

ECJ Strengthens Legal Professional Privilege in the Exchange of Tax Information

News

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On 26 September 2024, the ECJ handed down an [important judgment](#) on the extent of the protection of the confidentiality of lawyer-client communication in the cross-border exchange of information on tax matters. The ECJ ruled that the Luxembourgish legislation under which advice and representation by a lawyer in tax matters do not enjoy the strengthened protection of communications between lawyers and their clients is incompatible with Art. 7 of the Charter of Fundamental Rights of the EU (CFR).

Facts of the case and questions referred

In the case at issue ([Case C-432/23, *Ordre des avocats du Barreau de Luxembourg*](#)), F SCS, a law firm incorporated as a limited partnership in Luxembourg, defends itself against a decision to provide information issued by the *administration des contributions directes* (Luxembourg Inland Revenue). This decision followed a request by a Spanish tax authority, which seeks information concerning the services F SCS provided to K, a company incorporated under Spanish law, in connection with the acquisition of a business and a majority shareholding in a company, both also incorporated under Spanish law.

After F SCS refused to disclose information, the Luxembourg Inland Revenue imposed a fine. In the action for annulment of this decision, F SCS – supported by the Luxembourg Bar Association – argued that the Luxembourgish legislation under which it is obliged to provide the authorities with all documentation and information relating to the lawyer’s relationship with his or her client does not respect the legal professional privilege. F SCS also stated that the instruction from its client in the case to which the decision relates did not cover tax matters but concerned only company law; this is a ground for lawyers to refuse disclosure of information entrusted to them in the exercise of their profession, as foreseen in Article 177(1) of the *loi générale des impôts du 22 mai 1931* (General Tax Law of 22 May 1931), known as the “Abgabenordnung” (AO).

By contrast, the Luxembourg Inland Revenue referred to Article 177(2) AO, which provides that the refusal ground is not applicable in respect of facts of which lawyers became aware in connection with advice or representation in tax matters, unless an affirmative or negative response to questions would put their clients at risk of criminal prosecution.

The *Cour administrative* (Higher Administrative Court, Luxembourg), before which F SCS’s action for annulment is pending, observed that both the underlying EU law (Council [Directive 2011/16/EU](#) on administrative cooperation in the field of taxation) and the national law could be incompatible with fundamental rights. It

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especially wonders whether the ECJ's statements made in its 2022 [judgement in Case C-694/20](#) (*Orde van Vlaamse Balies and Others*) are applicable also to the present situation. In *Orde van Vlaamse Balies*, the ECJ ruled that the obligation for a lawyer under [Art. 8ab of Directive 2011/16](#) (as amended by [Directive 2018/822](#)) to inform other intermediaries involved in potentially aggressive cross-border tax-planning infringes the right to respect for communications with his or her client. Against this background, the *Cour administrative* posed questions on the following three issues:

- Scope of the right to respect for communications between lawyers and their clients guaranteed by Art. 7 CFR;
- Validity of Directive 2011/16 in the light of Art. 7 and Art. 52(1) CFR;
- Compatibility of the administrative decision such as that at issue in the main proceedings with Art. 7 and Art. 52(1) CFR.

[Interference with right to respect lawyer-client communication](#)

The ECJ clarifies: Legal advice on company law is subject to the strengthened protection of communications between lawyers and their clients guaranteed by European fundamental rights.

The ECJ emphasises the scope of the protection of professional secrecy guaranteed by Art. 7 CFR, which corresponds to the protection guaranteed by Art. 8(1) ECHR, both in terms of the existence and the content of the mandate. The reason for the protection of professional secrecy is the fundamental task entrusted to lawyers in a democratic society, namely defending litigants. It follows that legal advice given by a lawyer, regardless of the area of law to which it relates, is guaranteed the protection of Art. 7 CFR with regard to lawyer-client communication. An instruction to a lawyer to provide the administration with all documents and information concerning his relations with his client in the context of advice on company law constitutes an infringement of that guarantee.

[Validity of Directive 2011/16](#)

The ECJ argues: The fact that the EU directive does not contain any provisions on the protection of the confidentiality of communications between a lawyer and his client in the context of the requested Member State's obligation to provide information does not mean that the directive infringes Arts. 7 and 52(1) CFR.

In view of those provisions, the European legislature merely defined the obligations of the Member States in relation to each other for the purposes of the exchange of information provided for in the directive, while authorising them not to comply with a request for information where conducting the investigations sought or gathering the information concerned would be contrary to their legislation. Accordingly, it is the responsibility of the Member States to ensure that their national procedures for gathering information for the purposes of information exchange comply with the Charter, in particular Art. 7.

[Compatibility of the national legislation and the administrative decision at issue](#)

The ECJ concludes: Instructions based on a national regulation under which advice and representation by a lawyer in tax matters is not covered by the strengthened protection of lawyer-client communication, except where there is a risk of criminal prosecution of the client, are in breach of Arts. 7 and 52(1) CFR.

The ECJ stresses that the Charter guarantees that persons who consult lawyers can reasonably expect their communications to remain private and confidential. Apart from exceptional situations, they must have confidence in the fact that their lawyers will not disclose the fact that they are consulting them to anyone without their agreement.

Considering these premises, the Luxembourgish legislation renders the afforded protection devoid of its very essence because it basically excludes the content of advice given by lawyers in tax matters – and thus an entire branch of law in which lawyers are likely to advise their clients. As for the decision at issue, which concerns an entire file not related to tax matters, it further extends the scope of the infringement of the substance of the right protected by Art. 7 CFR. Both the national legislation and its application by means of the administrative decision are far from being confined to exceptional situations, and thus infringe the essence of the right guaranteed by Art. 7.

Put in focus

Following the [judgment in *Orde van Vlaamse Balies*](#) (see above), the ECJ reaffirms the importance and function of legal professional privilege. The confidentiality of communication between lawyer and client is strengthened. It is clarified that legal advice or representation cannot generally be excluded from the protection afforded to legal professional privilege. The decision also means that the cross-border exchange of information between the authorities is limited in tax matters since there is no differentiation between lawyers specialized in tax or corporate law and defending criminal lawyers.

The ECJ continued however its stance that Directive 2011/16 on administrative cooperation in the field of taxation is not incompatible with higher ranking EU law (the Charter). A try to declare the Directive invalid also failed in case [C-623/22, *Belgian Association of Tax Lawyers and Others*](#) which was decided on 29 July 2024 (→[eucrim 2/2024, 120-122](#)). However, the latter case concerned the newly introduced reporting obligation for aggressive tax planning.

In the present case, the ECJ did not follow [the bar associations' plea](#) that Directive 2011/16 itself is invalid since it lacks provisions on legal professional privilege. The bar associations referred to other ECJ case law (particularly with regard to data retention) in which the Court emphasised that, in order to meet the requirements of Art. 52(1) CFR, secondary EU law (i.e., a directive) must itself regulate the interferences with fundamental rights that they effect and intend, and to that end lay down clear and precise rules as to the scope and application of the measures provided for, and imposing minimum safeguards. The ECJ seems now follow the line that in the area of cooperation against tax evasion and tax fraud, it is the national law which must provide the necessary safeguards for the protection of the legal professional privilege.

Lastly, it must also be noted that the ECJ emphasised again the protection of lawyers who are conferred a “fundamental role in a democratic society”, i.e., lawyers who give independent legal advice and act in good faith towards their clients. Comparing the [judgment in *Belgian Association of Tax Lawyers*](#) (see above) on the one hand and the present judgment in [Orde des avocats du barreau de Luxembourg](#) as well as the judgment in [Orde van Vlaamse Balies](#) on the other hand, the ECJ does not extend the strengthened protection of the legal professional privilege to other professionals even if they advise in legal matters and are subject to professional secrecy.

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