
The European Court of Justice Clarifies the Scope of Legal Professional Privilege Under EU Law

On December 8, 2022, the European Court of Justice (ECJ), the European Union’s highest court, delivered a landmark ruling in *Orde van Vlaamse Balies a.o.* (the Judgment) clarifying that legal professional privilege (LPP) is protected not only as part of the rights of defense but also under the right to protection of private communications.¹

From a practical standpoint, this means that, under EU law, the protection of confidentiality of attorney-client communications covers communications regarding legal advice beyond those that are related to litigation.

- **Whom does this ruling affect?** Companies doing business in the European Union, irrespective of whether they are headquartered there or have a European office.
- **How does this case change the law?** It clarifies that LPP covers legal advice generally, such as regulatory or commercial legal advice, and not only advice related to defense in a legal proceeding.

Facts of the Case

EU Directive 2011/16/EU (the Directive) requires all intermediaries involved in potentially aggressive cross-border tax planning to report relevant practices to the competent tax authorities.² This obligation also applies to attorneys, although each EU Member State may exempt attorneys (“attorney-intermediaries”) from this obligation where the reporting would undermine LPP under that Member State’s law. In such circumstances, the Directive requires that the attorney-intermediary notify other intermediaries or the taxpayer of their reporting obligations (the “notification obligation”).

¹ Judgment of December 8, 2022, *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v. Vlaamse Regering*, C-694/20, EU:C:2022:963.

² An intermediary is any person who designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

The Flemish Bar Association and other plaintiffs challenged the validity of the Belgian law implementing the Directive. They argued that the notification obligation infringes LPP because it violates the right to respect for private life and the right to a fair trial and that the obligation is not strictly necessary to ensure reporting of relevant cross-border arrangements. The Belgian Constitutional Court decided to refer questions regarding the validity of the Directive to the ECJ (using the preliminary reference procedure under EU law).

The ECJ's Grand Chamber Judgment

The ECJ, sitting in its extended composition of 15 judges, determined that the notification obligation did not infringe the right to defense or interfere with the right to a fair trial, because the obligation would arise before any litigation commenced.³ The ECJ observed, however, that the EU Charter of Fundamental Rights protects secrecy of legal advice more widely, including both the fact that the advice occurred and the content of the advice, beyond just in the context of defending litigation.⁴ Thus, the ECJ found that, outside of exceptional situations, individuals who consult an attorney can reasonably expect that their communications will be kept private and confidential.⁵

As a result, the ECJ ruled that the notification obligation infringes LPP since it requires disclosure of (i) the identity of the notifying attorney-intermediary, (ii) the fact that he or she was consulted, and (iii) his or her assessment that the relevant arrangement is reportable.⁶

The ECJ went on to conclude that this interference with the right to privacy of communication and LPP was not justified as necessary to achieve a general interest objective (i.e., to combat aggressive tax planning and reduce the risk of tax avoidance and evasion).⁷

Impact of the Judgment

Until now, the ECJ had only expressly recognized that LPP covers communications with an EU-qualified external counsel that are made for purposes and in the interest of a client's rights of defense in competition proceedings.⁸ This Judgment substantially expands the current scope of LPP. Companies will no longer need to show that the communication is for the purpose and in the interest of the right of defense; rather they will only need to show that the communication had the purpose of obtaining legal advice from an EU-qualified attorney. This

³ Judgment, para. 65.

⁴ Judgment, para. 27.

⁵ Judgment, para. 27; see also, ECtHR, judgment of April 9, 2019, *Altay v. Turkey (No 2)*, judgment of April 9, 2019, CE:ECHR:2019:0409JUD001123609, para. 49.

⁶ Judgment, para. 29.

⁷ Judgment, paras. 34–35 and 46–47.

⁸ Judgment of May 18, 1982, *AM&S v. Commission*, Case 155/79, EU:C:1982:157, para. 21.

legal precedent applies wherever the legal advice sought relates to a question of EU law or in respect of a procedure conducted by an EU institution or body or where national authorities implement EU law. In these situations, the precedent will prevail over any conflicting national LPP rules.⁹ Where the advice does not relate to EU law, the EU Member States may define LPP as they see fit.

State of Play in Europe

Given that EU law will not always be applicable, companies should be aware of how different EU Member States interpret LPP.

National Discrepancies. While the principle of confidentiality of communications between a legal professional and a client is generally recognized in all Member States, the scope of this principle and the criteria for applying it vary significantly. Most Member States, e.g., France, Belgium, Ireland and Spain, recognize LPP for both general advice and litigation proceedings, regardless of who possesses the relevant document. As noted above, in the many cases concerning the implementation of EU law, national LPP principles will also be overridden by the LPP principles developed by the ECJ.

In-House Attorneys. EU-level LPP does not cover communications with in-house attorneys, i.e., attorneys under employment contracts. Most Member States follow this approach, including Germany and France. Exceptions include Belgium, the Netherlands and Portugal, which extend LPP to in-house communications provided that the in-house attorney is admitted to the bar, and Ireland and Norway, where communications with an in-house attorney are protected when they concern legal rather than commercial issues.¹⁰

EU Merger Control. While the European Commission (EC) typically applies the same rules to EU merger control proceedings as to litigation,¹¹ the Judgment removes any ambiguity on this point. Most EU Member States do not have explicit rules regarding LPP in national merger control proceedings.

Common Law Jurisdiction. The treatment of LPP under EU law contrasts with the LPP rules in common law jurisdictions, such as the United States or the United Kingdom, where LPP covers communications between the attorney and client regarding both the receipt of legal

⁹ Judgment of February 26, 2013, *Åklagaren v. Åkerberg Fransson*, Case C-617/10, EU:C:2013:105, paras. 19–23.

¹⁰ Nevertheless, there is a trend toward greater protection of communications with in-house attorneys, with legislation to achieve that coming into effect in Spain, and there are discussions regarding such legislation in France.

¹¹ OECD, Treatment of legally privileged information in competition proceedings – Note by the European Union, November 26, 2018, para. 14, available at [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2018\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)46/en/pdf).

advice and the defense of proceedings. In the United States and the United Kingdom, LPP also covers communication with an in-house attorney, provided that the attorney receives information and acts as an attorney rather than in a commercial capacity. These rules are also applicable in merger control proceedings. An attorney who is only qualified outside the European Union, such as a solely English qualified attorney, cannot rely on EU LPP, however.

Joint and Common Interest. So far, the EU courts have not ruled on the concept of “joint” or “common interest” privilege, which can cover communications among the parties to a transaction or members of an association of undertakings and their counsel.¹² Some Member States have recognized such a concept. For instance, Irish courts have developed a practice of recognizing “common interest” privilege in cases where parties disclose privileged materials to other parties sharing a common interest.¹³ US law also recognizes this principle. For more information on recent developments in common interest and other aspects of legal privilege in the United States, please see [here](#).

Practical Tips

There are practical ways to ensure that communication with your attorney is protected by EU LPP, including:

- ensuring that advice regarding EU proceedings is led by EU-qualified independent attorneys and the EU attorney is copied on the relevant correspondence;
- involving EU-qualified external counsel as soon as possible—preferably before the start of potential administrative or judicial proceedings—if legal advice is required or there is an internal investigation;
- marking all communications seeking legal advice or related to an investigation or review undertaken in contemplation of litigation as “*Privileged and Confidential*” and being as clear as possible about whether communications relate to legal advice; and
- circulating privileged documents on a “need to know” basis only.

WilmerHale has extensive experience in disputes, compliance, and administrative and judicial proceedings, including asserting LPP, at both the national and the EU levels. Communications with our EU-based attorneys are fully covered by LPP.

¹² To deny that right would deprive the right to obtain legal advice of its very substance under Article 52(1) of the EU Charter of Fundamental Rights.

¹³ See, e.g., *Stewart Wood v. English* [2022] IEHC 579.

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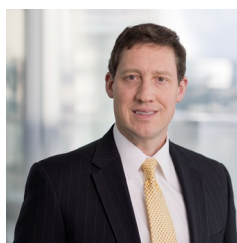
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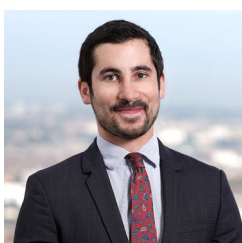
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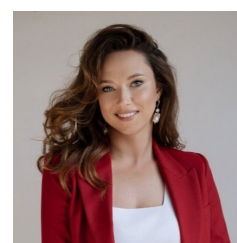
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