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The CJEU invalidates certain EU MDR notification obligations

CJEU – DAC6 – Legal professional privilege – Notifications – EU MDR

On December 8, 2022, the Court of Justice of the European Union (CJEU or the Court) gave its decision in case [C-694/20](#) concerning compatibility with EU law of the requirement for intermediaries, who are subject to legal professional privilege, to notify other intermediaries of their reporting obligation under the EU mandatory disclosure rules (DAC6). The CJEU held that the notification obligation is invalid in light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union (the Charter) - specifically the right to respect for communications between a lawyer and his or her client (Article 7).

Background

On December 21, 2020, a request for a preliminary ruling was made to the CJEU by the Belgian Constitutional Court in a case regarding the mandatory disclosure requirements for intermediaries and relevant taxpayers under DAC6.

The question referred to the CJEU concerns the compatibility of Article 8ab of DAC6 with the right to a fair trial, as guaranteed by Article 47 of the Charter, and the right to respect for private life, as guaranteed by Article 7 of the Charter.

Article 8ab(5) of DAC6 provides that Member States grant intermediaries “the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State”. However, Article 8ab(5) further provides that intermediaries claiming legal professional privilege are required “to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations”.

The waiver for legal professional privilege was incorporated into Belgian domestic law in Article 11/6(1) of a Flemish decree on administrative cooperation in the field of taxation. While the decree does not specify the manner in which the notification must be made or the full content required, it does require that the intermediary notifies other intermediaries (or the taxpayer, if there is no other intermediary) that a reportable cross-border

arrangement exists and that a reporting obligation arises. In addition, the decree requires that the name of the intermediary is listed as part of the notification data.

The Flemish Bar Council argued that they are not able to fulfil their obligations under the decree without breaching professional secrecy rules. In this regard, the Flemish Bar Council argued that the notification obligation was an infringement of the right to a fair trial and the right to respect for private life under the Charter.

On April 5, 2022, Advocate General ('AG') Rantos recommended that the CJEU finds that the requirement for intermediaries availing of legal professional privilege under DAC6 to notify other intermediaries (or the relevant taxpayer) of their reporting obligation, did not infringe on their rights under the Charter of Fundamental Rights of the EU insofar as the name of the intermediary claiming privilege is not disclosed to the tax authorities – see E-News [Issue 472](#) for further details.

The CJEU decision

The CJEU first noted that Article 7 of the Charter recognizes that everyone has the right to respect for his or her private and family life, home and communications. These provisions correspond to Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), while Article 47, which guarantees the right to an effective remedy and the right to a fair trial, corresponds to Article 6(1) ECHR. The Charter is intended to be interpreted consistently with the ECHR. The CJEU must therefore take into account the interpretation of the European Court of Human Rights (the ECtHR) when interpreting the rights guaranteed by the Charter.

In this context, the Court noted that it is apparent from the ECtHR case law that confidentiality of all correspondence between individuals is protected and enhanced protection is provided to exchanges between lawyers and their clients. In the Court's view, except in exceptional situations, persons who consult a lawyer must be able to legitimately trust that their lawyer will not disclose to anyone, without their consent, that they consulted him or her.

The Court continued by observing that for the case at hand, where intermediaries subject to legal professional privilege are required to notify other intermediaries of their reporting obligation under DAC6, this entails the consequence that those other intermediaries become aware of the identity of the notifying intermediary, of his or her assessment that the cross-border arrangement must be reported and of the fact that he or she is consulted on it. The Court noted that in those circumstances and in so far as those other intermediaries are not necessarily aware of the identity of the intermediary subject to legal professional privilege and of the fact that he or she has been consulted, the notification obligation entails an interference with the right to respect for communications between lawyers and their clients.

Moreover, the Court observed that such notification obligation indirectly leads to another interference with Article 7 of the Charter, resulting from reporting by the notified intermediary of the identity of the intermediary subject to legal professional privilege and their involvement in the cross-border arrangement.

The Court continued by analyzing if such interference can be justified. In this respect, the CJEU noted that the objective of DAC6 is the fight against aggressive tax planning and the prevention of the risk of tax avoidance and evasion. In the Court's view, this represents an objective of general nature capable of justifying the interference with fundamental rights.

Nevertheless, the CJEU observed that the measure under dispute was not strictly necessary to ensure that the relevant information is reported. In this respect, the Court noted that under DAC6 all intermediaries are, in principle, required to report to the competent authorities information within their knowledge, possession or control. An intermediary is exempt from filing the information only to the extent that it has proof that the same information has already been filed by another intermediary. Other intermediaries would therefore typically not

rely on a report filed by a lawyer – either because they may not be aware of their involvement or because they could not verify that the same information has already been filed by them.

The Court further noted that DAC6 provides that an intermediary subject to legal professional privilege remains required to notify the relevant taxpayer of his or her reporting obligations. The reporting obligation of intermediaries not subject to legal professional privilege, and in the absence of such intermediaries of the taxpayer ensures, in principle, that the tax authorities are informed of the reportable cross-border arrangement. Additionally, in the Court's view, reporting of the identity and consultation of the intermediary lawyer subject to legal professional privilege will not allow the relevant authority to require him or her to disclose information without the consent of their client.

The Court therefore concluded that Article 8ab(5) of the Directive is invalid in the light of Article 7 of the Charter where its application has the effect of requiring a lawyer acting as an intermediary and that is subject to legal professional privilege to notify any other intermediary – who is not his or her client, of their reporting obligations.

As regards the right to a fair trial, the Court concluded that the obligation of lawyers subject to legal professional privilege to notify other intermediaries does not entail an interference with Article 47 of the Charter.

ETC comment

The Court has historically seemed reluctant to engage in a substantive review of secondary Union law, in particular where legislation was adopted unanimously by Member States. However, the Court recently (November 22, 2022) held that the conditions for allowing access to beneficial ownership information under the EU fifth Anti-Money Laundering Directive (AMLD) are in breach of the fundamental rights guaranteed by the Charter (please refer to [Euro Tax Flash issue 494](#) for further details). It is worth noting that the AMLD was adopted under the ordinary legislative procedure, which only requires a qualified majority of Member States for adoption by the Council.

While the case was brought by the Flemish Bar Council and is therefore framed in the context of lawyers subject to legal professional privilege, it is also possible for members of the Belgian Institute for Tax Advisors and Accountants to rely on the same professional privilege. In this respect the case could have an impact on the position of recognized tax advisors and accountants in Belgium as a result.

It will be interesting to see what changes this ruling will generate to the notification obligations under DAC6 more generally. Member States will have to revisit these provisions to ensure compliance with the ruling. It may be the case that obligations of intermediaries subject to legal professional privilege will be limited to informing only the relevant taxpayer of their respective obligations.

The challenge raised by the Flemish Bar Council represents the first case taken to the CJEU since the new mandatory reporting requirements were introduced under DAC6. Since this referral was made in December 2020, a similar question was also referred by the French Supreme Administrative Court (Conseil d'État) in the case of Conseil national des barreaux and Others, C-398/21, which also challenges the legal professional privilege notification obligations of DAC6, as introduced into French domestic law (as reported in [E-News Issue 136](#)).

Furthermore, on September 15, 2022, the Belgian Constitutional Court ruled in the joint cases of Belgian lawyers and the Institute of Tax Advisors and Accountants concerning the implementation of DAC6 into Belgian legislation. In the new judgement, the Belgian Constitutional Court acknowledged the application of legal professional privilege for lawyers, tax advisors and accountants, and annulled the “unprivileged” periodic

reporting of marketable arrangements. The Belgian court raised several additional questions to the CJEU in light of the meaning and objective of such privilege, including whether:

- the DAC6 reporting obligations infringe the principle of equality and non-discrimination protected under article 6(3) of the Treaty on the Functioning of the European Union (TFEU) and Articles 20 and 21 of the Charter, respectively;
- the use of key terms / deadlines that are not sufficiently clear and precise infringe the principle of legality in criminal cases and the general principle of legal certainty and the right to respect for private life, protected under Article 49(1) and Article 7 of the Charter and Article 8 of the ECHR. These terms include “arrangement”, “intermediary”, “participant”, “associated enterprise”, the qualification of “cross-border”, the different “hallmarks”, the “main benefit test” and the trigger date for the 30 days reporting period.

For more details, please refer to a [report](#) prepared by KPMG in Belgium.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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