

CJEU Expands Scope of Legal Professional Privilege to Any Legal Advice

According to a new judgment LPP protects private communication between clients and lawyers, limiting requests for information in competition proceedings.

Key Points:

- Clients can now argue that their communications with external EEA-admitted lawyers that involve legal advice with respect to *any* subject matter should no longer be captured in requests for information from the EC targeting internal documents.
- The European Commission can no longer review (even in a cursory manner) the content of documents covered by LPP.

On 8 December 2022, the Court of Justice of the European Union (the CJEU) issued a judgment that expands the scope of Legal Professional Privilege (LPP) in the EU.¹

The judgment in *Orde van Vlaamse Balies* clarifies that both Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) (right to an effective remedy and a fair trial) and Article 7 of the Charter (protection of private communications, including between clients and their lawyers) protect LPP. The corresponding provisions in the European Convention of Human Rights (ECHR) are Articles 6 and 8.

- **What is LPP?** LPP covers all communications between EEA-qualified external lawyers and their clients that involve the provision of legal advice, regardless of whether such advice relates to the clients exercising their rights of defense.
- **Why is the judgment relevant?** The expanded LPP grants clients more arguments to object to the European Commission's (EC) previously restrictive interpretation of LPP when it seizes internal documents during on-site inspections, or orders their production in a request for information. The expanded interpretation is particularly relevant as the EC increasingly relies on document requests to establish potential infringements in the context of competition proceedings (e.g., document requests in merger reviews), as well as the Digital Markets Act (DMA) and the Foreign Subsidies Regulation (FSR).

LPP's Previous Coverage

The CJEU has previously acknowledged that LPP covers the following (rather limited) categories of documents:

- Written communications between a client and an external lawyer qualified to practice in the EEA in connection with the client's rights of defense²
- Internal notes confined to reporting the content of privileged communications, as well as working documents or summaries that were drafted exclusively to seek legal advice from an EEA-qualified external lawyer in connection with the exercise of the rights of defense³

In its *AM&S*, *Dow Benelux*, *Hilti*, *LVM*, and *Akzo* decisions⁴, the CJEU recognized that LPP covers written communications between external counsel admitted in the EEA and their client if this communication related to the subject matter of an existing or anticipated investigation, and therefore was in connection with the clients' rights of defense in the investigation's subject matter.

The New Judgment

The *Orde van Vlaamse Balies* judgment relates to lawyers' disclosure obligations in the field of "aggressive tax planning" measures. Legal professionals' associations challenged the Belgian legislator's decision which requires lawyers to disclose that they are advising a client on reportable cross-border tax arrangements. The judgment recognizes that:

- **LPP applies to any legal advice (not only to legal defense as before).** The CJEU has traditionally focused on whether the EC had violated undertakings' rights of defense under Articles 47 and 48 of the Charter. Now, the CJEU added the right to respect for private life enshrined in Article 7 of the Charter. By analogy with Article 8(1) of the ECHR, the judgment concludes that, LPP covers "not only the activity of defense but also legal advice." LPP therefore no longer requires proof that the client's communication with their external lawyer had the purpose to prepare for or exercise their rights of defense.

The judgment does not expressly address whether companies (as legal rather than natural persons) too can rely on Article 7 of the Charter to protect their exchanges with their lawyers. However, the European Court of Human Rights (ECtHR) has interpreted the term "correspondence" broadly to include general exchanges between a lawyer and representatives of companies that were clients of his firm.⁵ In the same vein, the ECtHR has indicated that companies can expect legal protection to respect their "home" and their correspondence.⁶

- **LPP also covers the very existence of legal advice.** The CJEU observed that Article 7 of the Charter guarantees "the secrecy of that legal consultation, both with regard to its content and to its existence."⁷ Companies can therefore expect their communications with their lawyers to be kept private and confidential — which could be particularly relevant for dawn raids. Indeed, the practice that EC officials take a "cursory look" at "superficial features" of the relevant documents may have to change.⁸

Going Forward

Clients can now argue that their communications with external EEA-admitted lawyers that involve legal advice with respect to *any* subject matter should no longer be captured in requests for information from the EC targeting internal documents.

Moreover, clients should now be able to resist any attempt by the EC to review (even in a cursory manner) the content of documents covered by LPP, based on the argument that their very existence should remain secret. This decision resonates with a previous judgment in which the Belgian Constitutional Court ruled that “the mere fact of having consulted a lawyer is covered by LPP” and that “the same applies a fortiori to the identity of the clients of a lawyer.”⁹

Additionally, the judgment will impact national authorities’ enforcement proceedings. Article 51 provides that the Charter always binds the EU institutions but applies to Member States only when they implement EU law. While Article 51 does not affect merger control, Article 3(1) of Regulation 1/2003 requires national authorities to apply EU competition law alongside national competition law in antitrust proceedings.

The new ruling does not define external counsel and does not appear to limit LPP to communications with EEA-qualified external counsel, as it refers to the broad concept of “lawyer.” As this case involved EEA-qualified lawyers only, the question remains whether the LPP will now protect communications with non-EEA qualified lawyers (e.g., US lawyers) and in-house counsel in the EEA. Future case law will have to show whether the European courts might also expand the personal scope of LPP in the EEA.

The *Orde van Vlaamse Balies* decision represents a potentially meaningful expansion of the privilege protection that parties may claim at EC level, particularly for cross-border enterprises which were previously unable to bring US-style privilege claims in Europe. How the Commission will address such claims, however, remains uncertain, and the privilege protection rules at the Member State-level may continue to vary from jurisdiction to jurisdiction.

Tips for Best Practice

Clients can ensure that LPP protects their attorney-client communications by recalling a few (simple) tips:

- Involve EEA-qualified external lawyers as soon as possible regarding (anticipated) antitrust proceedings.
- Include an EEA-qualified external lawyer's email address in the “To” field of the email correspondence. Mark emails and documents as “privileged & confidential” or “request for advice from external EEA-qualified counsel.”
- Circulate privileged documents and communications on a “need to know” basis only. If forwarding privileged information, make sure that this communication (i) is necessary to develop external lawyers’ advice, (ii) directly relates to the subject matter of the external lawyers’ advice/request, and (iii) properly labels the chain as “privileged & confidential.” Do not forward privileged information unless you can maintain that privilege.
- Choose neutral titles for email subjects, document titles, or meeting invites to ensure that regulators such as the EC cannot misinterpret if they seize or receive them. Do not pick a title that reveals the content of the privileged information.
- Discuss sensitive information on the phone or in person if you are uncertain you can maintain privilege in email communication.
- Where appropriate, clearly indicate in the internal document's header that it is being prepared to seek the advice of an outside counsel.

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Endnotes

- ¹ Judgment of 8 December 2022, *Orde van Vlaamse Balies and Others v Vlaamse Regering*, C-694/20, ECLI:EU:C:2022:963.
- ² Judgment of 18 May 1982, *AM & S Europe Ltd. v Commission*, 155/79, ECLI:EU:C:1982:157, paragraph 23.
- ³ Respectively Order of 4 April 1990, *Hilti v Commission*, T-30/89, ECLI:EU:T:1990:27, paragraph 18 and Judgment of 17 September 2007, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v Commission*, ECLI:EU:T:2007:287 paragraphs 122 to 124.
- ⁴ Judgment of 18 May 1982, *AM & S Europe Ltd. v Commission*, 155/79, ECLI:EU:C:1982:157, paragraphs 22 to 31; Judgment of 17 October 1989, *Dow Benelux NV v Commission*, 85/87, ECLI:EU:C:1989:379, paragraphs 17 to 19; Order of 4 April 1990, *Hilti v Commission*, T-30/89, ECLI:EU:T:1990:27, paragraph 18; Judgment of 20 April 1999, *LVM and others v Commission*, T-305/94, ECLI:EU:T:1999:80, paragraphs 472 to 477; Judgment of 15 October 2002, *LVM and others v Commission*, C-254/99 P, ECLI:EU:C:2002:582, paragraph 305; Order of 30 October 2003, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v Commission*, T-125/03 R, ECLI:EU:T:2003:287, paragraphs 95 to 96; Judgment of 17 September 2007, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v Commission*, T-125/03, ECLI:EU:T:2007:287, paragraphs 80 to 88.
- ⁵ Judgment of the ECtHR of 19 November 2020, *Klaus Müller v. Germany*, no. 24173/18, ECLI:CE:ECHR:2020:1119JUD002417318, paragraphs 37 to 41.
- ⁶ Judgment of the ECtHR of 16 July 2002, *Société Colas Est and others v France*, no. 37971/97, ECLI:CE:ECHR:2002:0416JUD003797197, paragraphs 40 to 42 and Judgment of the ECtHR of 16 October 2007, *Wieser and Bicos Beteiligungen GmbH v Austria*, no. 74336/01, ECLI:CE:ECHR:2007:1016JUD007433601, paragraphs 42 to 46.
- ⁷ Judgment of 8 December 2022, *Orde van Vlaamse Balies and Others v Vlaamse Regering*, C-694/20, ECLI:EU:C:2022:963, paragraphs 27 and 32.
- ⁸ Judgment of 17 September 2007, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v Commission*, T-125/03, ECLI:EU:T:2007:287, paragraph 81.
- ⁹ Belgian Constitutional Court 14 March 2019, 43/2019 *J.V.M. v Belgium*, paragraph B.6.