Belgian Association of Tax Lawyers

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ISSUES RELATED TO THE EUROPEAN DIRECTIVE 2018/822 (DAC6) AND ITS TRANSPOSITION INTO NATIONAL LAW

1. The obligation for Member States to observe primary EU law when transposing directives.

By 31 December 2019, at the latest, Member States must transpose European Council Directive 2018/822/EU of 25 May 2018 (hereinafter DAC6) into national law. DAC6 explicitly states that constructions implemented after 25 June 2018 and before 1 July 2020 must be reported by 31 August 2020. The gathered information must then be made available for exchange between the Member States by 31 December 2020.

DAC6 intervenes into the contracts between the providers of tax services (intermediaries) and their clients (taxpayers) and justifies doing so by the need for Member States to gather, as soon as possible, knowledge that relates to legal forms of tax optimisation that include arrangements with a cross-border element. The intermediary must notify within 30 days his involvement in certain phases of preparing or implementing the arrangement.

DAC6 is a rule of secondary EU law and must, therefore, be transposed by Member States into national law in compliance with primary EU law. The Charter of fundamental rights of the European Union[1] (hereinafter the Charter) is part of that primary EU law.

In the case *Melloni* of 26 February 2013, the Court of Justice of the European Union (hereinafter CJEU) found that Article 53 of the Charter requires that Member States take into account the protection of these fundamental rights when transposing EU law[2] if :

(1) there is no EU law that organises this protection (EU law must respect the Charter[3]);
(2) this transposition into national law grants at least the same level of protection as the fundamental rights laid down in the Charter;
(3) provided that this level cannot be considered less high than the level of protection granted under the corresponding articles of the European Convention on fundamental rights and freedoms (hereinafter ECHR) (and thus the case law of the European Court of Human Rights)(hereinafter ECtHR);
(4) when the level of protection goes beyond the protection offered by the Charter, that this higher level does not jeopardise other objectives of EU law.

[1] CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (O.J., 2000/C 364/01)
[2] CJEU, 26 February 2013, case C-399/11, *Melloni*, EU:C:2013:107 - § 60
[3] Pointed out by the President of the CJEU in his speech of 26 January 2018 to the ECHR, p. 7, first paragraph.

In a decision of 7 March 2017, the CJEU subjected the European Council VAT Directive 2006/112/EU of 28 November 2006 to a compatibility test with Article 20 of the Charter that protects the principle of non-discrimination[4]. It was decided that this directive treats differently electronic books and non-electronic books by excluding electronic books from the benefit of a lower VAT rate. But this different treatment was found to be compliant with the principle of non-discrimination under Article 20 of the Charter, in the presence of a proportionate purpose under the objectives of that Directive.

Under the 'base' 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, 11.3.2011) (hereinafter the Directive), the obligation to respect the Charter is explicitly stated in consideration 28[5]. The Charter thus provides a level of protection for the fundamental freedoms that must be observed by the Member States.

In May and June 2019, the International Bureau for Fiscal Documentation published doctrine[6] on DAC6 that also underlines the obligation for Member States to observe primary EU law when transposing directives.

2. Attorney/client privilege must be respected

In order to achieve the objectives of the Directive, the arrangement must always be notified; when the obligation to notify shifts from the lawyer to his client, the obligation to report both the identity of the consulted lawyer and the content of his advice go beyond what is proportionate for achieving this objective. There is no proportionate justification for such a violation of the Charter.

Where DAC6 addresses the legal professional privilege of lawyers, it touches upon fundamental values of the rule of law that protects the confidentiality of information given to a lawyer and the effectiveness of the right of defence. In a decision of 12th December 2018, related to competition law, the CJEU again confirmed this principle [7] : the confidentiality of written exchanges between a lawyer and his client are considered to be inseparable to the ability to organise effectively the right to defend oneself[8] and, therefore, cannot be used by the Commission[9].

Only the expression of his *free will* by the client of such written exchanges, when fully understanding his right to keep these documents confidential, can legally authorise the use of these documents by the Commission when inquiring into violations of EU law.

The content of written exchanges between a lawyer and his client cannot be disclosed, as demanded by DAC6, without violation of primary EU law that must be observed by the Member States.

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[4] CJEU, 7 March 2017, case C-390/15, *RPO*, ECLI:EU:C:2017:174.

[5] "*This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union.*"

[6] Daniel W. BLUM and Andreas LANGER, 'European Union - At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1', *European Taxation*, 2019 (Volume 59), N°6, Journals IBFD and Part 2 (Volume 59), N° 7.

[7] CJEU, 12 December 2018, Case T-75/104, *Unichem Laboratoris Ltd. t. Europese* Commissie, ECLI:EU:T:2018:915, p. 13 – 14.

[8] Reference by the CJEU to CJEU, 8 July 2008, case T-99/04, *AC-Treuhand t. Commissie*, EU:T:2008:256, § 46.

[9] Reference by the CJEU to CJEU, 29 February 2016, case T-267/12, *Deutsche Bahn and others v. Commission*, EU:T:2016:110, § 49 (not published) and CJEU, 17 September 2007, cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, EU:T:287, § 86.

3. The Member State competent to transpose in the presence of multiple intermediaries

In working document COM(2017) 335 final of 21st June 2017[10] of the European Commission, it is considered (p.12) that when an intermediary engages other local *independent* actors in providing a tax service '*only the intermediary who carries the responsibility vis-à-vis the taxpayer(s) for designing and implementing the arrangement(s) shall file the requisite information with the tax authorities. If the obligation to file information has shifted to the taxpayer and more than one related parties are meant to use the same reportable cross-border tax arrangement, only the taxpayer that was in charge of agreeing the arrangement(s) with the intermediary shall bear the onus of filing information.*'

In the draft directive proposed by this working document, the following text is proposed to express these principles in the phases of designing and implementing the arrangements :

> *"Each Member State shall take the necessary measures to ensure that, where more than one intermediary is involved in a reportable cross-border arrangement or series of such arrangements, only the intermediary that carries the responsibility vis-à-vis the taxpayer for designing and implementing the arrangement or series of arrangements shall file information in accordance with paragraph 1."*

Under that definition, an intermediary must file only when he designs or implements himself directly or *by another person that is dependant upon him*. Such criterion is fully proportionate with the obligation to file since in a context of linked persons or companies one can assume the presence of contractual relationships allowing this intermediary to obtain access, from the taxpayer, to the information required to file the arrangement.

As soon as a third party (*i.e., independent* from the intermediary) intervenes, such obligation cannot reasonably be extended. It is a disproportionate obligation to report when this relates to information one possibly does not know of nor has access to.

4. The obligation to report and the need for criteria to define intermediaries of type I and type II

The final version of the directive omits the proposal in the working document COM(2017) 335 final of 21st June 2017 of the European commission suggesting a criterion that distinguishes between a direct and relevant contractual relationship with the taxpayer. This criterion should be maintained, particularly in light of the fact that the directive extends the obligation to file to a second type of intermediaries that provide 'aid, assistance or advice'.

Article 3 b) (21) :

> *" "Intermediary" means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.*
>
> *It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.*

[10] https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-335-F1-EN-MAIN-PART-1.PDF

When such intervention can be considered as completely secondary and dispensable as to the 'designing, marketing, organising, making available for implementation or managing the implementation of the arrangement' an obligation to report can also be triggered.

Is this proportionate when these intermediaries are independent contractors; the intermediary of type II will, in principle, not have access to all information needed to assess the existence or the content of his own obligation to file ?

The chosen definition does not provide a clear, distinctive, criterion and so violates the obligation under EU law to provide legal certainty for EU rules by adopting clear criteria that allow those subjects to the rules to know with certainty their obligations under those rules[11]. It falls, therefore, upon the national legislator to transpose the directive in such a manner that this will be clear for those concerned.

A distinctive criterion between both definitions under Article 3 b) (21) of the Directive can be made through the above-mentioned working document of the Commission: a type I intermediary has, in at least one of the phases of the arrangement, a direct contractual relationship to at least one participant. This direct contractual relationship must be relevant to that phase of the arrangement: **this phase of the arrangement requires the contracted actions of the type I intermediary.**

The type II intermediary, mentioned in the second paragraph under Article 3 b) (21) of the Directive, provides 'aid, assistance or advice' to the intermediary of type I or to the taxpayer in a phase of designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. He does this either independently or by describing himself as the assistant to others. Such contracted actions are rather optional for that phase of the arrangement.

Under the distinctive criterion of contracted services a 'cascade' of intermediaries is avoided ;

- the first type of intermediaries must report when forming directly a contractual bond with a participant;
- the second type of intermediaries is exonerated when they did not know or reasonably cannot be considered to have known that their provided services were required by a participant or an intermediary of the first type for a phase under an arrangement;
- the 'other persons' who provide services to intermediaries that are not in a direct contractual bond with a participant do not have to report.

Such interpretation complies with the obligation to provide clear rules that allow those concerned to know with certainty their obligations. The burden of proof that a second type of intermediary must have known that his services were required for a phase of an arrangement falls upon the tax administration of the Member State. Criteria of exoneration should be defined in order to grant as much legal certainty as possible through a 'white list'. Such criterion could include: the more general is the rendered opinion, the less cause there is to consider the provided opinion as necessary to a phase of that arrangement.

5. Only Member States with at least one territorial connection with the intermediary are competent to require compliance with DAC6 upon such 'national' intermediaries.

[11] See CJEU, case of 7th March 2017, case C-390/15, *RPO*, ECLI:EU:C:2017:174 ; with in particular the reference to CJEU, case of 24th February 2015, case C-512/13, *Sopora*, C-512/13, ECLI:EU:C:2015:108, point 33, and the principle of legal certainty Union law has to observe.

Both types of intermediaries qualify only when they have a territorial bond with a Member State, through their tax residence or a permanent establishment that offers these services, or when they fall under the laws of the Member State that organises their creation, functioning, or are part of a professional organisation in that Member State that provides such services.

6. It is not clear which Member State can enforce the obligation to report when multiple intermediaries are involved in the arrangement.

Article 8 ab (9) and (10) :

> *"9. Each Member State shall take the necessary measures to require that, where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement lie with all intermediaries involved in the same reportable cross-border arrangement*
>
> *An intermediary shall be exempt from filing the information only to the extent that it has proof, in accordance with national law, that the same information referred to in paragraph 14 has already been filed by another intermediary."*

It will only be possible to invoke the exemption for intermediaries who are interlinked. Only they can be reasonably expected to have reciprocal sufficient knowledge to know what one of them reported and to obtain prove of that.

For intermediaries of type II it is also very important to know if they qualify as such for they must then see to it that they receive all necessary information to report or receive the proof that such reporting occurred when required. The quality of intermediary of the second type must, therefore, be applied in a restrictive way and only be presumed by their reasonable ability to demand the same information from their contractors as if they were intermediaries that are in a direct contractual bond with a participant. This might be the case when that phase of the construction requires their intervention. This is less the case when their intervention is not necessary or can be generally applied outside the arrangement.

For both types of intermediary there is the issue of the competent Member State that needs interpretation.

The interpretation of these rules can give cause for confusion over the competent Member State under the first paragraph : can a Member State impose the obligation to report without the territorial link of article 3 b) (21) ? Or is DAC6 referring here to the situation of multiple intermediaries with a territorial link under article 3 b) 21 within that same Member State ? And is the purpose to ensure that they all are required to report ?

Only this second interpretation is compliant with the second paragraph. That second paragraph continues by exempting intermediaries who prove, under 'national law', that another intermediary has already reported under that same 'national' law.

The first interpretation would grant an extra-territorial competence to Member States upon all intermediaries with a territorial link to the territory of the European Union. It is possible that all national reporting requirements apply upon a same arrangement that is to be reported in a Member State. Conflicts between national rules of proof and transpositions of DAC 6 can only be prevented if one assumes 'national law' to be in compliance with the territorial criteria under article 3 b) (21).

Under the first interpretation, an excessive burden would be placed upon the intermediaries and the concerned Member States. Both would have to organise the filing of reports under

other Member States' requirements. It is clear that such interpretation cannot work, is incompatible with the principle of legal certainty and would be create distortions to the internal market.

DAC6 explicitly states under recital (10) *Given that the primary objective of this Directive concerning the reporting of potentially aggressive cross-border tax-planning arrangements should focus on ensuring the proper functioning of the internal market* (...)

The text also considers that when a Member State strengthens national reporting measures of a similar nature, then any information collected, in addition to what is reportable, cannot be exchanged automatically. In other words, DAC6 does not apply to such national reporting requirements and such obligations cannot invoke the protection of transposing secondary EU law when judging restrictions of freedoms or fundamental rights. For those arguments the second interpretation should be applied when transposing DAC6.

7. DAC6 should not be transposed with an extra-territorial scope.

DAC6 also organises explicitly the order to follow when an arrangement can be reported in multiple Member States. This order strengthens the interpretation that the Member State with the territorial link of article 3 b) (21) is the only one competent to impose the rules set out in DAC6 upon these intermediaries. This order is the same as the criteria under article 3 b) (21) :

Article 8 ab (3) :

> *"3. Where the intermediary is liable to file information on reportable cross-border arrangements with the competent authorities of more than one Member State, such information shall be filed only in the Member State that features first in the list below:*
>
> *(a) the Member State where the intermediary is resident for tax purposes;*
> *(b) the Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;*
> *(c) the Member State which the intermediary is incorporated in or governed by the laws of;*
> *(d) the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services."*

The intermediary of both types must report only in the Member State with the strongest territorial bond under article 8 ab (3). Under that interpretation, there is no hypothetical case where an intermediary can be required to report in a Member State that does not have at least one territorial link with him under article 3 b) (21). For that reason, DAC6 does not organise how an intermediary with no territorial link under article 8 ab (3) should report.

As a consequence, national legislators should refrain from transposing DAC6 with an 'extra-territorial' scope towards intermediaries who do not qualify under article 3 b) (21). They are excluded from reporting under that national law. **National intermediaries who are not established in another Member State or are not registered with a professional organisation there cannot be forced to report in other Member States.**

8. Competent Member State to grant the right of intermediaries to waive filing.

The principles set out above that relate to the competence of Member States to enforce obligations on intermediaries with a territorial link also fully apply to the competence to organise the right to waiver for intermediaries with a legal professional privilege.

DAC6 requires that the right to waiver can only be organised within the limits of the national law that organises that profession and the legal professional privilege. Such national law contains the obligation to join a professional organisation. The territorial link required to invoke the legal professional privilege is via the affiliation to that professional organisation. Without such a link, an intermediary can be prohibited from exercising his profession in that Member State.

It cannot be the purpose to subject, for example, a Dutchman, living in France, but registered with a Belgian professional organisation, to have his right to waiver granted by France (Member State of the tax residence) to his professional activities in Belgium. **The competence to grant the right to waiver should be determined by the affiliation to the professional organisation in the Member State where that profession is exercised**. In the example given, when the intermediary has professional activities relating to all three countries, the obligation to report as an intermediary and the right to waiver can only be organised by the Member State and under the national law of the professional organisation where his 'main' affiliation is registered. DAC6 explicitly excludes the principle of multiple reporting obligations in the way article 8 ab (3) is organised. However it is far from certain that all transposing national laws will observe this objective.

9. *Competent Member State in the presence of multiple taxpayers.*

The working document COM(2017) 335 final of 21 June 2017 of the European Commission[12] suggested these wordings :

> *"Article 8 (..) is made available for implementation by the intermediary to one or more taxpayers **following contact with that taxpayer or those taxpayers**, or where the first step in a series of arrangements has already been implemented.*
>
> *Each Member State **shall take** the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement or series of such arrangements **where they are entitled to a legal professional privilege under the national law of that Member State**. In such circumstances, the obligation to file information on such an arrangement or series of arrangements shall be the responsibility of the taxpayer and intermediaries shall inform taxpayers of this responsibility due to the privilege.*
>
> *Intermediaries may only be entitled to a waiver under the first subparagraph **to the extent that they operate within the limits of the relevant national laws that define their professions** (..)*
>
> *The taxpayer shall file information within five working days, beginning on the day after the reportable cross-border arrangement or series of arrangements or the first step in a series of such arrangements has been implemented."*

This draft text is compliant with the above-mentioned principle of competence of Member States to organise the right to waiver; **only the Member State that organises a**

[12] https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-335-F1-EN-MAIN-PART-1.PDF

<u>profession with a legal professional privilege is competent to impose obligations on intermediaries when transposing DAC6, including the right to waiver.</u>

10. The need to respect legal professional privileges and the competent Member State.

The Commission working document on impact assessment (document SWD (2017) 236 final of 21 June 2017[13] (hereinafter the report of the Commission) presented a draft of DAC6 to the European Council that mentions (p. 69) under '*impacts on fundamental rights*' that DAC6 must be compliant with the Treaties (primary EU law). It is required, to that end, that legal professional privileges that are organised under law must be respected when transposing DAC6:

> "*In this context, professional secrecy will be respected (e.g. the* ***<u>legal</u> profession*** *privilege (LPP))* ***where it is required by the law****."*

Again, one can only understand this as referring to the law of the Member State that organises the profession.

Lawyers can be covered by this provision only when they are registered with a Bar Association or a Law society (the professional organisation of a legal profession) in the Member State where his principal office is located and either himself offers directly an arrangement, implements it or manages it, or provides aid, assistance or advice as an intermediary of type I.

11. DAC6 must be transposed in a manner consistent with the Charter of fundamental rights

The *Council of Bars and Law Societies of Europe* (in short CCBE), in a note of 19 October 2018, questions the use of the word 'may' in DAC6[14] for the competence of Member States to waive the obligation to report. This cannot be understood as an option for the Member State not to organise the right to waiver when a legal professional privilege applies.

BATL supports this assessment since the Charter obliges Member States to protect the legal professional privilege where and as it applies. The CCBE supposes that the verb 'may' is intended to allow Member States the option to exclude certain arrangements from the legal professional privilege which is, in principle, organised under national law.

BATL suggests an even more restrictive interpretation of the word 'may' and explains this by the division of competences between the Member States and the European Union. Under recital (16), DAC6 seeks a uniform application of the rule and grants several competences to the European Commission to ensure that this is the case. DAC6 wants to enforce minimum standards upon the Member States when transposing the directive. Such uniformity is, however, not possible where it relates to national rules and legal traditions that organise the size and nature of the legal professional privilege that can, in turn, justify a waiver.

Article 8 ab (5), therefore, confirms an exception to the uniform transposition sought by DAC6 and based on the principle that a Member State may, under its sovereign competence, organise the legal right to waiver, explicitly allows different rules for each Member State as to when the right to waiver can apply *under the national law of that Member State*.

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[13] https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-236-F1-EN-MAIN-PART-1.PDF

[14] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TAX/TAX_Position_papers/EN_TAX_21081019_CCBE-Guidance-on-certain-aspects-of-the-Tax-Intermediaries-Directive.pdf

As also noted by the CCBE, this interpretation, allowing an exception from the principle of a uniform minimal transposition, is also consistent with a logical reading of the second paragraph of article 8 ab (5) that restricts the sovereign right of the Member States to organise the right to waiver. To transpose the right to waiver under DAC6, the waivered actions must fall within the scope of the exercise of the legal professional privilege as organised under that national law.

BATL understands that the purpose of DAC6 is not to allow a general waiver by the sole quality of being such a professional. The interpretation described above enables the transposition of DAC6 in full respect of the Charter, thus enabling a rule of secondary EU law to be consistent with the requirements of primary EU law.

12. The content of the legal opinion determines the right to waiver

Where the transposition applies to lawyers, the need to protect the fundamental rights is highest and, therefore, the transposition must be particularly careful and well considered. The obligation to report for lawyers must also be most strict and proportionate.

BATL considers that the obligations under the Charter require Member States to transpose DAC6 in respect of the following principles:

- for lawyers who qualify as intermediaries of the first type who limit their actions to rendering legal opinions: neither they nor their clients can be forced to report the identity of the lawyer, the fact that this opinion has been rendered or its content, when relating to a 'passive' opinion;
- for lawyers who provide tailor-made opinions, the right to waiver passes on the obligation to report only that phase of the arrangement without forcing their clients to report the identity of the lawyer, the fact that this opinion has been rendered or its content;
- lawyers who themselves intervene in arrangements act outside the scope of their profession and can so not invoke the right to waiver;
- for lawyers who qualify as intermediaries of the second type : neither they nor their clients can be forced to report.

13. The right to waiver

When multiple taxpayers are involved, the same logic relating to intermediaries in general can be found in the working document COM(2017) 335 final of 21 June 2017 of the European Commission where one taxpayer has to report:

> *"Each Member State shall take the necessary measures to ensure that, where the obligation to file information on a reportable cross-border arrangement or series of such arrangements is the responsibility of the taxpayer and a single such arrangement or series of such arrangements is used by more than one taxpayers who are associated enterprises, only the taxpayer that was in charge of agreeing the arrangement or series of arrangements with the intermediary shall file information in accordance with paragraph 1."*

Article 8 ab (5 to 8 and 10) of DAC 6 requires :

- that the right to waiver is organised by law;
- if the reporting was not waived, the reporting would constitute a violation of the legal professional privilege under that national law;

- an intermediary who invokes the exemption to waiver is forced to notify this to 'every other intermediary' or, this lacking, to notify the taxpayer;
- the intermediary can only be allowed to waiver when acting within the scope of the national law that organizes that profession.

This other intermediary or the taxpayer must then, themselves, report. The other intermediary will have to comply with the rules as discussed above.

14. Extra-territorial competence of rules for reporting

In the presence of multiple Member States for reporting, the taxpayer shall only be held to report in the Member State with the closest territorial link to him (tax resident, permanent establishment, deriving income or exerting an activity that does not qualify as a permanent establishment). In the presence of multiple taxpayers, only the taxpayer with a direct contractual bond to the intermediary or the taxpayer who organises the arrangement is required to report under the working document COM(2017) 335 final of 21 June 2017 of the European Commission.

Article 8 ab (6) of the Directive demands that the exercise of the right to waiver under article 8 ab (5) shifts the obligation to report to the taxpayer.

These rules are inconsistent with an effective protection of the legal professional privilege of lawyers where DAC6 allows the granting of competence under the national law of the taxpayer to organise the reporting obligation related to the identity and the content of the legal opinion rendered by a lawyer in another Member State to that national taxpayer. The goal of uniformity of DAC6, the principle of equality under article 20 of the Charter, and the right to an effective exercise of one's right to defence ; all demand that all clients of a lawyer-intermediary be subject to the same obligations to report when the right to waiver applies.

The client of a lawyer-intermediary who falls under the obligation to report under DAC 6 can only be held to report the arrangement instead of the lawyer-intermediary and in the Member State of that lawyer intermediary. Any other transposition would imply that all other Member States have *de facto* a say in the national rules that organise the legal professional privilege in the Member State where the lawyer is registered with a professional organisation. A Belgian lawyer-intermediary who invokes the exemption to waiver under the Belgian obligation to report shall have to notify also to his client that he is to report in Belgium even when not established in Belgium. The taxpayer who fails to do so will be subject to penalties under Belgian law.

This extra-territorial competence is the only interpretation that can reconcile the personal obligation to report for the taxpayer and the effective protection of the fundamental rights granted under the Charter. If this interpretation is deemed inconsistent with other freedoms or rights by the CJEU in future rulings, DAC6 cannot be applied in compliance with primary EU law where its shifts the obligation to report to the taxpayer.

15. Reporting requirements for members of professional organisations and their clients

The following rules of competence apply to members of professional organisations of lawyers and their clients, such clients being either participating taxpayers to the arrangement or intermediaries of the first type :

a) The Member State that organises, under national law, the professional organisation is the only one competent to organise the right to waiver for

the members of that organisation, provided they act within the scope of that profession;

b) The participant-taxpayer to whom is transferred the obligation to report can only be required to report in the Member State that has organised the right to waiver for his lawyer-intermediary, unless the participant-taxpayer proves that the arrangement has already been reported by himself or another intermediary under the obligations of the national law of that intermediary in another Member State;

c) The intermediary to whom is notified the exemption to waiver by the lawyer-intermediary can only be required to report in the Member State that organises the right to waiver if the arrangement has not already been reported by himself or another intermediary under their national law in another Member State;

d) The Member State that organises the national organisation under national law is not competent to organise the obligation to report for intermediaries that are members of that national organisation but that act outside the scope of that profession. Competence is then determined by the territorial links that apply to intermediaries that do not exercise a profession with a legal professional privilege;

e) An intermediary affiliated with a professional organisation in a Member State who acts outside the scope of that organisation can be required to report only in the Member State with the closest territorial link to them and in the order as organised by article 3 b) (21) of the Directive. When reporting obligations arise in multiple Member States, reporting must be done only in the Member States according to the rank organised under article 8 ab (3) of the Directive;

f) When reporting instead of the lawyer intermediary, only the client of the lawyer intermediary has knowledge of the facts and the content of the legal opinion and cannot be forced to disclose this under the national law of the Member State that organises the legal professional privilege. The client can be required to report only the portion of the arrangement related to the legal opinion and when such reporting obligation is triggered by that opinion.

16. Principal inconsistencies between DAC6 and primary EU law

In an article published online on 15 January 2019, professor M. Stöber[15] identifies multiple possible inconsistencies between DAC6 and primary EU law. They relate to :

Article 115 TFEU ; directives adopted under this legal base must seek to improve the functioning of the internal market. DAC6 describes under recital (2) the goal for Member States to improve, over time, maintaining a tax base by discouraging the use of cross-border tax arrangements (p. 13-14);

- Such a goal is, by its nature, a distortion of the internal market since the internal market does not concern tax optimisation within the Member State. The Hallmarks listed under attachment IV of DAC6 are also not motivated by how they address the abuse of freedoms. The whole logic is thus inconsistent with the principle of the internal market to lift restrictions on cross-border activities (p. 14). The freedoms of establishment (Article 49

[15] Professor M. Stöber lectures in the German city of Kiel ; https://beck-online.beck.de/Bcid/Y-300-Z-BB-B-2018-S-1559-N-2

TFEU), of services (Article 56 TFUE) and capital (Article 63 TFEU) are, therefore, restricted by DAC6 and this without just cause, in the view of that author;

- Article 8 of the Charter protects the fundamental right to privacy; DAC6 requires reporting data of taxpayers in reportable legal arrangements that must be filed by the intermediary and then, under DAC6, be forwarded to the tax administrations of the other Member States;

- Article 16 of the Charter protects the fundamental right of the freedom to conduct business as recognised under EU law and national law. This freedom includes the right for an enterprise to decide over its financial assets. According to this author, this protects also the right to prefer the least-taxed option[16]. The objective of DAC6 is, therefore, inconsistent with this fundamental right, according to professor Stöber.

- Article 15 of the Charter protects the right to choose an occupation and the right to engage in work that includes the right to trade and enterprise secrets[17]. Lawyers and legal councils alike have acquired, through their professional activity, a unique knowledge in international tax law and are forced, by the reporting obligation under DAC6, to divulge this capability to the authorities in what is a considerable restriction to their freedom to organise their profession. This author reminds us that large enterprises have withdrawn from the activity of rendering tax opinions in the United Kingdom after similar national legislation was adopted and so criticises again the objective of DAC6 to discourage such activities through the obligation to report;

- Article 48 of the Charter expresses the principle of *nemo tenetur* and protection against self-incrimination[18];

- Article 52 of the Charter allows restrictions on the fundamental rights that are protected under the Charter when compliant with the principle of proportionality. This principle requires that restrictions should be necessary and effective for objectives of general interest that are recognised under EU law or for objectives that relate to the protection of the fundamental rights and freedoms of others. The author finds that severe restrictions to those protected rights will need, in general, an increased level of justification of their necessity for the objectives of general interest that are recognised under EU law.

Restrictions on the fundamental rights of intermediaries and taxpayers in order to stop leaks in national tax legislation are not considered to form such an objective by that author.

Professor Stöber's article lists several issues based on important principles that can be invoked under primary EU law regarding the objectives of DAC6.

A Member State cannot, however, refuse to transpose a directive and must be vigilant when transposing a rule under that directive in order to not violate EU law. This requires motivating in a particularly meticulous way why a specific transposition could violate EU law and how a partial transposition could be considered compliant with that EU law under the requirements of proportionality contained in Articles 52 and 53 of the Charter.

[16] With reference to the decisions of the CJEU, 21 February 2006, case C-255/02, Halifax,ECLI:EU:C:2006:121 and CJEU, 27 March 2014, case C-314/12, UPC Telekabel Wien, ECLI:EU:C:2014:192

[17] With reference to CJEU, 23 September 2004, cases C-435/02 en C-103/03, Axel Springer, ECLI:EU:2004:552.

[18] With reference to CJEU, 7 January 2004, cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00, Aalborg, ECLI:EU:C:2004:6

17. Existing anti-abuse rules and "potentially" aggressive cross-border arrangements

Other recent doctrine[19] stresses the objective of DAC6 to trigger reporting to the Member States, in an earlier stage, *potentially* aggressive cross-border arrangements. An aggressive cross-border arrangement is an arrangement with the principal goal, or one of the principal goals, to obtain legally a tax advantage through mismatches in national law or treaties or by the complexity of the tax system.

Such arrangements can already be addressed by a set of existing anti-abuse rules that limit the tax advantage that the construction aims to achieve by comparing it to the intended purpose and object of the tax law the arrangement seeks to use.

Anti-abuse rules are widely used, broadly defined and can address effectively most cases. One can, therefore, question the necessity of the earlier reporting to address 'illegal' arrangements. **This raises questions regarding certain provisions of DAC6 when weighed against restrictions on fundamental rights.**

DAC6 explicitly makes all constructions reportable as soon as they are cross-border and *may* serve a tax purpose. The relation to the stated purpose and object of the national tax law is thus entirely dissociated from the obligation to report. These authors find that Hallmark 3 is excessive where the obligation to report is triggered by the criterion of using the effects of more than one double tax treaty.

The effect of such a broad definition is that the distinction between tax-avoidance and tax-fraud that has practically already faded is further blurred by the absence of the criterion of proportionate justification under the intended purpose and object of the national tax law the construction seeks to apply.

The suspected occurrence of a tax advantage already triggers the obligation to report the cross-border arrangement, even when such an advantage was not intended but only a consequence. This very large reporting obligation under DAC6 is amended by the main benefit test for certain Hallmarks: when the obtained tax advantage can be seen as entirely complementary to the whole of the arrangement, there is no obligation to report. For other Hallmarks, this test is not possible and reporting must, therefore, always take place.

18. Fundamental rights and proportionality; CJEU case law

The authors BLUM and LANGER refer to case law of the CJEU[20] requiring proportionality to apply to the restrictions on the freedoms for budgetary purposes used by the Member States to ascertain tax collection. This demands an artificial nature (1) of an arrangement that abuses national tax law (2) without giving rise to general or irrefutable presumptions of abuse.

Where no rebuttal based on of the presumption of the complementary nature of the tax advantage is allowed, one can question vigorously the proportionality of the resulting restrictions to the freedoms and fundamental rights under the case law of the CJEU.

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[19] Daniel W. BLUM and Andreas LANGER, 'European Union - At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 2', *European Taxation*, 2019 (Volume 59), N° 7, Journals IBFD.

[20] Note 93 of their article : ECJ, 12 Sept. 2006, Case C-196/04 , Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue , ECLI:EU:C:2006:544, para. 55, Case Law IBFD; and FR: ECJ, 7 Sept. 2017, Case C-6/16 , Eqiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des comptes publics , ECLI:EU:C:2017:641, para. 26, Case Law IBFD; and DE: ECJ, 20 Dec. 2017, Joined Cases C-504/16 and C-613/16, Deister and Juhler Holding v. Bundeszentralamt für Steuern, ECLI:EU:C:2017:1009, Case Law IBFD.

This case law of the CJEU relates to national tax law. However, even though DAC6 is a rule of secondary EU law that restricts freedoms, the case law of the CJEU implying a strict interpretation, applies also to a rule of secondary EU law (see for instance the 20 December 2017 decision of the CJEU[21]) :

> *"59. As regards measures for the **prevention** of fraud and abuse within the meaning of Article 1(2) of the Parent-Subsidiary Directive, it should be noted that, since that provision provides for an exception to the general rules laid down by the directive, namely the common tax rules applicable to parent companies and subsidiaries coming within the scope of the directive, it must be subject to strict interpretation (see, to that effect, judgments of 24 June 2010, P. Ferrero e C. and General Beverage Europe, C-338/08 and C-339/08, EU:C:2010:364, paragraph 45, and of 8 March 2017, Euro Park Service, C-14/16, EU:C:2017:177, paragraph 49 and the case-law cited)."*

Where DAC6 aims at cross-border arrangements, it must receive a strict interpretation when incompatible with freedoms or fundamental rights. National law that transposes the obligation to report to purely domestic arrangements cannot invoke a general presumption by the Hallmarks to justify a restriction on freedoms or fundamental rights unless it can be rebutted (see considerations 60 and 61 of the same decision) :

> *"60. The Court has stated that, in order for national legislation to be regarded as seeking to prevent tax evasion and abuses, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which **do not reflect economic reality**, the purpose of which is **unduly to obtain a tax advantage** (judgment of 7 September 2017, Eqiom and Enka, C-6/16, EU:C:2017:641, paragraph 30 and the case-law cited).*
>
> *61 Therefore, a **general** presumption of fraud and abuse cannot justify either a fiscal measure which compromises the objectives of a directive or a fiscal measure **which prejudices the enjoyment of a fundamental freedom** guaranteed by the treaties (judgment of 7 September 2017, Eqiom and Enka, C-6/16, EU:C:2017:641, paragraph 31 and the case-law cited)."*

DAC6 cannot justify itself by the necessity to prevent fraud or abuse since it has itself cut the link with the intended purpose and object of the national tax laws the arrangements seek to use.

DAC6 can also not justify restrictions on freedoms and fundamental rights by invoking the need to enable Member States, in an earlier stage, to correct unintended or undesired effects under their national tax policy. A national tax law or policy is not an objective of EU law under the Treaties.

It has already been pointed out that an EU legal framework exists on anti-abuse measures to address abuse of national tax law. DAC6 goes beyond what is necessary to achieve an objective that has already been implemented by other EU laws.

Finally, DAC6, through the obligation to report, attempts to dissuade taxpayers and their advisors to design cross-border arrangements. It is unlikely that such an objective is proportionate to justify restrictions on freedoms and fundamental rights under primary EU law.

Member States must observe primary EU law when transposing secondary EU law. The authors BLUM and LANGER see a conflict arising, among other, with regard to the right to privacy (Articles 7 and 8 of the Charter).

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[21] CJUE, 20 December 2017, cases C-504/16 en C-613/16, *Deister and Jugler Holdings v. Bundeszentralamt für Steuern*, ECLI:EU:C:2017:1009.

According to these authors, it cannot be reasonably questioned that the reportable information contains personal and economic data that falls under the scope of the protection of Article 8 of the Charter[22]. Where the case law of the CJEU may leave some room for debate as to whether the notion of personal data also extends to legal entities, this is not the case under the case law of the ECtHR[23]. As already mentioned, the case law that offers the largest protection applies, under the *Melloni* case of the CJEU that interpreted Article 53 of the Charter.

These authors also question the proportionality under Article 52(1) of the Charter that requires that restrictions to fundamental rights be necessary and not go beyond what is needed. A justification limited to the budgetary necessities of the Member States may be insufficient and threatens, if found sufficient, by its potential large scope to overrule all fundamental rights in fields where the TFEU allows harmonisation.

Only Hallmarks under category D could, in the opinion of these authors, possibly comply with Article 52(1) of the Charter since they aim to ensure an equal effect under national tax law. Other Hallmarks, such as the existence of a confidentiality agreement, do not comply, according to them.

They also raise questions regarding justification of the automatic exchange of all reported data to all Member States.. This also applies to Member States that are not concerned by the arrangement. They find such communication from the database to be compliant with the protection under Article 8 of the Charter only when specifically requested by a Member State.

Also, the fact that certain categories of Hallmarks do not allow to challenge reporting under the main benefit test is seen as a difficult issue.

These authors end their article by reminding readers that the search for the least-taxed option is a consequence of the rule of law. The respect for the rule of law, therefore, dictates that measures such as those included in DAC6 must be weighed against their necessity to address fraud or abuse and not as an instrument to brand behaviour that is politically considered as undesirable and treated it as if it constitutes illegal behaviour.

The Spanish revue Nueva Fiscalidad published an article of S. MORENO GONZALEZ[24]. In that article multiple issues are as well raised under the requirement of the Charter :

- There is no definition of 'an aggressive cross-border tax arrangement' tough a dissuasive sanction must be organised. With reference to a precedent in France[25] that related to a national obligation to disclose arrangements for tax optimizing. The French *Conseil constitutionnel* rendered a ruling of December 29th 2013 (n° 2013-685) stating that rules that impose severe sanctions must comply with the requirements of legal certainty and for clear criminal law provisions. Vague provisions were considered non-proportionated in the ruling of this high court to impose such far reaching obligations to professions such as lawyers and tax consultants.

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[22] Note 56 of their article : P. Baker, Taxation and the European Convention on Human Rights , 40 Eur. Taxn. 8, p. 319 (2000), Journal Articles & Papers IBFD; P. Baker, Privacy Rights in an Age of Transparency: A European Perspective , 28 TNI, p. 583 et seq. (2016); M. Schaper, Data Protection Rights and Tax Information Exchange in the European Union: An Uneasy Combination , 23 MJ 3, p. 517 et seq. (2016); A. Rust, Data Protection as a Fundamental Right , in Exchange of Information and Tax Law p. 189 et seq. (E. Fort & A. Rust eds., Wolters Kluwer 2012); and Wöhrer (2007), supra n. 53 , at p. 296 et seq.

[23] Note 65 of their article : ECtHR, 14 Mar. 2013, Case No. 24117/08, Bernh Larsen Holding AS and Others v. Norway , para. 107; and NL: ECtHR, 16 June 2015, Case No. 75292/10, Othymia Investments BV v. the Netherlands , para. 37.

[24] Saturina MORENO GONZALEZ, 'La Directiva sobre revelación de mecanismos transfronterizos de planificación fiscal agresiva y su transposición en España: Transparencia, certeza juridica y derechos fundamentales.', *Nueva Fiscalidad,* Número 2, Abril-Junio 2019, pp. 19 – 72.

[25] See footnote 128 of that article.

- The legal professional privilege of lawyers is a protected right under Articles 6 and 8 ECHR. The same right is also protected under the Articles 7, 47.2 and 48.2 of the Charter[26].

Given these severe criticisms regarding the compatibility of DAC6 with Articles 52 and 53 of the Charter with respect to both necessity and proportionality, Member States should favour a strict interpretation when transposing DAC 6 and always seek to minimise the restrictions to fundamental rights by not qualifying an arrangement as aggressive and reportable when only a complementary tax advantage occurs.

19. Which taxes fall within the reporting obligation under DAC6 ?

DAC6 was adopted under Article 115 TFEU that relates to DIRECT TAXES. A Member State may choose to go further than the goal of DAC6 but cannot ignore the purpose of a directive adopted under Article 115 TFEU. This purpose aims to address distortions to the internal market. Aggressive tax arrangements must thus be tested according to their ability to distort competition.

On p. 66 of the Commission's report, the limitation of the scope of DAC6 to direct taxes is considered the best option under three examined criteria : 'effectiveness', 'efficiency' and 'coherence'. On p. 38 it is considered that:

> "*In theory, any type of tax or duty may suffer from aggressive tax planning. However, the problem definition shows that the concerns are related to international tax issues which are precisely linked to income taxes.* ***On this premise, it is justified to focus on direct taxation****."*

Although the general wording of Article 2 (1) of the base Directive provides to apply on *all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities*, a transposition of DAC6 that goes beyond the scope of income taxes could be challenged under the objective of DAC6 and the Directive itself.

This Directive was designed as a data reporting system between Member States to enhance the proper functioning of the internal market. DAC6 adds an entirely new dimension by implicating third parties (non-Member States) in this system of peer data exchange.

The last recital, n° 29, of the Directive refers to the principle of subsidiarity under Article 5 TFEU ; the organisation of data exchange between Member States is judged necessary to the functioning of the internal market. Under the principle of proportionality, DAC6 cannot go beyond what is needed to achieve this objective of the Directive.

Insofar as the Commission reported (p. 37 – 38) that DAC6 is necessary under Article 115 TFEU to protect the internal market in the field of income taxes :

> *'VAT, custom duties, excise duties as well as on social security contributions are already covered by specific rules (..) the problem definition shows that the concerns are related to international tax issues which are precisely linked to income taxes. On this premise, it is justified to focus on direct taxation (..) notably personal and corporate income tax.'*

an interpretation of DAC6 that seeks to subject non-Member States in all the other fields of taxation that Member States agreed upon under the Directive, is in violation of Article 5 TFEU

[26] CJEU, 15 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd vs. Commission*, C-550/07, §§ 40-44 and the rulings of the ECtHR by the CJEU that relates to the legal professional priviledge of lawyers with reference to ECthR, 6 December 2012, *Michaud v. France*, (n° 12323/11) and ECtHR, 1st December 2015, *Brito Ferrinho Bexiga Vila-Nova v. Portugal*, (n°. 69436/10).

and the principle of subsidiarity it includes. Also, attachment IV to DAC6 with Hallmarks cannot be easily explained or applied in those other fields of taxation.

20. Compatibility between DAC6 and TFEU

Recent doctrine[27] argues that all EU law adopted under Article 115 TFEU must be able to justify itself through its effect on and effectiveness for the internal market as required by 26 (2) TFEU and the case law of the CJEU under that article to either lift obstacles to the freedoms or address distortion of competition by national tax law of Member States that directly affects the internal market (ref. to CJEU, 13 July 1994, case C-350/92, *Spain v. the Council*, ECLI:EU:C:1995:237, § 32 and CJEU, 12 December 2006, case C-380/03, *Germany v. the Council*, ECLI:EU:C:2006:772, §. 37).

DAC 6 struggles to justify itself under these requirements of primary EU law. The objective of protecting the tax interests of the Member States is not mentioned in the language of Article 26 (2) TFEU. So both the Hallmarks and the other obligations must be considered first from their ability to create distortions to the market before considering the additional justification of national budgetary interests for allowing them to apply on arrangements.

While the exchange of information between Member States already retrieved through their national tax law, under the Directive for information, does not further affect the rights or obligations of their citizens, this cannot be said for DAC6.

There is no justification under the case law of the CJEU for the different treatment between domestic arrangements and cross-border arrangements for merely national budgetary interests but only for the necessity for a Member State to address tax fraud or abuse.

21. DAC6 and market distortion

Therefore, each measure and Hallmark required by DAC6 must be justified when transposing the directive from the angles both of market distortion and the necessity to tackle difficulties for effective taxation of *foreign* income of *their* own tax residents. If such justification were not required, a precedent could be set for the Council to adopt any sort of harmonising measures outside the existing division of competences between the European Union and the Member States.

One should also be vigilant when transposing DAC6 not to trigger measures that distort the internal market. Targeting cross-border arrangements that have a tax implication is not a criterion that could be seen to encourage establishing business elsewhere in the European Union and thus raises questions under the principle of freedom of establishment (Article 49 TFEU).

The Hallmark of the confidentiality agreement under category A can also be difficult to justify under the requirements of primary EU law. Only the Hallmarks under category D could be justified with respect to the necessity to address the avoidance of reporting obligations required by other EU laws. The other Hallmarks will need to be tested by the CJEU on their compliance with an effective tax survey on the internal market to address tax fraud or avoidance[28].

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[27] Daniel W. BLUM and Andreas LANGER, 'European Union - At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1', *European Taxation*, 2019 (Volume 59), N° 6, Journals IBFD.

[28] BLUM and LANGER, *l.c.*, note 45 with reference to C. Osterloh-Konrad, C. Heber & T. Beuchert, *Anzeigepflicht für Steuergestaltungsmodelle in Deutschland (Gutachten erstellt im Auftrag des Bundesministeriums für Finanzen)*, p. 74 et seq. (Max-Planck-Gesellschaft 2017)

The motivation in the Commission's report to address at an earlier stage tax optimisation in the field of income taxes through cross-border arrangements could possibly pass such a test under primary EU law. It is uncertain whether other fields of taxation could pass the test under the criterion of disruptions to the internal market when transposing DAC6. This should be at least a point of consideration for the national legislator - to provide justification under primary EU law when considering whether to widen the scope to other fields of taxation under the Directive.

22. Hallmarks

In other recent doctrine, the technique of the Hallmarks themselves is criticised when motivated through the invoked difficulty of defining an aggressive cross-border arrangement[29]. There is already a definition of an 'aggressive cross-border arrangement' in the recommendation of the European Commission of 6 December 2012 : "Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability"[30].

The technique of Hallmarks thus solves a problem that doesn't exist. The extensive list of Hallmarks and their repetitive character are also, in the view of these authors, difficult to reconcile with the principle of subsidiarity under the second member of Article 5 TFEU.

The above-mentioned recommendation defines, under its point 4.7, such a tax advantage as :

> *"In determining whether an arrangement or series of arrangements has led to a tax benefit as referred to in point 4.2, national authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s). In that context, it is useful to consider whether one or more of the following situations occur:*
>
> *(a) an amount is not included in the tax base;*
> *(b) the taxpayer benefits from a deduction;*
> *(c) a loss for tax purposes is incurred;*
> *(d) no withholding tax is due;*
> *(d) foreign tax is offset."*

It could thus be recommended, in the words of the Commission itself, and in compliance with primary EU law that Member States consider when transposing :

a) applicability in the field of income tax only, based on the principle of subsidiarity;
b) justifying partial transposition by the need to address distortions to the internal market via restricting freedoms and fundamental rights under primary EU law;
c) the general definition of a tax advantage for *triggering* the obligation to report an arrangement when such result applies in combination with a listed Hallmark;

[29] René OFFERMANS and Rita BOTELHO MONIZ, 'Current Trends Regarding Disclosure Mechanisms : Reporting Ultimate Beneficial Ownerschip – Part 1', *European Taxation*, April 2019, p. 162 – 168, in particular p. 168.

[30] European Commission, Commission Recommendation on aggressive tax planning, C(2012) 8806 final (6 Dec. 2012).

d) the complementary nature of the tax advantage under the main benefit test which would then be considered to *exonerate* reporting of such arrangements under all Hallmarks.

23. The obligation to sanction under DAC6

DAC6 requires dissuasive sanctions when the obligation to report is not met. DAC6 also requires the application of a retroactive obligation to report with effect from 25 June 2018. All arrangements that became reportable as from 25 June 2018 must be reported at the latest by 31 August 2020.

The first question to consider is whether this retroactive effect violates primary EU law. If so, the second question raised is to know how, by transposing DAC6, such violation of primary EU law could be avoided.

The ECHR forms part of primary EU law (article 6 TEU) insofar as it is applied under the constitutional traditions of the Member States. These articles of the ECRM cannot be considered as the individual interpretation given by a constitutional court of a Member State. The articles relate to the joint constitutional tradition of the Member States as enshrined in the Charter.

The TEU (article 6 (1)) thus requires Member States to observe the Charter as the common result of traditions when transposing EU law into national law. A directive must be explained in a way that does not violate primary EU law.

Article 49, first paragraph, of the Charter prohibits sanctions (penalties) when the violated legal rule did not exist at the moment the violation occurred :

> *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable."*

A penalty can, therefore, only have a proportionate justification for information received or actions posed or not posed by the intermediary after the national law that transposes DAC6 comes into effect.

The Commission has said itself that there is a danger for disproportionality when the obligation to report is considered too wide (p. 62-63, Doc SWD (2017), 236).

24. How should reporting requirements be fulfilled during the transposition period of DAC6?

DAC6 should therefore be transposed in a manner that does not violate this fundamental right. This requires to consider what should be reported - after the national law that transposes comes in effect - as compared to what should have been reported under that transposition in the period that preceded that moment.

The longer the act of transposing DAC6 takes, the greater the concern for the principle of legal certainty for intermediaries and taxpayers on the information they must provide and document. This retroactivity poses various practical problems that can justify a *pro rata* limitation of the requirements under DAC6 as to their effects for the past :

- What about arrangements that already were in a reportable phase before DAC6 was published ?
- What about the obligation to report for intermediaries who no longer intervene in 2020 ?
- How to determine what is considered as a first step of implementation (not defined) ?

Logical limitations on the retroactive effect of the obligation to report are :

- a delay for retroactive reporting must be sufficiently large after the coming into effect of the national law ; at least 3 months rather than one month, so the national law should best come into effect at the latest by end April 2020;

- limitation of the obligation to report for both intermediaries and taxpayers regarding those arrangements that are still 'active' on the date of coming into effect of the national law;

- refraining from penalties on an intermediary who reports an incomplete file when that information was not available to him after 25 June 2018.

25. Clear definitions needed regarding the start to the obligation to report

The Commission's report (p. 66 - 67) proposes to limit the retroactivity to new arrangements that relate to income taxes only :

> "*The preferred options will consist of the following fundamental features :*
>
> - *Only direct taxes are covered;*
> - *Intermediaries have the primary reporting obligation and users a secondary;*
> - *(..)*
> - *Only* ***new*** ***schemes*** (a = that are being designed etc.. and then come to the knowledge of the intermediary) *and* ***schemes that were put in place*** (b = managed) ***after political agreement on this Directive was reached*** *in Council will have to be reported (limited retrospectively);*
> - *(..)"*
>
> *It is therefore envisaged that the burden should be accommodated by existing compliance obligations of intermediaries.'*

The principle of legal certainty under Article 49, first paragraph, of the Charter demands that a rule be clear in order to legally impose a penalty when it is transgressed.

DAC6 provides no legal certainty regarding the moment the obligation to report is triggered, with the result that arbitrary interpretations cannot be excluded. Given the demand for 'dissuasive' sanctions when failing to report or when only partially reporting, it is strongly recommended to remove this uncertainty by clear definitions.

A 'theoretical' scheme, when not applied, has no effect on the income of Member States and is, therefore, objectively difficult to determine. What DAC6 probably means with 'making available' is the moment a 'script' is notified to a taxpayer that can be easily applied by him (see Hallmark category A, 3°).

The same intermediary is not necessarily consulted in each following phase of the implementation. No one can be penalised for another man's actions. If one does no longer know when or what to report, one cannot be exposed to penalties.

26. Prohibition of self-incrimination

The prohibition of self-incrimination is found in article 48, second paragraph, of the Charter :

> *"Respect for the rights of the defence of anyone who has been charged shall be guaranteed."*

The respect of the right of defence holds the prohibition of self-incrimination. The ECtHR considered in a decision of 16 June 2005 that the right to silence does not relate to an administrative obligation to report to a tax-administration[31].

In three cases, DAC6 imposes on taxpayers the reporting of aggressive cross-border arrangements. These cases relate to :

- When no intermediary has intervened in conceiving or applying the arrangement;
- When only intermediaries intervened, who can waive their obligation to report;
- When calling upon intermediaries who are not based within the European Union.

What if the reported arrangement proves later to be a fraud ? Could the information reported by the intermediary be used against him in tax or criminal litigations ? And what if an administrative investigation is triggered by such reporting ? Does the entire procedure that follows become void because it violates Article 48 (2) of the Charter ?

What if the arrangement is perfectly legal ? Could one qualify the obligation to report such an arrangement as equivalent to the obligation to file an annual tax return ? Or does this obligation go further since DAC6 demands dissuasive sanctions when not met ?

These are questions that will have to be weighed by the CJEU. A factor to consider might then be the presence of a clear definition related to the time and the content of what is to be reported under the national law that transposed DAC6 and the penalty that is triggered[32].

But independent of the content of such a document, a document that transited between lawyers and clients cannot be the object of mandatory reporting without violating the Charter (see hereinafter).

27. Proposed definitions for timing and content that trigger reporting

The national law transposing DAC6 should according to Articles 48 (2) and 49 (1) of the Charter, use a clear definition on when an obligation to act, under penalty, begins and ends. A proposal for a legal provision in compliance with these requirements is :

> *"When an intermediary to an arrangement is no longer intervening when that arrangement is brought for the first time to the knowledge of the taxpayer by another intermediary, the first intermediary does not have to report if he no longer interves in that arrangement at any time afterwards.*
>
> *The intermediary who no longer intervenes in a later phase of the arrangement, after it was brought for the first time to the knowledge of the taxpayer, has no obligation to report for the phases of the arrangement that occur afterwards and that contain their own obligation to report.*

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[31] ECtHR, 16 June 2014, 787/14, *van Weerelt v. the Netherlands.*

[32] CJEU, 5 July 2012, case C-318/10, SIAT, ECLI:EU:C:2012:415, § 50 (*it may be regarded as not going beyond what is necessary to prevent abusive practices, if, on each occasion on which the existence of such an arrangement cannot be ruled out, that legislation gives the taxpayer an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement)* and § 58 (*meet the requirements of the principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings).*

Relevant taxpayers and intermediaries who receive notice from judicial authorities that they are under investigation are, for the duration of this investigation and the criminal trial that may follow, exempt from reporting the arrangements that are under investigation."

And on the problem of defining criteria for moments that may trigger, for each phase, the obligation to report, one could consider adopting criteria such as :

"The arrangement is brought to the knowledge of a relevant taxpayer at the moment a document is handed over or through any other form of communication of information that contains a list of all or the main actions that lead to a tax advantage when these listed actions are applied.

The arrangement is made available at the moment a document is handed over or through any other form of communication of information to a relevant taxpayer that will modify the legal position or the tax position of the relevant taxpayer as required for implementing the arrangement.

The first step in the implementation of an arrangement occurs at the moment the legal position or the tax position of the relevant taxpayer is altered or is expected to be altered. The date of signing of the contracts that change the legal position or the tax position or the date of filing documents with a view to alter the tax position of the relevant taxpayer is considered the first step of implementation.

The intermediary manages the arrangement when his intervention is requested to maintain or alter the legal position or tax position the arrangement sought to obtain. The date of managing begins on the day when the intermediary renders his opinion to the relevant taxpayers of the actions needed or not needed to that end or the date when an intermediary has acted on behalf and in the name of the relevant taxpayer or the intermediary that acts for him.

For each separate phase of designing, making available, implementing and managing, the intermediary must report when his intervention is requested for the first time by a relevant taxpayer or an intermediary that acts on behalf of the relevant taxpayer."

These proposed definitions focus on a 'purpose' that can be considered as comparable to an 'intent' required to act under criminal law since DAC6 demands effective, proportionate and dissuasive penalties under national law. If not deemed to be a penalty under the criteria of criminal law, such differences can be considered as very narrow.

The large number of Hallmarks may trigger endless discussions on how each phase relates to each Hallmark. The proposed definitions focus, therefore, on defining a moral component to trigger reporting for each phase. Another requirement for defining such an obligation can be found in the definitions contained in the European Commission's recommendation of 6 December 2012, for seeking an advantage through the technicalities of a tax system or mismatches between two or more tax systems for the purpose of reducing tax liability (see above).

28. Proportionate application of penalties

Article 49, 3 of the Charter requires that:

"3. The severity of penalties must not be disproportionate to the criminal offence."

DAC6's purpose is that the relevant Member State has knowledge of no-fraud cross-border arrangements. To enhance the likelihood of reporting, all intermediaries fall under the obligation for each phase of a single arrangement, unless that phase was already reported by another intermediary.

It would thus be proportionate that arrangements that have already been reported multiple times lead to no or lesser penalties if a intermediary failed to report without having proof whether other intermediaries had reported that arrangement.

Such a proportionate limitation of the penalty could be phrased as :

> *"When the information at the disposal of an administration shows that an arrangement has already been reported in (the Member State) or in another Member State by another intermediary or a taxpayer in compliance with (the national law that transposes), the penalty does not apply.*
>
> *The (government) fixes a scale of administrative penalties and delays and organises how they apply when an individual obligation to report has not been met or partially met by the concerned. A full report that should have been submitted by the concerned but was submitted by a third person gives no longer cause for the penalty."*

Another issue under the obligation that penalties be proportionate relates to scaling penalties with regard to the phase that was not reported. The objective is to inform tax administrations of the arrangements; when already reported in the first phase, it is logical to consider lower penalties for failing to report later phases than when no reporting at all occurred during multiple successive phases. The need to obtain knowledge of the arrangement will be highest in the first phase of implementation and smallest when only under consideration or preparation and subject to adjustments before the arrangement comes into effect.

29. Questions related to the reporting obligation for mere opinions

Given the preceding considerations on the obligation to report under primary EU law, a strict interpretation of DAC6 applies at least in the transposition.

Must an opinion that just explains the applicable tax law in different jurisdictions, that refrains from explaining how that tax law can apply to the taxpayer's specific situation and the means of such application be reported under the first reportable phase ?

Would the same conclusion apply for an opinion that analyses an existing structure ? Or when the opinion relates to tax optimising through a cross-border effect or only finds that there is a tax advantage under an already-existing structure ?

What if the opinion only relates to third countries ?

30. When does an opinion require reporting?

The proposed definition for the obligation to report the first phase suggests an answer :

> *"The arrangement is brought to the knowledge of a taxpayer at the moment a document is handed over or through any other form of communication of information to a relevant taxpayer that holds a list of all or the main actions that lead to a tax advantage when these listed actions are applied."*

An abstract opinion that limits itself to analysing different tax systems and doesn't implement them at the level of the enterprise is thus not an opinion that must be reported under this definition. To be reportable, the opinion must contain "a list of all or the main actions that lead to a tax advantage when these listed actions are applied".

If the opinion relates to an existing group where the tax advantage is already present (latent or not) it cannot be obtained as a result of the opinion since it is already there. If the opinion has

the sole purpose of checking out an existing situation, there is no obligation to report (passive opinion).

If the opinion has as its purpose to optimise the functioning of an existing group for tax purposes, then there will be an obligation to report, all the more if the opinion focuses on future activities of the group and is 'tailor-made' for implementation purposes (active opinion).

An active opinion that examines optimisation through third countries only is not to be reported, given the objective of DAC6. To avoid discussion, it would be best to state this explicitly in the national transposing legislation.

Under phase 4 of the proposed definitions that trigger the obligation to report, an existing arrangement is 'managed' when the intention to keep or to adapt the tax advantage provoked the opinion. But what if the intermediary is requested for the first time to intervene in phase 4 and thus requested to analyse an existing situation as to its tax consequences without the explicit purpose to consider a new optimisation ?

The hypothesis of succession is clearly worked out in the proposed definition :

> *"The intermediary manages the arrangement when his intervention is requested to maintain or alter the legal position or tax position the arrangement sought to obtain. The date of managing is the date when the intermediary renders his opinion to the relevant taxpayer regarding the actions needed or not needed to that end or the date when an intermediary has acted on behalf and in the name of the relevant taxpayer or of the intermediary that acts for him.*
>
> *For each separate phase of designing, making available, implementing and managing, the intermediary has the obligation to report when his intervention is requested for the first time by a relevant taxpayer or an intermediary that acts on behalf of the relevant taxpayer."*

There may still be legal uncertainty over the obligation to report when an opinion is requested for analysing the international tax situation of a group. Under the proposed definition of the obligation to report under phase 4, there is an 'active opinion' when actions should be taken to preserve or adapt the tax advantage and the opinion holds – as under phase 1 – a personalised list of steps to be taken to make that happen.

If the opinion is a 'status quo', without any need for action, it becomes a passive opinion that only observes an existing situation and thus does not fall under the obligation to report. An additional objective criterion could be to transpose DAC6 so that only arrangements implemented after 25 June 2018 trigger the obligation to report for phase 4.

31. Fundamental rights and the reporting obligations for lawyers and their clients

The Treaty of the European Union states, in its article 2, that upholding human rights is a value of the Union. Article 6 (1) grants to the rights, freedoms and principles laid out in the Charter the same legal order as the treaties that founded the European Union. The Charter must be interpreted according to the dispositions that the Charter itself holds to that end (see Article 53 of the Charter).

Article 6 (2) stipulates that the Union joins the ECHR without altering, by doing so, the founding Treaties.

Article 6 (3) confirms that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.

What is the effect of Article 6 TEU, when transposing DAC6, on the relations between a lawyer and his client ?

In his speech held on 26 January 2018 for the ECtHR, the President of the CJEU, M. Koen Lenaerts, clarified that the case law of the ECtHR is considered in the case law of the CJEU via the fundamental rights under the Charter.

- A national law that transposes secondary EU law must take care to reconcile the given interpretation with primary EU law, including the Charter;

- Articles 52 and 53 of the Charter demand that fundamental rights that are also protected under the ECHR receive a protection that is at least equal to that offered under the ECHR;

- Articles 7 and 8 of the Charter protect privacy in a way consistent with the case law of the ECtHR under Article 8 ECHR;

- Articles 47 and 48 of the Charter protect the right of defence in a way consistent with the case law of the ECtHR under the Articles 6 (1) and 6 (3) ECHR.

The ECtHR has published on its website a topic 'Legal professional privilege' as guidance for protection under the case law of the ECtHR that relates to legal professional privileges.

The ECtHR found Article 8 ECHR provides a general protection of confidentiality on documents exchanged between individuals. This protection is reinforced when it relates to documents between a lawyer and his client since a lawyer holds a fundamental role in solving disputes in a democratic society. They can only fulfil this role as trusted advisors when they can guarantee the non-disclosure of their correspondence with clients. Indirectly – but nonetheless necessarily – the legal professional privilege of lawyers is founded on the need to guarantee the effective exercise of the rights of defence.

A note that is handed over by a lawyer to his client is always protected notwithstanding its content. A restriction of this right can only be justified when there is the presumption of **illegal** activity. The higher level of protection applies in this manner for each note written by a lawyer in that capacity[33].

DAC6 precisely intends to report **legal** arrangements in order to enhance the tax policy tools of Member States in reaction to undesired – but legal – effects of their tax legislation. According to this objective, there can be no proportionate justification under Article 52 of the Charter to restrict the fundamental right of the privacy of correspondence, and an effective protection demands that the client cannot be forced to report either the fact or the content.

In a decision of 12 December 2018 on competition law, the CJEU confirmed a similar principle[34]: the confidentiality of written messages between a lawyer and his client are inseparably intertwined with the effectiveness of the right of defence[35] and thus cannot be used by the Commission[36]. Only a willing release of that correspondence by the client, knowing that it is protected, can justify such a restriction of that fundamental right.

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[33] ECtHR 24 May 2018, *Laurent v. France*.

[34] CJEU, 12 December 2018, case T-75/104, *Unichem Laboratoris Ltd. v. European* Commission, ECLI:EU:T:2018:915, p. 13 – 14.

[35] Reference by the CJEU to CJEU, 8 July 2008, case T-99/04, *AC-Treuhand v. Commission*, EU:T:2008:256, § 46.

[36] Reference by the CJEU to CJEU, 29 February 2016, case T-267/12, *Deutsche Bahn and others v. Commission*, not published, EU:T:2016:110, § 49 and CJEU, 17 September 2007, cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, EU:T:287, § 86.

This case leads to the same finding as under the ECtHR: that DAC6 is inconsistent with primary EU law where it requires an obligation to report the relation between a lawyer and his client and the subject of this opinion.

32. The legal professional privilege

Article 8 ab (5) of the Directive, as amended by DAC6, authorises a Member State to organise the right to waiver when the legal professional privilege applies under the national law and insofar as the lawyer acts within the scope of the national rules that organise his profession.

Under the rules of competence explained above, only the Member State that organises the legal professional privilege can organise the right to waiver *and* the obligation to report that follows from it for the relevant taxpayer or an intermediary. This is necessary to guarantee an effective and equal protection for all clients of that lawyer under the national rules that organise the legal professional privilege.

An analysis of the Belgian national law organising the legal professional privilege for lawyers when Belgium transposes DAC6 is, therefore, relevant for all clients of Belgian lawyers that may have to report in Belgium under DAC6.

The Belgian Constitutional Court has aligned itself in the field of legal professional privilege for lawyers with the ECtHR by referring to the case law of the ECHR (for instance ECtHR, 6 December 2012, *Michaud v. France* ; ECtHR, 16 February 2010, *V.D. v. Romania*).

A decision of 23 January 2008 of the Belgian Constitutional Court (Gw.H., n° 10/2008, 23 January 2008) considers that this fundamental right must enable clients to avoid litigation by confiding in their lawyer.

The decision of 26 September 2013 of the Belgian Constitutional Court (Gw.H., n° 127/2013, 26 September 2013) considers that the legal professional privilege is a general principle of law that can only be overridden by an urgent reason of general interest and the lifting of it must be strictly proportionate to that general interest (consideration B.31.2).

This decision of the Belgian Constitutional Court also considers that the legal professional privilege of a lawyer must be considered differently from the legal professional privilege of other professions (considerations B.29.2, 29.3 and 30). It is a cornerstone that guarantees the right of defence when the client can be confident that there can be no divulging of the information passed on to his lawyer. The right not to incriminate oneself also depends indirectly, but necessarily, on the confidential bond between lawyer and client and the confidentiality of their discussions (reference to ECtHR, 6 December 2012, *Michaud v. France*, § 123).

Information passed on by a client to his lawyer and that might incriminate the client cannot be disclosed under the protection offered by Article 6 ECHR. But when the lawyer learns from that information that there might be a realistic and severe danger that cannot be avoided other than by divulging some information, such situation is an emergency where the professional rules adopted by lawyers themselves organise a disclosure that can justify overriding the general principle of the legal professional privilege (consideration B.33). The Belgian Constitutional Court refers here to the decision of the ECtHR (ECtHR, 16 February 2010, *V.D. v. Romania*, § 112) to consider that the objective to protect vulnerable victims does not lift the condition of proportionality with an effective exercise of the right of defence.

A decision of the Belgian Constitutional Court of 6 December 2018 (Gw.H., n° 174/2018, 6 December 2018) annuls a criminal procedural law insofar as that law organised the hacking by investigators of information systems from a distance, without need to notify the concerned

parties, but did not organise exceptions for information systems in practices of medical doctors or offices of lawyers.

The Belgian Constitutional Court underlined, to that end, that the legal professional privilege is necessary to protect the fundamental right of privacy of those who confide their secrets to these professionals (Article 8 ECHR).

The Belgian Constitutional Court has thus ruled that private information passed on to these two professions qualifies for a higher level of protection under that law. For lawyers, there is also the more specific protection of Article 6 ECHR, since the legal professional privilege guarantees the fundamental right of defence of the person who confides in them.

This case law links the legal professional privilege of lawyers to the fundamental rights under Articles 6 and 8 ECHR, that have their respective counterparts under the Articles 47, 48 and 49 and 7 and 8 of the Charter**. Belgium must observe these fundamental rights when transposing DAC6 and can thus, *on principle,* not consider forcing clients of Belgian lawyers to report the identity of the lawyer, the fact of the consultation or opinion or its content**.

33. Belgium's approach to rendering compatible DAC6 and the fundamental rights under the Charter

How could Belgium solve this inconsistency between the purpose of DAC6 and the fundamental rights under the Charter ?

On the one hand, DAC6 provides, under Article 8 ab (5), restrictions that Belgium must observe when organising the right to waiver under national law :

> "*Intermediaries may only be entitled to a waiver under the first subparagraph to the extent that they operate within the limits of the relevant national laws that define their professions.*"

Article 52 of the Charter provides, on the other hand, that restrictions on fundamental rights are possible insofar as these restrictions aim to protect higher values and do not go beyond that what is needed.

Given the alignment of the case law of the Belgian Constitutional Court, the CJEU and the ECtHR, the higher level of protection of the legal professional privilege can, under Belgian law, apply only to lawyers insofar as they act in that quality.

Under Belgian law, there can, therefore, be a question of abandoning the principle of the higher level of protection only when the lawyer himself acts in implementing or managing the arrangement as do other economical agents. In those cases, it can be argued that the right to waiver may not apply (see above the notion of passive and active opinions when discussing sanctions under DAC6).

Articles 7, 8, 47, 48 and 49 of the Charter (Articles 6 (3) and 8 ECHR) compare a transposition of the obligations required under DAC6 to other fields of taxation. The protected values are higher than the personal interests of the client or the intermediary but are indissociably intertwined with the functioning of the rule of law. This is an objective reason not to submit lawyers to an obligation to report to either to an authority or to another intermediary.

34. Reporting to or by other intermediaries

Reporting to other intermediaries violates, in itself, the legal professional privilege of lawyers and is therefore inconsistent with the Charter. The other intermediary cannot be forced to report in the only competent Member State for the lawyer-intermediary who used his right to waiver the identity, the fact of the rendered opinion or its content.

Notifying the client that he has become subject to an obligation to report cannot result in the client, when reporting the arrangement to the only competent Member State, divulging the lawyer-intermediary that used his right to waiver his identity, the fact of the rendered opinion nor its content.

The relevant taxpayer or the other intermediaries that report instead of the lawyer-intermediary can only be forced to do so in the only competent Member State for the lawyer-intermediary in compliance with the national law that organises the legal professional privilege and insofar as that arrangement or that phase of the arrangement has not been reported in another Member State.

35. Reporting illegal practices and reporting legal practices.

The Belgian author S. SCARNA considered the effects of the right to waiver under DAC6[37]. She finds that lawyers that are only requested to provide an opinion on an arrangement after its designing and implementation – for instance as a second opinion - cannot be obligated to report (n° 29, p. 6 of her article). In that case there is no cause to use the right to waiver since there is no reporting obligation.

Her article stresses the effects of Articles 6 and 8 ECHR in the dealings between clients and lawyers (correspondence included) and cites Belgian case law and doctrine that lead to the conclusion of the essential role of a lawyer for the functioning of the rule of law in a democratic society (n° 36 – 37, p. 7 – 8 of her article).

This author further considers the transposition of the obligation for lawyers to divulge under the directives that relate to money-laundering[38] when they receive indications of *illegal practices* outside the context of a pending litigation.

She concludes her article with a question: if arrangements are *legal* how can an obligation to report under DAC6 have a proportionate justification under the criteria of Articles 6 and 8 ECHR ?

The directives on money-laundering target practitioners of legal professions when they take part in financial or corporate transactions, including tax advice they render on those transactions as other economic agents.

Is it possible that transactions or opinions that must be reported under money-laundering rules can fall under a right to waiver in DAC6?

This question requires first examining what needs to be reported under money-laundering rules.

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[37] S.SCARNA, 'La directive 2018/822/UE du Conseil du 25 mai 2018 ou "DAC6". L'obligation de déclaration des conseils fiscaux potentiellement agressifs.', *Le pli juridique*, n° 46, 2018/4, p. 3 – 10).

[38] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, *JO*, 5 June 2015, L 141/73, see in particular consideration (9).

Information retrieved before, during or after a judicial procedure, or when determining the legal position of a client, cannot be reported unless the concerned party knows that the legal opinion will be used for the purposes of money-laundering or financing terrorism.

This requirement of knowledge for an *illegal* use lifts the quality of lawyer for the person that knowingly rendered that opinion. Through that knowledge and rendered opinion that person becomes an accessory to the crime of money-laundering (see the definition under Article 2, 4° of the Belgian law of 8 September 2017 on the prevention of money-laundering and terrorism financing and limitation of the use of cash[39]).

According to Article 5 § 1, 28° of this law, the obligation to report arises for lawyers when they assist their client in designing or implementing transactions listed as qualified financial operations in section a) of that article or in any financial or real estate transactions in general. In those cases, they must identity their clients before intervening (Article 30) and when not compliant with information requirements, they must abstain from intervening (Article 33). They must request proof of the origin of the funds used and remain constantly vigilant and report if need be to the Chairman of their Bar. The Chairman will decide whether to pass on such information. Such transferred information must then be unfiltered (Article 52). Article 53 of this law is an almost literal copy of the wording of consideration (9) of the directive on money-laundering that relates to the exemption of reporting for information received in the context of a judicial procedure.

Even legal cross-border arrangements that do not aim at a tax advantage fall under this obligation to report under the directive on money-laundering when these criteria are met.

36. The right to privacy and legal proceedings

The Belgian author D. GARABEDIAN also points out that the obligation for Member States to uphold the ECHR when transposing the directive on money-laundering is relevant for the transposing of DAC6[40]. He refers to a decision of 26 June 2007 of the ECtHR in the case OBFG v. Belgium[41]. Under recital 32, this decision finds that lawyers cannot function under the rule of law to guarantee the rights of defence of their clients under Article 6 ECHR if they could be forced to divulge to an authority information received during legal consultations.

In that decision, the ECtHR finds that if it is proportionate under Article 2 a (5) of the Directive 91/308 to limit the obligation for lawyers to report when they assist their clients in designing or executing contracts as defined under Article 2 a (5) (a). They cannot be obliged to report, in general, *opinions outside a judicial context* since such opinions could have the effect of preventing a trial. In this decision, Article 8 ECHR was not taken into consideration.

Under this criterion, one might ask how to determine whether the content of the rendered opinion may have the effect of avoiding a trial ? That question does not require an answer since **Article 8 ECHR is already violated by the compulsory reporting obligation of the content of opinions rendered with a presumed legal intent**.

Article 8 (2) ECHR requires that restrictions to the right of privacy and the confidentiality of correspondence always meet the following conditions :

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[39] Wet van 18 september 2017 met betrekking tot de voorkoming van de witwas van kapitalen en de financiering van terrorisme en ter beperking van het gebruik van contanten, *BS*, 6 October 2017.

[40] D. GARABEDIAN, *The implementation of DAC 6 in conjunction with legal privilege issues*., contribution to the seminar of ERA of 16 May 2019.

[41] ECtHR, 26 June 2007, Grand Chamber, OBFG v. Belgium.

1° be in accordance with the law;
2° be necessary in a democratic society in the interest of national security, public safety or *the economic well-being of the country*, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

When broadly interpreted, '*the economic wellbeing of the country*' can be understood as the need for a budgetary balance by assuring sufficient effective income, and could offer a cause that can justify, under Article 8 ECHR, the obligations under DAC6.

However, when testing the criterion of the *necessity* of a law that restricts a right protected under Article 8 ECHR, the ECtHR considered (§ 126) (*Lastly, and above all, two factors are decisive in the eyes of the Court in assessing the proportionality of the interference*.) that the obligation to report for lawyers outside a judicial context was proportionate since a double condition had been met under French law (ECtHR, 6 December 2012, *Michaud v. France*, considerations §§ 123 – 130) :

- Lawyers who act in specific qualities or transactions (§ 127) and receive in this way knowledge of *suspicious dealings* that are indications of illegal activities as targeted by the Directive (§ 123) (..*Its importance should also be weighed against that attached by the Member States to combating the laundering of the proceeds of crime, which are likely to be used to finance criminal activities linked to drug trafficking, for example, or international terrorism*..);
- To report them to the Chairman of their Bar (§ 129), not directly to an authority.

On the first decisive condition for the ECtHR, there is a contradiction with the requirement of necessity; DAC6 targets the obligation to report opinions that have no illegal intent – until proven otherwise – of financing or enhancing in any way criminal activities. To the contrary, DAC6 aims to interfere in the *legal* positions of citizens and authorities seeking the least taxed option. This does not constitute a criminal intent. Such intent is on the contrary consistent with Article 170 of the Belgian Constitution that requires a law in order to tax citizens (the rule of law).

As pointed out by Professor Stöber, Article 16 of the Charter protects the fundamental right of the freedom to conduct business as recognized under EU law and national law. This freedom includes the right for an enterprise to decide over its financial assets. According to this author, the right to prefer the least taxed option is also protected (with reference to CJEU, 21 February 2006, case C-255/02, Halifax,ECLI:EU:C:2006:121 and CJEU, 27 March 2014, case C-314/12, UPC Telekabel Wien, ECLI:EU:C:2014:192). Under that interpretation, the purpose of DAC6 is so also incompatible with this fundamental right.

As stated earlier, one can also question whether DAC6 is necessary under the criteria of both Articles 8 (2) ECHR and 52 of the Charter, given the wide application of anti-abuse measures under EU and national law to address abuse of national tax law.

On the second decisive criterion for the ECtHR there is also an inconsistency (§ 129); the ECtHR has found that the double layer of both a lawyer and the Chairman of their Bar (..*It can be considered that at this stage, when a lawyer shares information with a fellow professional who is not only subject to the same rules of conduct but also elected by his or her peers to uphold them, professional privilege has not been breached*..) was sufficient in a context where France insisted that if there are no presumptions of money-laundering or no legal obligations to report, this double layer avoids unnecessary restrictions. **Insofar as DAC6 requires an obligation for a lawyer to report directly to an authority, this criterion is violated**.

37. Division of competence between Member States and the EU

The above decision of the ECtHR on transposing the obligation to notify money-laundering creates a **precedent** for the transposition of DAC 6 where it relates to lawyers. This transposition is inconsistent with the requirement of necessity of Article 8 (2) ECHR and 52 of the Charter and can, therefore, only be transposed in a consistent way if the client is only obliged to report the phase of the arrangement in which the rendered opinion triggered reporting, without reporting the identity of the lawyer, the fact nor the content of the rendered opinion.

It has been pointed out that DAC6 poses issues regarding the division of competence between the Member States and the EU since concerns for the budgetary balance of Member States is not an objective under Articles 5 and 26(2) TFEU.

Member States can choose to use the principles under DAC6 for purely domestic arrangements. This raises questions of consistency under the principles of EU law (restrictions on freedoms and fundamental rights), the ECHR and the constitution of that Member State. Many issues have been raised as to the proportionality of Hallmarks under the ECHR and the principle of subsidiarity under the Treaties.

For a Member State with a limited geographical size, an unintended effect could occur when applying the principles of DAC6 on purely domestic arrangements. The relevant taxpayer could contract the services of a service provider just over the frontier for a purely domestic arrangement that, by definition, has no cross-border element. Such contractor would not fall under the obligation to report where national intermediaries would be. This could be an important distortion of competition for national service providers and may discourage foreign service providers to establish themselves in that Member State, thereby distorting the internal market from the perspective of EU law. Poland, though large geographically, has transposed the directive with a requirement that domestic arrangements must be made in all fields of taxation.

38. Directive on money-laundering and DAC6

Insofar as the directive on money-laundering seeks to fight or prevent certain crimes, a restriction on fundamental rights can be allowed under the case law of the Belgian Constitutional Court, the CJEU and ECtHR. DAC6 goes further in seeking to prevent a tax advantage that is legal but considered as unintended or unwanted under national tax policies.

Where DAC6 interferes with the legal professional privilege of lawyers, fundamental elements of the rule of law are concerned, such as the confidentiality of consultations with lawyers and the effective exercise of the rights of defence. Only a *willing* disclosure by the client, *knowing* these documents are protected as confidential, could possibly justify a restriction on these fundamental rights.

An opinion that must be reported under the directive on money-laundering is not necessarily to be reported under DAC6. The legal professional privilege of a Belgian lawyer, acting within the scope of this profession, cannot be restricted under DAC6 without violation of the Charter. This is the higher value the Member State must uphold when transposing (see the earlier cited decision *Melloni* of the CJEU that applied Article 53 of the Charter*)*.

39. Conclusions.

- Obligation to notify

A transposition is disproportionate if it extends the obligations to notify as intermediaries of type II to service providers (lawyers or others) that provide services to service providers (lawyers or others) or contractors of relevant taxpayers in the arrangement. Service providers (lawyers or others) to contractors of relevant taxpayers in the arrangement are the only eligible intermediaries of type II and they require clear rules for the presumption of having acquired sufficient knowledge on the arrangement to trigger for them an obligation to notify.

The obligation for a client-taxpayer or a client-intermediary to notify both the fact of the opinion and its content when rendered by a lawyer acting in that capacity violates the Articles 7, 8, 47, 48 and 49 of the Charter. The objectives of DAC6 cannot justify a restriction of these fundamental freedoms under Article 52 of the Charter nor Article 8(2) of the ECHR.

Neither the obligation for the lawyer, under DAC6, to notify to others that he invokes the legal professional privilege to pass on the obligation to notify to his client, nor the subsequent notification by his client of the fact of the opinion and its content is compliant with primary EU law.

- Legal professional privilege

When transposing DAC6, the Member States can determine when the lawyer no longer acts within the limits of his profession as organised under the national law. In that case, the exemption of the legal professional privilege under DAC6 no longer applies and the obligation to notify must be applied as organised for a regular intermediary. This includes the rules to determine the competence of Member States.

Given the nature and purpose of the protection of the legal professional privilege, a lawyer should refrain from acting himself as an economic agent in the implementation or the follow-up of the arrangement when he wishes to invoke the exemption of legal professional privilege.

The transposition of DAC6 can be made in compliance with the protected fundamental rights under the Charter when the obligation to notify is limited to the description of that phase of the arrangement that the rendered opinion relates to. The Member State cannot force divulging these opinions nor divulging the identity of the lawyer who rendered it when the legal professional privilege applies.

Lawyers who limit their actions to mere opinions can never fall themselves under the obligation to notify. Such 'passive opinions' should give no cause to report at all. It is important to clarify that a 'passive' opinion relates to an opinion with a passive intent by not elaborating a cross-border construction with other Member States with a tax benefit as the *purpose*, or on how to maintain such a tax benefit for constructions that have been implemented after 24th June 2018. Under the proposed definition, the first phase requires that the rendered opinion must '*list all or the main actions that will lead to a tax benefit when implemented*' in order to become an 'active opinion' that may trigger both the obligation to report and the subsequent right to waiver.

- DAC6 violates in multiple sections the protection of the legal professional privilege of lawyers

To prohibit imposing, on the client-taxpayer or the client-intermediary who cannot himself invoke the legal professional privilege, the obligation to notify the fact and the content of the documents or opinions rendered by a lawyer, does not lift the obligation for that client to notify the arrangement when designed, made available, implemented or followed-up, when that effect occurs for that phase of the arrangement by the rendered opinion of the lawyer.

The effectiveness of the protection of the legal professional privilege of lawyers is deemed crucial for the rule of law in the joint case law of both the CJEU and the ECHR. This requires modification to multiple sections of DAC6 :

(1) The lawyer who provides services to contractors of relevant taxpayers that are limited to rendering opinions cannot fall under the obligation to notify himself. Only the client-contractor, who cannot invoke the legal professional privilege himself or has rendered 'active' opinions to a taxpayer, can be held to notify a phase of the arrangement (but not the 'active' opinion itself). This rule avoids conflicts of competence for organising the obligation to notify and the right to waiver ; only the Member State of the lawyer-contractor can exert this competence for all clients of the lawyer.

(2) The client who notifies instead of this lawyer-contractor must do so in the Member State where that lawyer-contractor is registered with his Bar Association (that of the main-registration when multiple registrations apply).

(3) The content of that notification can only be organized under the national law of the Member State that organizes the law of that Bar Association.

(4) The client can only be forced to notify when, by the action rendered by the lawyer-contractor, a phase of the construction is triggered (listing all or the main actions to obtain the tax benefit => drafting documents to modify the legal / tax position => the signing of those documents / filing reports => to manage, preserve / alter such tax position).

(5) When notifying a phase, the client-participant / client-contractor of a participant can never be forced to reveal the identity of the consulted lawyer nor the content of the rendered opinion.

Brussels, 22 November 2019.