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European Court Adviser Backs Privacy Protection for Law Firms

By Jan Stojaspal

- Case stems from law firm ordered to produce some client documents
- Decision backs expanded privacy rights at time of increased data sharing

Legal advice provided by a law firm is generally confidential—whether it covers tax matters or company law, an adviser to the European Court of Justice said.

A tax authority, therefore, can't issue a blanket order for it to surrender all available documentation relating to its relations with a client, Advocate General Juliane Kokott wrote in a non-binding legal opinion issued Thursday.

Such an order, according to Kokott, would constitute "interference with the right to respect for communications between lawyers and their clients" that is guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union.

And while there may be situations where such interference is necessary, its conditions, scope, and limits must be clearly stipulated in national legislation, she added.

Her comments come in a case where a law firm was ordered by the director of the Direct Taxation Administration in Luxembourg to produce all available documents concerning services provided to a client in connection with the acquisition of two companies, including a detailed description of how the acquisition was conducted and who was involved.

The information was requested by the Spanish tax administration under Council Directive 2011/16 EU on administrative cooperation in the field of taxation. The directive, also known as DAC, is a set of reporting rules that govern collection of information relevant for cross-border taxation.

The unidentified law firm refused to comply and appealed to the Cour administrative, which stayed the proceedings and asked the European Court of Justice for guidance.

Privacy Rights Focus

Kokott's opinion is the last step before the court issues the guidance. While not binding for the court, her opinion is significant in that it backs expanded privacy rights at a time of increased data collection and data sharing among tax authorities of EU member countries.

The opinion also extends the privacy rights to legal advice on tax matters, according to Paul Verhaeghe, partner at Wanted Law Tax and board member of the Belgian Association of Tax Lawyers.

“With this opinion, the advocate general recognizes a broad protection under Article 7 of the Charter for all legal advice lawyers give, including tax advice,” he said. “The first discussion is whether there is protection, and she says there is protection. And then, if there is protection, the law can interfere in that protection, but it must be consistent with a set of criteria.”

According to Kokott, it is important to strike a balance between the objectives in the general interest and the protection afforded by legal professional privilege.

“Since Luxembourg law does not allow for such a balance to be struck in matters of tax law, Article 7 of the Charter precludes the application of the national law to that extent,” Kokott concluded.

Jean-Paul Olinger, executive committee director of the Direct Taxation Administration in Luxembourg, said in an email the tax authorities don’t comment on court decision-specific queries.

Pit Reckinger of Ordre des Avocats du Barreau de Luxembourg said by email that his organization needed to analyze the advocate general opinion internally before making a public comment. The Luxembourg bar association has joined the law firm in litigation before the national court.

The Spanish tax administration didn’t immediately respond to a request for comment.

The case is C-432/23, F, *Ordre des Avocats du Barreau de Luxembourg v Administration des contributions directes*.

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