

ATOZ ALERT

CJEU held that DAC6 violates the lawyer-client privilege

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Under the Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (known as “DAC6”), EU tax intermediaries such as tax advisers, accountants and lawyers that design and/or promote tax planning schemes, have to report potentially aggressive cross-border tax planning arrangements to the competent tax authorities.

On 8 December 2022, the Court of Justice of the European Union (“CJEU”) held its decision in the case *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU vs. Vlaamse Regering* (Case C-694/20) regarding the obligations of lawyers under DAC6 (the Mandatory Disclosure Regime, “MDR”).

Background

DAC6 provides that member states shall give intermediaries the right to waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach their legal professional privilege under the national law of the member state. This might, for example, apply in case of professionals that are lawyers or tax advisers.

However, in these circumstances, intermediaries must notify, without delay, any other intermediary (or, in the absence of such an intermediary, the relevant taxpayer) of their reporting obligations.

Here, the CJEU had to assess whether the requirement that lawyers, acting as intermediaries, must notify any other intermediary, when they are exempt from reporting obligations in accordance with their legal professional privilege, is consistent with the EU Charter of Fundamental Rights.

Notably, Article 7 of the EU Charter of Fundamental Rights (“CFR”) guarantees that everyone has the right to respect for his or her private and family life, home and communications.

Decision of the CJEU

According to the CJEU, the obligation to notify other intermediaries entails an interference with the right to respect for communications between lawyers and their clients which is guaranteed in Article 7 of the CFR.

More precisely, the CJEU emphasized that this obligation “... implies that those other intermediaries become aware of the identity of the lawyer-intermediary. They also become aware of his or her analysis that the tax arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement.”

The CJEU pointed out that Article 7 of the CFR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. Moreover, a person must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.

The CJEU stated that: “Given that other intermediaries are required to inform the competent tax authorities of the identity of the lawyer and of his or her having been consulted, that obligation also leads indirectly to a second interference with the right to legal professional privilege.”

The CJEU reminded that the rights enshrined in Article 7 of the CFR are not absolute rights but must be considered in relation to their function in society. Therefore, the Court examined whether the interferences with the right to respect for communications between lawyers and their clients may be justified.

However, the CJEU considers that the notification obligation on a lawyer that is subject to legal professional privilege is not necessary in order to attain the objective of DAC6.

The CJEU stated that: “The reporting obligation on other intermediaries who are not subject to legal professional privilege and, if there are no such intermediaries, that obligation on the relevant taxpayer, ensure, in principle, that the tax authorities are informed. The tax authorities may, after receiving such information, request additional information directly from the relevant taxpayer, who will then be able to consult his or her lawyer for assistance. The tax authorities may also conduct an audit of that taxpayer’s tax situation.”

Conclusion and outlook

The CJEU held that DAC6 violates the right to respect for communications between a lawyer and his/her client. It can be assumed that the decision may also have an impact on other professions that are protected by legal professional privileges such as tax advisers.

Based on the decision of the CJEU, professionals that are protected by a legal professional privilege should not communicate on potential reporting obligations under the MDR with other intermediaries involved in a cross-border arrangement, unless the taxpayer explicitly requests the professional to do so. The decision of the CJEU should further be reflected in changes to the Directive on Administrative Cooperation (DAC) and the laws of EU member states that transposed DAC6 into domestic laws.

The new decision of the CJEU joins a string of bad news for the EU Commission that lately had to stomach the decision of the CJEU in the Fiat state aid case, and in regard to the “public” ultimate beneficial owner (“UBO”) register.

It is rather concerning that the EU Commission seems to not pay (enough) attention to ensure compliance of all its rushed initiatives with EU law. On the positive side, the CJEU lights a beacon of hope that the rule of law will be upheld and, hopefully, that these decisions have a positive impact on current initiatives of the EU Commission that are problematic from an EU law perspective.

Do you have further questions?



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