

## DAC6 Case Analysis: Belgian Association of Tax Lawyers e.a. (C-623/22)

### Introduction

On 29 July 2024, the Court of Justice of the European Union (CJEU) delivered its judgment in the case of the *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. The case was brought before the CJEU following proceedings before the Belgian Constitutional Court initiated by various organisations representing lawyers and tax consultants.

### Background

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 2020, several organisations representing legal and tax professionals filed a case before the Belgian Constitutional Court, contesting the Belgian law of 20 December 2019 transposing the Directive. They argued that the Directive violated the Charter of Fundamental Rights of the European Union (the Charter) and general principles of EU law. Subsequently, the Belgian Constitutional Court referred several questions to the CJEU for a preliminary ruling.

#### 1. Scope of Reporting Obligation: Broad Range of Taxes vs. Corporate Tax

The first item addressed by the CJEU was the scope of the reporting obligation under the Directive. Specifically, the CJEU examined whether the Directive's application to a broad range of taxes, beyond just corporate tax, was valid in light of the principles of equal treatment and non-discrimination. The Directive's reporting obligation applies to all taxes levied by EU Member States, except VAT, customs duties, and excise duties.

The CJEU reaffirmed the principles of non-discrimination (Article 21 of the Charter) and equal treatment (Article 20 of the Charter). It emphasised that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. Additionally, the CJEU pointed out that the EU legislature has a broad discretion in the exercise of the powers conferred on it in this respect. The CJEU highlighted that the risk of aggressive tax planning is not confined to corporate tax. Furthermore, a broad application of the reporting obligation is necessary to achieve the Directive's objectives in the field of combating aggressive tax planning and tax avoidance and evasion in the internal market. The CJEU concluded that the Directive's broad scope is justified and appropriate, finding no factors affecting its validity concerning the principles of equal treatment and non-discrimination.

#### 2. Concepts, Definitions and Reporting Period

The second item concerned the clarity and precision of concepts used in the Directive and the starting point of the reporting period, evaluated in light of the principles of legal certainty, legality in criminal matters, and respect for private life.

The CJEU underlined the principle of legal certainty, which requires, on the one hand, that the rules of law are clear and precise and, on the other hand, that their application is foreseeable for those subject to law. It acknowledged that while the Directive employs abstract legal notions, these can be clarified through judicial interpretation and are reasonably foreseeable. The definitions of key terms such as "cross-border," "marketable," "bespoke arrangements," "intermediary," "associated enterprise," the "hallmarks" and "main benefit test" were deemed sufficiently clear and aligned with international standards like the OECD's CRS Model Rules.

In particular, the CJEU delved into the definition of "arrangement" and the distinction between an arrangement and a series of arrangements. An arrangement is broadly defined to include any mechanism, operation, structure, or setup aimed at tax planning. The CJEU emphasised that this broad definition ensures a comprehensive capture of various tax planning practices that might otherwise evade scrutiny.

The CJEU clarified that if individual mechanisms within an arrangement independently meet the criteria for "reportable cross-border arrangements", each must be reported separately. If they do not independently meet the criteria, only the overall arrangement must be reported once it meets the specified conditions.

Regarding the reporting period, the CJEU derived from the DAC6 Directive that it starts from the day after an arrangement is available for implementation, is ready for implementation, or its first step is made. For those providing aid, the period starts after completing the aid or advice. The CJEU concluded that these provisions are clear and precise, meeting the requirements of legal certainty and legality in criminal matters.

In terms of respect for private life (Article 7 of the Charter), the CJEU determined that the interference with private life by the reporting obligation is sufficiently precise and limited to the necessary information. That consideration is, however, without prejudice to the fourth issue below. Thus, it upheld the validity of the Directive concerning legal certainty, legality in criminal matters, and respect for private life.

### **3. Legal Privilege of Lawyers vs. Other Professionals**

The third item addressed the interactions between the reporting obligations under the Directive and intermediaries' legal professional privilege.

The Directive establishes a two-tier system for reporting:

- Generally, intermediaries must directly report information on reportable cross-border arrangements to the competent tax authorities.
- By way of exception, intermediaries may claim a waiver from reporting information on a reportable cross-border arrangement (the waiver) if the reporting obligation would breach legal professional privilege under national law. 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 (Article 8ab(5) of DAC6).

In its previous judgment in *Orde van Vlaamse Balies and Others* (8 December 2022, [C-694/20](#)), the CJEU 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.

In the present judgment, the CJEU first clarified the interpretation of the professionals who are in scope of the exception of the reporting obligation. It reiterated the Commission's observations, to the effect that the waiver was established not in respect of all professionals subject to an obligation of legal professional privilege under national law, but only with regard to those who are comparable to lawyers in that they are entitled, under national law, to represent parties in legal proceedings.

The CJEU noted divergences in the language versions of Article 8ab(5) and emphasised the need for systematic interpretation and concluded that a textual/grammatical interpretation does not clearly determine the scope of the provision regarding the professions that qualify for the waiver.

The CJEU then referred to the objectives of DAC6 and the OECD commentary that served as a basis for DAC6 to conclude that only the professional secrecy of lawyers and other professionals that are authorised to ensure legal representation are in scope of that provision. This authorisation to ensure legal representation for other professions than lawyers is determined by domestic legislation of the EU Member States.

Consequently, the CJEU clarified the scope of the question and examined in essence the validity of the obligation to notify any other intermediary when the waiver is applied by intermediaries who are not lawyers, but are also authorised to ensure legal representation and are bound by legal professional privilege under domestic law.

The CJEU reiterated the special protection afforded to lawyers due to their role in the administration of justice and ethical obligations, reason for which it concluded in the case *Orde van Vlaamse Balies and Others* that the obligation to notify violates the respect for private life of Article 7 of the Charter. Finally, the CJEU concluded that the invalidity of the obligation to notify applies only to lawyers (as defined in Directive 98/5), and not to other professions authorised to provide legal representation.

### **4. DAC6 in general: Private Life**

The fourth item concerned the validity of the reporting obligation under DAC6 in light of the right to respect for private life (Article 7 of the Charter).

The CJEU acknowledged that the reporting obligation which involves revealing personal data and professional activities, constitutes an interference with the right to respect for private life. It is indeed a limitation of the freedom of taxpayers and intermediaries to organise their personal, professional and business activities. However, it found that this interference is justified, as the reporting obligation is clearly defined by law and does not undermine the essence of the right to private life. The CJEU emphasised that the Directive's objective of combating aggressive tax planning and preventing tax avoidance and evasion is of general interest and that early and detailed reporting is crucial for tax administrations to act promptly and effectively.

The CJEU concluded that the reporting obligation is proportionate to the objective pursued and does not impose a burden that outweighs that objective. Therefore, it upheld the validity of DAC6 concerning the right to respect for private life.

## Conclusion

The CJEU found no reasons affecting the validity of DAC6 concerning the principles of equal treatment, non-discrimination, legal certainty, legality in criminal matters, respect for private life, and the specific provisions related to legal professional privilege. The Directive's broad application, clear definitions, and reporting obligations were deemed appropriate and necessary to achieve its objectives of combating aggressive tax planning and preventing tax avoidance and evasion.

## Let's talk

For a deeper discussion, please contact:

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