

European Court of Justice Expands Concept of Legal Professional Privilege in the EU

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All communications between EU-qualified external lawyers and their clients benefit from Legal Professional Privilege

In a recent judgment, the European Court of Justice underlined the importance of Legal Professional Privilege in the EU and expanded its scope and nature as compared to the previous situation. The judgment underlines the importance of the fundamental right of respect of communications between a client and their lawyer, and provides reassurance to companies that irrespective of their scope or nature, such communications do not need to be provided to public authorities.

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The background to the dispute

The case in question relates to EU legislation (Directive 2011/16/EU) that requires all intermediaries involved in potentially aggressive cross-border tax-planning that might lead to tax avoidance and evasion to report relevant practices to the competent tax authorities. The obligation also covers those who provide advice in that regard, although each EU Member State may grant lawyers (“lawyer-intermediaries”) a waiver from that obligation where it would breach Legal Professional Privilege (LPP) protected under national law. In such a situation, the lawyer-intermediary must nevertheless notify other intermediaries or the relevant taxpayer of their reporting obligations under the relevant legislation.

On that basis, the Flemish decree which transposed the Directive outlined that a lawyer-intermediary must inform other intermediaries that he or she could not fulfil the relevant reporting obligations him- or herself. Two lawyers’ professional organizations argued in front of the Belgian Constitutional Court that by providing even this information, lawyer-intermediaries would breach LPP. The European Court of Justice (ECJ) ruled on this issue on 8 December 2022 in response to a request for guidance from the Belgian Constitutional Court.

The ECJ judgment

The judgment first outlines a number of general principles about the sanctity of communications between lawyers and clients and the nature of LPP itself, even though this was not in itself the subject matter of the request for guidance from the Belgian Constitutional Court. It invokes both the EU Charter of Fundamental Rights as well as case-law of the European Court of Human Rights to highlight:

- the confidentiality of correspondence between individuals and the strengthened protection in that regard to exchanges between lawyers and their clients;
- that such protection covers not only the activity of defence but also legal advice;
- the secrecy of such legal consultation must be guaranteed, both with regard to its content and to its existence;
- individuals who consult a lawyer must therefore have a legitimate expectation that

their lawyer will not disclose to anyone, without their consent, that they are being consulted.

Against this backdrop, the judgment goes on to answer the specific request for guidance in relation to the Directive. It holds that the obligation for a lawyer to notify other intermediaries of their obligations under the Directive is in itself an interference of the fundamental right of respect of communications between lawyer and client because those other intermediaries become aware of the identity of the notifying lawyer-intermediary, of their assessment that the arrangement at issue is reportable and of their having been consulted in connection with the arrangement

Since even fundamental rights are not absolute, the judgment then assesses whether such interference is justified in terms of whether it is necessary to achieve a general interest. It holds that the interference is not strictly necessary, *inter alia* because the reporting obligation of the Directive is clear and already applies to all relevant intermediaries without it being necessary for a lawyer to be involved.

The Court therefore holds that the obligation to notify set out in the Directive infringes the fundamental right of respect for communications between a lawyer and their client.

Implications of the judgment

Beyond the specific subject-matter of the case, the judgment is significant because of the importance it attaches to LPP and the expansion of its scope and nature. These issues were not the specific subject-matter of the request for guidance from the Belgian Constitutional Court and so it is noteworthy that the ECJ, sitting in its Grand Chamber composition, sought to highlight them. By importing provisions from the EU Charter of Fundamental Rights and jurisprudence of the European Court of Human Rights, the judgment significantly expands the nature of LPP in the EU. Under the previous case-law (e.g. the *AM&S* and *Akzo* cases), LPP covered only communications relating to the defence of a client or earlier communications related to the subject-matter of the investigation. In practice, this raised questions about which pre-investigation communications could benefit from LPP.

The judgment means that this question is now moot - there is no longer any potential temporal or subject-matter limitation to the notion of LPP in the EU since all communications between lawyers and clients are presumed to benefit from such protection. In practice therefore, clients will no longer be subject to any uncertainty about whether and if so which lawyer-client communications benefit from LPP in the EU. Clients continue to need to be aware that in the EU, in contrast to the situation in the United States, communications with in-house lawyers are not deemed to benefit from LPP and only EU-qualified lawyers benefit from LPP under the EU rules.

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Gibson Dunn's lawyers are available to assist in addressing any questions that you may have regarding the issues discussed in this update. For further information, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's Antitrust and Competition practice group:

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