ec TAX REVIEW 2025–2

Article

DAC 6 and the European Rejection of Professional Secrecy Beyond That of Lawyers: The CJEU Judgment of 29 July 2024*

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The CJUE decided in its judgment of 29 July 2024 in answer to a question of the Belgian Constitutional Court that lawyers but not other persons having the right to represent taxpayers in court could be exempted from the obligation to notify other intermediaries that they were claiming legal privilege exempting them from the obligation to report certain cross-border tax arrangements under DAC 6. They had to inform their clients that this obligation rested on them.

Is the exclusion from this right of other professionals subject to professional secrecy under national law justified? The author analyses the opinion of the advocate general and the judgment. He submits that this restriction is not justified in view of the evolution of society and of national legislations. DAC 6 endorsed the judgment and confirmed the exemption as applicable to registered lawyers only.

Keywords: DAC 6, Legal privilege, Notification of cross-border arrangements, Notification by lawyers to other intermediaries, Confidentiality, DAC 8, Obligation of client of lawyers to report cross-border tax arrangement, Power to represent client in court, Charter of fundamental rights, Belgian Constitutional Court

The DAC 6 Directive,[1] part of the directive on the exchange of tax information,[2] requires intermediaries to report international tax arrangements to the authorities.

In its 2022 judgment, the European Court of Justice invalidated the provision of the DAC 6 Directive which obliged a lawyer relying on his professional secrecy to inform not only his client but also another intermediary who was not his client of his obligation to declare a cross-border tax scheme.[3] As a consequence, the Belgian Constitutional Court annulled the Belgian legislative provisions transposing this obligation under the directive.[4] The grounds for the Court of Justice's ruling were that Article 8bisb(5) of Directive 2011/16[5] infringed Article 7 of the Charter of Fundamental Rights of the European Union insofar as the obligation of lawyers benefiting from a notification exemption to inform not only their clients of their personal notification obligation but also to inform other intermediaries resulted in the disclosure of the lawyer's identity and of the fact that the lawyer had been consulted by the client. A new question posed by the Constitutional Court in its ruling of 15 September 2022 took a broader view of the problem, asking whether the right to be exempted from the obligation to provide information concerning a reportable cross-border arrangement extended to all intermediaries benefiting from professional secrecy that is criminally punishable under the law of a Member State.[6] In other words, was

* This is the translation of a study published in Journal des Tribunaux, 2024, nr. 7004, at 722, with the kind authorization of Larcier.

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1 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive2011/16/EU as regards automatic and obligatory exchange of information in the field of taxation in relation to reportable cross-border arrangements, O.J. L 139/1 of 5 Jun. 2018, at 1.

2 Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, O.J. L 64 of 11 Mar. 2011, at 1.

3 CJEU, judgment of 8 Dec. 2022, Orde van Vlaamse balies and others, C-694/20, EU:C:2022:963.

4 Ruling no. 103/2022 of 15 Sep. 2022 and ruling no. 1/2024 of 11 Jan. 2024.

5 'Each Member State may take the necessary measures to grant intermediaries the right to be exempted from the obligation to provide information concerning a cross-border device which is subject to a declaration where the obligation to declare would be contrary to professional secrecy applicable under the national law of that Member State. In such cases, each Member State shall take the necessary measures to ensure that intermediaries are required to notify without delay any other intermediary or, in the absence of such an intermediary, the taxpayer concerned of their reporting obligations under paragraph 6. Intermediaries may be entitled to an exemption under the first paragraph only insofar as they are acting within the limits of the relevant national legislation defining their professions'.

6 'Does Article 1(2) of Directive 2018/822 infringe the right to respect for private life guaranteed by Article 7 of the Charter and Article 8 of the ECHR, in that the new Article 8ab(5) which it inserted into Directive 2011/16 and which provides that, if a Member State takes the necessary measures to grant intermediaries the right to be exempted from the obligation to provide information concerning a cross-border device which is subject to a declaration where the obligation to declare would be contrary to professional secrecy applicable under the national law of that Member State, that Member State shall be obliged to require the said intermediaries to notify without delay any other intermediary or, failing such intermediary, to the taxpayer concerned, his reporting obligations, insofar as this obligation has as effect that an intermediary who is subject to professional secrecy punishable under the law of that Member State shall be obliged to share with another intermediary who is not his client any information which becomes known to him in the course of the exercise of his profession'.

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this right limited to lawyers or did it extend to notaries, accountants, tax advisers and any person whose professional secrecy is provided for and sanctioned by law?

The answer to this fourth question, in the judgment of 29 July 2024,[7] is the most interesting part for professional advisers. The rest of the judgment dismisses all objections to the directive on the grounds of vagueness and breach of privacy.

The Advocate General provides no fewer than six reasons in favour of a restrictive interpretation of the concept of professional secrecy, limited to lawyers and meeting the objective of the directive, which is to increase transparency in tax matters by enabling the authorities to obtain information on potentially aggressive tax schemes so that they can react quickly.[8]

The Advocate General begins his opinion with an analysis of the text.[9] Some language versions of the provision use the expression 'legal professional privilege' (the English, Maltese and Romanian versions, the Greek version expressly referring to the lawyer's professional privilege), while other versions refer to the professional privilege applicable under national law, without any further detail, and could therefore concern professions other than that of lawyer. Second, the Advocate General gives a historical interpretation. The case law of the Court of Justice[10] and the European Court of Human Rights[11] relates specifically to the activities of lawyers, being linked to respect for the confidentiality of communications between lawyers and their clients. This justification extends beyond European borders, as it can be found in American law, where the 'client attorney privilege' is justified by the need 'to encourage full and frank communication between attorneys and their clients and thereby to promote the broader public interest in the observance of the law and the administration of justice'.[12] According to the Advocate General's research, numerous decisions in Anglo-Saxon countries have rejected the claim by tax accountants that their communications with their clients should be confidential.[13] It is, therefore, a fundamental principle of democratic society, and particularly of European society, but limited to attorney-client privilege.

However, it should be noted that in the legislation transposing the Directive, some Member States have not limited to lawyers the possibility of obtaining an exemption on the basis of professional secrecy.[14] There are even discrepancies between the wording of recital 8 of Directive 2018/822 on the insertion of Article 8ab(5) of Directive 2011/16[15] and the actual text of the article: the Greek version of the recital is no longer limited, as is the text of the article, to the lawyer's professional privilege.[16] The Advocate General concludes that the textual interpretation does not provide a clear and unambiguous solution to the problem.

First, he considers that the possibility of granting exemptions to categories of intermediaries other than lawyers would impact the effectiveness of the system by excluding a substantial proportion of intermediaries.[17] Second, as the Directive does not contain any criteria defining the professional categories that may benefit from the exemption, a reference to national legislation would leave Member States with an almost unlimited margin of discretion in this respect and could give rise to professional relocations to states with more favourable legislation,[18] creating distortions within the internal market.

Third, extending the scope of the exemption would be contrary to the system envisaged by the OECD and in particular to Rule 2.4 of the OECD Model Rules, which provides for exceptions only where they are necessary to protect the confidentiality of communications between a lawyer and his client, and to the system of mandatory disclosure that existed in certain Member States, namely Ireland, Portugal and the

7 Belgian Association of Tax Lawyers and Others, C-623/22, ECLI:EU:C:2024:639; 'DAC 6': le secret professionnel invocable par les seuls avocats?, Fiscologue, 2024, nr. 1851, at 1.

8 Opinion, paras 200 et seq.; judgment, paras 98 et seq.

9 Opinion of Advocate General Nicholas Emiliou delivered on 29 Feb. 2024, paras 183 et seq.

10 Judgment of 18 May 1988, AM&S Europe *v.* Commission, 155/79, EU:C:1982:157, points 18 to 28. This judgment exempted correspondence between a client and his independent lawyer admitted to the bar of a Member State from the Commission's power of investigation in competition law cases; judgment of 8 Dec. 2022, C-623/22 Belgian Associaiton of Tax Lawyers and others.

11 European Court of Human Rights, 4 Feb. 2020, Kruglov and Others *v.* Russia, EC:ECHR:0204JUD01126404, §137. The Court recalled that searches of a lawyer's home could only take place if there were procedures in place to prevent abuses, and in this case it found that the searches violated Art. 8 of the Convention on respect for private life and correspondence because there were no such safeguards.

12 Opinion of 25 Jun. 1998 of the Supreme Court of the United States, Swidler & Berlin et al. *v.* United States, 524 US 399, 1998, at 403. The Supreme Court recalled the privileged nature of notes taken by a lawyer during a meeting with his client and confirmed that this character persists after the lawyer's death.

13 Decisions cited in para. 195 of the conclusions, n. 125.

14 Conclusions, point 198.

15 'In order to ensure the proper functioning of the internal market and to prevent loopholes in the proposed regulatory framework, the obligation to report should apply to all actors who are generally involved in the conception, marketing, organisation or management of the implementation of a reportable cross-border transaction or series of such transactions, as well as to those who provide assistance or advice. It should be noted that, in some cases, the reporting obligation would not apply to an intermediary because of the professional secrecy applicable under the law or where there is no intermediary, for example because the taxpayer designs and implements a scheme in-house. It would therefore be essential that, in these circumstances, the tax authorities are not deprived of the possibility of receiving information on tax arrangements potentially linked to aggressive tax planning. It would therefore be necessary for the reporting obligation to fall on the taxpayer who benefits from the scheme in these particular cases'.

16 Judgment, point 96.

17 Opinion, para. 203; Judgment, para. 99.

18 Opinion, points 204 and 205; judgment, point 107.

United Kingdom, when Directive 2018/822 was proposed.[19]

Fourth, as the Advocate General points out, it is true that the text gave Member States a margin of manoeuvre as to the scope of the exemption in order to enable them to comply with the Charter of Fundamental Rights and the case law of the European Court of Human Rights. However, in his view, neither the Charter nor the case law in question require the professional secrecy specific to lawyers to be extended to other professions. He concludes that the EU legislature intended to adopt the restrictive approach proposed at the hearing by the European Commission.[20]

Fifth, the Advocate General considers that a restrictive reading of the concept of professional secrecy is consistent with a 'well-established principle of interpretation' according to which exceptions to rules of general application are to be interpreted strictly, particularly in European law.[21]

Sixth, the High Magistrate refers to the 'Orde van Vlaamse balies' judgment insofar as it protects exchanges between lawyers and their clients, justifying the protection by the fact that lawyers perform a fundamental function of defending litigants, which means that litigants must be able to speak to their lawyer in complete freedom. This reading of the judgment is indeed correct, but the question put to the Court only concerned the lawyer-client privilege.

The Advocate General, however, leaves a certain amount of freedom to national legislators by granting them the right to extend the exemption to professionals other than lawyers who are treated, in exceptional circumstances, in the same way as lawyers.[22]

The Court of Justice points out, first of all, that the interpretation of EU law must take account not only of its terms but also of its context and the objectives it pursues.[23]

By way of preliminary considerations and before answering the question referred for a preliminary ruling, the Court sets out three justifications for limiting to lawyers the exemption from the obligation to declare cross-border arrangements. The linguistic diversity of the versions of the directive means that it must take into account the context and the objectives pursued, namely the state's need to obtain information quickly on potentially aggressive tax arrangements in order to be able to react appropriately. Excluding vast categories of professionals from the scope of this provision would compromise its effectiveness.[24]

The Court then follows the Advocate General's historical interpretation, drawn from the work of the OECD. It has frequently used this reference, but in cases where the inspiration of European legislation clearly referred to the OECD texts.[25] In this case, there is at best a coincidence of objectives. The Union pursues its own tax objectives, which are those of the Treaties, and cannot content itself with repeating those of an international organization[26] which, moreover, lacks democratic legitimacy.

Finally, the Court considers that the margin of appreciation available to the Member States does not allow them to identify professions other than those providing legal representation on the basis of the professional secrecy applicable 'under national law' but only to 'take account' of the other professions.[27] Any other interpretation would create distortions between Member States.[28]

The Court notes that the question to be resolved is limited to whether the relationship between a non-lawyer professional authorized to act as a legal representative must be exempt from the obligation to notify in order to remain secret from third parties.[29]

It examines, on the basis of a reading of the fourth question referred for a preliminary ruling, whether Article 7 of the Charter, which corresponds to Article 8(1) of the ECHR and is therefore covered by the need for consistency between the two texts ensuring respect for the confidentiality of correspondence and private life,

[19] Conclusions, point 206; judgment, points 100 to 104 citing recitals 4 and 13 of Directive 2018/822 introducing the DAC 6 regime, which refer to Action 12 of BEPS and the Common Reporting Standard (CRS) developed by the OECD for financial account information. The OECD Model Rules on the mandatory reporting of information relating to CRS circumvention schemes and opaque territorial structures do contain an exception in the case where the exchange would reveal 'the content of confidential exchanges between a lawyer or other authorised legal representative and a client', as defined in the commentary on Art. 26 of the OECD Model Convention (rule 2.4, a)). The commentary adds that states may add to the article relating to the exchange of information an exception to the exchange obligation (Art. 26.3) covering the case of disclosure of a confidential communication between a client and a lawyer or other authorized legal representative produced in the context of legal advice or legal proceedings (point 19.4). As for the OECD's BEPS (Base Erosion Profit Shifting) report, the original text states: 'While schemes promoted by legal professionals come within the scope of mandatory disclosure rules, the existing legislation recognises that legal professional privilege, as recognised under the UK and Irish law, may act to prevent the promoter from providing the information required to make a full disclosure'. This is therefore simply a reminder of the law in two Member States (OECD/G20 Base Erosion and Profit Shifting Project, Mandatory Disclosure Rules, Action 12: 2015 Final Report, OECD, 2015, at 34, no. 70).

[20] Conclusions, point 208.

[21] CJEU, judgment of 27 Apr. 2023, Fluvius Antwerpen, C-677/21, EU:C:2023:348, para. 54 and case law cited. The judgment confirmed that the negligible nature of an activity constituted a derogation from the VAT liability of any economic activity and was therefore to be interpreted strictly.

[22] Conclusions, point 221.

[23] Judgment, point 94.

[24] Judgment, point 99.

[25] D. Gutmann, *Sources et ressources de l'interprétation juridique* 111 (Etude de droit fiscal, Paris, LGDJ 2023).

[26] *Ibid.,* at 117.

[27] Judgment, point 106.

[28] Judgment, point 107.

[29] Judgment, point 109.

requires the exemption from notification to be extended to professions other than that of lawyer.[30]

The Court that this limitation is reflected in the legal order of the Union and in particular in the Statute of the Court of Justice.

The Court notes that the case law of the European Court of Human Rights confers enhanced protection only to lawyers.[31] This protection is justified, in the Court's view, by the fact that lawyers are entrusted with a fundamental task in a democratic society, namely the defence of litigants, which implies the possibility of addressing one's lawyer in complete freedom.[32] This favour is justified by the 'unique position occupied by lawyers within the judicial organisation of the Member States'[33] and by a conception of the role of the lawyer 'regarded as a collaborator of justice and called upon to provide, in complete independence and in the best interests of justice, the legal assistance that the client needs'.[34] The other side of this protection is professional discipline. Not everyone will agree with the definition of the lawyer as occupying a singular position within the judicial system, characterizing him as a collaborator of justice. Others will be closer to Cicero's more liberal definition[35] or to the modern concept of the lawyer as a provider of legal services who has taken an oath and is subject to discipline, interpreting the law in the face of power and not within it. The European Union's Code of Conduct for Lawyers[36] states more precisely that: 'The lawyer's obligation of professional secrecy serves the interests of the judicial administration as well as those of the client. It must therefore be protected by the State'.[37]

The lawyer's involvement enables the justice system to be properly 'administered' without the lawyer being involved in its 'organization' or being its 'collaborator'. Although the French Revolution had abolished the involvement of lawyers,[38] the Empire reinstated their ministry in the face of the disorder created by this measure.[39]

The Court concludes that the protection cannot extend to persons other than lawyers, excluding, unlike the Advocate General, certain persons, including university professors, who are recognized in certain Member States as having the function of representing litigants.[40]

This reading of the judgment is indeed correct, but the question put to the Court concerned only the lawyer's professional privilege. Nothing can be inferred from the respect shown to lawyers as concerns other professions, which may engage in activities that are just as honourable in a society that has evolved since the Roman Republic, when perhaps the lawyer was the only 'vir bonus, dicendi peritus'. If the legislator has extended the obligation of professional secrecy, which is punishable under criminal law, to new professions, it may be said that the motive is similar to that which justifies the obligation on lawyers and doctors, namely respect for necessary confidentiality and its corollary, advice that is useful to the functioning of society.

The DAC 8 directive, following up on the judgment of the CJUE amended Article 8 ab of the directive on administrative cooperation to allow Member States to give a waiver from filing information if this would breach the 'legal professional privilege under the national law'.[41]

According to the preamble to the directive, this applies only to 'lawyers acting as intermediaries'.[42]

In line with the judgment, non-lawyers are not in scope, even if they have the power to represent clients in court.

The Court's analysis and the DAC 8 directive are in line with the CJUE's recent case law, aimed at ensuring the effectiveness of European legislation, which itself favours an extension of the powers of the state over the individual freedoms stemming from the nineteenth century tradition and the texts on which it is based. These contradictions are linked to the 'malaise' raised by the 'relevance of the current tax model' in the light of the confrontation between the two conceptions mentioned above and a third that is seeking to reconcile 'social solidarity, the obligation to achieve results and the democratic tradition'.[43]

The Draghi report on competitiveness[44] stresses the excessive regulatory and administrative burdens

[30] Judgment, paras 111 to 113.

[31] Judgment, para. 114; ECtHR, 6 Dec. 2012, Michaud *v*/France, CE:ECHR:2012:1206, JUD0011232311, §117 and 118. This judgment decides that the obligation to report suspicions of money laundering may be imposed on lawyers; 9 Apr. 2019, Altay *v*. Turkey (no. 2), EC:ECHR:2019:0409, JUD001123609, §49. This judgment relates to the right of a detainee to communicate with his lawyer. These two judgments can obviously only concern a lawyer.

[32] Judgment, point 115.

[33] Judgment, point 116.

[34] Judgment, point 117.

[35] 'Iudicis est semper in causis uerum semper patroni non numquam ueri simile etiam si minus de uerum, defendere'. (Translation: The judge's duty in trials is always to adhere to the truth; the lawyer's duty is sometimes to defend the plausible, even if it is not true), Cicero, De officiis, II, 49.

[36] CCBE, Brussels; M. Vlies & M. Dal, *Le secret professionnel et le devoir de discrétion de l'avocat*, in *Liber Amicorum Georges-Albert Dal, L'avocat* 232 (Brussels, Larcier 2014); G.-A. Dal, *Conclusions générales – Le secret professionnel, principe fondamental du droit européen*, in *Le secret professionnel de l'avocat dans la jurisprudence européenne* 237 (Brussels, Larcier 2010).

[37] 2.3.1.

[38] Laws of Aug. 16 and 2 Sep. 1790.

[39] Decree of Dec. 14, 1810.

[40] Judgment, point 119.

[41] Council Directive (EU)2023/2226 of 17 Oct. 2023 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, Art. 1(4).

[42] Preamble, point 44.

[43] M. Bouvier, *What is the Legitimacy of Taxation? Quelle légitimité de l'Etat fiscal? Quel modèle fiscal pour quel nouvel Etat?,* in *Quelle pertinence du modèle fiscal actuel* 27–28 (Revue française de finances publiques 2024), n° 167.

[44] The future of European competitiveness: Report by Mario Draghi, 9 Sep. 2024.

hindering the competitiveness of EU companies. There is no single methodology to assess their impact once transposed at national level. A larger regulatory flow – the number of new provisions passed in a dedicated time period – is among those negative factors. Although the report does not point to tax provisions, they can be added to the list: the directive on information exchange was modified and expanded eight times; several definitions of abuse of law were added to each others to the detriment of legal predictability; unnumerable reports are requested from taxpayers, and tax harmonization or even coherence remains a distant possibility, double taxation persists in several tax fields and solution of conflicts stays in the hand of tax authorities without any meaningful role of taxpayers.