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DAC6 Directive and Attorneys' Professional Secrecy: Analysis of the Opinion of AG Rantos in Case C-694/20.

A Critical Analysis under European, French and Belgian Law[1]

Part I : The incompatibility with European, French and Belgian Law of precluding the protection under Article 47 of the Charter for legal counsel given by attorneys.

Introduction

The opinion of the Advocate General Athanasios Rantos was highly anticipated. Indeed, it was the first time that a representative of the Court of Justice was called upon to adjudicate on questions of professional legal privilege linked to the transposition of the DAC6 Directive[2]. The Directive leaves it to the Member States to deal with the issue of professional secrecy or the professional legal privilege of attorneys. It is thus possible to exempt them from the obligation to report a cross-border arrangement where such a reporting would be contrary to the professional legal privilege applicable under the national law of the Member State[3] of the attorney. The Member State shall then take the necessary measures to ensure that the attorney is required to notify any other intermediary, or in the absence of such an intermediary the taxpayer himself, of the reporting obligation incumbent on him.

Case C-694/20, which is the subject of the opinion, concerns the implementation of DAC6 in the Belgian Flemish region law, which, unlike the French regulation, does not impose a reporting obligation on the attorney himself, but requires him to inform other intermediaries of the reporting obligations incumbent on them. Against this background, the Belgian Constitutional Court referred a question to the Court of Justice for a preliminary ruling on whether or not the obligation imposed on attorneys to communicate information about their clients to third parties who are not their clients constitutes an "interference" with the attorney's professional legal privilege that is not in conformity with the Treaties. The Advocate General – no doubt seeking a compromise solution – is of the opinion that the Court should rule that the obligation on the attorney to inform other intermediaries does not infringe the provisions of Article 47 of the Charter of Fundamental Rights (fair trial) and "*does not infringe the right to respect for private life guaranteed by Article 7 of the Charter of Fundamental Rights, provided that the name of that [attorney] is not disclosed to the tax authorities in the context of the fulfilment of the reporting obligation under Article 8ab…*" of the Directive[4].

On 15 September 2022 the Belgian Constitutional Court rendered it's ruling 103/2022 on the merits of four appeals formed against the Belgian Federal transposition of DAC 6[5]. Some of the provisions of the federal law were annulled. For some provisions, the Belgian Constitution Court decided to wait for the answer of the ECJ in the case C-694/20 and to submit five new preliminary questions to the ECJ[6]. The fourth new preliminary question relates to the professional privilege of other intermediaries then attorneys. It will be briefly commented.

Preliminary Remarks

1. From the outset, there are strong reservations about the solution proposed by the Advocate General. Indeed, it is hard to see how this solution can be implemented in practice, or who would be the guarantor. When the other intermediaries – non-attorneys – file their reporting, how can we imagine that in practice they will be prohibited from referring to the attorney who informed them of the principle and content of what must be communicated to the revenue service, anxious as they will be not to take any responsibility for the principle or content of the reporting? And what would be the sanctions if the intermediaries nevertheless disclosed the name of the attorney to the revenue service in violation of the latter's duty under the professional legal privilege? All this deserves clarification.

2. The regulation requiring the attorney to transmit to third parties any information covered by the professional legal privilege places the attorney outside his professional ethical regulations ("deontology"). The attorney exercises an independent liberal profession. The attorney works for clients to whom the attorney owes a "duty to advise". The letter of engagement specifies the nature of the diligence to be observed. In connection with this, it defines the scope of the professional legal privilege, which is absolute. Conversely, in this case it is the law that requires the attorney to transmit information to third parties to whom the attorney is not bound by any duty to advise.

The attorney thus becomes a "public agent" rendering a service to the state, providing unpaid services. This "dark transfiguration" of the attorney must be emphasised. It also raises questions of civil liability: what if the attorney makes an error of analysis and sees reportable patterns where there are none, or fails to see them where the attorney should have seen them? What is the nature and extent of an attorney's civil liability if the attorney makes a mistake in assessing the reality of a scheme or in qualifying it in terms of the Directive's hallmarks? One thinks in particular of the main benefit criteria, which refer to a subjective assessment of the principal advantage that the taxpayer intends to derive from an arrangement and which only the taxpayer can assess. All of this shows the precariousness of the regulation.

3. At the hearing in the case C-694/20 that took place on 25 January 2022, the Commission recalled that the objective of the directive is indeed to create a dissuasive mechanism, as the multiplication of reporting obligations and the resulting conflicts of interest should lead stakeholders to renounce such schemes. However, this stated objective refers to the more general question of civil liberties and the role of the attorney in a state governed by the rule of law. What is the freedom of thought and enterprise of an attorney in a liberal democratic society? What are the limits?

Traditionally, an attorney is recognised as having total freedom of thought and action (without being allowed to commit an offence as a perpetrator or accomplice, in which case the attorney can be prosecuted and the professional legal privilege is no longer enforceable). That being said, and outside the context of an offence, can the attorney be forced to organise his/her thoughts "in the interest of the State"? In a liberal state, the rules and the division of roles are more demanding. The legislator and the government set the standard; the administration applies it as well as the attorney whose analysis may differ from that of the administration, all under the control of the judiciary.

Attorneys remember the lessons they were given in law school, where they were taught to differentiate between "law", "equity", "justice", "morality", "ethics", etc., which are not superimposed on each other. The role of the attorney in a liberal society is to apply the law

without seeking to confuse law, morality, equity, justice, etc.[7] One example is the statute of limitation, a legal rule regulating the social organisation and that is binding on all, regardless of the judgment one may make on the consequences attached to it in terms of morality, equity, ethics, justice, etc., whereby one thinks in particular of the victims. As one colleague said[8] : "*[t]he attorney has only one logic: that of defending his client by all the legal means at his disposal. It is a permanent struggle between the general interest, the public interest and the interest of the individual, which is the only interest that the attorney defends. The attorney finds himself in a permanent contradiction: respecting the law and defending his client.*".

4. French attorneys are opposed to the stubborn desire of the public authorities to make them public agents required to comply with reporting obligations on behalf of and in the interest of the state and which could create a conflict of interest between them and their clients. Since offences, the taxpayer can perfectly fulfil the reporting obligation himself so that the objectives of the Directive are achieved.

A comparison can be made with the transfer pricing policy of a corporation, which also has an impact on the relevant states' rights to tax. This tax policy leads the taxpayer to file sophisticated (so-called contemporaneous) documentation with the help of attorneys and economists. The fact that attorneys are involved in the design and implementation of the transfer pricing policy does not make them reporting agents, as it is the corporations that make their own tax management decisions, with the attorneys only providing technical assistance.

The Notification to Other Intermediaries and the Violation of Article 47 of the Charter of Fundamental Rights

The Advocate General concludes that the notification by the attorney to other intermediaries of the obligation to transmit information does not infringe Article 47 of the Charter since this obligation is not part of a "judicial procedure" and, therefore, falls outside the scope of this provision.[9] From the perspective of European Union law, this approach by AG Rantos raises several issues.

1. Firstly, there is the very purpose of answering a question for a preliminary ruling. When the Court is called upon to provide a national court with useful answers, it is competent to give indications drawn from the file of the main proceedings and from the observations submitted to it, which may enable the referring court to give its ruling[10].

In case C-694/20, the Belgian Constitutional Court clearly explained in its referral decision the extent of the professional legal privilege of attorneys according to the Belgian legal tradition (free translation)[11]:

> *"B.5.5. The professional legal privilege of attorneys is an essential component of the right of respect for private life and the right to a fair trial.*
>
> *The main purpose of the professional legal privilege is to protect the fundamental right of the person who confides in the attorney, sometimes in the most intimate aspects of his or her life, to respect that privacy. Furthermore, the effectiveness of the rights of defence of any person subject to trial necessarily presupposes that a relationship of trust can be established between him and the attorney who advises and defends him. This necessary relationship of trust can only be established and maintained if the person subject to trial has a guarantee that what he or she confides in his or her attorney will not be disclosed by the latter. It follows that the rule*

of professional legal privilege imposed on the attorney is a fundamental element of the rights of the defence.
As the Court of Cassation has held, "the professional legal privilege by which members of the bar are bound is based on the need to ensure complete security for those who confide in them" (Cass., 13 July 2010, Pas., 2010, no. 480; see also Cass., 9 June 2004, Pas., 2004, no. 313).
Even if it is "not inviolable", the attorney's professional legal privilege therefore constitutes "one of the fundamental principles on which the organisation of justice in a democratic society is based" (ECHR, 6 December 2012, Michaud v. France, § 123).
(...)
B.6 (...) The Court has held that information known to an attorney in the course of the exercise of the essential activities of his profession, namely the defence or representation of the client in court and legal advice, even outside any legal proceedings, remains covered by the professional legal privilege and cannot therefore be brought to the attention of the authorities and that it is only when the attorney carries out an activity that goes beyond his specific task of defending or representing the client in court and providing legal advice that he may be subject to the obligation to communicate to the authorities the information of which he has knowledge."

According to this concept under Belgian law, the professional legal privilege of the attorney does not make any distinction between rendering legal advice and defending a client in court. In both instances, the rights of the defence require a relationship of trust, even in the presence of cross border arrangements[12] .

With this reasoning, the Constitutional Court has complied with the requirements of Article 94 of the Rules of Procedure of the Court of Justice to set out the reasons that led the referring court to request the interpretation of certain provisions of European Union law, as well as the link that it establishes between those provisions and the national legislation applicable to the main proceedings[13].

The Advocate General, for his part, makes no mention of this reasoning or of the implications for the referring court of his opinion that Article 47 of the Charter does not apply. In sum, this opinion, if adopted and confirmed by the European Court of Justice, would place the Belgian Constitutional Court before the same conflict between its constitutional law and the measure imposed by the Directive. However, the Court of Justice is competent to provide the referring court with all the elements of interpretation under European Union law that enable it to assess such conformity[14].

Faced with such an extended effect of the attorney's professional legal privilege under national law, it seems rather contradictory that in order "to arrive at useful answers for the file in the main proceedings and the observations submitted", the concept of the professional legal privilege under the national law of the referring court is to be entirely disregarded. Where this approach also leads to the conclusion that the professional legal privilege is limited to activities that are directly related to litigation for the purposes of Article 47 of the Charter, the application of the resulting reporting obligation is irreconcilable with national law. This opinion is therefore contrary to the purpose of judicial referrals in that it cannot be useful to the referring court in resolving the dispute brought before it.

French attorneys do not recognise themselves in the flimsy approach to "fair trial". Indeed, it does not seem possible to divide the attorney's activity between "advice" and "litigation", as if they were extrinsic and heterogeneous worlds. The advisory activity, apart from the fact that it leads to the collection of numerous confidences from the client, constitutes the basis of pre-litigation management and judicial policy decisions that are taken by a corporation after a detailed assessment of the risk of legal dispute and litigation with the help of attorneys. All legal management decisions taken in the context of the advisory activity will therefore very directly

condition the quality and level of risk attached to any future litigation.

2. This approach to a “dual secrecy” is also contrary to the professional regulations which led France to merge the professions of “legal counsel” and “attorney” in 1990, precisely in order to have one and the same profession capable of assuming all the functions of the attorney, without a bifurcation between advice and litigation. Gone is the “litigation attorney” who is alien to the world of business and all legal management decisions; gone is the “legal adviser” who, after having built up a legal and judicial policy over the years, finds himself cut off from the possibility of filing briefs and pleading the case in court.

3. It can be assumed that an attorney who has made a declaration relating to a client would find himself automatically excluded from any future litigation for lack of independence.

It is therefore his freedom of enterprise and of exercising his profession that are directly at stake as a result of the declaratory obligation placed on the attorney, and it is precisely because the attorney will no longer be able to assist his client that the question of “fair trial” and “equality of arms” is touched upon. The fact that the client would have to separate from his attorney who would no longer be independent for the litigation phase, while the revenue service could retain the same attorney, would constitute a breach of the fair trial and equality of arms principles.

4. Finally, the dismissal by the Advocate General of Article 47 of the Charter for the remainder of the opinion is surprising in the light of the judgments of the Court of Justice of 6 October 2015 and 6 October 2020[15].

As observed by First Advocate General Szpunar[16], in these two judgments the forced disclosure of information to a revenue service gave rise to a combined examination of Articles 7, 8 and 47 of the Charter. In its judgment of 6 October 2020, the Court of Justice stated that, in a context of forced disclosure, the examination of the protection offered by Article 47 of the Charter cannot be dissociated from the protection offered by Articles 7 and 8 of the Charter. Since the purpose of the obligation to report is to result in mandatory reporting by either the client or another intermediary, a combined review of these three sections seems logical.

This final remark strengthens the conclusion that there are sound arguments against the preclusion of Article 47 of the Carter by secondary Union law in the presence of national law that offers that protection to the activities by attorneys of rendering legal counsel outside litigation. The objectives of the DAC 6 Directive and the obligations laid on attorneys must therefore be examined under the requirements of Articles 47 and 52 of the Charter.

In the second part we focus on European Law for assessing DAC 6 obligations under the requirements of both Articles 47 and 52 of the Charter and in providing further comments on how the Opinion considered the restrictions on legal counsel by attorneys by the DAC 6 Directive regarding cross-border tax arrangements under both the requirements of Articles 7 and 52 of the Charter.

Part II : The legal professional privilege in the common constitutional tradition and the requirements under Article 52 of the Charter for restricting fundamental rights.

Introduction

The first part found that under European, Belgian and French law the protection of Article 47 of the Charter cannot be precluded from an exam under Article 52 of the Charter for activities by attorneys that relate to rendering legal counsel outside the context of litigation. This also regarding cross-border tax arrangements. The second part looks into the protection of the legal professional privilege of attorneys under Article 47 of the Charter against the restrictions of that fundamental right by the DAC 6 Directive. It provides also further comments on the assessment of the Opinion on the protection under Article 7 of the Charter.

Lack of Examination of DAC6 from the Perspective of European Union Law Itself

In its judgment of 11 March 2010[17], the Court of Justice reiterated its competence to give preliminary rulings in the specific case where the national law of a Member State refers to the provisions of a directive with a view to determining the application of the relevant rule to a purely internal situation in that State. In such a case, there is a clear Community interest in ensuring that, to avoid future divergences of interpretation, the provisions of Community law at stake are given a uniform interpretation, regardless of the conditions in which they are to be applied.

In the present case, it is the obligation for intermediaries bound by professional legal privilege – which is not a harmonised concept – to notify other intermediaries that is enshrined in the Directive that poses a problem for attorneys.

In the ruling of 15 September 2022, the Belgian Constitutional court raised a fourth preliminary question that relates to the preliminary question that was posed to the ECJ. It found when examining the merits of the appeal formed by the Institute of Tax Advisors and Accountants that under Belgian national law intermediaries – other than attorneys – that have a professional privilege that is upheld by criminal sanctions when violated, may require protection under Article 7 of the Charter against the obligation to report or notify to somebody else than their client information that they received.

Where the three other appeals formed by organisations that represent attorneys raised issues under the obligations of DAC 6 for attorneys with regard to their legal professional privilege, the Belgian Constitutional court confirmed once again the broad protection under both Articles 7 and 47 of the Charter for all actions undertaken in that quality but decided to wait for the answer of the ECJ on the preliminary question in the case C-694/20.
This clear distinction that is so made under Belgian national law between intermediaries that are subject to DAC 6 obligations and the difference in protection offered by the Charter they can claim against these obligations is an example of the importance of the national law for answering preliminary questions in fields that are not harmonised.

Uniform Interpretation

The aspect of uniform interpretation in the response to be given for the whole of the European Union is also rather thorny.

1. A first element concerns the introduction of the same general restriction on all types of professional privileges. Indeed, DAC 6 was adopted on the basis of Article 115 TFEU. According to Article 2(5) TFEU, apart from measures having a direct effect on the establishment or functioning of the internal market, such a directive cannot go beyond mere administrative coordination as referred to in Article 6(g) TFEU.

It is clear that imposing the same restriction on all holders of professional privileges in all Member States would go far beyond mere administrative coordination. It would therefore have been useful if the Advocate General had examined whether it concerns a measure that has a direct effect on the internal market. The general aim of the Directive to promote the internal market "through all the measures taken" is no justification for this particular measure.

2. A second element in relation to a uniform interpretation concerns attorneys in particular and the distinction to be made in relation to the protection offered by Article 47 of the Charter to their professional legal privilege and the professional legal privilege of other professions according to common constitutional traditions[18]. Indeed, Article 6(3) TEU refers to the protection of fundamental rights, resulting from the common constitutional traditions of the Member States. Article 52(4) of the Charter also requires a combined reading. A combined interpretation was therefore necessary. However, the Advocate General's opinion is silent on this point.

Several judgments of the Court of Justice have held that attorney-client privilege is a right protected by Union law outside the context of a dispute.

- For example, in relation to the fundamental freedom of establishment, Member States have argued that there cannot be freedom of establishment for the profession of attorneys because their profession is too closely linked to the proper functioning of the courts. The Reyners judgment of 21 June 1974[19] concluded that, notwithstanding the differences in the organisation of the legal profession from one Member State to another, the most typical activities of the legal profession are, on the one hand, legal advice and assistance and, on the other hand, the representation and defence of parties in court. Since the function of an attorney is broader than the mere representation of a client in court, the exercise of the freedom of establishment was granted to the attorney. However, this freedom must be exercised in compliance with both the legal rules and the ethical (or deontological) rules governing the profession in the other Member State.

- In its judgment of 18 May 1982[20], the Court of Justice stated that respect for confidentiality between an attorney and his client is a matter of "the principles and concepts common to the laws" of the Member States. It is precisely this notion of confidentiality that is found in the reasoning on the conflict between norms given by the Belgian Constitutional Court.

- In a case concerning competition law, the European Commission argued that an opinion given by an attorney on a commercial contract could not be protected by the professional legal privilege. This argument is akin to the one used by AG Rantos in his opinion to exclude the application of Article 47 of the Charter. The General Court referred in its decision of 12 December 2018[21] to the above-mentioned judgment of the Court of Justice of 18 May 1982 and other decisions of the General Court in order to decide that also attorneys' advice made at a time when there was no contentious context are protected. The client cannot be compelled to disclose such advice later. Confidentiality serves his rights of defence which may arise later.

The referral decision, which explicitly confirms the protection of confidentiality by means of professional privilege for all consultancy activities of the attorney, also in the case of cross-border arrangements, is therefore supported by a common constitutional tradition.

According to this tradition, the distinction made in the opinion based on the context of the attorney's intervention in order to confer the protection of Article 47 of the Charter is not relevant. The need to ensure confidentiality between the consultations (written or oral legal advice) of an attorney to his client is inherent in Article 47 of the Charter. Modifying it according to the context of the consultation (e.g., a non-fraudulent and non-abusive aggressive cross-border tax arrangement) arguably lacks the necessary proportionate justification because the need for confidentiality exists in all contexts.

Moreover, a national tradition also includes the national deontology (ethical rules) of the attorney. The case law of the Court of Justice has long recognised that the professional rules that attorneys impose on themselves, their "deontology", is inseparably linked to their professional legal privilege[22]. This set of national ethical rules has also developed a common European core through the rules issued by the CCBE[23]. The national legal tradition to which the directive refers thus includes both a national and a supranational "deontology". The AG's opinion does not take these into consideration.

Therefore, for purposes of (i) providing a useful answer to resolve the dispute and (ii) the uniform interpretation of the Directive in view of the protection by Article 47 of the Charter in light of common constitutional traditions, that protection is at risk when an obligation to notify or report is imposed on an attorney in relation to advice he gives or data he obtains for that purpose. See also further below.

Fundamental Rights (Freedom of Establishment) – Article 52 and 47 of the Charter

There will be a subsequent violation if the measure infringes the core of the fundamental right or does not meet the requirements of Article 52 of the Charter. Unfortunately, the AG's opinion does not address these two aspects.

The Advocate General stated at the hearing of 25 January 2022 before the Grand Chamber the institutions and the Belgian State, that the purpose of the directive in introducing this notification requirement is to discourage tax attorneys from giving cross-border advice. This is a rather curious objective in the light of the requirements of Article 52 of the Charter.

In the debate on the requirements of Article 52 of the Charter – which also requires consideration of the effect of the measure on the rights and freedoms of other persons – the requirement of strict necessity may be problematic, as well as the effect that the tax measure has in relation to other areas of primary Union law such as fundamental freedoms. From the perspective of the freedom of establishment, the judgment of 12 June 2014 of the Court of Justice[24] requires that any restriction of this fundamental freedom, in this instance resulting from a tax measure, must be justified by a specific objective of combating artificial arrangements lacking economic reality and whose purpose is to evade the tax normally due. Both the freedom of the client and that of the attorney are therefore affected when the attorney's reporting concern cross-border transactions that have no artificial element. Indeed, none of the hallmarks listed in the Annex to DAC6 refer to any "artificial element" as a requirement for an arrangement to be within the scope of DAC6.

Intermediary Conclusion

A uniform interpretation with respect to fundamental rights, applied in the light of common constitutional traditions, or with respect to the competences of the Union and with respect to the national tradition of the referring court in order to give it a useful answer, requires that the legal profession be exempted from any obligation towards a person other than their client.

Article 7 of the Charter of Fundamental Rights of the European Union (Right to Privacy)

In his introduction, the Advocate General refers to the Michaud judgment[25] to point out that the protection of the attorney-client privilege under Article 8 of the ECHR does not cover all of the attorney's activities.

However, the analysis of the Michaud judgment should have led the Advocate General to the exact opposite conclusion.

Indeed, what Advocate General Rantos fails to mention is that the major difference between the anti-money laundering directives and DAC6 is that in the fight against money laundering, one is prosecuting offences or crimes for which it is not possible to ask the accused to incriminate himself – for example, by means of some kind of reporting or declaration – which is prohibited by the 1789 Declaration of the Human Rights as well as by Article 6 of the ECHR. It is in this context that some professionals, and in particular attorneys, have been asked to assist in the form of a "suspicious transaction report". The limits thereof are well known: it puts both the attorney's legal advice and his litigation activities off limits. Conversely, suspicions arising in the course of activities of support for the implementation of an operation or transaction are still reportable.

In contrast, under DAC6 the attorney is not asked to establish a legal qualification of facts but to check the arrangement for the presence of specific elements listed by annex IV to the Directive that trigger a mandatory reporting obligation (the *hallmarks*). In doing so, the attorney makes a legal assessment that falls within the perimeter of his profession on the question of the presence of these hallmarks. It is not a question of reporting infringements but situations or *hallmarks* that reveal the hybrid nature of Member States' tax laws in order to enable them to rapidly amend their tax legislation and close any (perceived) loopholes.

For this reason, the taxpayer can perfectly well make the requested reporting himself without the prohibition of self-incrimination being an obstacle.

It is regrettable that this solution was not identified and did not impose itself on the Advocate General in his opinion on the grounds of the lack of necessity and proportionality of the interference with professional secrecy.

Following a similar pattern to that applied to exclude the application of Article 47 of the Charter, a division is made by the Advocate General according to the purpose and context of the attorney's intervention. Tailor-made arrangements are protected, marketable arrangements are not, in principle at the time of their design, because they do not require confidential data. But what happens if the attorney only gives advice to the designer of such an arrangement, which will often be the case in practice?

After having recognized that Article 7 of the Charter applies, the Advocate General quickly closes Pandora's box and notes that it would in any event be difficult to ignore the advisory role that the attorney may be called upon to play in the context of the legal assessment of a cross-border arrangement.

Is the Restriction of Article 7 of the Charter Justified, Necessary and Proportionate?

The Advocate General then reconsiders and finds that by informing the third-party intermediary of the exemption from the obligation to report and of the obligations on the other intermediaries, the attorney necessarily shares with the latter his assessment of whether the arrangement does indeed contain the characteristics (described in the hallmarks listed in the Annex to the Directive – Annex IV of the consolidated DAC directive).

However, as the Advocate General recognises, this assessment is the result of an "analysis of the facts" and of the "applicable law" which constitute "the essence of an attorney's advisory activity" and, as the latter is protected by the professional legal privilege, it can be communicated by the attorney only to his client.

Having established the existence of an interference with the professional legal privilege, the Advocate General is then led to investigate the justification for this interference.

He recalls that the "prevention of the risk of tax evasion and fraud" is an objective of general interest, as is the "fight against abusive arrangements, when the search for a tax advantage is the essential aim of the transactions in question".

For Advocate General Rantos, the justification thus seems to be easily established and refers only to the recent evolution of mentality towards a greater permissiveness in favour of the Member States in the assessment of these two criteria.

Having resolved this issue, he then examines what he describes as a "final obstacle", i.e., the issue of disclosure of the attorney's name to the revenue service. Does this disclosure constitute "in itself" a violation of Article 7, particularly in the light of the principle of "proportionality", which requires that the measure in question be limited to what is strictly necessary to achieve the objective sought?

Again, it is regrettable that the Advocate General did not examine whether the reporting by the client would be sufficient to achieve this aim. This without having to sacrifice the confidentiality of the data exchanged between the attorney and his/her client.

Disclosure of the Attorney's Name to the Revenue Service in Light of Article 7 of the Charter of Fundamental Rights of the European Union

The Advocate General recalls that, according to the provisions of Article 8ab of DAC6, the notified third-party intermediaries shall inform the revenue service not only of the existence of the scheme and the taxpayer concerned, but also of the name of the intermediary attorney.

The Advocate General considers that this provision undermines the "enhanced protection of exchanges between attorneys and their clients" guaranteed by Article 8 of the ECHR.

He therefore examines whether the obligation is indeed "provided for by law", whether it "pursues an objective of general interest" recognised by the Union and whether it is "necessary to achieve the objective" and "respects the principle of proportionality".

He notes that knowledge of the attorney's identity is unnecessary since professional secrecy would exempt the attorney from answering any questions that might subsequently be asked by the revenue service.

At the hearing, some Member States argued that notification of the attorney's name to the revenue service would be justified by the need to ensure "effective control" of intermediaries. The AG states – that the objective of the directive can be attained without controlling whether an attorney used privilege in a right way – see par. 110 and 112 of the opinion. Such an ambition of a directive is striking – controlling attorneys undermines the self-regulation and independence that are the corner stones of the legal professional privilege that serves the purposes under the rule of law to enable attorneys to give in full independence legal advice. Under the combined ECHR and Charter, Member States should provide means and manner by which to achieve the protection of the professional secrecy, confidentiality and privacy for attorneys and their clients, also when ascertaining the legal position of their client[26]. All purpose of DAC 6 to influence the conduct of attorneys, acting in that capacity and depending of a self-regulated body, by submitting them to reporting obligations, is in clear violation with the Charter. It is the self-regulated body as established and recognized under the law of that Member State, and only that body, that under the rule of law may regulate the obligations flowing from all actions done within the perimeter of that profession and it's legal professional privilege under the national tradition. As pointed out above, DAC 6 lacks also the legal base under the Treaties to enforce any harmonisation in that field.

On the other hand, several speakers during the hearing recalled that the name of an attorney consulted in the advice phase must remain confidential in the same way as the name of a doctor consulted by a patient, which cannot become public information. The Advocate General considers that it would be paradoxical to recognise the professional legal privilege of the attorney – and to grant him an exemption from reporting – and then to undermine this right by providing that, as an indirect consequence of the obligation to report which is incumbent on third party intermediaries, he should respond to questions from the revenue service[27].

Advocate General Rantos finds that the disclosure of the attorney's name to the revenue service would be excessive and would not respect the principle of proportionality.

On this point, we can only agree with Advocate General Rantos, but we do not see why any advice given by an attorney, which enjoys the same protection as the attorney's name, should not also be presented in an abstract form of filing. Does the common constitutional tradition of protecting attorney-client confidentiality not deserve better in the search for a fair balance? After all, this tradition is being sacrificed by a directive to inform Member States of a *potential risk* of a *legitimate* tax advantage that *may* result from a cross-border arrangement.

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[1] Opinion of Advocate General Athanasios RANTOS of 5 April 2022.

[2] Directive (EU) 2018/822 of 25 May 2018.

[3] In France, the professional legal privilege of attorneys is defined in Article 66-5 of the Law of 31 December 1971, which covers both advisory and litigation activities. Furthermore, the recently amended preliminary article of the Code of Criminal Procedure provides that: “Respect for the professional secrecy of the defence and counselling provided for in Article 66-5 of Law No. 71- 1130 of 31 December 1971 reforming certain judicial and legal professions is guaranteed during criminal proceedings under the conditions laid down in this code. The disclosure of information covered by professional secrecy is punishable by one year’s imprisonment and a fine of €15,000 (Art 226 13 of the Criminal Code). Article 226-14 lists a number of cases in which failure to respect professional legal privilege will not be punished. Finally, all French legislative provisions relating to exceptions to attorney-client confidentiality are subject to so-called conventionality control, i.e., compliance with international treaties signed by France that, according to the Constitution, prevail over the statute, such as European Union law.

[4] According to this reasoning, it is not clear mutatis mutandis how an attorney could be required to file a reporting “on his own account” – as is the case under French law – without his name being disclosed to the revenue service.

[5] C.C., 15 September 2022, n°103/2022

[6] These five preliminary questions can be summarizes as relating to :

(1) Is DAC 6 applicable outside corporate income taxes?
(2) Are multiple definitions in DAC 6 compatible with both the requirements of the rights of defence and the general legal principle of foreseeability of the effects of norms (Article 49 Charter) and the requirements for the protection of private life against arbitrary or ineffective state action (Article 7 Charter)?
(3) Is there a clear definition of the commencement for the 30-days reporting period under the protection granted by Articles 7 and 49 of the Charter?
(4) Extension of the question for a preliminary ruling in C-694/20 to all intermediaries with professional secrecy that is sanctioned by a criminal law, but limited to the sole protection under Article 7 of the Charter.
(5) As regards the protection which Article 7 of the Charter confers on private life, are the reporting obligations which DAC 6 imposes justified by their necessity for the proper functioning of the internal market, and this specially in the presence of reportable arrangements that can be genuine in all aspects, that are not motivated by a tax advantage or no other tax advantage then the one organised by a national tax law?

[7] In France, attorneys are bound by the rules of professional conduct in the exercise of their functions as defined by the Internal National Regulation (RIN) of the National Council of Bars (CNB).

[8] Jean-Michel Braunschweig.

[9] Paragraph 45 of the Opinion.

[10] Attorney general M. G. HOGAN in his opinion (point 56) in the joint case C-80/18 and C-83/18 that led to the ruling of non-admittance of 7 November 2019, with reference in note 26 to the ruling of 6 December 2018, Montag (C-480/17, EU:C:2018:987, point 34).

[11] Case C-604/20, decision published on the website of the ECJ (C.c., 17 December 2020, n° 167/2020).

[12] Regarding the design phase of marketable arrangements, the Belgian Constitutional Court considers in both rulings of 17 December 2019 and 15 September 2022 that in the first phase of a marketable agreement there can be no professional legal privilege for intermediaries since no personal data of clients is obtained that needs protection. Setting up marketable arrangements is also considered to form a commercial type of activity that does not fall within the activities of an attorney. It should however be noted that the definition of a marketable arrangement is to be examined with various other definitions under the second preliminary question posed to the ECJ by the ruling of 15 September 2022.

[13] ECJ, 7 November 2019, cases C-81/18 et C-83/18, UNESA, EU:C:2019:934, point 34.

[14] ECJ, 26 January 2010, case C-118/09, Transportes Urbanos y Servicios Generales, points 23- 24.

[15] ECJ, 6 October 2015, C-362/14, Schrems, EU:C:2015:650 ; ECJ, 6 October 2020, C- 45/19 and C-246/19, Luxemburg, EU:C:2020:795.

[16] M. Szpunar, ‘Limitations on the exercise of fundamental rights in the case-law of the Court of Justice’, in EUnited in Diversity: Between Common Constitutional Traditions and National Identities – International Conference Riga, Latvia, 2-3 September 2021 – CONFERENCE PROCEEDINGS, to be found on the Court of Justice’s website (https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_riga_september_2021_-_conference_proceedings.pdf), p. 169 – 171.

[17] ECJ, 2 March 2010, cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and others*, point 48.

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[18] According to the contribution of the President of the Court of Justice, K. Lenaerts, a common constitutional tradition is the result of a comparative study. If the comparative study concludes that there are several traditions in that field, the traditions that best achieve the objectives of the European Union will be preferred but adapted so as not to create too much tension in the Member States with another tradition. These are also evolving concepts (see. K. Lenaerts, "The constitutional traditions common to the Member States: the comparative law method", in EUnited *in* Diversity: Between Common Constitutional Traditions and National Identities – International Conference Riga, Latvia, 2-3 September 2021 – CONFERENCE PROCEEDINGS, **to be found on the Court of Justice's website**.).

[19] ECJ, 21 June 1974, case C-2/74, *Reyners*, Rec. p. 631, n° 40, point 52.

[20] ECJ, 18 May1982, C-155/79, *AM&S*, EU:C:1982:157, points 18 et 24.

[21] General Court, 12 December 2018, Case T-705/14, *Unichem Laboratories Ltd. v. European Commission*, EU:T:2018:915, point 119.

[22] See the decisions cited : ECJ, 21 June 1974, Case C-2/74, *Reyners*, Rec. p. 631, n° 40, point 52 ; ECJ, 18 May 1982, C-155/7, *AM&S*, EU:C:1982:157, points 18 et 24 and Tribunal, 12 December 2018, case T-705/14, *Unichem Laboratories Ltd. v. European Commission*, EU:T:2018:915, point 119.

[23] See CCBE Charter of core principles of the European legal profession & Code of conduct for European lawyers, available **here.**

[24] ECJ, 12 June 2014, Joined Cases C-39/13, C-40/13 and C-41/13, *SCA Group Holding*, EU:C:2014:1758, point 42.

[25] Michaud v. France – **12323/11**, 6 December 2012.

[26] 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, O.J., 5 June 2015, L 141/73, considerations 39 and 40 :

(39) For certain obliged entities, Member States should have the possibility to designate an appropriate self-regulatory body as the authority to be informed in the first instance instead of the FIU. In accordance with the case-law of the European Court of Human Rights, a system of first instance reporting to a self-regulatory body constitutes an important safeguard for upholding the protection of fundamental rights as concerns the reporting obligations applicable to lawyers. Member States should provide for the means and manner by which to achieve the protection of professional secrecy, confidentiality and privacy.

(40) Where a Member State decides to designate such a self-regulatory body, it may allow or require that body not to transmit to the FIU any information obtained from persons represented by that body where such information has been received from, or obtained on, one of their clients, in the course of ascertaining the legal position of their client, or in performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.

[27] Paragraph 112 of the Opinion.