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Legal Professional Privilege and the Validity of Certain Provisions of DAC6 in Light of the Charter of Fundamental Rights of the European Union – Opinion Statement ECJ-TF 1/2025 on the CJEU Decision of 8 December 2022 in *Orde van Vlaamse Balies* (Case C-694/20) and of 29 July 2024 in *Belgian Association of Tax Lawyers* (Case C-623/22)

In this CFE Opinion Statement, submitted to the EU Institutions in February 2025, the CFE ECJ Task Force comments on the CJEU's decision of 8 December 2022 in *Orde van Vlaamse Balies* (Case C-694/20) and of 29 July 2024 in *Belgian Association of Tax Lawyers* (Case C-623/22), in which the Court concludes that the obligation established for lawyers to communicate their waiver to report to other intermediaries violates the right to respect for private life, while the same obligation established for other intermediaries does not. At the same time, it considers that the obligation to report certain cross-border tax planning schemes did not violate the principles of equality and non-discrimination, nor the principles of legal certainty and legality in criminal matters, nor the right to a fair trial.

1. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on the Decisions of the Court of Justice of the European Union (CJEU) on the validity of certain aspects of the Amending Directive to the 2011 Directive on Administrative Cooperation [on reportable cross-border arrangements] (2018/822) (DAC6)[1] in light of the Charter of Fundamental Rights of the European Union (the "Charter"), in respect of which the Court delivered its decisions on 8 December 2022 (Grand Chamber) and 29 July 2024 (Second Chamber) (the "DAC6 cases").[2]

In both cases, the CJEU delivered preliminary rulings on questions raised by the Belgian Constitutional Court (Dutch-speaking and French-speaking sections) on the validity of these provisions of DAC6 in light of the Charter. The Court concluded that the obligation established for lawyers to communicate to other intermediaries their exemption from the reporting obligation violates the right to respect for private life, while the same obligation established for other intermediaries does not. At the same time, it considered that the obligation to report certain cross-border tax planning schemes, established in

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1. 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, OJ L 139 (2018), Primary Sources IBFD [DAC6].
2. BE: ECJ, 29 July 2022, Case C-694/20, *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v. Vlaamse Regering*, ECLI:EU:C:2022:963, Case Law IBFD [*Belgian Vlaamse Balies* (C-694/20)]; and BE: ECJ, 29 July 2024, Case C-623/22, *Belgian Association of Tax Lawyers and Others v. Premier ministre/Eerste Minister*, ECLI:EU:C:2024:639, Case Law IBFD. By Order of 7 Mar. 2023, the Court removed from the register the request for a preliminary ruling presented by the French *Conseil d'Etat*, Case C-398/21, as a result of the decision of the Court in *Belgian Vlaamse Balies* (C-694/20).

the DAC[3] (as per the fifth amendment (DAC6)) does not violate the principles of equality and non-discrimination. Moreover, the ECJ declared that DAC6 did not violate the principles of legal certainty and legality in criminal matters, since the key concepts of DAC6 are determined in a sufficiently clear and precise manner. The ECJ held that the right to a fair trial had also not been violated since there is no link between the reporting obligations and a judicial proceeding.

This Opinion Statement focuses on questions of law and the scope of legal professional privilege as a waiver of the disclosure obligations established by DAC for fiscal intermediaries. This Opinion Statement seeks to explain and analyse the CJEU's reasoning regarding the scope of the invalidity and the justification of the validity of certain aspects of DAC6.

2. Background, Facts and Issues

DAC6 introduced a reporting obligation for tax intermediaries and relevant taxpayers in respect of potentially aggressive tax planning cross-border tax arrangements based on the hallmarks enumerated in Annex IV to DAC.

The Belgian Constitutional Court (Dutch-speaking and French-speaking sections) made parallel requests for preliminary rulings regarding the validity of certain provisions of DAC as amended by DAC6,[4] which impact the validity of the corresponding provisions of the Law of 20 December 2019 transposing that Directive into domestic law.[5] While the first request focused on a potential breach of the right to respect for private life and the right to a fair trial, the second expanded the analysis to the principles of equal treatment, legal certainty and legality in criminal matters.

The applicants asked the Belgian Constitutional Court to override the Law of 20 December 2019 implementing DAC6 in whole or in part, raising the question of the validity of the Directive in light of the principles of equal treatment, legal certainty and legality in criminal matters, as well as the rights to respect for private life and to a fair trial, in particular articles 7, 20, 21 and 49(1) of the Charter.

The Belgian Constitutional Court referred the following questions for preliminary rulings:

As regards *Belgian Vlaamse Balies* (Case C-694/20):[6]

> Does Article 1(2) of [Directive 2018/822] infringe 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], in that the new Article 8ab(5) which it inserted in [Directive 2011/16], provides that, where a Member State takes the necessary measures to give intermediaries the right to 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, that Member State is obliged to require the intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations, in so far as the effect of that obligation is to oblige a lawyer acting as an intermediary to share with another intermediary, not being his [or her] client, information which he [or she] obtains in the course of the essential activities of his [or her] profession, namely, representing or defending clients in legal proceedings and giving legal advice, even in the absence of pending legal proceedings?

As regards *Belgian Association of Tax Lawyers* (Case C-623/22):[7]

> (1) Does [Directive 2018/822] infringe Article 6(3) [TEU] and Articles 20 and 21 of the [Charter] and, more specifically, the principles of equality and non-discrimination as guaranteed by those provisions, in that [Directive 2018/822] does not limit the reporting obligation in respect of [reportable] cross-border arrangements to corporation tax, but makes it applicable to all taxes falling within the scope of [Directive 2011/16,] which include under Belgian law not only corporation tax, but also direct taxes other than corporation tax and indirect taxes, such as registration fees?
>
> (2) Does [Directive 2018/822] infringe the principle of legality in criminal matters as guaranteed by Article 49(1) of the [Charter] and by Article 7(1) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR')], the general principle of legal certainty and the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the concepts of 'arrangement' (and therefore the concepts of 'cross-border arrangement', 'marketable arrangement' and 'bespoke arrangement'), 'intermediary', 'participant', 'associated enterprise', the terms 'cross-border', the different 'hallmarks' and the 'main benefit test' that [Directive 2018/822] uses to determine the scope of the reporting obligation in respect of [reportable] cross-border arrangements, are not sufficiently clear and precise?
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> (3) Does [Directive 2018/822], in particular in so far as it inserts Article 8ab(1) and (7) into [Directive 2011/16], infringe the principle of legality in criminal matters as guaranteed by Article 49(1) of the [Charter] and by Article 7(1) of the [ECHR], and infringe the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the starting point of the 30-day period during which the intermediary or relevant taxpayer must fulfil its reporting obligation in respect of a [reportable] cross-border arrangement is not fixed in a sufficiently clear and precise manner?
>
> (4) Does Article 1(2) of [Directive 2018/822] infringe the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the new Article 8ab(5) which it inserted in [Directive 2011/16], [and which] provides that, where a Member State takes the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach legal professional privilege under the national law of that Member State, that Member State is obliged to require the intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations, in so far as the effect of that obligation is to oblige an intermediary bound by legal professional privilege subject to criminal sanctions under the national law of that Member State to share with another intermediary, not being his client, information which he obtains in the course of the essential activities of his profession?
>
> (5) Does [Directive 2018/822] infringe the right to respect for private life as guaranteed by Article 7 of the [Charter] and by

3. Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64 (2011), Primary Sources IBFD [DAC].
4. In particular, art. 8ab(5) in *Belgian Vlaamse Balies* (C-694/20) and art. 8ab(1), (5), (6) and (7) in *Belgian Association of Tax Lawyers* (C-623/22).
5. *Belgian Association of Tax Lawyers* (C-623/22), para. 2.
6. *Belgian Vlaamse Balies* (C-694/20), para. 17.
7. *Belgian Association of Tax Lawyers* (C-623/22), para. 21.

> Article 8 of the [ECHR], in that the reporting obligation in respect of [reportable] cross-border arrangements interferes with the right to respect for the private life of intermediaries and relevant taxpayers which is not reasonably justified or proportionate in the light of the objectives pursued and which is not relevant to the objective of ensuring the proper functioning of the internal market?

3. The Decisions of the Court of Justice and the Reasoning on Which They Are Based

3.1. In general

For the purposes of a systematic analysis, the reasoning of the Court in the two decisions will be considered together, along with the principles and fundamental rights considered.

3.2. Absence of breach of the principles of equality and non-discrimination

The first question of the Belgian Constitutional Court in *Belgian Association of Tax Lawyers* referred to a potential violation of the principles of equality and non-discrimination and of articles 20 and 21 of the Charter, insofar as DAC6 did not limit the reporting obligation established in article 8ab(1), (6) and (7) to corporation tax, but applied to all taxes falling within the scope of the directive.[8] According to article 2 of the DAC, it applies to "all taxes of any kind" levied by, or on behalf of, a Member State but not to value added tax, customs duties and excise duties covered by other EU legislation or cooperation mechanisms between Member States.

The CJEU determined that the fact that DAC6 is not limited to corporation income tax does not infringe the principles of equal treatment and non-discrimination.[9] Following the Advocate General's Opinion in that regard,[10] the CJEU found that the different tax types subject to the reporting obligation represent comparable situations in light of the objectives pursued by the Directive related to combating aggressive tax planning and tax avoidance and evasion in the internal market. Considering that the EU legislature has broad discretion in the exercise of the powers conferred on it, it is not manifestly inappropriate to establish such a broad obligation in light of those objectives.[11]

The principle of equality, which the prohibition on discrimination is a specific expression of, as reflected in article 20 of the Charter, requires that comparable situations not be treated differently and different situations not be treated in the same way unless such treatment is objectively justified.[12] The Court analysed the comparability of the reporting obligations regarding the different taxes covered, following settled case law on the matter, mainly the comparability test[13] and the manifestly inappropriate test,[14] concluded that no factor examined is capable of affecting the validity of DAC6 in light of the principles of equal treatment and non-discrimination (articles 20 and 21 of the Charter).[15]

From that perspective, the CJEU found that a reporting system capable of capturing the largest possible range of tax types does not infringe the comparability analysis, since all taxes falling within the scope of DAC6 are in a comparable situation as regards the need to counteract aggressive tax planning, tax avoidance and evasion.[16] Moreover, since the European Union has broad discretion in the field of taxation and there is no evidence that tax evasion or tax planning in relation to other taxes is negligible, the broad scope of the Directive is not manifestly inappropriate in light of the objectives pursued and appears consistent with the subject matter and purpose of the legal instrument that introduced it.

3.3. Absence of breach of the principles of legal certainty and legality in criminal matters

Belgian Association of Tax Lawyers deals with the question of whether some of the basic concepts underlying the reporting obligation are defined in a sufficiently clear and precise way so that intermediaries and relevant taxpayers are able to ascertain the extent of their obligation, or whether it violates the principle of legal certainty. Moreover, since these concepts are the basis for the establishment of penalties by Member States in the event of a failure to fulfil the obligation, the Belgian Constitutional Court asked whether the principle of legality in criminal matters (article 49(1) of the Charter) and the right to respect for private life (article 7 of the Charter) had been infringed.[17]

The concepts under scrutiny were "arrangement", "cross-border arrangement", "marketable arrangement" and "bespoke arrangement", "intermediary", "participant", "associated enterprise"; also, the description "cross-border", the various "hallmarks", the "main benefit test", and lastly, the starting point of the 30-day period prescribed for fulfilling the reporting obligation were at issue. According to the claimants, the lack of precision of these concepts, which are essential in defining the extent of the reporting obligation, renders its enforcement by means of administrative fines under national law invalid from the point of view of the principles of legal certainty, legality in criminal matters (article 49(1) of the Charter) and the right to respect for private life (article 7 of the Charter).

8. Id., paras. 18 and 22.
9. Id., para. 24.
10. BE: Opinion of Advocate General Emiliou, 29 Feb. 2024, Case C-623/22, *Belgian Association of Tax Lawyers and Others v. Premier ministre/Eerste Minister*, ECLI:EU:C:2024:189, paras. 20-37, Case Law IBFD.
11. *Belgian Association of Tax Lawyers* (C-623/22), para. 33.
12. Id., para. 24.
13. According to this test, the comparability of different situations must be assessed with regard to all elements that characterize such situations, in light of the subject matter and purpose of the EU act that makes the distinction, taking into account the principles and objectives of the field. *Belgian Association of Tax Lawyers* (C-623/22), para. 25; and AT: ECJ, 10 Feb. 2022, Case C-522/20, *OE v. VY*, EU:C:2022:87, para. 20.
14. In areas of broad discretion for the EU legislature, involving political, economic and social choices that imply complex assessments and evaluations, only manifestly inappropriate measures in relation to the objectives sought may affect the lawfulness of the measure (*OE v. VY* (C-522/20), para. 21).
15. *Belgian Association of Tax Lawyers* (C-623/22), para. 34.
16. Id., para. 33.
17. Id., para. 35.

The Court reiterated the twofold operation of the principle of legal certainty. First, the rules of law must be clear and precise. Second, their application must be foreseeable for those subject to the law, especially in the event of adverse consequences.[18] Those concerned must be made precisely aware of the extent of the obligations imposed on them; they must be able to ascertain their rights and obligations unequivocally and take steps accordingly.[19] However, the principle of legal certainty does not preclude norms referring to an abstract legal notion; nor does it require that such a norm refer to the various specific hypotheses to which it applies, since all those hypotheses cannot be determined in advance by the legislature.

DAC6 does not itself lay down any penalty for infringement of the reporting obligation. It is for the Member States to establish effective, proportionate and dissuasive penalties, possibly criminal in nature. However, any lack of clarity or precision in the concepts and time limits used in the Directive regarding the conduct required of individuals and entities is liable to undermine the principle of legality in criminal matters,[20] pursuant to which legislation must clearly define offences and the penalties that they attract. The fact that the assistance of the courts may be necessary in interpreting the wording of the relevant provision does not necessarily infringe that principle.[21]

Article 52(3) of the Charter ensures that the fundamental rights it contains have at least the same meaning and scope as those guaranteed by the ECHR, which means that the case law of the ECtHR on article 7 of the ECHR is relevant in examining these rights.[22] The ECtHR has established that the wording of legislative acts of a general nature cannot be absolutely precise; general categories often leave grey areas at the fringes of a definition. These areas do not make a provision incompatible with article 7 of the ECHR, provided that the provision is sufficiently clear in the vast majority of cases. Nor does the principle prohibit the gradual clarification of rules of criminal liability by means of interpretations in the case law, provided that those interpretations are reasonably foreseeable. The degree of foreseeability required depends, to a considerable extent, on the context of the text in question, the field it covers and the number and status of those to whom it is addressed. The Court has stated that "any ambiguity or vagueness in those concepts may be dispelled by using the ordinary methods of interpretation of the law", or the guidance provided by relevant international agreements and practices. Moreover, the need to obtain appropriate legal advice to assess the consequences of a given action may still satisfy the requirement of foreseeability.

The first concept to be evaluated is that of "arrangement". Although not specifically defined in article 3 of DAC, the concept is broadly used in DAC6, either alone or in a phrase. The Court considers that the term must be understood in its usual sense as a "mechanism, operation, structure or set-up, the purpose of which, in the context of amended Directive 2011/16, is to carry out tax planning". Moreover, an arrangement may itself consist of a number of arrangements, for instance when it involves the coordinated implementation of separate mechanisms in different Member States that pursue overall tax planning.[23] The Court also refers to the OECD's Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (OECD Model Rules),[24] which is referred to in Recital 4 of DAC6, according to which the concept is sufficiently broad and robust to capture any arrangement, scheme, plan or understanding and all the steps and transactions that form part of or give effect to that arrangement. The distinction between a reportable arrangement and a reportable "series of arrangements" derives from the fact that, in respect of the former, each arrangement individually and in isolation entails a "potential risk of tax avoidance", regardless of the fact that the overall arrangement to which it belongs generates a "series of arrangements" that needs to be reported as well.[25]

These considerations led the Court to consider that the concept of "arrangement" appears to be sufficiently clear and precise having regard to the requirements stemming from the principles of legal certainty and legality in criminal matters.

Second, the concepts of "cross-border arrangement", "marketable arrangement" and "bespoke arrangement" are considered together.

The first does not generate any particular difficulty in comprehension, since it is determined based on the residence of the participant(s) in the arrangement and the location of the activity of the participant(s), the consequences of the arrangements on the automatic exchange of information or the identification of the actual beneficiaries of that arrangement. The Court considers that "participant in the arrangement" has to be understood as covering the "relevant taxpayer" and not *a priori* an "intermediary".[26] The impact on the automatic exchange of information or the identification of beneficial ownership is sufficiently explained by Annex IV.

The concepts of "marketable arrangement" and "bespoke arrangement" are mutually exclusive, the distinction being whether they can be implemented without being "substantially customized". According to the Court, this element is sufficiently clarified by hallmark A.3, meaning an arrangement the documentation or structure of which is largely standardized and that may be available to a number of taxpayers.[27]

Another important element of the reporting obligation is the concept of "intermediary", which determines the person or entity subject to the obligation and is considered

18. Id., para. 36.
19. HU: ECJ, 16 Feb. 2022, Case C-156/21, *Hungary v. Parliament and Council*, EU:C:2022:97, para. 223 and the case law cited therein.
20. *Belgian Association of Tax Lawyers* (C-623/22), paras. 38-39.
21. IT: ECJ, 5 Dec. 2017, Case C-42/17, *Criminal proceedings against M.A.S. and M.B.*, EU:C:2017:936, para. 56, Case Law IBFD.
22. *Belgian Association of Tax Lawyers* (C-623/22), para. 46.
23. Id., para. 49.
24. Id., para. 50.
25. *Belgian Association of Tax Lawyers* (C-623/22), para. 52.
26. Id., paras. 56-57, 59.
27. Id., para. 60.

in third place. The Court analysed the definition in paragraph 21 of article 3 of DAC, as amended by DAC6 and the four additional conditions that connect the intermediary with the territory of a Member State. The doubts in that regard refer to "auxiliary intermediaries", secondary intermediaries or service provider intermediaries, which only provide aid, assistance or advice, as opposed to the promoters of the arrangements. The Court considered that the definition does not lack the precision necessary to enable the operators concerned to identify whether or not they themselves fall within the category and, therefore, does not breach the principles of legal certainty and legality in criminal matters.[28]

The Court then considered the concept of "associated enterprise" defined in paragraph 23 and rejected the claim of a potential breach of the principles concerned, taking into account that the arguments of the claimants mainly refer to the breadth of the concept rather than a lack of clarity.

As regards the doubts raised by the formulation of the various hallmarks of Annex IV of DAC, the Court took into account the specific and concrete characteristics of the tax arrangements affected, distinguishing those that are hallmarks *per se* and those that need to satisfy the "main benefit test" set out in Part I of Annex IV. The Court considered that intermediaries, who are, as a general rule, tax specialists, or even taxpayers that design cross-border tax-planning arrangements, are able to identify those characteristics without undue difficulty. Moreover, the definitions in Annex IV can be linked to the detailed analysis contained in the BEPS Action 12 Report[29] and in the Impact Assessment.[30] Despite the heterogeneous nature of the arrangements concerned, this fact does not make the application of the obligation unforeseeable to the persons subject to that obligation.[31]

The same conclusion was reached as regards verification of the "main benefit test", which, for the Court, "does not appear particularly difficult for an intermediary" or in the absence thereof, "for the relevant taxpayer". In reaching that conclusion, it referred to the BEPS Action 12 Report, which gives an indication of the concept: the main benefit test compares the value of the expected tax advantage to any other benefits likely to be obtained from the transaction, considering an objective assessment of the tax benefits.[32]

As for the reporting deadline, DAC6 fixes the starting point of the 30-day period for mandatory reporting with reference to diverse parameters, which may affect the various intermediaries involved in a different way: i.e. as the day after the reportable cross-border arrangement is made available for implementation, the day after that arrangement is ready for implementation, or when the first step in the implementation of that arrangement has been taken, whichever occurs first. For auxiliary intermediaries, the 30-day period begins on the day "after they provided, directly or by means of other persons, aid, assistance or advice" and for relevant taxpayers it begins the day after the arrangement is made available to that taxpayer for the purposes of implementation, or is ready to be implemented by that taxpayer, or when the first step of its implementation has been made in relation to that taxpayer, whichever occurs first.

The Court concluded that the reporting periods established in DAC6 are determined in a sufficiently clear and precise manner.[33] The Court followed the Advocate General's Opinion, which provided that "implementation of the arrangement refers to the transition of that arrangement from its conceptual stage to its operational stage", a moment that is neither imprecise nor lacks clarity.[34] As regards auxiliary intermediaries, it reckons that the timing cannot be precisely fixed, since reference is to the "moment the person concerned knows or could reasonably be expected to know" that it is providing aid, assistance or advice, which in some cases may only arise after the beginning of the provision of such services, since the intermediary is to provide evidence of the lack of knowledge and reasonable expectation of knowledge of their involvement in a reportable arrangement.

Referring to Recital 7 of DAC6, the Court acknowledged that early filing of information with the tax administration, before implementation of the arrangement, is to be preferred, however, it considers it desirable to prevent unnecessary reporting obligations, particularly for auxiliary intermediaries, when implementation remains uncertain. Most importantly, the Court clarified that the auxiliary intermediaries' reporting period cannot begin to run until the day after the date on which they completed their provision of aid, assistance or advice and, at the latest, on the day defined by the first subparagraph of article 8ab(1) of DAC6, in so far as they are aware of it.[35]

Moreover, the Court also followed the Advocate General's Opinion that article 7 of the Charter does not impose an obligation that is stricter than article 49 of the Charter in terms of the requirement for clarity or precision of the concept used and the time limits laid down and, therefore, the interference with the private life of the intermediary and relevant taxpayers is defined in a sufficiently clear and precise manner.

3.4. Breach of the right to respect for private life

The argument that is common to *Belgian Vlaamse Balies* and *Belgian Association of Tax Lawyers* is the potential breach of the right to respect for private life derived from the obligation of intermediaries to communicate their name and the name of their client to another interme-

28. Id., para. 64.
29. OECD/G20, *Mandatory Disclosure Rules – Action 12: 2015 Final Report* (2015), Primary Sources IBFD.
30. European Commission Staff Working Document, Impact Assessment accompanying the document Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, SWD(2017)236.
31. *Belgian Association of Tax Lawyers* (C-623/22), paras. 69-73.
32. Id., paras. 71 and 74.
33. Id., para. 86.
34. Id., para. 81.
35. Id., para. 85.

diary in order to benefit from the waiver of the reporting obligation due to the application of legal professional privilege. While *Belgian Vlaamse Balies* concentrated on the application of the waiver to lawyers, *Belgian Association of Tax Lawyers* sought to determine whether the waiver can be extended to other tax professionals/intermediaries who are bound by legal professional privilege under national law.[36] Moreover, in *Belgian Association of Tax Lawyers*, the validity concerns referred to the obligation to report cross-border arrangements that are lawful, genuine, non-abusive and the main advantage of which is not fiscal in nature.[37]

The right to respect for private life is protected by article 7 of the Charter, which corresponds to article 8(1) of the ECHR. According to ECtHR case law,[38] article 8(1) of the ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. The protection of exchanges between lawyers and their clients covers not only the activity of defence but also legal advice.[39] Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and its existence.[40]

Legal professional privilege primarily takes the form of obligations on lawyers and is justified by the fact that they are assigned a fundamental role in a democratic society, that of defending litigants. Therefore, clients of a lawyer can reasonably expect that their communications will remain private and confidential.[41] Any person must be able, without constraint, to consult a lawyer, whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it. Lawyers are also bound by a duty to act in good faith towards their client.[42]

The establishment of an obligation to notify other intermediaries of the identity of the lawyer intermediary and of them having been consulted on the reportable cross-border arrangement in order to claim the waiver of the reporting obligations entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in article 7 of the Charter.[43] Moreover, it leads to another indirect interference, i.e. the disclosure by the notified third-party intermediaries to the tax authorities of the identity of the lawyer-intermediary and of their having been consulted.[44]

The analysis of the potential justification of these interferences with the fundamental right to respect for private life, since it is not an absolute right, leads to an analysis under article 52(1) of the Charter of whether:

- the limitations on the exercise of this right are provided for by law;
- the limitations respect the essence of this right; and
- the limitations respect the principle of proportionality, which implies an analysis of whether the limitations are necessary and genuinely meet objectives of general interest recognized by the European Union, as well as the need to protect the rights and freedoms of others, and whether there is a proper balance between the interference and the objective of general interest pursued.[45]

The CJEU considered that the interference derived from the obligation to report both the name of the lawyer and of their being consulted is provided by law. The CJEU considered that this requirement has been satisfied since DAC6 expressly provides for the obligation of intermediaries to file information to notified other intermediaries of their reporting obligations and provides the limitations based on parameters defined in and content inferred from that Directive (articles 8ab(1), (6), (9), (13) and (14) of DAC6.[46]

The CJEU considered that the limitations derived from revealing such data under the reporting obligation respect the essence of the right to respect for communications between lawyers and their clients and for private life guaranteed in article 7 of the Charter. The communication of data revealing the design and implementation of a potentially aggressive tax arrangement, without even directly affecting the possibility of such design or such implementation, cannot be regarded as undermining the essence of these rights.[47] *Belgian Vlaamse Balies* is more specific in that regard, considering that this obligation entails, only to a limited extent, the lifting of the confidentiality of such communications, since the reporting obligation does not oblige or authorize the lawyer to share information on the content of those communications without the client's consent. Without this consent, the other intermediaries would not be in a position to file such information with the tax authorities.

The CJEU verified the proportionality of the interference in *Belgian Vlaamse Balies* using the typical structure of analysis:

- The limits on rights and freedoms cannot exceed the limits of what is appropriate and necessary.
- The limits must pursue legitimate objectives or the need to protect the rights and freedoms of others.
- Where there are various alternatives, the least onerous on the rights and freedoms must be chosen.

36. Id., para. 91.
37. Id., para. 122.
38. FR: ECtHR, 6 Dec. 2012, *Michaud v. France*, CE:ECHR:2012:-1206JUD001232311, paras. 117 and 118.
39. *Belgian Vlaamse Balies* (C-694/20), para. 27.
40. Id., para. 27.
41. TR: ECtHR, 9 Apr. 2019, *Altay v. Turkey (No 2)*, CE:ECHR:2019:-0409JUD001123609, para. 49.
42. ECJ, 18 May 1982, Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, EU:C:1982:157, para. 18.
43. *Belgian Vlaamse Balies* (C-694/20), para. 30.
44. Id., para. 31.
45. Id., para. 34.
46. Id., paras. 36-38; *Belgian Association of Tax Lawyers* (C-623/22), paras. 136-137.
47. *Belgian Vlaamse Balies* (C-694/20), paras. 39-40; *Belgian Association of Tax Lawyers* (C-623/22), para. 138.

– The objective of general interest must be reconciled with the fundamental rights affected by the measure with a proper balance between the general interest objectives and the rights at issue.

Following the Advocate General's Opinion, the Court recognized that DAC6 seeks to combat aggressive tax planning and prevent the risk of tax avoidance and evasion,[48] which are objectives of general interest recognized by the European Union for the purposes of article 52(1) of the Charter.[49]

As regards appropriateness and necessity, the CJEU had doubts whether the obligation to notify other intermediaries of the name of the lawyer and the fact that they have been contacted is necessary: "[T]hat obligation cannot, however, be regarded as being strictly necessary in order to attain those objectives and, in particular, to ensure that the information concerning the reportable cross-border arrangements is filed with the competent authorities".[50]

This is so because, regardless of this notification, all intermediaries are, in principle, required to file the information that is within their knowledge,[51] even if there is more than one intermediary and regardless of whether it was informed of the waiver of another intermediary.[52] In order for other intermediaries to be exempted from filing the information, they must have proof that the same information has already been filed by another intermediary (or the relevant taxpayer); the communication of a waiver by the lawyer intermediary cannot give rise to any expectation of relief from their own obligation.[53] Nor does the waiver relieve the relevant taxpayer from their own reporting obligations in the event that there is no other intermediary.[54] Moreover, the disclosure of the identity of the lawyer-intermediary and of their having been consulted is not strictly necessary because the tax authorities will always be informed of reportable cross-border arrangements.[55] Tax authorities cannot, in any event, require the lawyer-intermediary to provide information without the consent of their client.[56]

The Court clarified that there is no need to disclose the identity of the lawyer-intermediary and of their having been consulted to verify whether they may rely on legal professional privilege, because this is not the purpose of the reporting and notification obligations; instead, the purpose is to combat aggressive tax practices and prevent tax avoidance and evasion.[57] This goal may be achieved without the disclosure of that information to the tax authorities.[58]

48. *Belgian Vlaamse Balies* (C-694/20), para. 43.
49. Id., para. 44.
50. Id., para. 46.
51. Id., para. 47.
52. Id., para. 47.
53. Id., paras. 48-49.
54. Id., para. 50.
55. Id., paras. 51-52.
56. Id., para. 53.
57. Id., para. 56.
58. Id., para. 57.

Therefore, the obligation to notify the waiver to other intermediaries, and of those intermediaries to disclose the name of the lawyer-intermediary subject to legal professional privilege, infringes the right to respect for communications between a lawyer and their client guaranteed in article 7 of the Charter.

Belgian Vlaamse Balies did not raise the issue of the scope *ratione personae* of the waiver, since the validity issue was limited to the situation of lawyer-intermediaries. That issue was the focus of *Belgian Association of Tax Lawyers*, which sought to clarify the meaning of the phrase "legal professional privilege under the national law of that Member State". *Belgian Association of Tax Lawyers* dealt with the validity of the obligation to notify the waiver of the reporting obligation on those intermediaries that are not lawyers but are bound by legal professional privilege under national law. The Court, however, reached a different outcome in *Belgian Vlaamse Balies* regarding intermediaries who are not lawyers.

In order to determine the subjective scope of the persons affected by "legal professional privilege" under national law, the Court analysed both the wording and the objectives of the legislation.

From the wording, it appeared that there is a divergence among the language versions, despite the fact that the vast majority seem to opt for a broad meaning of the expression. Some versions, such as the English language version, refer to "legal professional privilege", meaning the professional secrecy of lawyers and other professionals who can ensure legal representation of a client before the national courts.[59] By contrast, 18 other languages refer to "professional secrecy applicable under national law" without reference to the professional secrecy of lawyers. These versions include other professions not entitled to provide legal representation in court proceedings. The same disparities exist in Recital 8 of DAC6, which makes it impossible to clearly determine the scope of the wording based on a literal interpretation.[60]

Examining the context and objectives of the Directive, the Court highlighted the need to obtain comprehensive and relevant information about potentially aggressive tax arrangements and to ensure the proper functioning of the internal market by combating tax avoidance and evasion in that market, for which purpose the mandatory disclosure of information was considered essential by the EU legislature.[61] The Commission considered that the power to substitute the obligation to notify for the obligation to inform referred only to lawyers and persons permitted to represent parties in legal proceedings.[62] The Council also claimed that the same protection should not be granted both to lawyers and to other intermediaries.[63] The Advocate General considered that granting a waiver to all intermediaries would potentially have the effect of calling into

59. *Belgian Association of Tax Lawyers* (C-623/22), para. 95.
60. Id., para. 97.
61. Id., para. 98.
62. Id., para. 92.
63. Id., para. 93.

question the effectiveness of the reporting mechanisms. The OECD Model Rules, which influenced DAC6, are used – especially rule 2.4 – to confirm that the intention of the BEPS Action Plan was to apply the waiver to prevent the revealing of confidential information held by an attorney, solicitor or other admitted legal representative.[64]

The Court concluded that DAC6 seeks, in essence, to protect professional secrecy only for lawyers and other professionals who, like lawyers, are legally authorized to ensure legal representation, even though this is not the literal wording of most versions.[65] The Court explained that the reference to national law is intended to extend the waiver to persons that, under the national law of Member States, have "the capacity to ensure legal representation to professions".[66] The Court, however, considered that this discretion is not intended to allow Member States to extend the benefit of that substitution of obligations to professions that do not ensure such representation.[67] In providing this interpretation, the Court noted the need to avoid the creation of distortions between Member States through the relocation of potentially aggressive tax planning activities to jurisdictions with a broader concept of professional privilege.[68]

Therefore, the Court concluded that the "power of the Member States to substitute the obligation to notify for the reporting obligation was given only in respect of professionals who are authorised under national law to ensure legal representation".[69]

Having concluded that this restrictive approach is the correct one, the Court moved on to analyse whether the relationship between a professional who is not a lawyer but is authorized to ensure legal representation, and their client should remain secret vis-à-vis third parties and therefore, should not be revealed to third parties.[70] The Court analysed article 7 of the Charter, alongside article 8(1) of the ECHR, which protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients, including a review of the case law on the specific protection of correspondence between lawyers and clients.[71]

The Court concluded from this case law that this specific protection relates to the special position occupied by a lawyer in the judicial organization of the Member States and to the fundamental task entrusted to them by Member States. The obligation to notify other intermediaries infringes article 7 of the Charter "when it is imposed on the lawyer".[72] This position is based on a conception of the lawyer's role as an independent collaborator in the administration of justice and the reliance by the client on the rules of professional ethics and discipline. This unique position led the court to conclude that the ruling in *Belgian Vlaamse Balies* extends only to persons pursuing their professional activities under one of the professional titles referred to in article 1(2)(a) of Directive 98/5.[73] Since other professionals do not reflect these characteristics, even if they do provide legal representation, there is no basis for the invalidity of the substitution of the reporting obligation by the obligation to notify other intermediaries, despite the fact that it leads to the knowledge of such a consultation link between the notifying intermediary and their client both by the notified intermediary and the tax administration.[74]

The final point of discussion in *Belgian Association of Tax Lawyers* was the potential breach of the right to respect for private life as a result of the obligation to undertake the reporting obligation by intermediaries not benefiting from the waiver, especially considering that the obligation may concern lawful, genuine and non-abusive cross-border arrangements. This reporting obligation would limit the taxpayer's freedom to choose and the intermediary's freedom to design and advise that relevant taxpayer on the least taxed route.[75]

The CJEU has held that provisions imposing or allowing for the communication of personal data, such as the name, place of residence or financial resources of natural persons, to a public authority must, in the absence of the consent of those natural persons and irrespective of the subsequent use of the data at issue, be regarded as an interference in their private life and therefore as a limitation on the right guaranteed in article 7 of the Charter, without prejudice to the potential justification of such provisions.[76] Moreover, the ECtHR has considered that article 8 of the ECHR and the protection of private life encompasses the right of each individual to approach others in order to establish and develop relationships with them and with the outside world, i.e. the right to a "private social life". Further, this provision may include professional activities or activities taking place in a public context,[77] not excluding professional or commercial activities. Private life thus includes the concept of personal autonomy, covering the freedom of any person to organize their life and activities, both personal and professional or commercial, although the interference may be far-reaching when professional or business activities are involved.[78]

64. Id., paras. 101-103.
65. Id., para. 104.
66. Id., para. 105.
67. Id., para. 106.
68. Id., para. 107.
69. Id., para. 108.
70. Id., para. 109.
71. Id., paras. 112-114.
72. Id., para. 116.
73. Id., para. 118. Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77 (14 Mar. 1998), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31998L0005 (accessed 3 Feb. 2025).
74. *Belgian Association of Tax Lawyers* (C-623/22), paras. 118-119.
75. Id., paras. 121-123.
76. HU: ECJ, 18 June 2020, Case C-78/18, *Commission v. Hungary (Transparency of Associations)*, EU:C:2020:476, para. 124.
77. FR: ECtHR, 19 Jan. 2018, *FNASS and Others v. France*, CE:ECHR:2018:-0118JUD004815111, para. 153.
78. FR: ECJ, 22 Oct. 2002, Case C-94/00, *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, EU:C:2002:603, para. 29.

The obligation to report and reveal data identifying the persons concerned and information on the cross-border arrangement at issue constitutes an interference with the right to respect for private life and communications. This obligation leads to revealing, to the administration, the result of tax design and engineering work, carried out in the context of personal, professional or business activities, by the taxpayer themself or, in most cases, by one or more intermediaries, and may deter both taxpayers and their advisers from designing and implementing these arrangements based on disparities between tax systems subject to mandatory reporting, despite being lawful.[79]

As to the potential justification of such interference, the Court reiterated the conditions for such justification.

The CJEU recognized that this limitation is provided for by law, as it stems from article 8ab(1) of DAC, as amended by DAC6. It does not undermine the essence of the right to respect for the private life of the persons concerned since it refers to the communication of data without directly affecting the possibility of such design or such implementation. The Court noted that the purpose of DAC6 is of general interest, i.e. combating aggressive tax planning and preventing the risks of tax avoidance and evasion. The early-stage reporting obligations may enable the prompt reaction of Member States to harmful tax practices, "even if they are lawful, and to remedy legislative or regulatory disparities and loopholes that may facilitate the development of such practices".

As regards the necessity analysis, the Court considered that the obligation is particularly effective to combat aggressive tax planning and prevent the risks of tax avoidance and evasion at a very early stage. With this reporting obligation, DAC6 allows Member States to react with precision and speed, if necessary in a coordinated manner, to aggressive tax planning mechanisms, which the examination and monitoring of tax behaviour *a posteriori* does not allow for to the same extent.[80] As for the content of the information, the CJEU did not consider it to go beyond what is strictly necessary for Member States to have a sufficient understanding of cross-border arrangements and be able to act promptly, either by analysing the information provided or contacting the intermediaries or relevant taxpayers for further information. The Court also considered it relevant to the proportional analysis that the obligation does not entail, for the obligor, an obligation to investigate and seek information beyond the scope of the information that they already control.

Finally, as regards the balance of interests, the Court recognized that the interference is certainly not negligible, but the important objectives of public interest pursued lead to the conclusion that the interference is not disproportionate in respect of both the taxpayer who benefits from the arrangement at issue and the intermediary who designed it.[81] Referring to recitals 2 and 6 of DAC6, the Court highlighted the combatting of aggressive tax planning and the prevention of the risks of tax avoidance and evasion, which contribute to the protection of the tax base, the establishment of a fair tax environment in the internal market, the safeguarding of the balanced allocation of the Member States' powers of taxation and the effective collection of tax.

3.5. Potential breach of the right to a fair trial

This was an argument discussed solely in *Belgian Vlaamse Balies*. The Court considered that the right to a fair trial would be infringed if lawyers were obliged, in the context of judicial proceedings or the preparation of such proceedings, to cooperate with the authorities by giving them information obtained in the course of related legal consultations.[82] In order, however, for article 47 of the Charter to be triggered, there must be a link with judicial proceedings, which is not the case as regards the early reporting obligations established by DAC6. A lawyer-intermediary is not acting as counsel for their client in a dispute; the mere fact that the lawyer's advice or the cross-border arrangement that is the subject of consultation may give rise to litigation at a later stage does not mean that the lawyer acted for the purposes of and in the interests of the rights of defence of their client.[83]

4. Comments

4.1. In general

The cases relating to the validity of DAC6 referred by the Belgian Constitutional Court are of significant relevance for professionals dealing with tax advisory activities in the European Union. The CJEU has given support to the EU legislature, despite the criticisms generated by DAC6 in its preparatory stage, the costs of its implementation and the uncertainty regarding whether it is really effective in countering aggressive tax planning, tax avoidance and tax evasion. In doing so, the CJEU basically followed the Advocate General Opinions.[84] For systematic purposes, the comments that follow are structured around the various principles and fundamental rights interpreted in the cases.

4.2. Principles of equality and non-discrimination

While the CJEU found it difficult to discern any discriminatory treatment regarding the reporting obligations affecting taxes other than corporate income tax, it is evident that the structure of DAC6 displays a certain lack of coherence and proportionality between the taxes covered and the identification of potential aggressive tax planning arrangements as identified by the hallmarks in Annex IV of the Directive.

79. *Belgian Association of Tax Lawyers* (C-623/22), paras. 129-132.
80. Id., paras. 139-143.
81. Id., para. 148.
82. Id., para. 60. BE : ECJ, 26 June 2007, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministers,* EU:C:2007:383, paras. 31-32.
83. *Belgian Vlaamse Balies* (C-694/20), para. 64.
84. BE : Opinion of Advocate General Rantos, 5 Apr. 2022, Case C-694/20, *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v. Vlaamse Regering*, ECLI:EU:C:2022:259. AG Opinion in *Belgian Association of Tax Lawyers* (C-623/22).

The formulation of the hallmarks as a closed list seems to be designed for corporate income tax purposes and does not proportionately take into account the potential risk of aggressive tax planning in respect of other taxes.

4.3. Principles of legal certainty and legality in criminal matters

Under article 25a of the Directive, Member States must introduce penalties for the violation of reporting obligations, and those penalties must be "effective, proportionate and dissuasive". The partly unclear scope of the reporting obligations themselves and the mandatory imposition of penalties raises issues of legal certainty and legality. The CJEU, however, provides support to the EU legislature by considering that the concepts and elements that define the reporting obligations and that may thus give rise to the imposition of penalties by Member States for a failure to comply with the different obligations enshrined in DAC6, have the necessary clarity and precision. As will be shown, however, some of the concepts and terms referred to do not offer sufficient clarity and precision even following the CJEU decisions. This lack of precision and careful consideration of the elements of the reporting obligation by the EU legislator may severely affect legal certainty for both relevant taxpayers and intermediaries, who need to evaluate the risks derived from the application of DAC6 with special care and make a quick assessment of the potential implications of the Directive considering the penalties established domestically.

Despite the decision of the CJEU validating the concepts that define the reporting obligations, some important disparities in the interpretation of the terms of DAC6 by tax authorities persist, which may give rise to significant uncertainty and a lack of homogeneous interpretation of the obligations concerned. Whether this affects the majority of cases or only a small, but important, minority is difficult to assess. It is also unclear what data and evidence was the basis of the CJEU's assessment.[85] Even if the CJEU ultimately resolves the disparities and divergent interpretations through a homogeneous EU interpretation, taxpayers and intermediaries, in the interim, may suffer a considerable level of uncertainty and will be subject to the domestic penalty regime. In order not to cause unnecessary harm, until the CJEU offers the required clarity and precision regarding certain terms, any reasonable interpretation of the DAC6 terms should prevent the application of penalties by the tax authorities of the Member States.

An example of this is the concept of "arrangement". On the one hand, the reference to international documents is not precise enough to give the concept used in the Directive enough substance, although it may provide context and point to a recommended best practice. On the other hand, one of the crucial elements in interpreting the term "arrangement" is the "indication of a potential risk of tax avoidance" (article 3(1)(b)(20) of the Directive). These terms are imprecise and duplicative. Naturally, a "risk" is a "potential", and it is not specified how likely or severe such a risk should be; also, the notion of "tax avoidance" is notoriously vague. The Directive is more precise in defining the "indication of a potential risk of tax avoidance" through the exhaustively listed hallmarks in Annex IV, each of which express a "characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance". For the CJEU, these "hallmarks" are sufficiently clear and precise. The CFE doubts whether this is necessarily true.

An example of a lack of clarity and precision can be found in the "main benefit test" and the relevance of the hallmarks that need to be assessed in determining the reporting obligations under DAC6. The Court does not consider it to be particularly difficult for an intermediary or the relevant taxpayer to decide whether "the main benefit or one of the main benefits that can reasonably be expected of the arrangement they design and/or use is fiscal in nature". In arriving at that conclusion, it refers to the BEPS Action 12 Report, which it says compares the value of the expected tax advantage with any other benefits likely to be obtained from the transaction and has the advantage of requiring an objective assessment of the tax benefits[86] and, therefore, does not contravene the principles of legal certainty and legality in criminal matters.

The fact that intermediaries are typically tax specialists should not lead the CJEU to disregard the need for clarity and precision in the legislation that affects them (and also taxpayers), especially when the imposition of penalties constitutes a serious risk.

Even for tax intermediaries, ascertaining the implications of the "main benefit test" or "one of the main benefits" may lead to important uncertainties that have not been clarified even following the CJEU interpretation. Just to name a few (uncertainties): it is not clear whether the outcome should be considered individually or for a group of taxpayers, or for the parties involved in a transaction or arrangement.[87] Nor is it clear whether the evaluation needs to consider only the implications of the tax system of the Member State where the intermediaries or the relevant taxpayer is obliged to report the arrangements, or also the implications derived from the interaction of the different tax systems involved.[88] Some other issues add

85. *Belgian Association of Tax Lawyers* (C-623/22), para. 42.

86. Id., para. 74.

87. For instance, whether the benefit needs to be referred to the client or the interested party in terms of reduction of the tax liability; or whether the benefit may not be relevant for the client but for another party – related or not – not being the client to which the service is provided; or whether the benefit may be considered taking into account the global tax liability of all parties involved in a transaction in order to consider that the tax benefit is greater than other types of economic benefits.

88. In order to ascertain the main benefit test, which approach should be taken into consideration: a per-country approach, a global approach, or an EU approach? For some countries that, in implementing DAC6, took the opportunity to introduce a mandatory disclosure regime for domestic cases, a simple analysis of the reduction of domestic tax liabilities may be sufficient to verify the main benefit test. In contrast, if the goal of the system established by DAC6 is to exchange information relevant to a prompt reaction of other countries, the analysis of the tax benefit in that other country should be more relevant, whether considered separately or together with the implications of the arrangement on the tax liability in the reporting Member State.

to the uncertain outcome, since the benefit arises from a comparison between the taxation applicable to the arrangements and some other theoretical taxable alternative (which may or may not include implementation of the arrangement). In applying the test, it is also not clear which concept of "benefit" is relevant.

Finally, the reference to the main "or one of the main benefits" may lead to different interpretations, points of view and calculations on the part of the (different) intermediaries (when their services are provided), by the taxpayer (when it is implementing the arrangement) and by the tax administration (later on, when it gathers more information to properly assess the calculation suggested).

4.4. Legal professional privilege versus professional secrecy applicable under domestic law

One of the main concerns regarding the formulation of the obligations established by DAC6 (reporting, notification, assessment, documentation) is compatibility with the different duties of professional secrecy by which EU intermediaries are bound under domestic law. In *Belgian Vlaamse Balies*, the CJEU dealt first with the validity of the obligations enshrined in DAC6 for intermediaries/lawyers. In this respect, the CJEU held that replacing the reporting obligation with the obligation to notify other intermediaries and the relevant taxpayer did not sufficiently preserve legal professional privilege. This is because the obligation to identify the lawyer and the fact that they had been consulted by a client interferes with the right to protection for private life and the right to respect for lawyer-client communications guaranteed in article 7 of the Charter. This interference was not justified since it was not necessary to require disclosure in order to ensure the outcome and goals foreseen by DAC6. The Court also found that the right to a fair trial was not at stake in the absence of a direct link with judicial proceedings. *Belgian Association of Tax Lawyers* confirms the approach that the confidentiality of lawyer-client communications deserves specific and strengthened protection.

It was in *Belgian Association of Tax Lawyers* that the Court had to focus on the scope *ratione personae* of the exception for legal professional privilege. This decision therefore considered whether some non-lawyer intermediaries who ensure legal representation could obtain the same Charter protection as lawyers as regards the right to respect for private life and the right to respect for communications with their clients. In that case, the Court offered a negative answer, validating the reporting and notification obligations contained in DAC6.

As a result of the outcome of the two cases, intermediaries face different obligations as regards the mandatory disclosure regime established by DAC6:

- On the one hand, lawyers, as defined by article 1(2) of Directive 98/5/EC, derive specific protection from article 7 of the Charter and do not have to report nor notify any other intermediary who is not the lawyer's client of the waiver to report.
- On the other hand, intermediaries who ensure legal representation under domestic law may obtain a waiver to report but remain bound to notify any other intermediary – and its client – of their obligation to report.
- Finally, other intermediaries that cannot claim a waiver remain obliged to report the arrangements to the tax authorities.

The invalidity of the obligation that applied to lawyers to notify other intermediaries of the waiver had already been dealt with by the EU legislature in DAC8, which is to be implemented by 31 December 2025.[89] Under the amended article 8ab(5), intermediaries who can rely on legal professional privilege under the national law of the Member State remain required to notify their clients (*and no one else*) without delay of their reporting obligations.[90] While the text of the Directive does not take into account the clarifications in the decision in *Belgian Association of Tax Lawyers*, recital 44 advances the outcome of this case, distinguishing between (i) lawyers acting as intermediaries, who are not obliged to notify any other intermediary that is not their client of the reporting obligation of any other intermediary, and (ii) any other non-lawyer intermediaries exempt from the reporting obligation because of legal professional privilege, who remain required to notify their client of their reporting obligations. It appears that the amended DAC6, which retains the original wording, should be interpreted according to the CJEU's clarification both as regards the extent of the invalidity and the personal scope of the waiver, as well as the obligation to notify, as per the recital to DAC8.

The Court found that DAC6 was in breach of the right to respect for private life guaranteed in article 7 of the Charter since the obligation to notify the waiver to other intermediaries who were not clients of the intermediaries could not override the specific protection of communications between a lawyer and their client, which cannot be disclosed without the client's consent. The substitution of the obligation to report by an obligation to notify the waiver does not sufficiently respect the protection under article 7 of the Charter and thus was declared invalid. While *Belgian Vlaamse Balies* only referred to lawyers acting as intermediaries, *Belgian Association of Tax Lawyers* sought to expand the scope of the invalidity of the obligation to notify to other non-lawyer intermediaries covered by legal professional privilege under the national law of a Member State.

Belgian Association of Tax Lawyers confirms that only lawyers are affected by the finding of invalidity, despite the fact that the majority of the various linguistic versions of the Directive apply a broad expression (professional secrecy under domestic law), rather than a restrictive one (legal professional privilege).

89. Council Directive (EU) 2023/2226 of 17 October 2023 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 2023/2226 (22 Oct. 2023), Primary Sources IBFD.
90. Art. 8ab (5) DAC, as amended.

Table 1. The expression used in various linguistic versions of the Directive	
Version	**Expression**
German	eine gesetzliche Verschwiegenheitspflicht
English	legal professional privilege
French	secret professionnel
Italian	segreto professionale
Swedish	yrkesmässiga privilegierna
Dutch	wettelijk verschoningsrecht
Bulgarian	професионална тайна съгласно националното право
Czech	zákonné profesní mlčenlivosti
Danish	korrespondancen mellem advokat og klient, eller en tilsvarende lovbaseret tavshedspligt
Estonian	õiguse kohase kutsesaladuse
Greek	δικηγορικό απόρρητο
Croatian	obveza čuvanja profesionalne
Latvian	saziņas konfidencialitāti
Lithuanian	profesinė paslaptis
Hungarian	titoktartási kötelezettség
Polish	tajemnicy zawodowej

The Court decided not to rely on a literal interpretation, considering the divergences among the different linguistic versions, and despite the fact that, on the one hand, most of the linguistic versions of DAC6 refer to the scope of the right to a waiver through a renvoi to the laws of the Member States and, on the other, that the provision refers to a generic term, in plural, i.e. professions, and not to any one profession in particular.[91] However, in doing so, the Court did not intend to clarify the subjective scope of the substitutive obligation to notify the waiver, but to clarify the scope of the invalidity of the substitutive obligation.

In doing so, it relied on case law that recognizes the specific protection of communications between a lawyer and their clients. This protection, under article 7, covers not only the activity of defense but also legal advice and guarantees the secrecy of that legal consultation, both with regard to its content and its existence.[92] The very existence of the relationship between a non-lawyer intermediary and their client should not remain secret *vis-à-vis* third parties, and therefore only client-lawyer relationships should remain secret and not be revealed to third parties, considering that only lawyers occupy a special position in the judicial organization of the Member States and in relation to the tasks entrusted to them. The Court relies, then, on the special position and status of an independent lawyer providing legal assistance in full independence and in the overriding interest, considering the rules of professional ethics and discipline that govern their profession.

In defining the scope of this strengthened protection, the Court relies on EU law, which establishes the mutual recognition of professional titles among different Member States, as outlined in article 1(2) of Directive 98/5, despite the fact that this instrument is aimed at ensuring the freedom of movement for lawyers admitted to the practice in a Member State. The protection of legal professional privilege of lawyers in the face of the obligation to report and communicate information regarding their clients under DAC was also confirmed in *F and Ordre des avocats du barreau de Luxembourg v. Administration des contributions directes* (Case C-432/23).[93] According to the Court, legal advice given by a lawyer in company law matters falls within the scope of the strengthened protection of communications between lawyers and their clients guaranteed by that article. Therefore, a request for information under DAC regarding all the documentation and information relating to client relations, concerning such legal advice, constitutes an interference with the right to respect for communications between lawyers and their clients guaranteed by that article. Advice and representation by a lawyer in tax matters also benefits from such protection.

Although article 7 of the Charter protects and guarantees the secrecy of legal consultations between clients and lawyers, it remains to be seen whether or not the mandatory disclosure of such legal consultations by the client itself deserves the same protection, considering that legal professional privilege is an obligation for the lawyer, whose goal is to protect the privacy rights that correspond to the client.

Given that the Court has clarified that lawyers, as intermediaries, deserve specific protection under the Charter, it is necessary to determine what types of intermediaries fall within the scope of the obligation to notify a waiver of the reporting obligation to other intermediaries who are not their clients. The English version of DAC6 refers to intermediaries that would breach "the legal professional priv-

91. AG Opinion in *Belgian Association of Tax Lawyers* (C-623/22), para. 190.
92. Following *Michaud v. France* (6 Dec. 2012), paras. 117-119.
93. LU: ECJ, 26 Sept. 2024, Case C-432/23, *F and Ordre des avocats du barreau de Luxembourg v. Administration des contributions directes*, ECLI:EU:C:2024:791, Case Law IBFD.

ilege under the national law of that Member State". The subjective scope of such a substitutive obligation varies in different Member States as a result of the *renvoi* clause included in the Directive, the different linguistic terms being used to delineate the subjective scope of such an obligation and the varying extent of the protection of professional secrecy in different Member States. The Court, however, clarified, in *Belgian Association of Tax Lawyers*, that the substitute obligation to notify only refers to other intermediaries that are entitled, under domestic law, to represent parties in legal proceedings.[94] Therefore, the question that arises is what type of legal representation is referred to and whether those Member States that follow a literal interpretation of their linguistic version of the Directive are in breach of the duties established under the Directive. The adaptation of these domestic regulations may create more domestic disparities and conflicts when trying to reconcile such a regulation with the interpretation of this decision.

As regards these intermediaries, the Court held that the obligation to notify the waiver to other intermediaries who are not their clients is not invalid and does not breach article 7 of the Charter. The Court did not fully analyse the requirements derived from the right recognized by article 7 and the proportionality principle. In contrast, it simply stated that since these intermediaries are non-lawyers they do not deserve the same specific protection and, therefore, the obligation to notify other intermediaries is not invalid.

Article 8(1) of the ECHR protects the confidentiality of all correspondence between individuals and, therefore, not only lawyer-client correspondence. But, despite that protection, the CJEU reached its conclusion regarding validity on the basis that non-lawyer intermediaries are not afforded strengthened protection of their exchanges, which can be directly inferred from previous case law. What is lacking in the analysis of the CJEU is whether or not it is justified to interfere with the protection of correspondence between a non-lawyer intermediary and their clients to the extent that DAC6 forces the intermediary to disclose their name and that of the individual being consulted by the relevant taxpayer to another intermediary. In such a situation, the CJEU does not apply a proportionality analysis;[95] it substitutes instead a lack of comparability test between lawyers and non-lawyers. By not making a comparability analysis – lawyer intermediaries and non-lawyer intermediaries are not comparable – the CJEU is choosing an "all or nothing"[96] approach without engaging in a proportionality analysis.

The third group of intermediaries are those that cannot claim any waiver and have to report the arrangements to the tax administration. The CJEU held that the obligations to report, imposed under DAC6, constitute an interference in the right to respect for private life guaranteed in article 7 of the Charter, but this interference is not disproportionate and, therefore, the obligation to report imposed on these intermediaries is not invalid. The disclosure requirements regarding certain personal data limit the freedom to organize personal, professional or business activities. This limitation, however, is established by law, i.e. DAC6, is justified by certain public interest goals, is appropriate to attain those objectives and is limited to what is strictly necessary.

In conducting its analysis of the requirements of the principle of proportionality, the Court confirmed that DAC6 does not impose on intermediaries a "hunting" obligation,[97] since intermediaries "are only obliged to file information that is within their knowledge, possession or control",[98] and not other information that the intermediary could have been aware of through the exercise of due diligence activities, despite the broad definition of intermediary contained in DAC6.[99] Moreover, the Court considered that a mere communication of the description, in abstract terms, of the relevant business activities and arrangements without disclosing a commercial or other secret should be sufficient to comply with the reporting obligation requirements.

In performing the different tests of the proportionality analysis, the Court justified the obligation based on the need to counteract tax evasion and tax avoidance and prevent aggressive tax planning indistinctly, taken together, in pairs or separately. Taking into account that the targets of those different public interest goals are different, it would be welcomed if the Court were to consider them separately in analysing the proportionality, adequacy and necessity of the measures.

Moreover, the Court conducted a formal analysis of the suitability test, relying on recitals 2, 6 and 7 of the Directive, and not on any other evidence, which was likely not adduced by the claimants in any event. In that regard, the mandatory reporting obligation was established by DAC6 as a mechanism to ensure a prompt reaction from national legislatures and tax administrations despite differences in national laws and regulatory loopholes. It is for this reason that the timeframe to report and evaluate potential economic and tax advantages, which is before the arrangement is even really developed, is rather short. There is limited evidence of legislative action in response to DAC6 reporting to date. The Directive itself neither constrains Member States from reacting promptly nor invites them to review or adapt their tax systems to prevent any disparities and close loopholes generated by the aggressive tax planning identified as a result of the information exchanged.

The Court also did not take into consideration an evaluation of the effectiveness of the broad reporting mechanism introduced affecting each and every intermediary that

94. *Belgian Association of Tax Lawyers* (C-623/22), para. 108.
95. The Court does not consider which level of protection applies to the communications between a relevant taxpayer and a non-lawyer intermediary subject to a professional secrecy legal clause, and whether or not, in this scenario, the interference in the secret of communications between the intermediary and the client is justified.
96. *Belgian Association of Tax Lawyers* (C-623/22), para. 118.
97. AG Opinion in *Belgian Association of Tax Lawyers* (C-623/22), para. 178.
98. *Belgian Association of Tax Lawyers* (C-623/22), para. 136.
99. DAC6 identifies intermediaries subject to the reporting obligation by a reasonable expectation of knowledge and not simply by the evidence of the provision of the services to the relevant taxpayers.

intervenes in the design, marketing, organization, availability for implementation, or management of implementation, or provides aid, assistance or advice with respect to these services, affecting not only potential aggressive tax planning arrangements but also lawful arrangements, considering that many of them have already been neutralized by counteracting legal measures both at the EU and domestic level. An analysis from a cost-benefit perspective could shed light on the necessity test under the proportionality analysis, both from a taxpayer and tax administration perspective.[100] The breadth of the obligation was only considered as regards the lack of clarity of the obligations established by DAC6, which did not include a proportionality analysis.

5. The Statement

The CFE notes that DAC6 raises numerous interpretative difficulties and has changed the landscape of reporting obligations. The CFE welcomes the fact that the Court has declared that DAC6 is invalid insofar as it concerns the obligation imposed on intermediary lawyers to notify certain personal data to non-client intermediaries based on the fundamental role that lawyers play in a democratic society. It regrets, however, that non-lawyer intermediaries only enjoy limited protections.

Despite the fact that the Court did not identify a violation of the principles of legal certainty and legality, DAC6 still leads to a very complex compliance analysis, both as regards the identification of the reportable arrangements and the information to be reported, as the evaluation assessment programme launched by the European Commission indicates.[101] This complexity leads to diverse implementation and interpretation of the hallmarks and the different obligations by Member States. Therefore, potential simplification of the reporting obligations could be considered.

100. In *Belgian Association of Tax Lawyers* (C-623/22), para. 148, the Court of Justice considers that "while that interference is certainly not negligible, combating aggressive tax planning and preventing the risks of tax avoidance and evasion are important objectives, the pursuit of which depends not only on the protection of the tax base, and therefore the tax revenue of the Member States, and the establishment of a fair tax environment in the internal market… but also on the safeguarding of the balanced allocation of the Member States' powers of taxation and the effective collection of tax".

101. European Commission, Directorate General for Taxation and Customs Union, Press Release, Evaluation of administrative cooperation in the field of direct taxation (8 May 2024), available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13678-Cooperation-on-direct-taxation-evaluation/public-consultation_en (accessed 18 Mar. 2025).