Kluwer International Tax Blog

DAC6 Directive and Attorneys' Professional Secrecy: Analysis of the Opinion of AG Rantos in Case C-694/201.

Jacques Taquet (Chair of the Tax Committee of the Council of Bars and Law Societies of Europe (CCBE) Former President of the Bar Association of Hauts-de-Seine) and Paul Verhaeghe (Director and general mandatee of the factual association Belgian Association of Tax Lawyers (BATL) and member of the Dutch speaking bar association of Brussels (NOAB)) · Thursday, November 3rd, 2022

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 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 the cross-border schemes referred to in DAC 6 are not – by their very nature – 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 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.

Jacques Taquet

Chair of the Tax Committee of the Council of Bars and Law Societies of Europe (CCBE)

Former President of the Bar Association of Hauts-de-Seine

Paul Verhaeghe

Director and general mandatee of the factual association Belgian Association of Tax Lawyers (BATL) and member of the Dutch speaking bar association of Brussels (NOAB)

[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 question 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, p. 169 – 171.

To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe here.

Kluwer International Tax Law

The **2022 Future Ready Lawyer survey** showed that 78% of lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity. Kluwer International Tax Law is an intuitive research platform for Tax Professionals leveraging Wolters Kluwer's top international content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.

This entry was posted on Thursday, November 3rd, 2022 at 6:00 pm and is filed under Belgium, DAC6, ECJ, France
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.