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By PwC Deutschland | 04. Oktober 2024

ECJ: Request for tax relevant information versus lawyer’s obligation to secrecy

In a request for a preliminary ruling from Luxembourg the ECJ was asked under what conditions a tax administration may seek disclosure from a lawyer in the context of an exchange of information and whether such information provided falls under the protection of legal professional privilege pursuant to Article 7 of the Charter of Fundamental Rights of the European Union. In this case the ECJ sees an infringement of the essence of the right guaranteed in Article 7 of the Charter which cannot be justified.

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Background

The ECJ was asked to further elaborate on the protection of legal professional privilege. Namely whether advice or representation in tax matters - as specifically provided for under Luxembourg law - can generally be excluded from the protection of legal professional privilege under EU law. The European Court of Justice (ECJ) has in the past already emphasized the importance of protecting the confidentiality of communications between lawyers and their clients in connection with the reporting obligation applicable to cross-border tax arrangements.

On June 28, 2022, the plaintiff (a law firm in the legal form of a limited partnership - *Société en commandite simple*) received a request for information from the Spanish tax administration. All available documents (letters of engagement, contracts with the client, reports, memoranda, communications, invoices, etc.) regarding the services provided by the client to a Spanish company (K) in the context of the acquisition of 80% of the shares in (N) by the investment group (O) in 2015 and the acquisition of another Spanish company by the group in 2018 were requested for the period 2016 to 2019. In addition, a detailed description of the course of the aforementioned transactions, as well as an explanation of its involvement in these transactions.

The plaintiff then stated that it had acted as a lawyer providing legal advice to the group of companies to which Company K belonged. It was therefore legally impossible to disclose information about the client, as this would be covered by professional secrecy. The legal mandate of the plaintiff in the case in questionwas not of a tax nature but related exclusively to company law.

Decision

In general, the ECJ confirms its general case law insofar ,,that legal advice by a lawyer in company law matters falls within the scope of the enhanced protection of exchanges between a lawyer and his or her client". It follows that a decision requiring a lawyer to provide an exchange of information in the field of taxation, including all documentation and information relating to his relations with his client, constitutes an interference with the right to respect communications between a lawyer and his client, except where there is a risk of criminal prosecution of the client.

The ECJ held that the Luxembourg legislation, far from being limited to exceptional situations, by the very extent of the waiver of lawyer-client secrecy which they authorize in respect of communications between the lawyer and his client, is an infringement of the essence of the right guaranteed in Article 7 of the Charter which cannot be justified.

Source and reference: The complete ECJ judgment in the case **C-432/23** - *Ordre des avocats du Barreau de Luxembourg* to be found here. – Note: At the time of publication of this article, the judgment was only available in the French language.

ECJ case law: A brief summary on the on the legal privilege of lawyers vs. other professionals

In its judgment of 8 December 2022 in the case **C-694/20** *Orde van Vlaamse Balies and Others* the ECJ has

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recognized that the lawyer-client relationship enjoys specific protection due to the lawyer's special role in the judicial system, which is recognized by all EU Member States. It concluded that a lawyer could not be obliged to notify any intermediary who is not their client of that intermediary's reporting obligations. A lawyer should thus only notify their client. Here, the ECJ reiterated the special protection afforded to lawyers due to their role in the administration of justice and ethical obligations, reason for which it concluded that the obligation to notify violates the respect for private life of Article 7 of the Charter.

The DAC6 Directive (Council Directive 2011/16/EU, as amended by Council Directive (EU) 2018/822) establishes an obligation for intermediaries, and in their absence, the involved taxpayers, to report potentially aggressive cross-border tax arrangements to the competent tax authorities. This measure aims to combat tax avoidance and evasion in the internal market.

In its most recent judgment of 29 July 2024, the ECJ commented in the case *Belgian Association of Tax Lawyers and others* (**C-623/22**). This case was about the validity of certain provisions of DAC6, which mandates the reporting of potentially aggressive cross-border tax arrangements by intermediaries or taxpayers to the competent tax authorities. In essence, the ECJ confirmed the legitimacy of the EU directive, but at the same time emphasized the importance of the relationship of professional confidence between lawyers and clients.

The Directive introduced reporting obligations for potentially aggressive cross-border tax arrangements for intermediaries. Such intermediaries may also include lawyers. The Directive provides that they may claim a waiver from reporting information on a reportable cross-border arrangement if they would breach legal professional privilege under national law. However, they must then inform other intermediaries or the taxpayer of their reporting obligation. In such cases, intermediaries are required to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations.

For an in-depth analysis of the ECJ judgment *Belgian Association of Tax Lawyers and others* see our PwC **EUDTG Newsalert of 3 September 2024**.

Schlagwörter

exchange of information