Kluwer International Tax Blog

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

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)) · Friday, November 4th, 2022

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

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[2], 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[3]. 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[4] 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[5], 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[6] 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[7]. This set of national ethical rules has also developed a common European core through the rules issued by the CCBE.[8] 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[9] 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[10] 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.[11] 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.[12]

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.

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

[3] 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.

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

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

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

[7] 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.

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

[9] 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.

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

[11] 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.

[12] Paragraph 112 of the Opinion.

This entry was posted on Friday, November 4th, 2022 at 5:30 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.