AG opinion on the validity of DAC6 and the applicability of the professional privilege waiver to non-lawyers

CJEU – DAC6 – Belgium – Principle of equality – Legal certainty – Proportionality – Legal professional privilege

On February 29, 2024, Advocate General (AG) Nicholas Emiliou of the Court of Justice of the European Union (CJEU) rendered his opinion in case C-623/22. The case concerns the validity of Council Directive 2018/822 (DAC6) amending Directive 2011/16/EU on administrative cooperation (the DAC), as transposed into the Belgian legislation, in light of various principles guaranteed by the Charter of Fundamental Rights of the European Union (the Charter) and the European Convention on Human Rights (ECHR).

The AG recommended the CJEU to find that none of the concerns raised by the referring court could impact the validity of DAC6. The AG also held that whilst several key concepts within DAC6 are broad and general, they are nevertheless "reasonably clear" and do not constitute a breach of the Charter. Regarding the notification waiver enshrined in DAC6, the AG argued for a restrictive interpretation of the legal professional privilege and held that it only applies to lawyers and other professionals which are, in exceptional circumstances, treated in the same way as lawyers.

Background

In 2020, several Belgian legal and tax professional bodies[1] initiated proceedings before the Belgian Constitutional Court (Constitutional Court), seeking the annulment of the local implementation of DAC6. The plaintiffs argued that the Directive itself was unlawful, either wholly or partially. In September 2022, the Constitutional Court raised several additional questions to CJEU, including whether:

[1] The Belgian Association of Tax Lawyers, Ordre des barreaux francophones et germanophone, Orde van Vlaamse Balies and Others, Institut des conseillers fiscaux et des experts-comptables

- the DAC6 reporting obligations, covering all taxes falling in the scope of the DAC and not only corporate income taxes, 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 allegedly 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;
- the reporting obligations interfere with the principles of legality and private life (Article 7 of the Charter and Article 8 of the ECHR), and whether such interference could be justified and considered proportional;
- the right of a waiver on account of professional secrecy, set out in Article 8ab(5) of DAC6, is restricted to lawyers or can be guaranteed also to other categories of professionals, if those categories enjoy such protection under national law.

On a related note, a previous referral (C-694/20) was brought by the Constitutional Court to the CJEU. The case concerned the 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 DAC6. In that case, the CJEU held that the notification obligation is invalid in light of the fundamental rights guaranteed by the Charter – specifically the right to respect for communications between a lawyer and his or her client (Article 7) – see Euro Tax Flash Issue 497. In light of this decision, the eighth version of the DAC (DAC8) modified the waiver to allow for the removal of the notification requirement for certain intermediaries. However, such intermediaries would still be required to inform clients about their reporting obligations.

The AG's opinion

Scope of the reporting obligation under DAC6

The AG started by analyzing the scope of the reporting requirement under DAC6 in light of the principle of equality[2].

The AG recalled that determining whether the principle of equality has been breached involves assessing whether comparable situations are treated differently, or whether different situations treated the same way, and whether such treatment is justified. The AG noted that the purpose of the DAC is to mitigate negative effects which the establishment of the internal market may have on the Member States's ability to assess taxes. Having regard to the objectives of the DAC and that, in the AG's view, aggressive cross-border tax arrangements may concern a variety of taxes, the AG deemed the broader scope of the DAC as justified.

The AG therefore concluded that the scope of the reporting obligation under DAC6 does not breach of the principle of equality.

Clarity and precision of DAC6

The AG dismissed the plaintiffs' plea that the lack of precision or clarity in certain key concepts of DAC6 breaches the principle of legal certainty by impeding affected individuals from identifying reportable arrangements.

[2] The AG held that the principle of non-discrimination, which the plaintiffs also invoked, was not applicable in the case under dispute.

Whilst acknowledging that some concepts are broad and general in nature, the AG held that none of the provisions examined rendered it impossible or unreasonably difficult for individuals to determine whether they are subject to the reporting obligation and the related timeframe. In support of this conclusion, the AG referenced the definitions provided in DAC and DAC6 and suggested interpretations using traditional legal methods, such as examining the ordinary meaning of terms in the light of their context and of the object and purpose of the rules. Additionally, the AG noted that many terms are commonly used in the field of international taxation.

In respect of the DAC6 hallmarks, the AG acknowledged the plaintiffs' concern regarding the legislative method employed by the EU legislature to identify reportable arrangements, i.e., utilizing a list of characteristics rather than providing a clear definition. However, the AG held that this choice of legal technique falls within the broad discretion afforded to the EU legislature when enacting laws that require the balancing of various public and private interests.

Proportionality concerns

The AG then focused on whether the reporting obligation outlined in DAC6 infringes on the right to privacy of intermediaries and taxpayers[3]. The AG acknowledged that the reportable information falls within the scope of the protection of private life guaranteed by Article 7 of the Charter, and continued by analyzing whether such interference can be justified under EU law.

Quoting the CJEU's settled case-law, and in particular C-694/22, the AG held that combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute objectives of general interest capable of justifying a limitation of rights guaranteed by Article 7 of the Charter. In the AG's view, the reporting obligations introduced by DAC6 are suitable to attain these objectives.

The AG continued the proportionality assessment, rejecting the plaintiffs' pleas that the provisions of DAC6 exceed what is necessary to achieve the public objectives pursued. Firstly, the AG deemed the requirement to communicate arrangements to the authorities, including those that may be lawful, non-aggressive, or not set up for tax reasons, as necessary. In the AG's view, whilst the mere pursuit by a taxpayer of the most favorable tax regime cannot set up a general presumption of fraud or abuse, Member States are free to take actions to close loopholes (including those considered lawful). Secondly, the AG deemed it justified that the reporting burden was also imposed on intermediaries, not solely on taxpayers. In this context, the AG referred to AG Rantos' opinion in case C-694/22, which suggested that the reporting system would be significantly less effective if taxpayers themselves were solely responsible for disclosing their participation in aggressive arrangements[4]. Additionally, the AG highlighted various safeguards and limits on the use of information and of the personal data obtained. Therefore, the AG concluded that the reporting obligation under DAC6 does not go beyond what is necessary to attain the objectives pursued by the EU legislature.

The AG also held that DAC6 achieves a fair balance between the interest of the various stakeholders.

In light of the above, the AG held that Article 8ab of DAC6[5] does not infringe Article 7 of the Charter by creating an impermissible interference with the right to private life of intermediaries and taxpayers.

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[3] 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 of the ECHR. The Charter is intended to be interpreted consistently with the ECHR. Under settled case-law, the CJEU must take into account the interpretation of the ECHR when interpreting the rights guaranteed by the Charter.

[4] In the opinion issued in case C-694/22, AG Rantos explained this reasoning, highlighting that intermediaries typically have the most comprehensive knowledge of the arrangements, making them best positioned to accurately and completely submit relevant information to tax authorities.

[5] Article 8ab introduces an obligation on intermediaries to disclose information on cross-border arrangements that meet certain criteria to their domestic tax authorities and rules for the subsequent exchange of this information between tax administrations.

Scope of the waiver to notify an intermediary of their reporting obligations under DAC6

The AG continued by analyzing whether DAC6 allows Member States to grant waivers solely to lawyers or to also extend them to other professionals bound by professional secrecy laws. In this context, the AG highlighted the difference between the language versions of the term "legal professional privilege" – where a majority of Member States use generic terms and others specifically mention lawyers – and examined the differences in waiver transposition at national level. Given all these differences, the AG concluded that a textual, comparative, contextual, and historical interpretation, as well as an examination of local transpositions, fails to provide definitive guidance. Instead, in the AG's view, the interpretation must focus on the object and purpose of DAC6.

The AG expressed concerns that granting Member States freedom to decide which professionals benefit from waivers could distort the internal market and create "safe havens" for professionals involved in aggressive tax planning. Whilst acknowledging the Council's statement about providing flexibility to Member States for compliance with the Charter and ECHR case law, the AG took the view that neither requires extending legal professional privilege beyond lawyers. Additionally, the AG noted that the CJEU's decision in case C-694/22 also supported the view that the "professional privilege" should be limited to lawyers.

In light of the above, the AG held that Member States may give a notification waiver only where the reporting obligation would be in breach of the legal professional privilege which, under the national law of that Member State, is recognized in relation to lawyers and other professionals which are, in exceptional circumstances, treated in the same way as lawyers.

ETC Comment

From the point of view of challenges brought in front of the CJEU against EU legislative acts, the AG opinion at hand is not surprising. The CJEU has historically seemed reluctant to engage in a substantive review of secondary EU law, in particular where legislation was adopted unanimously by Member States. Two recent exceptions refer to the invalidation of Article 8ab (5) of DAC6 – as explained above, and the November 2022 invalidation of the conditions for allowing access to beneficial ownership information under the EU fifth Anti-Money Laundering Directive (AMLD)[6]. It is worth noting though that the AMLD was adopted under the ordinary legislative procedure, which only requires a qualified majority of Member States for adoption by the Council.

Nevertheless, the AG's opinion contains several potentially controversial remarks and conclusions, particularly regarding the clarity of key terms under dispute and the overall complexity and burden faced by both taxpayers and intermediaries in conducting DAC6 assessments. One notable aspect is the AG's interim conclusion, where it is argued that objections regarding the clarity and precision of certain key concepts are unfounded. Whilst acknowledging that these concepts are broad and general in nature, the AG held that DAC6 already provides "very detailed and fact-based definitions of some of the key concepts," and that other terms are "reasonably clear." Additionally, the AG highlighted that competent authorities of Member States can, and indeed have, issued formal and informal guidance for concerned professionals and taxpayers. However, these comments overlook the possibility that local guidance may lead to divergent provisions and interpretations, potentially increasing compliance costs and complexity for intermediaries and taxpayers required to conduct DAC6 reporting assessments across various Member States. The divergence in interpretations or existing guidance for key terms under DAC6 was already acknowledged by a study commissioned by the European Parliament sub-committee on tax matters (FISC) [7].

[6] Please refer to Euro Tax Flash Issue 494 for further details.

[7] Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6), March 2022 – see here.

It is also interesting to note the AG' views that DAC6 does not impose a duty to report arrangements that are not intended to be operational. Moreover, the AG argued that imposing a broad obligation on intermediaries to report purely hypothetical and speculative transactions would be unnecessary and create a disproportionate burden for professionals. If the CJEU adopts this viewpoint, it could affect countries like Belgium, where current guidance mandates reporting of all versions of a cross-border arrangement (having all important components), regardless of whether they will be agreed to or implemented by the taxpayer.

Regarding the personal scope of the right to a waiver from the DAC6 reporting obligation based on legal professional privilege, the AG noted that it can hardly be disputed that the term "legal professional privilege" specifically pertains to the activities of lawyers and other professionals who are, in exceptional circumstances, treated similarly to lawyers. It will be intriguing to see how the final opinion of the CJEU, assuming it follows with the AG's comments, will interact with the new wording of the waiver as amended by DAC 8.

It should be noted that AG opinions are not binding on the CJEU. Therefore, it remains to be seen whether the CJEU follows the proposal of AG Emiliou to answer the referred questions.

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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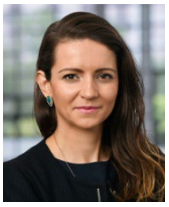

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