in-house legal. On this issue, English law differs from the position in the majority of European jurisdictions as well as under EU law itself[38] which considers in-house lawyers "insufficiently independent" from their employers to warrant the protection of privilege. Tax advise from in-house counsels are protected by C-AP in the UK provided that the communications in question are confidential and concern advice which is legal (as opposed to, for example, strategic or purely commercial), and so long as the in-house lawyer retains a valid law practising certificate, English law protects the communication with C-AP.

United States of America

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35 Ghana: Ethics and practicalities, Practical Law UK Checklist 6-214-5022, Published by Thomson reuters Practical Law; Accessed from https://uk.practicallaw.thomsonreuters.com/6-214-5022

37 Accessed on 29.10.2020 https://uk.practicallaw.thomsonreuters.com/2-103-2508?transitionType=Default&contextData=(sc.Default)&firstPage=true

38 The EU competition authorities; legal advice privilege will not cover advice from in-house legal in circumstances where a company is under investigation. For example, see Akzo Nobel Chemicals Limited v European Commission [Case C-550/07].

The United States Supreme Court confirmed in **Upjohn Co. v. United States**[39] that communications between corporate counsel and corporate employees to facilitate the provision of legal services are privileged. However, the applicability of C-AP to in-house counsel widely differs from state to state in America. In Arizona, where an investigation is initiated by the corporation and factual communications are made between in-house counsel and other corporate employees, the privilege does not apply to the communications unless they concern the employee's conduct within the scope of his or her employment. The inquiry is made to assist in-house counsel in assessing or responding to the legal consequences of the employee's conduct for the corporation.[40] California recognises that in-house counsel may serve as an attorney for purposes of the C-AP, however in circumstances where communication is for business purposes or where the business and legal portions of communication are not separable, the C-AP is inapplicable.[41] In Hawaii, the C-AP does not apply to communications from lower-level employees with in-house counsel.[42] In Minnesota, communications with in-house counsel are analysed on a case-by-case basis to determine if a communication is protected or privileged.[43] The C-AP is codified in Montana (Code Annotated Section 26-1-803) which provides a privilege to communications between an attorney and client in the course of the attorney's professional employment. This statute has been found by the Montana Supreme Court on several occasions to protect communications between in-house counsel and the corporation.[44] Under Missouri law, communications between a corporation's in-house counsel and its directors, officers and employees will be privileged if the conditions prescribed therein are present.[45] In New Hampshire, Rule 502 of New Hampshire Rules of Evidence, protects communications between in-house counsel and the company for which such counsel is employed with the C-AP.[46] New Jersey extends the C-AP to confidential communications between in-house counsel and officers, directors or employees of the companies they serve who are deemed members of its so-called "litigation control group."[47] In New Mexico, C-AP applies to in-house counsels by a rule of evidence promulgated by the New Mexico Rule of Evidence 11-503.[48] New York, Ohio, South Carolina, Tennessee, Utah, Virgin Islands and Virginia bestow the C-AP on communication with in-house counsel.[49]

EU Countries:

European Union (EU) takes an entirely different approach. The EU does not protect communications between in-house counsel and corporate employees. Although the legal-professional Privilege is viewed as a fundamental right among the European Community (EC) members, it requires the lawyer's independence, and the communication must be related to the

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39 449 U.S. 383 (1981),

40 *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 506, 862 P.2d 879 (1993). Also see In-House Counsel and the Attorney-Client Privilege, pg 74

41 See, e.g., Chicago Title Ins. Co. v. Superior Court, 174 Cal. App. 3d 1142, 1151 (1985), Also see In-House Counsel and the Attorney-Client Privilege, pg 75

42 Also see In-House Counsel and the Attorney-Client Privilege, pg 7643 Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 399 n.6 (Minn. 1979), Also see In-House Counsel and the Attorney-Client Privilege, pg 77

43 Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 399 n.6 (Minn. 1979), Also see In-House Counsel and the Attorney-Client Privilege, pg 77

44 Union Oil Co. of California v. District Court, 160 Mont. 229, 503 P.2d 1008 (1972), Also see In-House Counsel and the Attorney-Client Privilege, pg 78

45 Meredith, 572 F.2d at 608, Also see In-House Counsel and the Attorney-Client Privilege, pg 81

46 Also see In-House Counsel and the Attorney-Client Privilege, pg 86

47 Ibid, pg 88

48 Ibid, pg 90

49 see In-House Counsel and the Attorney-Client Privilege, pg 91-101

client's right of defence.[50] Following the Azko Nobel case[51], in-house counsels are considered by the EU courts to be "insufficiently independent" of their employer companies for the attachment of privilege to their advice. Therefore, any communications with in-house counsel may not attract privilege.

South Africa

South Africa has C-AP under the common law system that also extends to in-house legal counsel. The same has been confirmed in ***South African Airways Soc. v BDFM*** **Publishers (Pty) Ltd and others**[52] wherein it was clarified that all communications from an attorney who is not in private, independent practise but is an employee of an entity, such as an in-house legal advisor, are also subject to privilege.

Asia- Pacific

In Asia-pacific, Australia and New Zealand uphold the applicability of C-AP to in-house legal counsel. Some of the broad characteristics in both of the legal systems have been discussed below:

Australia

The general principle is that the law in relation to privilege applies in the same way to in house counsels as for external lawyers. The mere fact that the lawyer is in house counsel does not affect the applicability of C-AP. Definition of "client" in the Federal Evidence Act[53] includes, among other things, a person or body who employs a lawyer (including under a contract of service) and the same has been upheld by Australian High Court in Ritz Hotel Ltd.[54]

New Zealand

New Zealand High Court following similar jurisprudence from Australia has concluded that Privilege does extend to in-house lawyers, provided they are acting as lawyers and not in some other non-legal capacity, such as a company director or manager.[55]

Summary

The country experiences enumerated above provide an overview of C-AP between in-house counsel and the officers, directors or employees of the companies they serve in selected jurisdictions. In a tax context, C-AP between in house counsel and company staff (e.g., officers, directors and employees) becomes relevant where in-house counsel is the first line of legal defence who advise on the issues ranging from day-to-day tax compliance to litigation in courts on tax matters. Therefore communication with in-house counsel is of significant importance.

In the UK, C-AP applies to communications with in-house counsel provided the communication in question is confidential and concerns legal advice. Similarly, Australia, New Zealand and South Africa, following the common law tradition, apply C-AP to communications with in-house legal counsel. Whilst the US follows similar common law traditions; its treatment differs from State to

[50] AM&S Europe Ltd. v. Commission of the European Communities, 1982 E.C.R. 1575, Case No. 155/79.

[51] Akzo Nobel Chemicals Ltd. v. E.U., 2010 E.C.R. Case No. 550/07

[52] Accessed on 18.05.2020 https://www.saica.co.za/integritax/2016/2531._Legal_professional_privilege.htm[53] *South African Airways Soc. v BDFM* Publishers (Pty) Ltd and others ([2015] ZAGPJHC 293) Accessed on 26.05.2020 https://www.legislation.gov.au/Details/C2018C00433

[53] *South African Airways Soc. v BDFM* Publishers (Pty) Ltd and others ([2015] ZAGPJHC 293) Accessed on 26.05.2020 https://www.legislation.gov.au/Details/C2018C00433

[54] Ritz Hotel Ltd v Charles of the Ritz Ltd and anor (1987) 14 NSWLR 100

[55] Miller v Commissioner of Inland Revenue[56] Strassberg (2007) 478.

State with some States having codified the C-AP in their local statutes while some follow the ruling delivered by local courts for guidance. The European Union (EU) stands out in its approach to the treatment of communications between in-house counsel and corporate employees. In-house counsel is considered by the EU courts to be "insufficiently independent" of their employer companies for the attachment of privilege to their advice. Therefore, any communications with in-house counsel may not attract privilege in EU countries. This mismatch in applicability of C-AP to inhouse counsels in EU countries

Generally, when deciding whether legal advice is being sought, an evaluation of the facts of the case is required. As evidenced in various cases, the factual settings may lead to courts having different interpretations of whether the nature of the service is partially legal or predominantly legal. Therefore, in determining whether a claim that legal advice is involved or not, is dependent on the particular factual setting and the settled or unsettled nature of the legal analysis.[56]

When documents are sent to both legal and non-legal staff, they are not viewed as having been created for the primary purpose of seeking legal advice. Therefore, communications with an attorney that require business or accounting advice and that use neither legal reasoning nor knowledge of the law, fail the first test of the privilege.[57] Where such communications consist of a combination of business and legal advice, the privilege will apply solely to those parts of the communications that constitute legal advice. Claims of privilege involving simultaneous communications to an attorney and a non-legal professional have a lesser chance of being viewed as frivolous when there is a possibility that the non-legal professional to whom the communication was made was an agent of the Attorney.[58] The so-called agent must be "needed by the attorney to render legal advice and must be under the direction and supervision of the attorney at the time of the communications."[59] These are primarily factual determinations that will rely on whether foundational facts are present and asserted in supporting affidavits or privilege logs.

It can be argued that if the communication was necessary for the Attorney's provision of legal advice and services and the proponent can identify a strong nexus between the consultancy and the Attorney's role, then it should be protected.[60] Beardslee[61] suggests that in evaluating whether a nexus exists, consideration should be given to (i) whether the legal professionals are skilled in the area legal advice is sought for; (ii) how the communication was done and distributed;[62] (iii) whether there is coexisting documentary proof supporting the interpretation

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56 Strassberg (2007) 478.

57 In South Africa there is not yet a reported judgment in which the tax administration demanded disclosure of documents containing tax advice given by accountants and in which the court has had to rule on whether legal advice given by an accountant is covered by legal professional privilege. It can expected that future cases would lean towards the UK and Australian case law as SA courts have tended to follow those jurisdictions.

58 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [42].

59 Voltz and Ellis (2009) 221. *United States v. Kovel,* 296 F.2d 918, 921-22 (2nd Cir. 1961) where it is held that attorney-client privilege may apply to an individual's communications with an accountant if the communications are "made in confidence for the purpose of obtaining legal advice from the lawyer."; *United States v Adams* No. 0:17-cr-00064-DWF-KMM (D. Minn. Oct. 27, 2018), where a narrow view of the waiver that applies when the taxpayer discloses an accountant's work to the tax administration by filing an amended return, was held by the court.

60 Beardslee (2009) 786. In *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [42] it was held that it is the function that the third party performs which is of importance and not the relationship between the parties. "Where that function is to enable the client to make the communication necessary to obtain legal advice, the third party has been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege."

61 (2009) 788-792.

62 Limiting the distribution may show the communication was primarily in furtherance of legal advice and not for the purposes of protecting unprivileged communication from discovery.

of the facts; and (iv) the substance of the law (e.g., the nature of privilege cannot be transformed into a generic cause of action as a remedy against anyone).[63]

The fact that there is an attorney-client relationship formed to seek legal advice does not mean that all communications made in the context of this relationship are privileged. Each communication must be shown to be to seek legal advice. There are three kinds of information routinely communicated to attorneys by clients that are not commonly viewed as communicated to seek legal advice: the identity of the client, location of the client, and fee or billing information.[64] Concerning the latter, fee information such as time expended, the general nature of work done, fee arrangements, including the fact of payment and who paid, is not viewed as privileged. If revealing this information has the effect of revealing a privileged attorney-client communication, such fee or billing information will be viewed as privileged as well. Therefore in the instance where specifics of legal services or the litigation strategy could be ascertained from the detailed bills, such bills will be viewed as privileged. In the landmark case *Commissioner of Inland Revenue v West-Walker*, Inland Revenue has been unable to trace a taxpayer for unpaid taxes.

Consequently, a notice was served on a lawyer who had previously acted for the taxpayer that required the furnishing of any information that may relate to the financial position of the taxpayer.[65] The lawyer declined to do so without his client's authorisation, and the Court found the refusal to be justified to the extent that the information fell within the common law privilege. Also, the Court found that the request by Inland Revenue was defective because it contained no findings of fact (regarding the nature of the documents in the lawyer's possession) and that the notice may have been "invalid for uncertainty" or merely served as a fishing expedition.

The South African case, *A Company and Two Others v CSARS*[66] , involved an application by a group of companies for a declaratory order that certain contents of two fee notes rendered by their attorneys are subject to the claim of legal advice privilege that they have sought to assert as the basis of their refusal to disclose portions of the invoices when complying with a request by the Commissioner of the South African Revenue Services (SARS) in terms of s 46 of the Tax Administration Act 28 of 2011. SARS sought the content of the invoices to confirm that the applicants, or fellow entities in the group of companies of which they were part, knew the flow of funds involved in particular structured finance arrangements in respect of which SARS had decided to reassess the third applicant's liability for payment of income tax. Copies of the invoices in question have been supplied to SARS, but the applicants have redacted the content thereof that is subject to the claim of privilege.[67] The privilege was claimed on the basis that "the nature of the advice sought by the first and third applicants is discernible from the invoices". In deciding the case, the Court highlighted that, (i) in general, it is not possible to judge whether the privilege is validly claimed or not if the context is not provided; (ii) that mere reference to the relevant content of an otherwise unprivileged document or communication is

63 Glencore International AG v Commissioner of Taxation [2019] HCA 26 [16:40].

64 Strassberg (2007) 483.

65 Cooke, R 1954. Solicitor and Client – Privilege – Statutory Interpretation" [1954] CLJ 156, 11VUWLRP46/2017, Cooke Paper 70/2017.

66 High Court Western Cape [2104] Case No: 16360/2013

67 In deciding whether the redacted contents constituted privilege, a judicial peek/in camera review was taken at/of the covered up portions. The practice has on occasion been adopted in South African courts to allow the judge to make a "just" decision of a disputed matter. The practice arose in the context of the determination of interlocutory disputes about the right of one party to inspect discovered documents with regard to which the other party had claimed privilege. It entails the judge looking at material that is not available to the party against whom the alleged right of nondisclosure is asserted. That self-evidently puts the party that is kept in the dark, as it were, at a disadvantage and it limits the assistance that a court is ordinarily able to derive for the purposes of deciding contentious questions from argument addressed to it by parties who are equally equipped. Similar to the US (see *Jones v. Boeing Co*., No. 94-1245-MLB, 1995 WL 827992 (D. Kan. Aug. 30, 1995), the practice is only applied where it is absolutely necessary or as a last resort. The inherent risk being that it may enable a judge to supplant their own substance and political preferences. In South Africa, statutory provision is made for the practice in s 80(1) of the Promotion of Access to Information Act 2 of 2000.

insufficient to claim legal advice privilege; (iii) that if the fee note set out the substance of the advice, or contained sufficient particularity of its substance to constitute secondary evidence of the substance of the advice, privilege can be claimed.[68]

5. C-AP on advice from non-attorneys and non legal advice

Applicability of C-AP on advice from non-attorneys is an important issue in tax context as much advice is provided by non-attorneys like accountants. Further, in the tax context, there are issues like non-legal advisory (e.g. accounting advisory) for taxation on which client may seek the advice of attorneys. Therefore it becomes crucial to understand the implications of C-AP on advice from non-attorneys and non legal advice. The implication of C-AP on advice from non-attorneys and non legal advice have been discussed below.

5.1. Advice from non-attorneys

The qualifications of the person with whom the communication takes place and which is supposed to be covered under C-AP is crucial for the constituting of the privilege. In practice, it is observed that the privilege would not be extended to the professionals who provide legal advice in the case but are not qualified in law, which prevents them from being qualified as attorneys or advocates. Thus, the communication with, e.g., an accountant, where the advice is legal (for example with regards to tax), cannot be qualified as legal advice which will be covered by C-AP.[69] Of course, this exception is to be distinguished from situations falling within the scope of the Kovel arrangement[70], when a person not officially qualified as an attorney or advocate is contacted as such to share their expertise in the case involved.

At the same time, it is also important to note that as the C-AP relates to the lawyer's obligation to defend the rights of its clients, it will not be applicable if the lawyer acts in a different role, for example as a company director or a court-appointed representative. The privilege will not cover any information which the lawyer obtained in this role. The privilege might apply only if the lawyer in his role will seek legal advice from another attorney.[71]

5.2. Treatment of non-legal advice

One of the recurring issues in the practice of the application of the C-AP among states is the approach towards the impact of non-legal advice. Jurisdictions tend to apply various solutions to this matter – ranging from full inclusion of the non-legal advice under the C-AP or any other form of legal privilege to the total exclusion from any form of protection. Here, it is important to note that a single solution applicable to all situations among all jurisdictions, does not exist. This is particularly relevant, taking into account that the increased globalisation undoubtedly encourages MNEs to operate in multiple markets. As beneficial as this can be for the business, it also entangles the companies in various legal frameworks, which might be particularly an issue when investigations or court proceedings are concerned.

When deciding about the treatment of non-legal advice, it seems that an approach shared among many jurisdictions is to determine whether the analysed information, no matter the character, was concerning the general subject of the case. Thus, for example, if a lawyer engages an accountant to advise concerning the analysed matter and bases his legal advice on the

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[68] In the US case of *Israel. v. Rogers*, 688 P.2d 506, 510 (Wash. 1984) it was similarly held that potential incriminating disclosures concerning fees, is not privileged if the substance of the confidential information is not conveyed in the confidential communications.

[69] Itsikowitz, A., Legal Professional Privilege/Intermediary Confidentiality: The Challenge for Anti-Money Laundering Measures, in: Institute for Security Studies Monograph No 124, June 2006.

[70] A Kovel arrangement is premised on the notion that the accountant's communications were "made in confidence for the purpose of obtaining legal advice from the lawyer." And therefore attracts client attorney privilege. It exists in US legal system.

[71] Buyle/Van Gerven, supra note 106, p. 13.

accountant's advice, the latter is also covered by the C-AP.[72] Consequently, the advice or documents from third parties which are not directly related to the subject matter and were not provided as a request for legal advice, will not be covered by the privilege. Interestingly enough, the C-AP is in general not applicable when a lawyer is hired solely as an accountant, or when the lawyer acts as a negotiator or business agent. Finally, it has to be underlined that just the presence of an attorney in a meeting does not necessarily mean that C-AP is constituted – first a relation, i.e. the seeking of legal advice, between the parties must be established. How communication is identified or labelled does not matter in the case of C-AP. The working papers are also covered by client attorney privilege as long they are between client and attorney. However any revelation of work papers to any person other than the lawyers would effectively remove the C-AP from those working papers.[73]

The European Commission presents an interesting approach concerning the privilege. As a general rule, the C-AP is excluded for the communication with other professional advisers. In addition, the privilege is applied selectively to specific information. This means that when a document contains privileged and non-privileged information, the EC can access and use the non-privileged information.[74]

6. Waivers and Exceptions to C-AP

The C-AP is not an principle applicable without limits. In legal systems of various states, there exist both institutionalised exceptions to this privilege as well as situations, in which the privilege is waived. Also, there exist several situations which constitute exceptions to the exceptions.

6.1.Crime-fraud exception

Another exception to the C-AP and similar privileges (e.g. tax practitioner privilege) is the crime-fraud exception, recognised by the judiciary in most states around the world.[75] Under this exception, the communications are not covered by the C-AP in a situation where the client (taxpayer) is trying to obtain advice to cover the commission of a crime or fraud or prevent the unfavourable decision in the proceeding.[76] The historical approach to this exception is based on the view that crime or fraud should not be covered by the professional confidence, as the essence of a lawyer-client relationship required that such a relationship was not constituted to be a vehicle for committing a crime.[77] As pointed out in the literature, the law should not provide for

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[72] Roberts, W.D., Wilbur, K.K., *Attorney-client privilege: consulting with accountants and other experts; and the use of Kovel letters*, Michigan Tax Lawyer – Winter 2016, p. 10-12; relations with accountants (primarily, but not only) with regards to C-AP are covered in the US by the *Kovel* doctrine which was envisaged in the *United States v Kovel* case, 296 F. 2d 918 (2d Cir. 1961); Pacini, C., Seay, P., Placid, R., *Accountants, Attorney-Client Privilege, and the Kovel Rule: Waiver Through Inadvertent Disclosure via Electronic* Communication, Delaware Journal of Corporate Law, Vol. 28, 2003, p. 893-960.

[73] Textron Decision, Accessed on https://www.compliancebuilding.com/2009/09/04/when-work-papers-are-not-subject-to-the-attorney-client-privilege/

[74] https://www.noerr.com/en/newsroom/news/eu-commission-clarifies-treatment-of-legally-privileged-information-in-competition-proceedings, accessed 10.12.2019.

[75] Heffernan, L., Legal Professional Privilege, Bloomsbury Professional, 2011, p. 123 and the case law cited there.

[76] Importantly, if the client decides to commit a crime or to carry out fraudulent activity after he or she has sought legal assistance from the attorney, this legal assistance will still be covered under the C-AP, as the original intention of the client was not fraudulent (see: Auburn, J., Legal Professional Privilege: Law and Theory, Hart Publishing, 2000, p. 161 and the case law cited there). At the same time, however, there exists a practical issue of how to distinguish between already committed acts, which are unconditionally covered by the C-AP and the future acts, which would fall within the scope of the crime-fraud exception. In practice such a distinction might be very difficult and it might turn out that a privileged status of a communication will be known long after the communication has taken place (see Auburn, p. 171, or Higgins A., Legal Professional Privilege for Corporations. A Guide to Four Major Common Law Jurisdictions, Oxford University Press, 2014, p. 232-234).

[77] Heffernan, supra note 99, p. 122-123.

institutions which would aid in breaking the law.[78] It seems natural, then, that the exception will apply regardless of whether the Attorney knew of the client's intention to commit a crime. For a bona fide acting lawyer, the application of the crime-fraud exception would mean that he or she could testify against its client when it turns out that the latter intended to commit a crime when seeking for the legal advice. The Attorney was not aware of it.[79]

What is important to note is that a reverse burden of proof applies if a party wants to oppose the assertion of the privilege by the other party to the proceeding. This means that the opposing party has to submit evidence proving that the intention of the other party (the client) or its lawyer was to commit a crime or that a crime has been actually committed and that the results of Attorney's work served to cover or further developing the crime or fraud at stake in the proceeding.[80] Here, one should also indicate that also the already discussed Kovel arrangement, will not protect the confidentiality of documents or communications if they cover the planning of future criminal acts.

The crime-fraud exception will differ depending on the jurisdiction in which it applies. Perhaps the most significant differences will of course, relate to the scope of crimes covered under this exception, which is no different for possible tax crimes. For example, in the US, there exists an official tax crime handbook which should help the attorneys in the course of advising their clients on criminal tax matters, and in evaluating recommendations for prosecution. At the same time, however, the list of tax crimes listed in the handbook provides a good overview of what kind of acts might be considered as rendering the C-AP void in the case of a client seeking legal help in the course of committing such a crime.[81] It has to be underlined that the crime-fraud exception, although very prominent in the US, is also recognised in other parts of the world, even if under a different name. When analysing the rules binding in various countries, one can note that the crime-fraud exception will apply in particular in the case of advice provided for the money laundering or terrorist financing purposes.[82]

Nevertheless, particular attention has to be paid to the definition of crime in the local legal system, as the crime is only one of the forms of misconduct if the most grave. Therefore, the application of the crime-fraud exception in a specific jurisdiction will depend on what, under the law of this state, falls within the category of crime or fraud.[83] In general, as indicated in the literature, the concept of an act falling within the scope of the exception might embrace a wide catalogue of misconduct.[84] Therefore, a close analysis of local provisions is needed to know what acts will be covered by the exception in the case at hand.

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78 Auburn, J., supra note 100, p. 157.

79 Heffernan, supra note 99, p. 124; Newbold, A.L.E., The Crime/Fraud Exception to Legal Professional Privilege, The Modern Law Review, Vol. 53, Wiley, July 1990, p. 475.

80 Saunders Gregor, K., Smith, E., Tolon, E., *A Brief Exploration of Privilege Nuances in the Tax Context*, Law360, 13 February 2019.

81 The catalogue of tax crimes listed in the IRS Tax Crimes Handbook comprises tax evasion, willful failure to collect or pay over tax, fraudulent withholding exemption or failure to supply information, fraud and false statements, fraudulent returns, statements or other documents and attempts to interfere with administration of internal revenue laws; see: Office of Chief Counsel, Criminal Tax Division, Tax Crimes Handbook, Internal Revenue Service, 2009, https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf, accessed 29.05.2020.

82 In this case, however, the exception should be applied narrowly, i.e. only when the lawyer provides advice using his knowledge being at the same time part of the crime, see: Buyle, J.-P., Van Gerven, D., Professional Secrecy of Lawyers in Europe, Cambridge University Press, 2013, p. 14. It is important to note tha the crime-fraud exception is recognized both in developed (e.g. Finland, Netherlands, Poland) and developing (e.g. Brazil, South Africa, Egypt) countries which apply C-AP. For a detailed survey on the C-AP including the crime-fraud exception, see country reports under https://interactiveguides.lexmundi.com/lexmundi/lex-mundi-global-attorney-client-privilege-guide, accessed 24 July 2020.

83 For examples of offences which are covered under crime-fraud exception in various legal systems, see Higgins, supra note 100, p. 228-232 or country-specific chapters in: Buyle/Gerven, supra n. 106, p. 29-605.

84 Heffernan, supra note 99, p. 125.

The above approach in specific jurisdictions is also backed by the developments on various international fora and in international organisations. In its recommendations, Financial Action Task Force (FATF) listed [85] the designated categories of offences as including tax crimes related to direct taxes and indirect taxes as well as smuggling concerning customs and excise duties as well as customs.[86] This approach was also confirmed by the OECD, which recommended designating tax crimes as predicated offences for money laundering.[87]

6.2.Common interest doctrine and *Kovel* agreement

One of the first examples of a situation in which the C-AP will be waived is disclosing the communication to a third party. There exists, however, an exception to this waiver, known as common interest doctrine. [88] It permits parties to share information with a third party without waiving the privilege. The application of the common interest doctrine is subject to three following conditions which have to be fulfilled cumulatively:[89]

- the disclosure relates to a common interest of the attorneys' respective clients;
- the disclosing Attorney has a reasonable expectation that the other Attorney will preserve confidentiality;
- the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing Attorney was consulted

The main reason behind the application of this doctrine is to enable the parties which work on a joint defence to come up with a coordinated legal strategy. Furthermore, it is also a tool for lawyers handling similar cases of various clients to consult between each other the approach to the analysed issue without disclosing it to other parties without the same interest and thus not risking waiving of the privilege.[90]

Another tool which permits the disclosure of communication, the Kovel arrangement, was developed through the case law of the US court. The main idea behind this concept is to allow the C-AP to be extended to communications with third-party experts, including accountants, under the condition that such experts were contacted to obtain legal advice from the lawyer. The arrangement was established in the case *United States v Kovel*[91]

> '*[…] if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it*

[85] FATF (2012-2019), International Standards on combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France, http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html, accessed 05.06.2020.

[86] Ibid, p. 115-116

[87] OECD, Fighting Tax Crime: The Ten Global Principles, OECD, Paris, 2017, p 54, http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf, accessed 05.06.2020; It is widely recognized that money laundering goes hand-in-hand with tax crime (or rather – tax crimes being frequently a vehicle for money laundering), see more: Unger, B., WP6 Money Laundering and Tax Evasion, http://coffers.eu/wp-content/uploads/2019/11/D6.2-Working-Paper.pdf, accessed 04.06.2020.

[88] Saunders Gregor, K., Smith, E., Tolon, E., *A Brief Exploration of Privilege Nuances in the Tax Context*, https://www.lexisnexis.com/LegalNewsRoom/tax-law/b/newsheadlines/posts/a-brief-exploration-of-privilege-nuances-in-the-tax-context, accessed 10.12.2019.

[89] US courts issued a number of decisions, where these conditions were mentioned, e.g. *Continental Cas. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510 (E.D. Cal. 2010); *Resources California, LLC v. Super. Ct.*, 115 Cal.App.4th 874, 887-88, 9 Cal.Rptr.3d 621; *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203 (Tenn. Ct. App. 2002)

[90] Rowlett, G.A., *The Common Interest Doctrine: Key Practices for Maintaining Confidentiality*, in: Subrogator, Spring/Summer 2011, NASP, p. 72.

[91] *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)

so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; [...] What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service.'

The above means that the privilege constituted between the client and the Attorney will also cover the communications between the Attorney and the third-party expert hired by those Attorneys if the work performed by experts is to help the Attorney better understand technical intricacies and specific issues of the case and to prepare a better line of argumentation for the defence of the client. Hence, C-AP can only apply to the communication connected directly with the matter of the case. Even though in tax cases most likely the privilege will mainly be associated with employing an accountant by the Attorney, the privilege does not discriminate between the types of expert involved, as long as their involvement in the case is for the purposes connected with a better understanding of the case by the Attorney. Of course, it has to be mentioned that this approach privilege exists only in the USA and has not been adopted by other jurisdictions. Judicial authorities in England and Wales, have been reluctant in extending the privilege to tax advice given by accountants.[92]

6.3.Country-specific solutions

The exceptions mentioned in 6.1 and 6.2 are just general examples of situations in which the privilege is waived or when there exist exceptions to it. However, domestic legislation of various states provides for more specific exceptions regarding C-AP.[93] Apart from the crime-fraud exception which is universally recognised among countries where the C-AP exists, specific countries waive the privilege for example in AML cases (e.g. Greece or Morocco) or with regards to public safety (e.g. Canada). Further, sometimes the States impose rules according to which only locally qualified attorneys are granted the privilege (South Africa[94]). One cannot forget that specific exceptions might also apply to specific types of legal professions, including tax advisors which are not necessarily attorneys (e.g. the mandatory disclosure standards). In addition, some countries provide for specific regulations dealing with how the privilege should be understood when not only the attorney but also other professionals work on advising in the case at hand.[95] This shows that as far as the C-AP is concerned, there is no 'one-size-fits-all' solution and that the application of the privilege will always depend on the specific domestic legislation. The analysis of this aspect should also take into account the area of law in which it operates, as sometimes the solutions tend to differ depending on the matter of the case.

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92 R (on the application of Prudential plc and another) v Special Commissioner of income tax and another [2010] EWCA Civ 1094.

93 Legal privilege global guide, DLA Piper, https://www.dlapiperintelligence.com/legalprivilege/, last accessed 10.12.2019.

94 Legal Professional Privilege Protection Available to Taxpayers too, CDH Tax & Exchange Control Alert, https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Tax/tax-alert-14-june-Legal-professional-privilege-protection-available-to-taxpayers-too.html, accessed 05.02.2020. There exists an exception, however, in situations where a foreign attorney comes from a country where the C-AP also exists; see: Confidentiality of Communications between Clients and their Patent Advisors. South Africa; World Intellectual Property Organization; https://www.wipo.int/export/sites/www/scp/en/confidentiality_advisors_clients/docs/03_south_africa.pdf; accessed 05.02.2020·

95 This is the case for example in Germany, where tax advisors have to oblige their employees or coworkers involved in the case to maintain secrecy, see: Ehrenberg, M.A., Die Verschwiegenheit der Angehörigen rechtsberatender, steuerberatender und wirtschaftsprüfender Berufe, Nomos, 2012, p. 106-109.

6.4.Relevant judicial decisions

The exceptions and waivers to C-AP is a topic which does not go unnoticed by the courts, and thus, there exist few judicial decisions on this specific issue. Interestingly enough, it seems that the issue is of considerable significance both in common law as well as in civil law countries.

The European Court of Human Rights in the case *Michaud vs. France*[96] decided upon in 2012, underlined the importance of the confidentiality of lawyer-client relationship and legal professional privilege. At the same time, however, it also indicated that because of a money laundering crime potentially unfolding before the eyes of the Attorney, the Attorney should have reported his suspicions, regardless of the privilege, in particular taking into account an existing procedure in place for such reporting.[97]

The judicial organ of the European Union – Court of Justice of the European Union differentiated in its case law between the C-AP for outside counsel and in-house counsel. While the advice provided by independent lawyers could benefit from the protection, this was not the case in for advice from in-house lawyers employed by the company.[98] The privilege, therefore, does not protect communications with in-house counsel. The Court indicated that this provision applied to any lawyer entitled to practice his profession in one of the Member States and it was of no importance in which Member State the client lived.[99] In addition, the party seeking the protection of the privilege had the burden of showing its applicability. This is an important element to consider when applying the privilege in the EU context, as it was also indicated that only specific parts of a document could be subject to the C-AP. Hence, the sole fact of certain privileged information being included in one document does not render this document 'untouchable'.

The judicature on the exceptions to the C-AP also extends to common law jurisdictions. The United States seems to be particularly prolific in this regard, dealing with a whole spectrum of the C-AP-related issues and in many cases being on the same page as the European courts. In the case the *United States v. Issa*, it was decided that the crime-fraud exception waived the Kovel agreement and hence the C-AP was no longer applicable.[100] The case law also provides for examples of situations when C-AP is waived. For instance in *Schaeffler v. United States*, it was stated that sharing otherwise privileged communications with an outsider is deemed to waive the privilege and it cannot be claimed that the communications were intended to be confidential.[101] Non-legal grounds of communication can waive the C-AP as well, as it was indicated in the *United States v. Sanmina Corp. & Subsidiaries*.[102] Here the Court held that a corporation waived the C-AP and work-product protection when it provided privileged information to a law firm for the nonlegal purpose of preparing a valuation report. In South Africa, in one of the cases, it was indicated that the C-AP can be waived directly by the party

96 Case of Michaud v. France, Application No. 12323/11, available under https://hudoc.echr.coe.int/eng#{"itemid":["001-115377"]} last accessed 10.12.2019.

97 Factsheet – Legal professional privilege, European Court of Human Rights, October 2018, p. 4.

98 C-155/79, *AM & S Europe Limited v Commission*, ECLI:EU:C:1982:157; C-550/07P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512.

99 OECD, *Treatment of legally privileged information in competition proceedings – Note by the European Union*, DAF/COMP/WP3/WD(2018)46, 21 November 2018.

100 United States v Issa , 2018 US Dist LEXIS 6041 (SDNY Jan. 8, 2018, No. 17-cr-00074 (CM)),
similarly: United States v Adams , 2018 US Dist LEXIS 184490 [D Minn Oct. 27, 2018, No. 0:17-cr-00064-DWF-KMM], 2018 WL 5311410, where the court stated that the C-AP and work-product doctrine were still applicable to the information, advice and data which were not revealed on the tax returns filed by the defendant and a matter at stake in the proceeding. The government, i.e. opposing party in the proceeding, claimed that because of the fact that the defendant submitted tax returns, all confidential information covered in the cooperation between the defendant and the counsel as well as the accountant (under Kovel exception) were not covered by the privilege anymore.

101 Schaeffler v. United States , 806 F.3d 34, 40 (2d Cir. 2015).

102 United States v. Sanmina Corp., No. 18-17036 (9th Cir. October 19, 2018).

to the proceeding – either expressly or impliedly, or if a waiver of privilege fell to be imputed.[103] This line of argumentation seems to be already well-grounded in the case law of the South African courts.[104]

In *Smith v Jones*, the Supreme Court of Canada held that C-AP is not absolute and it should be set aside in situations where the facts "raise real concerns that an identifiable individual or group was in imminent danger of death or serious bodily harm." It was held that on the facts, C-AP had to be set aside in favour of the wider public interest. The New Zealand law society also expressed that the solicitor-client privilege in a non-litigious context is not to be regarded as so sacrosanct that it cannot in appropriate cases be set aside in the public interest.[105] Arguably, in the face of the coronavirus pandemic of 2020, courts will follow the same stance in obtaining privileged information for purposes of tracking and tracing COVID 19 carriers in the interest of public health and safety.

This great variety of case law available in developed jurisdictions provides for an exciting overview of approaches towards C-AP. An in-depth analysis of the solutions accepted by numerous courts can translate into meaningful policy considerations and recommendations, taking into account the specificity of the involved legal systems.

7. Abuse of privilege

In recent times, several mass "public interest" disclosures by whistleblowers highlighted tax evasion and abuse corporate practices.[106] The effect of the scandals was threefold: first, it reignited the debate on international tax reform to counter practices contributing to illicit financial flows (IFFs); second, it resulted in the renewed emphasis of the human rights concerns raised by lost tax revenue and secrecy in financial transactions,[107] and third, it drew attention to the role of legal professionals in shielding clients from prosecution through abuse of C-AP.[108]

Though the role of Legal professional is questioned in light of scandals and disclosure by whistleblowers, C-AP is still acknowledged as a right embedded in the constitution or other allied laws in most jurisdictions. In *Thint (Pty) Ltd v National Director of Public Prosecutions*

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[103] *Astral Operations Ltd t/a County Fair Foods and Others v Minister for Local Government, Environmental Affairs and Development Planning (W Cape) and Others* (3509/2014) [2017] ZAWCHC 114; *Legal Professional Privilege Protection Available to Taxpayers too*, CDH Tax & Exchange Control Alert, https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Tax/tax-alert-14-june-Legal-professional-privilege-protection-available-to-taxpayers-too.html, accessed 05.02.2020.

[104] See also: 2019 (3) SA 189 (WCC) (11 October 2017); *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* (2015/33205) [2015] ZAGPJHC 293; [2016] 1 All SA 860 (GJ); 2016 (2) SA 561 (GJ) (17 December 2015); *S v Tandwa and Others* (538/06) [2007] ZASCA 34; [2007] SCA 34 (RSA) ; 2008 (1) SACR 613 (SCA) (28 March 2007)

[105] Law Commission Report 67 (NZLC R67). 2000. Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information. Wellington, New Zealand. Availalble at: http://www.nzlii.org/nz/other/nzlc/report/R67/R67.pdf.

[106] The *Panama Papers* constituted a "a global investigation into the sprawling, secretive industry of offshore jurisdictions that the world's rich and powerful use to hide assets and skirt rules, by setting up front companies in far-flung jurisdictions. Based on a trove of more than 11 million leaked files, the ICIJ investigation exposes the use of offshore companies to facilitate bribery, arms deals, tax evasion, financial fraud and drug trafficking." In November 2017, the investigative unit published the "*Paradise Papers*" which include "nearly 7 million loan agreements, financial statements, emails, trust deeds and other paperwork from nearly 50 years at a leading offshore law firm with offices in Bermuda and beyond." In a similar manner, in 2016, the *Gupta Leaks* revealed high levels of corruption amongst senior government officials, including the South African president, in their generous treatment of benefactors of the president. The *Luxleaks* scandal exposed how Luxembourg authorities had reportedly been "secretly sanctioning, on an industrial scale, aggressive cross-border tax avoidance by some of the world's largest businesses." According to press releases at the time, some world leaders expressed that the *LuxLeaks* revelations meant that the boundaries of permissible tax competition between countries had shifted." UNCTAD (2015) estimates that 30 per cent of cross-border corporate investment stocks are directed through offshore hubs, before ending up as productive assets at their destination. Other tax avoidance options utilised are the tax rate differentials between jurisdictions, different legal systems and tax treaties.

[107] The IJRC (2016) for example, argues that these funds in particular could have been used to lessen inequality and to advance the realization of economic, social, and cultural rights in countries around the world.

[108] IJRC (2016).

and Others, Zuma and Another v National Director of Public Prosecutions and Others,[109] the Constitutional Court confirmed that the right to legal professional privilege is a general rule of South African common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.[110] The character of the rule is accepted to be substantive rather than procedural.[111] In the Australian High Court case *Baker v Campbell* the Court found that attorney-client professional privilege extends beyond communications made for litigation to all communications made to give or receive advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for the proper functioning of the legal system and not merely the proper conduct of particular litigation. In *Serious Fraud Office (SFO) v Eurasian Natural Resources Corp. Ltd*[112] , the South African Appeal Court, held that legal advice given to 'head off, avoid or even settle reasonably contemplated proceedings' has the same protection under litigation privilege as advice given to defend or resist such contemplated proceedings. Courts from different common law jurisdictions have generally taken an adverse view where C-AP is claimed as blanket protection from revealing documents that are summonsed. If a claim of privilege is asserted, the Attorney or client must specifically delineate which documents and communications are privileged on a document-by-document basis. The party asserting that the C-AP protects communications carries the burden to establish its application.[113] Abuse through frivolous claims of privilege is well illustrated by the tobacco industry litigation, which serves as an example of the use of overly broad claims of privilege.[114] To protect internal documents from discovery, tobacco companies had their scientific research conducted under close consultation or management of their legal representatives. The purpose thereof was to ensure that adverse scientific research findings could be protected from disclosure through C-AP. Detailed examinations of the claims, however, revealed that the bulk of documents did not meet the elements of successful claims of privilege.[115]

Tax authorities are equally concerned over the potential for abuse of C-AP. In this regard, the Australian Tax Office (ATO) highlighted in 2019 that one in five major audits are being frustrated by blanket claims of legal privilege. Privilege claims also feature strongly in ATO audits of large multi-nationals groups, where some 32000 documents are being withheld in 2 out of 24 current audits. The New Zealand Inland Revenue, in its evidence to the Davison Commission[116], provided examples of how claims of privilege could hamper legal investigations:

- for materials held on file by a lawyer that does not involve matters of a legal nature;

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109 [2008] ZACC 13.

110 (i) the legal advisor must have been acting in a professional capacity at the time; (ii) the advisor must have been consulted in confidence; (iii) the communication must have been made for the purpose of obtaining legal advice; (iv) the advice must not facilitate the commission of a crime or fraud; and (v) the privilege must be claimed.South African common law follows English law where the position is that if there is a legal context, privilege attaches to all communications between lawyer and client, provided that they are (1) directly related to the performance of the lawyer's professional duties as legal adviser to the client and (2) made for the purpose of obtaining legal advice and assistance.

111 *S v Safatsa and Others*.

112 [2018] EWCA Civ 2006.

113 *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985).

114 *Minn. v. Philip Morris Inc.*, No. C1-94-8565, 1998 WL 257214 (Minn. Dist. Ct. Mar. 7, 1998); *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661 (D. Kan. 2001).

115 Documents disguised as privileged information, illustrated the tobacco lawyers' involvement in cover-ups of the addictive and cancer-causing effects of cigarette smoking. The information came about after being leaked to the plaintiffs by a disgruntled employee.

116 Commission of Inquiry into Certain Matters Relating to Taxation, Report of the Winebox Enquiry, August 1997.

- where a narrow interpretation of the word "control" is assigned over information held by a company's lawyers in response to wide-ranging information requests;

- where documents are removed from files made available for inspection without informing the administration that legal professional privilege has been claimed;

- where transactional documents are mixed (or not separated) with legal advisory papers and blanket privilege is claimed for all documents;

- where transaction details are included in the document containing legal advice to hide them from the tax administration;

- where access to offices where important records may be retained is obstructed without giving sufficient notice that a claim of legal professional privilege can be made.

The net effect of such abuse is diminishing voluntary compliance as it creates the perception that:

> "Some taxpayers are able to use the privilege system to conceal details of their true income, and therefore avoid or evade payment of tax. A reduction in voluntary compliance increases the tax burden for those taxpayers who continue to comply with the law."[117]

Where the law of C-AP is "too unsettled, inconsistent, or convoluted," it may be difficult to establish whether claims of privilege are frivolous. [118] Strassberg identifies "an ultra-zealous approach" to C-AP as a systemic problem that underlies the adversarial system as it does not always allow for full testing of claims of privilege which, in turn, leads to a situation where abuse of privilege cannot be successfully exposed. Litigants may not have the resources to query each document or communication and courts may not have the patience or time to review each claim of privilege - as manifested during the tobacco litigation.

An attorney's conduct in claiming privilege can be considered ethically impermissible in situations where (i) they are not motivated by the defence of legal rights but by other interests; (ii) they are based on weak research or factual findings; (iii) they do not adhere to procedural requirements; and (iv) they are inconsistent with existing laws and are conducted in bad faith.

Abuse of C-AP occurs where (i) general advice is covered up as legal advice; (ii) communication to a person who is not an attorney, or an agent of an attorney is cloaked as such; (iii) no communication is made or no communication is made to give legal advice; (iv) communications are not made in confidence; (vi) no client-attorney relationship is formed; (vii) no protection is afforded to the communications; and (viii) the privilege is waived. In applying the eight-prong test, courts have further delineated the requirements of several of the elements.[119] For example, purely investigative work done by attorneys does not constitute legal

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[117] Cullen, M. 2002. Tax and privilege: a proposed new structure -A government discussion document. Ministry of Finance. Available at: https://taxpolicy.ird.govt.nz/sites/default/files/2002-dd-privilege.pdf.

[118] The FATF (2013) 31 identifies some practical challenges in investigating money laundering by or through legal professionals that include: (i) uncertainty about the scope of privilege, (ii) the difficult and time-consuming processes for seizing legal professional's documents, and (iii) the lack of access to client account information.

[119] See *AWB Ltd v Cole* (No 5) [2006] FCA 1234; (2006) 155 FCR 30 and *Mitic v Oz Minerals Ltd* [2015] FCA 1152 where these principles are clearly set out.

advice and frivolous claims and attempts cloak to non-legal advice as legal communications, attracts sanctions.[120]

In *Glencore International AG v Commissioner of Taxation,*[121] it was held that privilege is only immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications and cannot be relied on where a public disclosure was made.[122] The Court found that Glencore sought to "transform the nature of the privilege from an immunity into an ill-defined cause of action which may be brought against anyone concerning documents which may be in the public domain." *South African Airways Soc. V BDFM Publishers (Pty) Ltd and Others*[123] that also deals with public leaks, highlights that what "the law gives to the client is a 'privilege' to refuse to disclose, not a right to suppress publication if the confidentiality is breached."[124]

Whilst government agencies are, in the pursuit of better information, keen to have legal privilege limited to a certain extent, the Courts have been clear on legal privilege as a principle of the common law. For example, in *Mann v Carnell*[125] it is stated that:

> "… the common law has adjudged that the search for truth, which usually has primacy in curial proceedings, must give way to the considerations inherent in legal professional privilege. Even though the privilege admittedly 'frustrates access to communications which would otherwise help courts to determine with accuracy and efficiency, where the truth lies in disputed matters,' other aims of the system of administration of justice outweigh the general undesirability of the truth being obscured."

Manyam argues that there is no plausible reason why taxation should be singled out for a significant change concerning C-AP because other areas of law, such as criminal law, which has an identical interface with the state as taxation law, has not been subjected to a similar "clamor for change" to C-AP as it applies to the rights of an accused person. There are already strong safeguards in place, against any abuse of C-AP.[126] Further, a real danger exists were privilege to be abolished, the wide powers of the investigation currently exercised by tax administrations, would have free reign and run the risk of being grossly abused.[127]

Considering the wide powers and tools available to tax administrations for investigative work, the onus should rather fall on the legal professional associations, they are after all the custodians of the legal profession[128] to police instances of abuse and to ensure that those that have been

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120 Cobell v Norten; FDIC v Hurwitz.

121 [2019] HCA 26.

122 The documents sought to be protected where published in the "Paradise Papers" after they were stolen from Appleby's electronic file management systems and provided to the ICIJ. Glencore asserted that the documents are subject to legal professional privilege and requested the ATO to return them and to provide an undertaking that they will not be referred to or relied upon. See also *SAA v BDFM Publishers*: "by invoking such legal advice privilege, no less than litigation privilege, the client invokes a 'negative' right, i.e, the right entitles a client to refuse disclosure by holding up the shield of privilege. What the right to refuse to disclose legal advice in proceedings cannot be, is a 'positive right'; ie a right to protection from the world learning of the advice if the advice is revealed to the world without authorisation.

123 2016 (2) SA 561(GJ) 2016 1All SA 860.

124 2016 1All SA 860 [49].

125 [1999] HCA 66; (1999) 74 ALJR 378 at 397.

126Manyam, J. 2015. Legal Professional Privilege and New Zealand's Taxation Law. Waikato Law Review Vol 23, pp56-81.

127 Manyam (2015) 81.

128 As per McIntyre, J in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 187–188: "It is incontestable that the legal profession plays a very significant – in fact, a fundamentally important – role in the administration of justice, both in the criminal law and the civil law … I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state."

found by courts of law to have abused legal privilege claims, be sanctioned using heavy fines and scrapping lawyers from the rolls of the respective bars.

8. Mechanisms to address abuse of C-AP

There are several mechanisms available to government to address abusive tax practices. These can be broadly categorised as legislative, judicial and administrative. Legislative measures include general and specific anti-avoidance rules as well as reportable arrangement provisions[129] to counter tax evasion and a penalty regime that addresses failures to disclose in a meaningful way.[130] Judicial measures include doctrines such substance over form and *fraudum legis* (sham transactions). Administrative measures can include awareness campaigns; monitoring tools (maintaining lists of buyers of schemes); registration of promotors of schemes and penalties for failure to register (disallowing claimed benefits); exchange of information, as well as voluntary disclosure programmes.[131]

As highlighted by the FATF,[132] the main challenges to financial transparency are uncertainty about the scope of privilege; the difficult and time-consuming processes for seizing legal professional's documents, and the lack of access to client account information. To address some of these challenges, governments have introduced legislative changes and processes to clarify the scope of the privilege, protection thereof and reporting obligations.[133]

Under AML legislation of most countries, legal professionals have a reporting duty and to file suspicious transactions reports. In *Michaud v France* (request no 12323/11), the applicant contended that the reporting duty is contradictory to the EU Human Rights Convention and that it protects the confidentiality of the exchanges between a legal professional and his client. The Court held that the obligation to report suspicious transactions was necessary to achieve the justifiable purpose of the defence of order and the prevention of criminal offences since it is aimed at fighting against money laundering and associated offences. The duty to file an STR will only fall away in an instance when the Attorney is defending a client.

The proposed Corporate Transparency Act of 2019 in the U.S. requires that formation agents would be included in the U.S. Bank Secrecy Act definition of a "financial institution" and therefore subject to the BSA's AML reporting obligations. This expanded definition potentially applies to a broad range of individuals and businesses previously not regulated directly by the BSA, including attorneys. The American Bar Association argues that the proposed legislation would "undermine the C-AP, the confidential attorney-client relationship, and traditional state court regulation of the legal profession, while also imposing excessive new federal regulations

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129 Provides for timeframes for reporting and disclosure obligations.

130 E.g., Regulations 6011; 6111; 6112 that require reporting of "transactions of interest" (TOI) that are transactions that the IRS believes has a potential for tax avoidance, but for which it lacks enough information to determine whether the transaction should be identified specifically as a tax avoidance transaction.

131 Rostain (2006) 95; Steenkamp (2012) 228.

132 (2013) 31.

133 E.g., section 42A into the Tax Administration Act, 2011 (the TAA) lays down the process to be followed where a taxpayer or other person claims legal professional privilege in respect of documents that SARS wishes to scrutinise: the taxpayer must identify, specifically and in detail, each item of the material requested by SARS which he claims is covered by legal professional privilege; the circumstances in which he obtained the material; the author of the material and the capacity in which the author produced the material (e.g., as the taxpayer's attorney). I.R.C. § 7525 (2006), creates a privilege for communications between authorized tax practitioners and their clients in civil cases before the IRS; Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1806(a) (2006) - communications otherwise privileged do not lose the privilege just because they were subject to electronic surveillance; Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2517(4) (2006); section 80(1) of the South African Promotion of Access to Information Act 2 of 2000, provision is made for in camera proceedings to determine whether legal privilege applies.

on lawyers engaged in the practice of law."[134]The upholding of the principle of privilege is under-scored in various jurisdictions. As stated by the honourable Sutherland, R:[135]

> *"The rationale for the idea of privilege has evolved over time in response to judicial perceptions and evolving social mores about how court proceedings might appropriately be conducted. In our era, it is incontrovertible that the 'right' vests in the client…" and:*
>
> *"… in divining the exact nature of the right, its rationale must dictate the nature of the right. The rationale for the concept of legal advice privilege has been distilled from what has been understood to be the essence of the adversarial legal system. The right of a person to a guarantee of confidentiality over communications with that person's legal advisor is an indispensable attribute of the right to counsel and the adversary litigation system."*

9. Importance of C-AP in the context of AML regulations, tax evasion and aggressive tax planning

The role of C-AP in the context of money laundering, tax evasion and aggressive tax planning should be evaluated in the jurisdictional and cross-border context to determine whether it may have the potential to delay or limit due process. Based on past events such as the Panama Papers and the Paradise Papers leaks, the potential for misuse has become more apparent as a threat to the ability of revenue authorities to recover tax revenues. In addition, the proliferation of suspicious transaction reports provided by legal professionals in countries like South Africa has indicated to FIUs that the supervisory bodies tasked with the regulation of the profession are not sufficiently undertaking their obligations to minimise suspicious activities. The threat of misuse and the complications that occur due to mismatch in the jurisdictional treatment of C-AP may have an impact on tax transparency, particularly on the exchange of information efforts and efforts to tackle money laundering, corruption and bribery. Little has been done to identify the potential obstacles, particularly as several organisations confront the last barriers to overall financial and tax secrecy.

9.1. FATF standards relating to C-AP

FATF Recommendation 12 recognises the ways that gatekeepers could be used to launder the proceeds of corruption. In particular, some lawyers were found to have used C-AP to shield the identity of corrupt, Politically Exposed Persons (PEP).[136] The most common examples arising out of case studies carried out by FATF were of the use of legal professionals to transfer corrupt proceeds belonging to PEPs through the use of client accounts.[137]

FATF have since recognised the vulnerabilities of legal professionals and the potential for increased complexity in carrying out investigations as a result of C-AP.[138] In particular, FATF has sought to address, the perception sometimes held by criminals and at times supported by claims from legal professionals that C-AP could prevent law enforcement from accessing

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134 American Bar Association (2019).

135 South African Airways Soc. V BDFM Publishers (Pty) Ltd and Others 2016 (2) SA 561(GJ) 2016 1All SA 860 [par 45; 47].

136 Ibid

137 FATF, note 16, pg. 20 - 21

138 28

information to enable prosecution.[139] Since the scope of C-AP remains diverse across countries, differing interpretation amongst legal professionals has disincentivised law enforcement taking action against complicit or willfully blind legal professionals.[140] FATF acknowledges that C-AP is complicated due to the diversity in treatment and interpretation of the concept.[141] For instance, the extent of information needed to invoke the crime/fraud exception and the consequences of a breach of C-AP varies from country to country, whilst the practical basis on which C-AP can be overridden is still unclear.[142]

The investigation of money laundering by or through legal professionals is often limited by the uncertainty about the extent to which evidence gathered or created is subject to C-AP.[143] Overall, FATF review of the operation of C-AP across a number of countries established that both law enforcement agencies and the private sector found the lack of clarity on the extent of the reporting duty under Anti Money Laundering and Combatting the Financing of Terrorism (AML/CFT) legislation challenging.[144] Since law enforcement must remain careful to respect C-AP, investigations often become lengthy and the resources required to build evidence increase in cases concerning legal professionals; this is similarly the case where privilege is claimed and needs to be resolved.[145] FATF has found evidence of "extremely wide claims of privilege…being occasionally made which exceed the generally understood provisions of the protections within the relevant country"[146]. As mentioned, these difficulties associated with the scope of privilege act as a disincentive for law enforcement to investigate legal professionals or seek alternative sources of evidence, especially where time is an essential factor.[147]

Ultimately, FATF identified a need for increased awareness about the misuse of legal professional services for purposes of money laundering, trends and vulnerabilities amongst professionals themselves, competent authorities, supervisors and professional bodies.[148] Further, greater efforts were deemed necessary to ensure a clear and shared understanding of the remit of C-AP and the procedures for investigating a legal professional.[149] FATF guidance for legal professionals on a risk-based approach, developed in 2019, tried to identify some of the risks they may be exposed to and recommend appropriate mitigation measures.[150] Most countries provide exceptions in the law permitting legal professionals to disclose information on suspicion of money laundering or terrorism financing without breaching their obligations if the disclosure may be subject to a legitimate claim of privilege.[151] However, the uncertainty about the application of such exceptions, lack of adequate information or training on these rules or complexities in clients' situations may often result in a lower likelihood of a disclosure.[152] FATF acknowledges that criminals often seek the services of legal professionals since the protections provided by C-AP would be likely to delay, obstruct or prevent investigation or prosecution.[153] In addition, criminals may also do this with the intent to conceal their activities

139 *Ibid,* pg. 6
140 FATF, *note* 11, pg. 6
141 FATF *note* 11, pg.
142 FATF, *note* 11, pg. 20 - 31
143 FATF, *note* 11, pg. 31
144 *Ibid*
145 FATF, *note* 11, pg. 31-32
146 *Ibid*
147 *Ibid*
148 FATF, *note* 11, pg. 85
149 FATF, *note* 11, pg. 86
150 FATF, *Guidance for a Risk Based Approach: Legal Professionals*, FATF, 2019, pg. 4, available online at: http://www.fatf-gafi.org/media/fatf/Risk-Based-Approach-Legal-Professionals.pdf
151 *Ibid,* pg. 23
152 *Ibid*
153 *Ibid*

and identity from law enforcement.[154] Overall a need was identified for legal professionals and law enforcement to carry out risk assessments linked to their professional codes of conduct.[155]

One clear issue that FATF consistently identified in their reports addressing the role of legal professionals is the lack of a shared understanding of the scope of privilege and its exceptions. Several court ruling tried to justify and set out the parameters of its operation in the context of money laundering and terrorism financing. The ECJ's Grand Chamber has[156], in the past, reviewed the legality of the obligation of legal professionals to inform and cooperate with competent authorities where there is suspicion of money laundering and found that whilst it was consistent with C-AP, it could be limited by reference to the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights (ECHR).[157] The ECHR in *Michaud v France*[158] concluded that the obligation to disclose any suspicious transaction or activity was for a legitimate aim that was necessary, for prevention of disorder and crime and it did not constitute a disproportionate interference with the professional privilege of lawyers.[159] In the US, the Courts have viewed the crime/fraud exception as having a wider scope than traditionally accepted. The Supreme Court in *United States v. Zolin*[160] determined that the exception ensures that C-AP does not extend to communications made for purposes of getting advice for the commission of a fraud.[161] For the exception to apply, it is the client's knowledge and intentions that matter and not whether the legal professional is aware of the plan to commit fraud.[162]

The case law sets out the need for a balancing of the public interest against the protection of communications between attorney and client. However, it is often the case that a legal professional's role may only facilitate one element of a crime that may not, on its own, elicit any suspicion. Since a client may not always diverge all information about a transaction, the uncertainties about their overall purpose or intentions have to be addressed with caution.

The varying treatment of C-AP and the difficulties with determining the scope of the principle are often further frustrated by the varying compliance with FATF AML/CFT standards. FATF's Horizontal Study of supervision and enforcement of beneficial ownership obligations found that 17% of jurisdictions reviewed, did not impose AML/CFT obligations or supervision on any Designated Non-Financial Businesses and Professions (DNFBPs).[163] In some cases, this was because of resistance to regulation from certain businesses or professions.[164] Most recently, following a proposal to amend the Kenya AML Act, 2009 to include advocates, notaries and other independent legal professionals as reporting institutions required to report any suspicious transactions and provide authorities with access to this information.[165] Legal professionals in Kenya were strongly opposed to this despite the broad recognition that due to their ability to conceal client transactions or money held on behalf of clients, they were more vulnerable to ML/FT. According to the Kenyan Financial Reporting Centre, the objective was to ensure that

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154 *Ibid*

155 *Ibid*

156 See *Ordre des barreaux francophones et germanophones & Others v Conseil des Ministres (Ordre des barreaux),* ECJ Grand Chamber, 26 June 2007

157 Jan Komarek, *Case comment: Legal Professional Privilege and the EU's Fight Against Money Laundering*, 27 Civil Justice Quarterly, 2008, pg. 1

158 Application no. 12323/11, 6 December 2012, available online at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115377%22]}

159 *Ibid*, at para 101 - 132

160 491 U.S. 554, 562 (1989)

161 See FATF, *note* 24, pg. 75

162 FATF, *note* 24, pg. 75, see *United States v Chen,* 99 F.3d 1495, 1504 (9th Cir. 1996).

163 FATF, *Concealment of Beneficial Ownership*, July 2018, para. 9, available online at: https://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Egmont-Concealment-beneficial-ownership.pdf

164 *Ibid*

165 See: Section 51 of the Kenya Finance Bill, 2019: http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/FinanceBill_2019.pdf

legal professionals carried out their due diligence.[166] The conflict between the role of legal professionals in facilitating money laundering and the need to protect C-AP is still evident in the discourse today. Without the effective implementation of the AML/CFT standards, it is still difficult to establish a standard or general principle on the approach to be taken by legal professionals.

9.1.1. Tax Crimes as a Predicate Offense and implications for C-AP

The implications for C-AP need to be understood in context.

> *'Financial institutions and other designated professionals and reporting entities are required to file suspicious transaction reports (STRs), which report suspicions that a client's funds are the proceeds of a criminal activity, including money laundering as well as predicate offences. As such, STRs can include suspicions of where a client's funds are the proceeds of tax crimes. This can provide greater intelligence from the private sector to the government authorities.'*[167]

Where tax evasion is concerned, the crime/fraud exception will apply and provide authorities with a clear basis to access information held by legal professionals. However, the overall lack of clarity in the definition of a tax crime may give rise to situations where uncertainty regarding whether they qualify as a tax crime may arise. As a result, STR requirements will raise specific obligations for lawyers to identify and report any risks of tax crimes.[168] Two scenarios need to be considered with regards to C-AP due to the lack of clarity in definition of tax crimes:

a. The crime/fraud exception may apply since the offence is considered predicate to money laundering, with significant uncertainty on the part of the taxpayer and the legal professional and potential exploitation on the part of authorities.

b. No exception applies; however, per FATF guidance, professional privilege should be protected with caution, paying particular attention to the potential for misuse. This could be a more conservative approach that may introduce challenges for authorities facing the risk of delays in investigations and the potential for destruction on evidence.

Both scenarios create uncertainty for taxpayers and revenue authorities and will undoubtedly require the preparation of additional guidance or applicable exceptions where no clear definition is provided. The differences in national definitions of tax crimes and the increasing challenges associated with distinguishing tax avoidance from evasion can be expected to create more uncertainty in this area. Despite this, the role of tax crimes in general introduces a potential opportunity for tax authorities seeking assistance in accessing information. The burden to prove that an activity constitutes a tax crime will however be placed on them.

9.2. Operation of C-AP under the Global Forum framework on transparency and exchange of information

Effective EOI requires the availability of reliable information since all exchange of information mechanisms should respect taxpayer rights and safeguards including C-AP, a requested

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166 Geoffrey Mosoku, *New plan to stop lawyers from hiding dirty money for clients*, Standard Digital, 17 June 2019, available online at: https://www.standardmedia.co.ke/business/article/2001330140/why-dirty-money-may-no-longer-be-hidden-by-lawyers

167 Ibid, pg.54

168 FATF (2019). n.129, pg.16

jurisdiction should not be obliged to share the information which is the subject of C-AP.[169] Article 7 of the 2002 EOI Model Agreement sets out the situations under which a Contracting Party may decline a request for EOI, in particular:

> The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:
>
> a) Produced to seek or provide legal advice; or
>
> b) Produced for use in existing or contemplated legal proceedings.

The communications must be between a client and an attorney or other admitted legal representative acting in that capacity and must be produced for purposes of seeking or providing legal advice.[170] The determination of who qualifies as an admitted legal representative will fall to domestic law and this is likely to result in significant differences in the application of C-AP since, for example, some jurisdictions may include legal interns, secretaries and any support staff. In addition, some obstacles may arise in connection with what type of legal advice is concerned since the approach is different across jurisdictions. Contracting states will need to identify any mismatches in the types of legal advice and legal representatives to anticipate the potential limitations for effective EOI.

The 2006 Manual on Information Exchange recommends that whilst a contracting party can decline to provide information on the basis that it is privileged information, what constitutes privileged information should not be interpreted or applied in such a broad way that it hampers effective EOI.[171] "*In particular, no privilege should attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure*"[172] and a requested party should verify and challenge, if necessary, the validity of a claim of C-AP.

Article 26, paragraph 3 of the OECD MTC provides that contracting states are not obligated to supply information which would not be obtainable under the laws or in the normal course of administration of the Contracting State. The commentary to this section adds:

> *A requested State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. However, the scope of protection afforded to such confidential communications should be narrowly defined.*[173]

Some countries may provide a broad scope for the privilege to apply, which may result in differences in the treatment of information for purposes of AEOI or EOIR. In 2017, the State Secretary of Finance of The Netherlands proposed to reduce the scope of C-AP regarding tax

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169 Global Forum on Transparency and Exchange of Information, *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions*, Global Forum, 2011, para. 84, pg. 141 available online at: https://www.oecd-ilibrary.org/docserver/9789264110496-en.pdf?expires=1579270050&id=id&accname=ocid177428&checksum=8F49DCB0D1B8E47B39085CE179B84C4D

170 Global Forum, *note* 6, para. 94 – 100 (Commentary to Article 7 of the 2002 EOI Model Agreement)

171 Global Forum, note 6, para. 42

172 Global Forum, note 6, para. 42

173 Commentary to Article 26, Paragraph 3 of the OECD MTC

matters.[174] According to the State Secretary, the scope of the statutory definition did not relate well to international standards for EOIR and tax authorities needed to be empowered to request any relevant tax information and transfer to the requesting party.[175] Too wide an interpretation would render the EOI provided for in a tax treaty ineffective.[176] For this reason, the OECD requests the Contracting States to consider, carefully, whether the interest of a taxpayer would justify the application of this protection.[177] According to the recommendations of the Commentary to Article 26, documents or records delivered to a legal professional in an attempt to protect them from disclosure and information on the identity of a person like a beneficial owner of an asset or entity should not be privileged.

A narrow definition would be beneficial in, to some extent, preventing the misuse of C-AP, particularly by those who are set on concealing information by using legal professionals. However, the recommendations made by the OECD significantly diminish the scope beyond what countries may be willing to concede and this is likely to be a challenge for jurisdictions that do not have a codified definition of C-AP. For instance, whilst Courts in the US would generally adopt a similar approach to limiting the application of C-AP[178], countries with stricter approaches like Brazil would require that the judiciary determine the question of applicability of C-AP.

Considering the diverse treatment of C-AP between jurisdictions, there is likely to be a difference in how broad the scope will be and the expectation that a narrow definition could easily be applied is not entirely practical. Mismatches in the definition of C-AP, the treatment of legal professionals and determination of the categories of legal advice that it is applicable to are all likely to give rise to delays or, at the least, conceptual disagreements between contracting parties. Moreover, where the contracting state tasked with collecting the requested information approaches a taxpayer for that information and they refuse to provide it based on C-AP, the question of whether the judicial process should be pursued to evaluate its applicability and the implications such a delay may have for the requesting state will need to be scrutinised. Most importantly, if parties are required to pursue the judicial process to determine whether or not C-AP is applicable, establishing whether the requesting state's interest should outweigh a citizen's right may pose a significant challenge.

The ability of a Contracting State to verify or challenge the validity of a claim of C-AP requires more scrutiny since validity can only be adjudicated based on the laws of the Contracting State that was requested to provide the information and not the requesting state. Countries with a broad scope would likely clash with countries that are progressively narrowing the scope of C-AP in the context of legal advice relating to tax matters. This would result in a delay in the process and will likely require the support of a third party to resolve fairly. Notably, no additional guidance has been provided in this area.

9.3. Data leaks

In 2016, the International Consortium of Investigative Journalists (ICIJ) and its partners published 40 years' worth of data leaked from the Panamanian law firm, Mossack Fonseca. The

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[174] William Hoke, *Government Promises Tougher Measures to Boost Tax Compliance,* Tax Notes International, Country Digest, 30 Jan 2017, available online at: https://www.taxnotes.com/tax-notes-international/collections/government-promises-tougher-measures-boost-tax-compliance/2017/01/30/svzx?highlight=client%20attorney%20privilege%20and%20tax%20transparency

[175] Ibid.

[176] OECD Commentary to Article 26, Paragraph 3(c) of the MTC, 2017 – pg. 1313, available online at: https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page1313

[177] Ibid

[178] See William H. Volz & Theresa Ellis

leak, known as the Panama Papers, contained information about more than 210,000 companies in 21 offshore jurisdictions.[179] The information provided by the Panama Papers has resulted in US$ 1.2 billion recovered in the form of fines and back taxes in various countries including the United Kingdom (UK) at US$ 252 million, Australia collecting US$ 92 million, Belgium at US$ 18 million and France confirming US$ 136 million.[180] French tax authorities have carried out more than 500 inspections since April 2016, whilst the Canadian Revenue Agency (CRA) expected to recoup over US$ 11 million in federal taxes and fines from 116 audits.[181] However, amid this process, it seems as though the fundamental protections provided by C-AP have been and will continue to be compromised.

Privileged information arising from a leak like the Panama Papers still requires either a waiver by the client or the application of an exception, or it will be treated as inadmissible in Court. The proceedings brought against Harald von der Goltz by the US Department of Justice raised questions about the applicability of C-AP to leaked data. Several Courts in the US have determined that despite the breach of the confidentiality of communications through public disclosure, C-AP is not waived.[182] The charges brought against von der Goltz involved conspiracy, wire fraud, money laundering and tax charges. The DOJ filed a motion to obtain privileged communications between von der Goltz and his former Attorney, Ramses Owens, and argued that the communications were subject to the crime-fraud exception because Mossack Fonseca assisted in the fraudulent concealment of assets and income from the Internal Revenue Service (IRS).[183] In making this argument, the DOJ cited the obligations of the taxpayer to report all income and capital gains, file a FinCen[184], and disclose any potential civil penalties with respect to a failure to report foreign financial assets as part of the Offshore Voluntary Disclosure Program.

Mossack Fonseca was based in Panama and multiple other jurisdictions, with clients across the globe, recommending structures that involved the use of entities based in various other jurisdictions. Due to the multitude of locations involved, the Panama Papers raised challenges in determining which laws to apply, the law of the jurisdiction where the advice was provided, where the client was located, or where litigation was being pursued.[185] Moreover, the mismatches in the scope and operation of C-AP across jurisdictions would likely impact the pace of legal proceedings. The Panama Papers highlighted the interplay of the application of privilege in the international arena.[186]

In November 2017, the ICIJ published a set of 13.4 million confidential electronic documents from Appleby[187], an offshore legal services provider, that came to be known as the Paradise Papers. Following the leak, the Australian Tax Office (ATO) gained access to information about Glencore's more than 214,488 offshore entities.[188] The data revealed how Glencore moved

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[179] For more see - ICIJ, *Explore the Panama Papers Key Figures*, 31 January 2017, available online at: https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/

[180] Douglas Dalby & Amy Wilson-Chapman, *Panama papers helps recover more than $1.2 billion around the world*, ICIJ, 3 April 2019, available online: https://www.icij.org/investigations/panama-papers/panama-papers-helps-recover-more-than-1-2-billion-around-the-world/

[181] Ibid

[182] See *In Re Grand Jury Proceedings Involving Berkley & Co.,* 466 F. Supp. 863 (D. Minn. 1970)

[183] *U.S. v Owens* 1: 18-cr-00693 (S.D.N.Y.) at 6-7

[184] Report of Foreign Bank and Financial Accounts filed with the United States Department of the Treasury

[185] Ibid

[186] Ava Borrasso, *Privilege and International Implications against the Backdrop of the Panama Papers*, Business Law Today, July 2016.

[187] Appleby (previously Appleby Spurling & Kempe, Appleby Spurling Hunter and Appleby Hunter Bailhache) is an offshore legal services provider. It is referred to in the Paradise Papers, and included in the assemblage of law firms known as the offshore magic circle. Accessed from https://en.wikipedia.org/wiki/Appleby_(law_firm) on 09.10.2020

[188] Ugur Nedim & Sonia Hickey, The Tax Office's Attack on Client Legal Privilege, Lexology, 2019, available online: https://www.lexology.com/library/detail.aspx?g=7d5c4edd-24f2-4ded-a317-52b36df7d98a

AUS$ 30 billion worth of resource projects out of the Australian tax net after AUS$ 16 billion write down.[189] To protect the documents, Glencore went to Court claiming the C-AP prevented the ATO from using these documents. The High Court noted, in particular:

> "The circumstances of this case identify a particular problem were an injunction to be granted. It is that the defendants would be required to assess Australian entities within the Glencore group to income tax on a basis which may be known to bear no real relationship to the true facts."[190]

This statement made the policy position of the High Court quite clear. Where the additional privileged information may reveal the real tax position of a taxpayer, the Court would be willing to dismiss C-AP.

The ATO has since made clear that they are not opposed to C-AP as a concept, but were concerned that it was being misused.[191] ATO Tax Commissioner, Chris Jordan, specifically commented that where claims of privilege were made on tens of thousands of documents, the ATO would likely question the legitimacy of that claim as an effort to conceal a contrived tax arrangement.[192] The ATO has since found that one in five major audits were being complicated by blanket claims of C-AP and requested for additional exceptions to privilege resulting in the drafting of a bill to facilitate this.[193]

Any jurisdiction attempting to bring proceedings against entities or individuals implicated by any of the data leaks from law firms will likely be faced with C-AP limitations. The ability to circumvent such claims will be highly dependent on how strict and unconstrained the courts will be in determining whether the rights of the taxpayer should trump the public interest. Overall, data leaks have revealed the potential challenges that may arise particularly in the enforcement of requests for exchange of information where the crime-fraud exception may not be of significance as it would in the context of AML/CFT.

9.4. The impact of the uncertain status of C-AP on tax and AML

Although the AML/CFT framework may prove easier to implement based on the crime-fraud exception, some challenges could be anticipated. First, the trend of unwillingness amongst legal professionals to report suspicious transactions and the failure of countries to strictly enforce this requirement. This has provided corrupt individuals, amongst others, with a loophole to conceal their identity and assets. Second, the ability to determine whether, as a legal professional, there is reason to be suspicious needs further guidance or, at a minimum, some immunity should the flagged transaction deliver no questionable outcome. A criminal is often not likely to provide all the information about an asset, transaction or even the intentions behind setting up a shell company in an offshore jurisdiction. As a result, a legal professional may not always have sufficient information to make an assessment. This may require some level of access or exchange of information with authorities and financial institutions to determine the purpose behind a transaction – this would likely take them beyond their ordinary duties. Without further guidance or protection (such as overall confidentiality of the report) lawyers are likely to remain unwilling to report their clients.

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189 Ibid

190 Glencore International AG & Ors v Commissioner of Taxation of the Commonwealth of Australia & Ors [2019] HCA 26, 14 August 2019, S256/2018

191 Nassim Khadem, *ATO cracks down on legal professional privilege 'misuse' after Paradise Papers tax leak*, ABC News Online, 14 March 2019, available online at: https://www.abc.net.au/news/2019-03-14/ato-steps-up-crackdown-on-lawyers-post-panama-papers/10899518

192 Ibid

193 Ibid

With respect to the overall effectiveness of the global tax transparency framework, C-AP may have the potential to introduce significant mismatches in scope and delays. These delays may permit a taxpayer to alter a structure or asset or even move it away from the jurisdiction of the original contracting state. Additional guidance from the OECD and the Global Forum regarding the potential for concealment of information from competent authorities to frustrate the exchange of tax information through claims of C-AP will be necessary for the near future. Notably, however, jurisdictions are continuing to introduce provisions that require tax advisors and legal professionals to reveal any tax avoidance structures or use of tax shelters by their clients to revenue authorities. For instance, in the interest of full disclosure, South Africa is considering adopting mandatory disclosure rules which will require advisors to report to authorities, cross border structures or transactions if they are of a tax-aggressive nature. In addition, the UK introduced the Disclosure of Tax Avoidance Schemes (DOTAS) regime in 2004, which requires that HMRC be notified of schemes used by individuals or corporations to avoid tax. Further, the 5th Anti Money Laundering directive (AMLD 5) adopted by the european parliament obliges EU member states to introduce rules on manadatory disclosure rules obliging Intermidiaries including legal professionals to report on certain specified transactions. These requirements indicate the indirect diminishing of the obligation of the legal professional and protection for the client provided by C-AP.

This narrowing of the concept is becoming more acceptable. For instance, the European Parliament's inquiry into money laundering, tax avoidance and tax evasion noted:

> "*The scope of the statutory provisions on the C-AP of certain designated professional practitioners such as lawyers and notaries to refuse to testify or give evidence in tax matters is not clear and consistent in all Member States, let alone across Member States*."[194]

According to the European Parliament, C-AP is not to protect lawyers, but to protect clients and it is to be narrowly defined.[195]

Legal professionals should anticipate the narrowing of C-AP. To prevent over shrinking of the concept, there is a need for clarity as to the acceptable and unacceptable uses of C-AP that may guide authorities, courts and clients. The current uncertain status is detrimental to authorities, legal professionals and their clients.

10. Mandatory disclosure rules and other tax reporting standards

Action 12 of the OECD BEPS Action Plan regarding mandatory disclosure rules (MDR) recognised the challenges raised by the lack of timely, comprehensive and relevant information on aggressive tax planning for tax authorities.[196] Acknowledging that timely access to information could improve responses to tax risks, MDRs were introduced as a means to identify abusive tax planning schemes and the promoters and users of those schemes.[197] MDRs tend to include the following features[198]:

- Disclosure obligations for the promoter of the scheme and the user (taxpayer).

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194 European Parliament, *Report on the Inquiry into Money Laundering, Tax Avoidance and Tax Evasion*, A8-0357/2017, 16 November 2017, pg. 32, available online: http://www.europarl.europa.eu/cmsdata/134368/A8-0357_2017_EN.pdf

195 European Parliament, note 57, pg. 94

196 OECD, *Mandatory Disclosure Rules – Action 12: 2015 Final Report*, OECD (2015), pg.9. Available online at: https://www.oecd-ilibrary.org/docserver/9789264241442-en.pdf?expires=1589278478&id=id&accname=ocid177428&checksum=F918A06D41FCB19A57E142A5A6AC0B9B

197 Ibid

198 Ibid

- May place emphasis on specific types of schemes such as those that are considered common, or result in increased difficulty to detect.
- Will require disclosure either when the scheme is made available to the taxpayer or when the promoter is implementing it.
- Includes penalties to promote compliance.

This has direct implications for C-AP where the promoter of a scheme is a legal professional. This has been, at least in part, addressed by the OECD[199]:

> *'While schemes promoted by legal professionals come within the scope of mandatory disclosure rules, the existing legislation recognises that legal professional privilege, as recognised under the UK and Irish law, may act to prevent the promoter from providing information required to make a full disclosure. In this circumstance, the obligation to disclose falls on the scheme user. Alternatively, the client has the option of waiving any right to legal privilege and, if that happens, the obligation to disclose remains with the promoter. The legal professional asserting legal privilege must advise clients of their obligation to disclose and must also advise the tax administration that the legal professional's obligation to disclose has not been complied with because of the assertion of legal professional privilege.'*

MDRs were introduced in the EU in June 2018 and were expected to have been operationalised by 1 July 2020. Even despite Covid19 pandemic, Austria and Germany have operationalised MDRs in there legislation. Only the penalties will not be executed in case of missing reports for now. In setting up similar regulations as proposed by Action 12, the European Parliament called for 'tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance and evasion.'[200] Regarding C-AP, the EU noted that it would be crucial that, where privilege is claimed, 'tax authorities do not lose the opportunity to receive information about tax-related arrangements that are potentially linked to aggressive tax planning'.[201] Much like the OECD, the EU shifts the reporting obligation in these instances to the taxpayer benefitting from the scheme. This approach, which has also been adopted in the UK, does not protect C-AP, but protects the professional from the obligation to disclose. So far, Tax Advisors Europe have provided a public statement indicating that the directive respects legal professional privilege and the waiver permitting member states to exempt tax advisers.[202]

South Africa has had MDR in the form of Reportable Arrangement Rules (RAR) since 2005. The RAR requires that any participant in a reportable arrangement must report the arrangement to the South African Revenue Service (SARS). Participants include promoters of the arrangement, persons obtaining a tax benefit from the arrangement or parties to the arrangement.[203] Reportable arrangements include schemes that do not result in a reasonable

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199 OECD (2015), n.175, pg.34

200 Council Directive (EU) 2018/822. Available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0822&from=EN

201 Ibid

202 Tax Advisors Europe, *Opinion Statement PAX 5/2018 on the legal professional privilege reporting waiver set out in Article 8ab(5) of the Council Directive (EU) 2018/822 of 25 May 2018 (DAC6)*, July 2018. Available online at: https://taxadviserseurope.org/wp-content/uploads/2018/07/CFE-Opinion-Statement-Legal-Professional-Privilege-Waiver-DAC6.pdf

203 S.34 of the South African Tax Administration Act, No. 28 of 2011

expectation of pre-tax profit[204], or those that qualify as a hybrid equity instrument. Unlike the general approach set out by the OECD, no protection is provided for C-AP in South Africa.[205]

Given that a client is still required to disclose the information, the right to privilege is significantly diminished by MDRs.[206] Some academics have recommended that balance could be achieved through rules targeted only at aggressive tax planning schemes.[207] Oguttu and Kavis-Kumar, cite the following statement by the Law Council of Australia:

> *'Mandatory disclosure regimes should be limited to those who design aggressive tax arrangements that are clearly and precisely identified by the ATO to be marketed to taxpayers generally or those who are actively engaged in marketing them.'*[208]

In practice, this may be an ambitious proposal given the existing challenges regarding the grey zone between tax avoidance and evasion highlighted above. It is clear that C-AP as we have traditionally understood it will need to operate with greater limitations in the context of taxation – mainly where MDRs apply.

11. Experiences of tax authorities, FIUs and taxpayers with C-AP

The duty of legal professionals with regards to privilege is a standard across a majority of countries; however, the extent to which it may prevent the tax authority from accessing information varies. For instance, in Argentina, lawyers should reject any request for information made by tax authorities regarding any of their clients unless the client has provided authorisation to disclose.[209] Any breach can result in a fine or disbarment.[210]

Several cases in Australia have established that the access powers of the ATO do not override C-AP.[211] In *Clements, Dunne & Bell Pty Ltd v Commissioner of the Australian Federal Police*, it was found that documents arising from the furtherance of a scheme subject to the general anti-avoidance provisions in Australia, were not subject to legal privilege.[212] North J stated:

> *'The fact that the (GAAP provisions) are applicable to the scheme renders the clients' actions improper in a sense required for the application of the doctrine which limits the reach of client legal privilege'*[213]

In Brazil, the Court of Ethics and Discipline of the Brazilian Bar Association held[214]:

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204 Section 35(1)(d) Tax Administration Act No.28 of 2011

205 Annet Oguttu & Ann Kayis-Kumar,'Curtailing Aggressive Tax Planning: The Case for Introducing Mandatory Disclosure Rules in Australia (part 1)', (2019) 17 (1) eJournal of Tax Research 83. Available online at: http://www5.austlii.edu.au/au/journals/eJlTaxR/2019/29.html

206 Oguttu & Kavis-Kumar (2019), n.183, pg. 103

207 See Oguttu & Kayis-Kumar (2019), n.183, pg.103 quoting Philip Baker, 'The BEPS Project: Disclosure of Aggressive Tax Planning Schemes' (2015) 43(1) Intertax85; John McLaren, 'The Distinction Between Tax Avoidance and Tax Evasion Has Become Blurred in Australia: Why Has It Happened?' (2008) 3(2) Journal of the Australasian Tax Teachers Association 141.

208 See Oguttu & Kavis-Kumar (2019), n.183, pg.103

209 Diego N. Fraga & Axel A. Verstraeten,'Argentina', in Eleanor Kristoffersson et al., *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law Part 1*, Deutsche Nationalbibliothek (2013), pg.47.

210 Ibid

211 Kathrin Bain, 'Australia', in Eleanor Kristoffersson et al., *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law Part 1*, Deutsche Nationalbibliothek (2013), pg.75.

212 Ibid

213 In Bain (2013), n.172, pg.75

214 Procedure no. E-3.838/2009 as quoted in Luis Schoueri & Mateus Barbosa, 'Brazil, in Eleanor Kristoffersson et al., *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law Part 1*, Deutsche Nationalbibliothek (2013), pg.196

'As a general rule, the lawyer is prohibited from providing the Revenue Service with information about the business and the financial situation of his client or former clients, under the penalty of violating the professional secrecy…As an exception, when the lawyers is under inspection by the Revenue Service and the information is necessary to prove that the values credited in his bank account are not taxable income, there is no ethical prohibition in giving such information, provided that he discloses only the values transferred to the clients and derived from judicial procedures in which an agreement was reached or in which there is a final decision.'

The US authorities have, what could be considered to be, the most extensive rules authorising access to the revenue authority. In general, taxpayers must file special disclosure statements with the Internal Revenue Service (IRS) Tax Shelter Analysis Office when engaging in reportable transactions which include transactions that may be difficult to identify as tax avoidance.[215] The disclosure requirements apply to lawyers, accountants and other advisors who support taxpayers to formulate the reportable transactions.[216]

Case Study - Kenya[217]:

The C-AP is provided for under the Evidence Act, Chapter 80 of the Laws of Kenya and prohibits advocates from disclosing any communications with the client without their express consent. However, Section 59 and 60 of the Tax Procedures Act, introduced in 2015, require the production of any records or information relating to the tax liability of a person and provides the tax authority with wide powers to search and seize goods or documents. The provisions in Section 59 and 60 override any laws relating to privilege. These provisions have been challenged, via public interest litigation, in Court as unconstitutional and infringing upon the right to privacy of individuals and the right not to self-incriminate.[218]

In addition, the High Court of Kenya has previously ruled that the two provisions are unconstitutional and 'invalid on the ground that the section violated the privilege for communications between an advocate and client'.[219] There have been significant efforts to limit the access powers of the revenue authority through litigation, the authority has challenged the decision of the High Court, and the Court of Appeal has yet to decide.

Based on Kenya's experience, there is undoubtedly a concern that future challenges to the information access powers of tax authorities should be expected. There is a need to evaluate and determine whether a complete elimination of privilege may have many implications for taxpayer rights, particularly those relating to privacy.

12. Conclusion

There are categories of crimes that carry substantial risk to societies such as environmental crimes and sweeping financial fraud that may be committed by individuals and corporate entities. In such an instance, regulatory bodies who are required to police professional standards need to set standards and enforce such.[220] There are well-established ethical duties that provide

215 Joshua D Blank, 'USA', in Eleanor Kristoffersson et al., *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law Part 1*, Deutsche Nationalbibliothek (2013), pg.1174.

216 Ibid

217 This case study is an extract of a presentation given by the Kenya Revenue Authority during the virtual meeting of the Focus Group on Client-Attorney Privilege as part of the Tax Transparency and Corruption project at the WU Global Tax Policy Center.

218 Okiya Omtatah Okoiti v Attorney General & Another (2020) eKLR Nairobi High Court Petition 156 of 2017

219 Petition no. 421 of 2016, Robert K Ayisi v Kenya Revenue Authority

220 E.g., the Tax Faculty of the Institute of Chartered Accountants in England and Wales provides specific guidance to its members on the fundamental standards and behaviour that are to be followed when dealing with tax matters.

a foundation for an ethical limit on claims of C-AP, namely, the duties to provide competent representation to a client and not to make frivolous claims in defence of a client.[221] Accountancy bodies and bar associations have an important role to play in not only protecting the reputations of their respective professions but also that of their clients. In addition, when competent authorities and professional bodies work together with a clearer and "shared understanding of the scope of legal privilege and legal professional secrecy in their own country," is possible.[222]

Claims of C-AP are a legitimate part of legal representation, and it is acknowledged as such in both common and civil law jurisdictions. This requires that attorneys exercise sound judgment to avoid making frivolous claims because with privilege comes responsibility.[223] Higgens argues that "abuse of privilege is an unavoidable cost of having the privilege rule because of the nature of the rule and the limitations in detecting abuse."[224] The costs associated with abuse are enormous, and the extent of the abuse may be unknowable, however, application and refinement of case law, and adherence to professional obligations can potentially mitigate abuse. It is also worth noting that a large portion of cases of abuse of privilege was not detected through court procedures but independent and publicly available evidence of abuse such as inadvertent disclosures or disclosures by whistleblowers. Additional exceptions for C-AP in the context of tax and financial transparency, are therefore not required.

[221] 422.

[222] OECD (2016) 256; FATF (2013) 20.

[223] Strassberg (2007) 493.

[224] Higgens (2011) 97.