

Legal professional privilege as a limit to the duty to cooperate with tax authorities

The Court of Justice confirms, in the context of Directive 2011/16/EU, that legal professional privilege covers client representation and advice and that any restrictions placed on said privilege must respect the rights enshrined in Article 7 of the Charter of Fundamental Rights

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The Court of Justice of the European Union (CJEU), in Judgment of 26 September 2024 (C-432/23, *Ordre des avocats du barreau de Luxembourg*), has once again ruled in relation to the confidentiality of communications between a lawyer and client as a limit to the duties of disclosure incumbent on legal practitioners in the framework of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation.

Unlike the judgments of 8 December 2022 (C-694/20) and 29 July 2024 (C-623/22), in which

the substantive question concerned the limits to the reporting obligations of intermediaries licensed for the practice of law in relation to potentially aggressive cross-border tax planning arrangements, which are the subject of subsequent automatic exchange of information, this time the dispute is framed in the context of the exchange of information on request.

The Luxembourg tax authorities, having received a request for information from the Spanish tax authorities based on Directive 2011/16/EU, requested from a law firm all available documentation and information concerning the

services provided to a Spanish company in the context of the establishment of certain corporate investment structures of the group to which that company belonged, in particular a detailed description of the transactions for which advice was provided, an explanation of its involvement in those transactions and the identity of its interlocutors. Article 177 of the Luxembourg Tax Code allows lawyers the possibility of withholding information conveyed to them in the practice of their profession, but expressly excludes those who advise or represent their principals in tax matters, unless they concern questions the affirmative or negative answer to which would expose such principals to the risk of criminal prosecution. On the basis of this legislative provision, the law firm refused to provide the requested information and documentation, adding that its advice did not fall within the field of taxation, but within the corporate and commercial field. Following the imposition of a tax fine for failure to comply with the request, the law firm initiated legal proceedings that landed at the Luxembourg Supreme Court. The national court referred a number of questions to the CJEU for a preliminary ruling, which can be grouped under three main issues:

- The first issue is whether legal advice given by a lawyer on company law matters falls within the scope of the enhanced protection of communications between lawyers and their clients provided for by Article 7 of the Charter of Fundamental Rights of the European Union and Article 8(1) of the European Convention on Human Rights. On the basis of Article 52(3) of the Charter, the CJEU interprets this fundamental right in the light of the case law of the European Court of Human Rights and its own previous case law (C-694/20 and C-623/22), an analysis which leads it to conclude that the confidentiality of the lawyer-client relationship is afforded absolutely specific protection, justified by the fundamental task of representation at court that is entrusted to lawyers in democratic societies. Moreover, this enhanced protection covers not only legal representation but also legal advice, both as regards its content and its very existence, whatever the field of law to which it relates. Consequently, a request such as that at issue in the main proceedings constitutes an interference with the right to respect for communications between lawyers and clients, enshrined by Article 7 of the Charter.
- The second issue concerns the very conformity of Directive 2011/16/EU with Articles 7 and 52(1) of the Charter, in so far as it does not contain any provision (beyond Articles 17(4) and 18(1) thereof) which expressly permits interference with communications between lawyers and their clients in the context of the exchange of information on request, nor does it define the scope of the limitation on the exercise of that right. On that question, the Court points out that, unlike the automatic and mandatory exchange of information on potentially aggressive cross-border tax planning arrangements, the directive does not lay down, for the exchange of information on request, any obligation on the persons or operators in possession of the information to make a declaration. The EU legislator has only determined the obligations that Member States have towards each other and has authorised them not to comply with a request for information where this would be contrary to their legislation. It is therefore up to the Member States to ensure that their national procedures for collecting information comply with the Charter and, in par-

Lawyer-client confidentiality extends to the existence and the content of the legal advice given in any field of law

particular, with the strengthened protection of communications between lawyers and their clients enshrined by Article 7 of the Charter, so that any limitation on its exercise must be laid down by law and comply with the other requirements of Article 52(1) of the Charter.

- The last group of issues raised concerns the conformity with Articles 7 and 52(1) of the Charter of a national legislative provision which, like that of Luxembourg, generally excludes advice and representation provided by a lawyer in tax matters - except where there is a risk of criminal prosecution against the client - from the strengthened protection afforded by Article 7 of the Charter. After pointing out that that protection applies to any field of law in which advice is given or the client is represented, the CJEU notes that the effect of the Luxembourg prohibition is that the content of communications between lawyers and their clients on tax matters cannot be kept secret from the authorities unless it exposes the client to the risk of criminal prosecution. The confidentiality enshrined by Article 7 of the Charter extends to both the very existence and the content of the legal advice given by the lawyer, so that clients can reasonably expect that their communications will be kept private and confidential and, save in exceptional situations, that the lawyer will not, without their consent, disclose the request for advice. Unlike in cases C-694/20 and C-623/22, in this case the CJEU finds that the national legislative provision infringes the essential content of the right

enshrined by Article 7 of the Charter by extending the exclusion of legal professional privilege, since that prerogative is rendered meaningless in a whole branch of law in

which those professionals may advise their clients. Moreover, the unenforceability of legal professional privilege in tax matters deriving from the national legislative provision was used by the Luxembourg tax authorities to demand the entire file held by the law firm, as well as details of the content of all communications with its client, even though that advice was given in the context of company law, thus further extending the scope of the infringement of the essential content of the fundamental right.

The judgment under discussion is relevant from a twofold perspective: on the one hand, it insists that the right to confidentiality of communications between lawyer and client, enshrined by Article 7 of the Charter, covers not only the representation of a client in proceedings, but also legal and, therefore, tax advice; on the other hand, it recalls that the limitations imposed on the exercise of this fundamental right by the Member States must be established by national legislation and must respect the other rights enshrined in Article 7 of the Charter.

One cannot but wonder about the projection of this ruling on the obligation of lawyers to provide information with tax implications to the authorities. Article 93(5) of the Spanish Taxation Act excludes the obligation of a professional to provide the information requested by the tax authorities when such information affects a) private non-property data that the professional knows by reason of his or her activity and the disclosure whereof would violate honour or personal and family privacy or b) confidential

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data of his or her clients of which he or she has knowledge as a result of the provision of professional advisory or representation services.

In the light of this judgment, it appears that the CJEU's approach to the enforceability of the

lawyers' duty of privilege reinforces the protection of the national law and covers property-related data and information deriving from tax advice given to clients, which, having regard to the circumstances of each case, strengthens the protection of legal professional privilege.