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OPINION STATEMENT

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

Prepared by the CFE ECJ Task Force
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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on the Decisions of the CJEU on the validity of certain aspects of DAC6 as regards the Charter of Fundamental Rights of the European Union (the "DAC6 cases"), in which the Court of Justice of the EU delivered its decisions on 8 December 2022 (Grand Chamber) and 29 July 2024 (Second Chamber).[2]

The *DAC6 cases* concern the question whether some obligations to report certain cross-border arrangements violate rights recognized by the Charter of Fundamental Rights of the European Union and, therefore, affect the validity of provisions of DAC6.

In both cases, the CJEU delivers preliminary rulings on questions raised by the Belgian Constitutional Court (Dutch-speaking and French-speaking sections) on the validity of certain provisions of tDAC6 with the Charter of Fundamental Rights of the EU. The Court concludes that the obligation established for lawyers to communicate to other intermediaries their exemption from the reporting obligation violates the right to respect for private life, while the same obligation established for other intermediaries does not. At the same time, it considers that the obligation to report certain cross-border tax planning schemes, established in DAC[3], in its fifth amendment by DAC6[4] does not violate the principles of equality and non-discrimination (raised because the scope of the obligation was not limited to corporate income tax; the principles of legal certainty and legality in criminal matters (key concepts are determined in a sufficiently clear and precise manner); or the right to a fair trial (there is no link between the reporting obligations with a judicial proceeding).

This Opinion Statement focuses on questions of law and the scope of legal professional privilege as a waiver to the disclosure obligations established by DAC for fiscal intermediaries.

This Opinion Statement seeks to explain and analyse the CJEU's reasoning regarding the scope of the invalidity and the justification of the validity of certain aspects of DAC6.

I. Background, Facts, and Issues

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

2. The Belgian Constitutional Court (Dutch-speaking and French-speaking sections) made parallel requests for preliminary rulings regarding the validity of certain provisions of DAC as amended by DAC6[5], with consequences for the validity of the corresponding provisions of the Law of 20 December 2019 transposing

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[2] CJEU, Belgian Vlaamse Balies, C-694/20, 29 July 2022, ECLI:EU:C:2022:963; and CJEU, Belgian Association of Tax Lawers, C-623/22, 29 July 2024., ECLI:EU:C:2024:639. By Order of 7 March 2023, the Court removed from the register the request for a preliminary ruling presented by the French Conseil d'Etat, C-398/21, as a result of the decision of the Court on the case C-694/20.

[3] Directive 2011/16/EU of the council, of 15 February 2011.

[4] Directive 2018/822, of the Council, of 25 May 2018.

[5] In particular, Article 8ab(5) (in case C-694/20) and Article 8ab(1), (5), (6) and (7) (in case C-623/22).

that Directive into domestic law[6]. While the first request focused on potential breach of the rights to respect for private life and fair trial, the second request expanded the analysis to the principles of equal treatment, legal certainty and legality in criminal matters.

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

4. The Belgian Constitutional Court referred the following questions for preliminary rulings:
5. As regards Case C-694/20 [7]:

> 'Does Article 1(2) of [Directive 2018/822] infringe the right to a fair trial as guaranteed by Article 47 of the [Charter] and the right to respect for private life as guaranteed by Article 7 of the [Charter], in that the new Article 8ab(5) which it inserted in [Directive 2011/16], provides that, where a Member State takes the necessary measures to give intermediaries the right to waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State, that Member State is obliged to require the intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations, in so far as the effect of that obligation is to oblige a lawyer acting as an intermediary to share with another intermediary, not being his [or her] client, information which he [or she] obtains in the course of the essential activities of his [or her] profession, namely, representing or defending clients in legal proceedings and giving legal advice, even in the absence of pending legal proceedings?'

6. As regards Case C-623/22 [8]

> (1) Does [Directive 2018/822] infringe Article 6(3) [TEU] and Articles 20 and 21 of the [Charter] and, more specifically, the principles of equality and non-discrimination as guaranteed by those provisions, in that [Directive 2018/822] does not limit the reporting obligation in respect of [reportable] cross-border arrangements to corporation tax, but makes it applicable to all taxes falling within the scope of [Directive 2011/16,] which include under Belgian law not only corporation tax, but also direct taxes other than corporation tax and indirect taxes, such as registration fees?
> (2) Does [Directive 2018/822] infringe the principle of legality in criminal matters as guaranteed by Article 49(1) of the [Charter] and by Article 7(1) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR')], the general principle of legal certainty and the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the concepts of 'arrangement' (and therefore the concepts of 'cross-border arrangement', 'marketable arrangement' and 'bespoke arrangement'), 'intermediary', 'participant', 'associated enterprise', the terms 'cross-border', the different 'hallmarks' and the 'main benefit test' that [Directive 2018/822] uses to determine the scope of the reporting obligation in respect of [reportable] cross-border arrangements, are not sufficiently clear and precise?
> (3) Does [Directive 2018/822], in particular in so far as it inserts Article 8ab(1) and (7) into [Directive 2011/16], infringe the principle of legality in criminal matters as guaranteed by Article 49(1) of the [Charter] and by Article 7(1) of the [ECHR], and infringe the right to respect for private life as

[6] CJEU, C-623/22, cit., p.2.
[7] CJEU, C-694/20, cit. p. 17.
[8] CJEU, C-623/22, cit. p. 21.

guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the starting point of the 30-day period during which the intermediary or relevant taxpayer must fulfil its reporting obligation in respect of a [reportable] cross-border arrangement is not fixed in a sufficiently clear and precise manner?

(4) Does Article 1(2) of [Directive 2018/822] infringe the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the new Article 8ab(5) which it inserted in [Directive 2011/16], [and which] provides that, where a Member State takes the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach legal professional privilege under the national law of that Member State, that Member State is obliged to require the intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations, in so far as the effect of that obligation is to oblige an intermediary bound by legal professional privilege subject to criminal sanctions under the national law of that Member State to share with another intermediary, not being his client, information which he obtains in the course of the essential activities of his profession?

(5) Does [Directive 2018/822] infringe the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the reporting obligation in respect of [reportable] cross-border arrangements interferes with the right to respect for the private life of intermediaries and relevant taxpayers which is not reasonably justified or proportionate in the light of the objectives pursued and which is not relevant to the objective of ensuring the proper functioning of the internal market?

II. The Judgments of the Court of Justice and the reasoning on which they are based

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

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

8. The first question of the Belgian Constitutional Court in case C-623/22 referred to a potential violation of the principles of equality and non-discrimination and of Articles 20 and 21 of the Charter, insofar as DAC6 did not limit the reporting obligation established in Article 8ab(1), (6) and (7) to corporation tax, but applied to all takes falling within the scope of the directive.[9] According to article 2 of DAC, it applies to "all taxes of any kind" levied by or on behalf of a MS but not to value added tax, customs duties and excise duties covered by other EU legislation or cooperation mechanisms between MS.

9. The CJEU considers that the fact that DAC6 is not limited to corporation income tax does not infringe the principles of equal treatment and non-discrimination.[10] Following the AG's opinion in that regard,[11] the CJEU considers that the different tax types subject to the reporting obligation represent comparable situations in the light of the objectives pursued by the Directive in the field of combating aggressive tax planning and tax avoidance and evasion in the internal market. Considering that the EU legislature has a broad discretion in the exercise of the powers conferred to it, it is not manifestly inappropriate to establish such a broad obligation in the light of those objectives.[12]

10. The principle of equality, of which the prohibition on discrimination is a specific expression, as reflected in article 20 of the Charter, requires that comparable situations must not be treated differently and different

[9] CJEU, C-623/22, cit. p 18 and 22.
[10] CJEU, C-623/22, cit. p. 24.
[11] Opinion of Advocate General Emiliou, 29 February 2024, C-623/22,, ECLI:EU:C:2024:189, p.20-37. (AG C-623/22).
[12] CJEU, C-623/22, cit. p.33.

situations must not be treated in the same way unless such treatment is objectively justified [13]. The Court analyses the comparability of the reporting obligations regarding the different taxes covered, following the already settled case law in the matter, mainly the comparability test[14] and the manifestly inappropriate test[15], and concludes that no factor examined is of such a kind as to affect the validity of DAC6 in the light of the principles of equal treatment and non-discrimination (Articles 20 and 21 of the Charter).[16]

11. From that perspective, the CJEU considers that a reporting system capable of capturing the largest possible range of tax types does not infringe the comparability analysis, since all taxes falling within the scope of DAC6 are in a comparable situation as regards the need to counteract aggressive tax planning, tax avoidance and evasion.[17] Moreover, since the EU has a broad discretion in the field of taxation and there is no evidence that tax evasion or tax planning in relation to other taxes is negligible, the broad scope of the directive is not manifestly inappropriate in the light of the objectives pursued and appears consistent with the subject matter and purpose of the legal instrument which introduced it.

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

12. Case C-623/22 deals with the question whether some of the basic concepts underlying the reporting obligation are defined in a sufficiently clear and precise way so that intermediaries and relevant taxpayers are able to ascertain the extent of their obligation, or whether it violates the principle of legal certainty. Moreover, since these concepts are the basis for the establishment of penalties by Member States in the event of failure to fulfil the obligation, the Belgian Constitutional Court asks whether there is an infringement of the principle of legality in criminal matters (Article 49(1) of the Charter) and the right to respect for private life (Article 7 of the Charter).[18]

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

14. The Court reiterates the twofold operation of the principle of legal certainty. First, the rules of law must be clear and precise. Second, their application must be foreseeable for those subject to the law, especially in the case of adverse consequences [19]. Those concerned must be made aware precisely of the extent of the obligations imposed on them; they must be able to ascertain their rights and obligations unequivocally and take steps accordingly.[20] However, the principle of legal certainty does not preclude having recourse in norms to an abstract legal notion; nor does it require that such a norm refer to the various specific hypotheses in which it applies, since all those hypotheses cannot be determined in advance by the legislature.

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[13] CJEU, C-623/22, cit. p.24.

[14] According to this test, the comparability of different situations must be assessed with regard to all elements that characterize such situations, in the light of the subject matter and purpose of the EU act that makes the distinction, taking into account the principles and objectives of the field. CJEU, C-623/22, cit. p.25. CJEU 10 February 2022, C-522/20, OE, EU:C:2022:87, p. 20.

[15] In areas of broad discretion for the EU legislature, involving political, economic and social choices, that imply complex assessments and evaluations, only manifestly inappropriate measures in relation to the objectives sought may affect the lawfulness of the measure. CJEU, C-522/20, cit. p 21.

[16] CJEU, C-623/22, cit. p. 34.

[17] CJEU, C-623/22, cit. p.33.

[18] CJEU, C-623/22, cit. p 35.

[19] CJEU, C-623/22, cit. p 36.

[20] CJEU, 16 February 2022, C-156/21, *Hungary* v *Parliament and Council*, EU:C:2022:97, p. 223 and the case-law cited.

15. DAC6 does not itself lay down any penalty for infringements of the reporting obligation. It is for the Member States to establish effective, proportionate and dissuasive penalties, possibly criminal in nature. However, any lack of clarity or precision in the concepts and time limits used in the Directive regarding the conduct required of individuals and entities is liable to undermine the principle of legality in criminal matters[21], under which legislation must clearly define offences and the penalties which they attract. The fact that the assistance of the courts may be necessary in interpreting the wording of the relevant provision does not necessarily infringe that principle [22].

16. Article 52(3) of the Charter ensures that fundamental rights it contains have at least the same meaning and scope as the s guaranteed by the ECHR, which means that the case law of the ECtHR on article 7 ECHR is relevant in examining these.[23] The ECtHR has established that the wording of legislative acts of general nature cannot be absolutely precise; general categories often leave grey areas at the fringes of a definition. These areas do not make a provision incompatible with Article 7 ECHR, provided that the provision is sufficiently clear in the large majority of cases. Nor does the principle prohibit the gradual clarification of rules of criminal liability by means of interpretations in the case law, provided that those interpretations are reasonably foreseeable. The degree of foreseeability required depends to a considerable extent on the context of the text in question, the field it covers and the number and status of those to whom it is addressed. The Court considers relevant that "any ambiguity or vagueness in those concepts may be dispelled by using the ordinary methods of interpretation of the law", or the guidance provided by relevant international agreements and practices. Moreover, the need to take appropriate legal advice to assess the consequences entailed by a given action may still satisfy the requirement of foreseeability.

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

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

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

[21] CJEU, C-623/22, cit. p 38-39.
[22] CJEU, 5 December 2017, C-42/17, EU:C:2017:936, p. 56.
[23] CJEU, C-623/22, cit. p 46.
[24] CJEU, C-623/22, cit. p 49.
[25] CJEU, C-623/22, cit. p 52.

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

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

22. Another important element of the reporting obligation is the concept of "intermediary" which determines the person or entity subject to the obligation and is considered in third place. The Court analyses the definition in point 21 of Article 3 of DAC as amended by DAC6 and the four additional conditions which connect the intermediary with the territory of a Member State. The doubts in that regard refer to 'auxiliary intermediaries', secondary intermediaries or service providers intermediaries, which only provide, aid assistance or advice, as opposed to the promoters of the arrangements. The Court considers that the definition does not lack the precision necessary to enable the operators concerned to identify themselves as falling or not within the category and, therefore, does not breach the principles of legal certainty and legality in criminal matters.[28]

23. The Court then considers the concept of "associated enterprise" defined in point 23, and rejects the claim of potential breach of the principles concerned, taking into account that the arguments of the claimants mainly refer to the breadth of the concept more than to any lack of clarity.

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

25. The same conclusion is reached as regards the verification of the "main benefit test", which for the Court "does not appear particularly difficult for an intermediary" or in the absence "for the relevant taxpayer". In order to reach that conclusion, it refers to the BEPS Action 12 Report, which gives an indication of the concept: the main benefit test compares the value of the expected tax advantage with any other benefits likely to be obtained from the transaction, considering an objective assessment of the tax benefits.[30]

26. As for the reporting deadline, DAC6 fixes the starting point of the 30-day period for mandatory reporting with reference to different parameters, which may affect differently the different intermediaries involved:

[26] CJEU, C-623/22, cit. p.56-57, 59.
[27] CJEU, C-623/22, cit. p.60.
[28] CJEU, C-623/22, cit. p.64.
[29] CJEU, C-623/22, cit. p.69-73.
[30] CJEU, C-623/22, cit. p.71and 74.

as the day after the reportable cross-border arrangement is 'made available for implementation, or the day after that arrangement is made available for implementation, or the day after that arrangement is ready for implementation, or when the first step in the implementation of that arrangement has been made, whichever occurs first. For auxiliary intermediaries the 30-day period begins on the day 'after they provided, directly or by means of other persons, aid, assistance or advice' and for relevant taxpayers it begins the day after the arrangement is made available to that taxpayer for the purposes of implementation, or is ready to be implemented by that taxpayer, or when the first step of its implementation has been made in relation to that taxpayer, whichever occurs first.

27. The Court concludes that the reporting periods established in DAC6 are determined in a sufficiently clear and precise manner.[31] The Court follows the AG opinion considering that "implementation of the arrangement refers to the transition of that arrangement from its conceptual stage to its operational stage", a moment that is neither imprecise nor lacks clarity.[32] As regards auxiliary intermediaries, it reckons that the moment cannot be precisely fixed, since it refers to the "moment the person concerned knows or could reasonably expected to know" that provides aid, assistance or advice, which in some cases may only arise after the beginning of the provision of such services, since the intermediary is to provide evidence of the lack of knowledge and reasonable expectation knowledge of his/her involvement in a reportable arrangement.

28. Referring to Recital 7 of DAC6, the Court acknowledges that early filing of information with the tax administration, before the implementation of the arrangement, is to be preferred, but considers it desirable to prevent unnecessary reporting obligations, particularly for auxiliary intermediaries, when the implementation remains uncertain. Most importantly, the Court clarifies that the auxiliary intermediaries' reporting period cannot begin to run until the day after the date on which they completed their provision of aid, assistance or advice and, at the latest, on the day defined by the first subparagraph of Article 8ab(1), in so far as they are aware of it.[33]

29. Moreover, the Court also follows the AG opinion considering that Article 7 of the Charter does not impose any obligation stricter than Article 49 of the Charter in terms of the requirement for clarity or precision of the concept used and the time limits laid down, and therefore, the interference with the private life of the intermediary and relevant taxpayers entailed is defined in a sufficiently clear and precise manner.

Breach of the right to respect for private life

30. The argument that is common to Cases C-694/20 and C-623/22 is the potential breach of the right to respect for private life derived from the obligation of intermediaries to communicate their name and the name of their client to another intermediary in order to benefit from the waiver of the reporting obligation due to the application of the legal professional privilege. While Case C-694/20 concentrates on the application of the waiver to lawyers, Case C-623/22 seeks to determine whether the waiver can be extended to other tax professionals/intermediaries who are bound by legal professional privilege under national law.[34] Moreover, in Case C-623/22 the validity concerns refer to the reporting obligation of cross-border arrangements that are lawful, genuine, non-abusive and the main advantage of which is not fiscal in nature.[35]

31. The right to respect for private life is protected in Article 7 of the Charter, which corresponds to Article 8(1) ECHR. According to ECtHR case law,[36] Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients.

[31] CJEU, C-623/22, cit. p
[32] CJEU, C-623/22, cit. p 81.
[33] CJEU, C-623/22, cit. p 85.
[34] CJEU, C-623/22, cit. p 91.
[35] CJEU, C-623/22, cit. p p 122.
[36] ECtHR, judgment of 6 December 2012, *Michaud v. France*, CE:ECHR:2012:1206JUD001232311, p. 117 and 118

The protection of exchanges between lawyers and their clients covers not only the activity of defence but also legal advice.[37] Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence.[38]

32. Legal professional privilege primarily takes the form of obligations on lawyers, and it is justified by the fact that they are assigned a fundamental role in a democratic society, that of defending litigants. Therefore, clients of a lawyer can reasonably expect that their communication is private and confidential.[39] Any person must be able, without constraint, to consult a lawyer, whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other hand gives rise to the duty of the lawyer to act in good faith towards his or her client.[40]

33. The establishment of an obligation to notify other intermediaries of the identity of the lawyer intermediary and of his or her having been consulted on the reportable cross-border arrangement in order to claim the waiver of the reporting obligations entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter.[41] Moreover, it leads to another indirect interference, the disclosure by the notified third party intermediaries to the tax authorities of the identity of the lawyer-intermediary and of his or her having been consulted.[42]

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

    a. The limitations on the exercise of this right are provided for by law;
    b. The limitations respect the essence of this right;
    c. The limitations respect the principle of proportionality, which implies the analysis of whether the limitations are necessary, they genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others, and there is a proper balance between the interference and the objective of general interest pursued.[43]

35. The CJEU considered that the interference derived from the obligation to report both the name of the lawyer and of him/her being consulted is provided by law. The CJEU considers that this requirement is satisfied since the amended Directive 2011/16 expressly provides the obligation for intermediaries to file information to notified other intermediaries of their reporting obligations and provides the limitations under parameters defined and content inferred from that Directive (Articles 8ab(6) and, 8ab(1), 8ab(9), 8ab(13), 8ab(14).[44]

36. The CJEU considered that the limitations derived from revealing such data under the reporting obligation respect the essence of the right to respect for communications between lawyers and their clients and for private life guaranteed in Article 7 of the Charter. The communication of data revealing the design and implementation of a potentially aggressive tax arrangements without even directly affecting the possibility of such design or such implementation cannot be regarded as undermining the essence of these rights[45]. Case C-694/20 is more specific in that regard, considering that this obligation entails only to a limited extent the lifting of the confidentiality of such communications, since the reporting obligation does not oblige or authorize the lawyer to share information on the content of those communications without the client's

[37] CJEU, C-694/20, cit. p 27.
[38] CJEU C-694/20, cited, p. 27.
[39] ECtHR, 9 April 2019, *Altay v. Turkey (No 2)*, CE:ECHR:2019:0409JUD001123609, p. 49.
[40] CJEU 18 May 1982, *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157, p. 18.
[41] CJEU C-694/20, cited, p. 30
[42] CJEU C-694/20, cited, p. 31.
[43] CJEU C-694/20, cited, p 34.
[44] CJEU C-694/20, cited, p 36-38; CJEU C-623/22, cited, p 136-137.
[45] CJEU C-694/20, cited, p 39-40; CJEU C-623/22, cited, p 138.

consent. Without this consent, the other intermediaries would not be in a position to file such information with the tax authorities.

37. The CJEU verifies the proportionality of the interference in the case C-694/20 with the typical structure of analysis:
    a. The limits on rights and freedoms cannot exceed the limits of what is appropriate and necessary.
    b. The limits must pursue legitimate objectives or the need to protect the rights and freedoms of others.
    c. Where there are various different alternatives, the least onerous to the rights and freedoms must be chosen.
    d. The objective of general interest must be reconciled with the fundamental rights affected by the measure with a proper balance between the general interest objectives and the rights at issue.

38. Following the Advocate General's opinion, the Court recognizes that DAC6 seeks to combat aggressive tax planning and prevent the risk of tax avoidance and evasion [46], which are objectives of general interest recognized by the EU for the purposes of article 52(1) of the Charter.[47]

39. As regards appropriateness and necessity, the CJEU has doubts whether the obligation to notify other intermediaries of the name of the lawyer and the fact that he or she has been contacted to be necessary: "[T]hat obligation cannot, however, be regarded as being strictly necessary in order to attain those objectives and, in particular, to ensure that the information concerning the reportable cross-border arrangements is filed with the competent authorities".[48]

40. This is so because regardless of this notification all intermediaries are in principle required to file the information that is within their knowledge;[49] even if there is more than one intermediary and regardless of whether it was informed of the waiver of another intermediary.[50] In order for other intermediaries to be exempted from filing the information, they must have proof that the same information has already been filed by another intermediary (or the relevant taxpayer); the communication of waiver by the lawyer intermediary cannot give rise to any expectation of relief from their own obligation.[51] Nor does The waiver relieve the relevant taxpayer from their own reporting obligations in case there is no other intermediary.[52] Moreover, the disclosure of the identity of the lawyer-intermediary and of his/her having been consulted is not strictly necessary, because the tax authorities will always be informed of reportable cross-border arrangements. [53] Tax authorities cannot, in any event, require the lawyer-intermediary to provide information without the consent of his or her client.[54]

41. The Court clarifies that there is no need to disclose the identity of the lawyer-intermediary and of his-her having been consulted to verify whether they may rely on legal professional privilege, because this is not the purpose of the reporting and notification obligations, but to combat aggressive tax practices, and prevent tax avoidance and evasion.[55] This goal may be achieved without the disclosure of that information to the tax authorities.[56]

[46] CJEU C-694/20, cited, p. 43.
[47] CJEU C-694/20, cited, p. 44.
[48] CJEU C-694/20, cited, p. 46.
[49] CJEU C-694/20, cited, p. 47.
[50] CJEU C-694/20, cited, p. 47.
[51] CJEU C-694/20, cited, p. 48-49.
[52] CJEU C-694/20, cited, p. 50.
[53] CJEU C-694/20, cited, p. 51-52.
[54] CJEU C-694/20, cited, p. 53.
[55] CJEU C-694/20, cited, p. 56.
[56] CJEU C-694/20, cited, p. 57.

42. Therefore, the obligations to notify the waiver to other intermediaries and of those intermediaries to disclose the name of the lawyer-intermediary subject to legal professional privilege infringes the right to respect for communications between a lawyer and his or her client guaranteed in Article 7 of the Charter.

43. Case C-694/20 did not raise the issue of the scope *ratione personae* of the waiver, since the validity issue was limited to the situation of lawyer-intermediaries. That issue was the focus of Case C-623/22, seeking to clarify the meaning of the phrase "legal professional privilege under the national law of that member State". Case C-623/22 deals with the validity of the obligation to notify the waiver of the reporting obligation for those intermediaries that are not lawyers but are bound by legal professional privilege under national law. The Court, however, reaches a different outcome than in Case C-694/20 for those intermediaries who are not lawyers.

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

45. From the wording, it appears that there is a divergence among the language versions, despite the fact that a great majority seem to opt for a broad meaning of the expression. Some versions, such as the English language version, refers to "legal professional privilege", meaning the professional secrecy of lawyers and other professionals who can ensure legal representation of a client before the national courts.[57] By contrast, 18 other languages refer to 'professional secrecy applicable under national law' without reference to the professional secrecy of lawyers. These versions include other professions not entitled to provide legal representation in court proceedings. The same disparities exist in the Recital 8 of the DAC6, which leads to make impossible to determine clearly the scope of the wording from a literal interpretation.[58]

46. Examining the context and objectives of the directive, the Court highlights the need to obtain comprehensive and relevant information about potentially aggressive tax arrangements and to ensure the proper functioning of the internal market by combating tax avoidance and evasion in that market, for which purpose the mandatory disclosure of information was considered essential by the EU legislature.[59] The Commission considered that the power to substitute the obligation to inform by the obligation to notify referred only to lawyers and persons enabled to represent parties in legal proceedings.[60] The Council also claimed that the same protection should not be granted both to lawyers and to other intermediaries.[61] The AG considers that granting a waiver to all intermediaries would potentially have the effect of calling into question the effectiveness of the reporting mechanisms. The OECD Model Rules that influenced DAC6 are used – especially rule 2.4 - to confirm that the intention of the BEPS action plan was to apply the waiver to prevent revealing confidential information held by an attorney, solicitor or other admitted legal representative.[62]

47. The Court concludes that DAC6 sought in essence to protect professional secrecy only for lawyers and other professionals who, like lawyers, are legally authorised to ensure legal representation, even though this is not the literal wording of most versions.[63] The Court explains that the reference to national law is intended to extend the waiver to other persons that, under the national law of Member States, have "the capacity to ensure legal representation to professions".[64] However, the Court considers that this discretion is not intended to allow Member States to extend the benefit of that substitution of obligations to professions which do not ensure such representation.[65] In providing this interpretation, the Court notes the need to

[57] CJEU C-623/22, cited, p 95.
[58] CJEU C-623/22, cited, p 97.
[59] CJEU C-623/22, cited, p 98.
[60] CJEU C-623/22, cited, p 92.
[61] CJEU C-623/22, cited, p 93.
[62] CJEU C-623/22, cited, p 101-103.
[63] CJEU C-623/22, cited, p 104.
[64] CJEU C-623/22, cited, p 105.
[65] CJEU C-623/22, cited, p 106.

avoid the creation of distortions between Member States through the relocation of potentially aggressive tax planning activities to jurisdictions with a broader concept of professional privilege.[66]

48. Therefore, the Court concludes that the "power of the Member States to substitute the obligation to notify for the reporting obligation was given only in respect of professionals who are authorised under national law to ensure legal representation".[67]

49. Having concluded that this restrictive approach is the correct one, the Court moves on to analyse whether the relationship between a professional who is not a lawyer but is authorised to ensure legal representation and his or her client should remain secret vis-a-vis third parties and therefore, should not be revealed to third parties.[68] The Court analyses Article 7 of the Charter, along Article 8(1) ECHR, that protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients, reviewing the case law on the specific protection of correspondence between lawyers and clients.[69]

50. The Court concludes from this case law that this specific protection relates to the special position occupied by a lawyer in the judicial organisation of the Member States and to the fundamental task entrusted to him or her by Member States. The obligation to notify other intermediaries infringed Article 7 of the Charter "when it is imposed on the lawyer".[70] This position is based on a conception of the lawyer's role as an independent collaborator in the administration of justice and the reliance by the client on the rules of professional ethics and discipline. This unique position leads the court to conclude that the ruling in Case C-694/20 can extend only to persons pursuing their professional activities under one of the professional titles referred to in Article 1(2)(a) of Directive 98/5.[71] Since other professionals do not meet these characteristics, even if they do provide legal representation, there is no basis for the invalidity of the substitution of the reporting obligation by the obligation to notify other intermediaries, despite the fact that it leads to the knowledge of such a consultation link between the notifying intermediary and his or her client both by the notified intermediary and the tax administration.[72]

51. The final point of discussion in Case C-623/22 refers to the potential breach of the right to respect for private life through the obligation to undertake the reporting obligation by intermediaries not benefiting from the waiver, especially considering that the obligation may concern lawful, genuine and non-abusive cross-border arrangements. This reporting obligation would limit the taxpayer's freedom to choose, and the intermediary's freedom to design and advise that relevant taxpayer on the least taxed route.[73]

52. The CJEU has held that provisions imposing or allowing the communication of personal data such as the name, place of residence or financial resources of natural persons to a public authority must, in the absence of the consent of those natural persons and irrespective of the subsequent use of the data at issue, be regarded as an interference in their private life and therefore as a limitation on the right guaranteed in Article 7 of the Charter, without prejudice to the potential justification of such provisions.[74] Moreover, the ECtHR considers that Article 8 ECHR and the protection of private life encompasses the right for each individual to approach others in order to establish and develop relationships with them and with the outside world, that is, the right to a "private social life", and that provision may include professional activities or

[66] CJEU C-623/22, cited, p 107.
[67] CJEU C-623/22, cited, p. 108.
[68] CJEU C-623/22, cited, p. 109.
[69] CJEU C-623/22, cited, p. 112-114.
[70] CJEU C-623/22, cited, p.116.
[71] CJEU C-623/22, cited, p. 118.
[72] CJEU C-623/22, cited, p. 118-119.
[73] CJEU C-623/22, cited, p 121-123-
[74] CJEU 18 June 2020, Commission v Hungary (Transparency of Associations), C-78/18, EU:C:2020:476, p. 124.

activities taking place in a public context[75], not excluding professional or commercial activities. Private life thus includes the concept of personal autonomy, covering the freedom of any person to organise his or her life and activities, both personal and professional or commercial, although the interference may be far reaching when professional or business activities are involved.[76]

53. The obligation to report and reveal data identifying the persons concerned and information on the cross-border arrangement at issue constitutes an interference with the right to respect for private life and communications. This obligation results in revealing to the administration the result of tax design and engineering work, carried out in the context of personal, professional or business activities, by the taxpayer him or herself or, in most cases, by one or more intermediaries, and may deter both the taxpayers and the advisers from designing and implementing these arrangements based on disparities between tax systems subject to mandatory reporting, despite being lawful.[77]

54. As for the potential justification of such interference, the Court repeats the conditions for such justification.

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

56. As regards the necessity analysis, the Court considers that the obligation is particularly effective to combat aggressive tax planning and prevent the risks of tax avoidance and evasion, at a very early stage. With this reporting obligation, DAC6 allows Member States to react with precision and speed, if necessary in a coordinated manner, to aggressive tax-planning mechanisms, which the examination and monitoring of tax behaviour *a posteriori* does not allow quite as much.[78] As for the content of the information, the CJEU does not consider it to go beyond what is strictly necessary for Member States to have a sufficient understanding of cross-border arrangements and be able to act promptly, either analysing the information provided or contacting the intermediaries or relevant taxpayers for further information. The Court considers also relevant for the proportional analysis that the obligation does not entail, for the obligor, an obligation to investigate and seek information beyond the scope of the information which he or she already controls.

57. Finally, as regards the balance of interests, the Court recognises that the interference is certainly not negligible, but the important objectives of public interest pursued lead to the conclusion that the interference is not disproportionate, whether with regard to the taxpayer who benefits from the arrangement at issue or the intermediary who designed it.[79] Referring to recitals 2 and 6 of DAC6, the Court highlights the combat against aggressive tax planning and the prevention of the risks of tax avoidance and evasion, which contribute to the protection of the tax base, the establishment of a fair tax environment in the internal market, the safeguard of the balanced allocation of the Member States' powers of taxation and the effective collection of tax.

Potential breach of the right to a fair trial

[75] ECtHR 19 January 2018, FNASS and Others v. France, CE:ECHR:2018:0118JUD004815111, p. 153.
[76] CJEU, 22 October 2002, *Roquette Fréres*, C-94/00, EU:C:2002:603, p. 29.
[77] CJEU C-623/22, cited, p 129-132.
[78] CJEU C-623/22, cited, p. 139-143.
[79] CJEU C-623/22, cited, p. 148.

58. This was an argument discussed solely in Case C-694/20. The Court considers that the right to a fair trial would be infringed if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations.[80] However, in order for Article 47 of the Charter to be triggered, there must be a link with judicial proceedings, which is not the case as regards the early reporting obligations established by DAC6. It cannot be considered that the lawyer-intermediary is acting as counsel for his or her client in a dispute; the mere fact that the lawyer's advice or the cross-border arrangement which is the subject of consultation may give rise to litigation at a later stage does not mean that the lawyer acted for the purposes and in the interests of the rights of defence of his or her client.[81]

III. Comments

59. The cases relating to the validity of DAC6 referred by the Belgian Constitutional Court are of significant relevance for professionals dealing with tax advisory activities in the European Union. The CJEU has given support to the EU legislature, despite the criticisms generated by DAC6 when it was in preparation, the costs of its implementation and the uncertainty whether it is really effective in counteracting aggressive tax planning, tax avoidance and tax evasion. In doing so, the CJEU basically follows the AG Opinions[82]. For systematic purposes, we will structure the comments around the different principles and fundamental rights interpreted in the cases.

Principles of equality and non-discrimination

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

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

Principles of legal certainty and legality in criminal matters

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

[80] CJEU C-694/20, cited, p. 60. CJEU, 26 June 2007, Ordre des barreaux francophones et germanophones and Others, C-305/05, EU:C:2007:383, p 31-32.

[81] CJEU C-694/20, cited, p.64.

[82] CJEU, Opinion AG Rantos, 5 April 2022, C-694/20. CJEU, Opinion AG Emiliou, 29 February 2024, C-623/22.

63. Despite the decision of the CJEU validating the concepts that define the reporting obligations, some important disparities in the interpretations given by tax authorities to the terms of DAC6 still persist, which may give rise to significant uncertainty and lack of homogeneous interpretation of the obligations concerned. Whether these cases affect a majority of cases or a relative but important minority of cases is difficult to assess, and it is unclear on the basis of what data and evidence the CJEU made that assessment[83]. Even if the CJEU may close the disparities and divergent interpretations by an EU homogeneous interpretation, until that moment arrives relevant taxpayers and intermediaries may suffer a considerable level of uncertainty that will not be free from the application of the domestic penalty regime. In order not to cause unnecessary harm, until the CJEU offers the required clarity and precision to some terms, any reasonable interpretation of the terms of DAC6 should prevent the application of penalties by the tax authorities of the Member States.

64. An example of this is the concept of "arrangement". On the one hand, the reference to international documents does not provide precise substance to the legal concepts used by the Directive, even if it may provide context and point towards a recommended best practice. On the other hand, one of the crucial elements in the explanation of the term arrangement is the "indication of a potential risk of tax avoidance" (Article 3(1)(b)(20) of the Directive), which uses a number of imprecise and duplicative terms at the same time. Naturally, a "risk" is "potential", and it is not specified how likely or severe such a risk should be; also, the notion of "tax avoidance" is notoriously vague. The Directive is more precise where it defines the "indication of a potential risk of tax avoidance" through the exhaustively listed hallmarks in Annex IV, each of which expresses a "characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance". For the CJEU these "hallmarks" are sufficiently clear and precise. We doubt whether this is necessarily true.

65. An example of lack of clarity and precision can be found in the "main benefit test" and its relevance for the reporting obligations under DAC6 of the hallmarks that require its assessment. The Court does not consider it particularly difficult for an intermediary or by the relevant taxpayer to decide whether "the main benefit or one of the main benefits that can reasonably be expected of the arrangement they design and/or use is fiscal in nature". In order to arrive at that conclusion, it refers to the BEPS Action 12 Report, which it says compares the value of the expected tax advantage with any other benefits likely to be obtained from the transaction and has the advantage of requiring and objective assessment of the tax benefits [84] and, therefore, does not contravene the principles of legal certainty and legality in criminal matters.

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

67. Even for tax intermediaries, ascertaining the implications of the "main benefit test" or "one of the main benefits" may lead to important uncertainties that have not been clarified even after the interpretation given by the CJEU. Just to name a few (uncertainties): it is not clear whether the outcome should be considered individually or for a group of taxpayers, or for the parties involved in a transaction or in an arrangement[85]. Nor is it clear whether the evaluation needs to consider only the implications of the tax system of the Member State where the intermediaries or the relevant taxpayer is obliged to report the arrangements, or also the implications derived from the interaction of the different tax systems involved[86].

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[83] CJEU, C-623/22, cited, p.42.

[84] CJEU, C-623/22, cited. p. 74.

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

[86] In order to ascertain the main benefit test, which approach should be taken into consideration: a per-country approach, a global approach, or an EU approach? For some countries that took the opportunity of the implementation of DAC6 to introduce a mandatory

Some other issues add to the uncertain outcome, since the benefit arises from the comparison between the taxation applicable to the arrangements and some other theoretical taxable alternative (including or not the implementation of the arrangement). In order to fulfil this uncertain outcome, it is not clear which concept of 'benefit' should be considered relevant.

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

Legal professional privilege vs professional secrecy applicable under domestic law

69. One of the main concerns regarding the formulation of the obligations established by DAC6 (reporting, notification, assessment, documentation) is their compatibility with the different duties of professional secrecy by which EU intermediaries are bound under domestic law. In C-694/20 the CJEU dealt first with the validity of the obligations enshrined in DAC6 for intermediary-lawyers. In this respect, the CJEU held that to replace the reporting obligation with the obligation to notify other intermediaries and the relevant taxpayer did not sufficiently preserve legal professional privilege. This is because the obligation to identify the lawyer and the fact that they had been consulted by a client interfered with the right to protection for private life and the right to respect for communications between lawyer and client guaranteed in Article 7 of the Charter. This interference was not justified since it was not necessary to require disclosure in order to ensure the outcome and goals foreseen by DAC6.The Court also found that the right to a fair trial was not at stake in the absence of a direct link with judicial proceedings. Case C-623/22 confirms the approach that the confidentiality of the communications between lawyer and client deserves specific and strengthened protection.

70. It was in case C-623/22 that the Court had to focus on the scope *ratione personae* of the exception for legal professional privilege. This judgment therefore considered whether some non-lawyer intermediaries who ensure legal representation could obtain the same Charter protection as lawyers as regards the right to respect for private life and the right to respect for communications with their clients. In that case, the Court offered a negative answer, validating the reporting and notifying obligations contained in DAC6.

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

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

disclosure regime for domestic cases a simple analysis of the reduction of domestic tax liabilities may be sufficient to verify the main benefit test. On the contrary, if the goal of the system established by the DAC6 is to exchange information relevant for a prompt reaction of other countries, the analysis of the tax benefit in that other country should be more relevant, whether considered separately or together with the implications of the arrangement on the tax liability in the reporting Member State.

72. The invalidity of the obligation that applied to lawyers to notify other intermediaries of the waiver had already been dealt with by the EU legislature in DAC8 to be implemented by December 31st 2025[87]. Under the amended article 8ab(5), intermediaries who can rely on legal professional privilege under the national law of the Member State remain required to notify their clients (*and no one else*) without delay of their reporting obligations[88]. While the text of the Directive does not take into account the clarifications derived from case C-623/22, recital 44 advanced the outcome of this case, distinguishing between (a) lawyers acting as intermediaries, who are not obliged to notify any other intermediary that is not their client of the reporting obligation of any other intermediary, and (b) any other non-lawyer intermediaries exempt from the reporting obligation because of legal professional privilege, who remain required to notify their client of their reporting obligations. It appears that the amended DAC6 which maintains the original wording should be interpreted according to the ECJ's clarification, both as regards the extent of the invalidity and the personal scope of the waiver and the obligation to notify, as the recital of DAC8 foresaw.

73. The Court found that DAC6 was in breach of the right to respect for private life guaranteed in Article 7 of the Charter, since the obligation to notify the waiver to other intermediaries who were not the clients of the intermediaries could not overcome the specific protection of communications between a lawyer and his/her client that cannot be disclosed without the client's consent. The substitution of the obligation to report by an obligation to notify the waiver does not suffice to respect the protection under article 7 of the Charter and thus, was declared invalid. While case C-694/20- only referred to lawyers acting as intermediaries, case C-623/22 sought to interpret the scope of the invalidity of the obligation to notify, as regards other non-lawyer intermediaries covered by legal professional privilege under the national law of a Member State.

74. Case C-623/22 confirms that only lawyers are affected by the extent of the invalidity, despite the fact that the majority of the various linguistic versions of the Directive applied a broader expression (professional secrecy under domestic law), instead of a more restrictive one (legal professional privilege).

Version	Expression
German	eine gesetzliche Verschwiegenheitspflicht
English	legal professional privilege
French	secret professionnel
Italian	segreto professionale
Swedish	yrkesmässiga privilegierna
Dutch	wettelijk verschoningsrecht
Bulgarian	професионална тайна съгласно националното право
Czech	zákonné profesní mlčenlivosti

[87] Council Directive 2023/2226/EU of 17 October, amending Directive 2011/16/EU on administrative cooperation in the field of taxation.

[88] Article 8ab (5) of Directive 2011/16 as amended.

Danish	korrespondancen mellem advokat og klient, eller en tilsvarende lovbaseret tavshedspligt
Estonian	õiguse kohase kutsesaladuse
Greek	δικηγορικό απόρρητο
Croatian	obveza čuvanja profesionalne
Latvian	saziņas konfidencialitāti
Lithuanian	profesinė paslaptis
Hungarian	titoktartási kötelezettség
Polish	tajemnicy zawodowej

75. The Court decided not to rely on a literal interpretation, considering the divergences among the different linguistic versions, and despite the fact that most of the linguistic versions of DAC6 referred to the scope of the right to a waiver through a renvoi to the laws of the Member States and that provision referred to a generic term, in plural, professions [89]. However, by doing so, the Court did not intend to clarify the subjective scope of the substitutive obligation to notify the waiver, but to clarify the scope of the invalidity of the substitutive obligation.

76. In order to do so, it relied on the case law that recognizes specific protection of the communications between a lawyer and his/her clients. This protection is such that article 7 covers not only the activity of defense but also legal advice and guarantees the secrecy of that legal consultation, both with regard to its content and with regard to its existence [90]. The very existence of the relationship between a non-lawyer intermediary and his/her client should not remain secret *vis-a-vis* third parties, and therefore only the client-lawyer relationship should remain secret and not be revealed to third parties, considering that only lawyers occupy a special position in the judicial organization of the Member States and tasks entrusted to them. The Court relies, then, in the special position and status of an independent lawyer providing legal assistance in full independence and in the overriding interest, considering the rules of professional ethics and discipline that governs their profession.

77. In defining the scope of this strengthened protection, the Court relies on EU law, which establishes the mutual recognition of professional titles among different Member States, as worded in article 1(2) of Directive 98/5, despite the fact of it being an instrument aimed at ensuring freedom of movement for lawyers admitted to practice in a Member State. The protection of the legal professional privilege of lawyers before the obligations to report and communicate information of their clients under the administrative cooperation Directive has also been confirmed in case C-432/23 [91]. According to the Court, legal advice given by a lawyer in company law matters falls within the scope of the strengthened protection of communications between lawyers and their clients guaranteed by that article. Therefore, a request of information under the

[89] Opinion AG Emiliou, 29 February 2024, C-623/22, cited, p. 190.
[90] Following ECtHR 6-12-2012 Michaud v France CE_ECHR:2012:1206JUD001232311, p 117-119.
[91] CJEU, Ordre des avocats du barreau de Luxembuourg, C-432/23, 29 September 2024, ECLO:EU:C:2024:791.

assistance provided by DAC requesting all the documentation and information relating to his or her relations with his or her client, concerning such legal advice, constitutes an interference with the right to respect for communications between lawyers and their clients guaranteed by that article. Advice and representation by a lawyer in tax matters also enjoy such a strengthened protection.

78. If article 7 of the Charter protects and guarantees the secrecy of the legal consultation from the client to the lawyer, it remains to be seen whether the mandatory disclosure of such a legal consultation by the client itself should not deserve the same type of protection, considering that the legal professional privilege is an obligation for the lawyer whose goal is to protect the privacy rights that correspond to the client.

79. Given that the Court clarified that lawyers as intermediaries deserve a specific protection under the Charter, it is necessary to figure out what type of intermediaries are in scope of the obligation to notify the waiver of the reporting obligation to other intermediaries -who are not their clients-. The English version of DAC6 refers to the intermediaries that would breach 'the legal professional privilege under the national law of that Member State'. The subjective scope of such a substituting obligation varies in different Member States as a result of the *renvoi* clause included in the Directive, the different linguistic terms being used to delineate the subjective scope of such an obligation and the different extent of the protection of the professional secrecy in different Member States. However, the Court clarifies in case C-623/22 that the substituting obligation to notify only refers to other intermediaries that are entitled under domestic law to represent parties in legal proceedings [92]. Therefore, the question arises what type of legal representation is referred to and whether those Member States that follow a literal interpretation of their linguistic version of the Directive are in breach of the duties established under the Directive. The adaptation of these domestic regulations may create more domestic disparities and conflicts when trying to make compatible such a regulation with the interpretation of this decision.

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

81. Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and, therefore, not only the correspondence between a lawyer and their clients. But despite that protection, the CJEU reaches its conclusion of validity considering that non-lawyer-intermediaries are not afforded strengthened protection of their exchanges, which could be directly inferred from the previous case law. What is lacking in the analysis of the CJEU is whether it is justified to interfere with the protection of the correspondence between a non-lawyer-intermediary and their clients to the extent that the DAC6 forces the intermediary to disclose their name and of the individual being consulted by the relevant taxpayer to another intermediary. In such a situation, the CJEU does not display any proportionality analysis,[93] which is substituted by a lack of comparability test between lawyers and non-lawyers. By making such a lack of comparability analysis -lawyers-intermediaries and non-lawyers-intermediaries are not comparable- the CJEU makes an "all or nothing"[94] validity alternative, lacking any proportionality analysis in the decision.

[92] CJEU, C-623/22, cited. p. 108.

[93] The Court does not consider which level of protection deserves the communications between a relevant taxpayer and a non-lawyer intermediary subject to a professional secrecy legal clause, and whether in this case the interference of the secret of communications between the intermediary and the client is justified or not.

[94] CJEU C-623/22, cited, p.118.

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

83. In the analysis of the requirements of the principle of proportionality, it is important to note that the Court confirms that DAC6 does not impose on intermediaries any hunting obligation[95], since intermediaries "are only obliged to file information that is within their knowledge, possession or control"[96], and not on any other information that the intermediary could have been aware of through the exercise of due diligence activities, despite the broad definition of intermediary contained in the DAC6 [97]. Moreover, the Court considers that a mere communication of the description in abstract terms of the relevant business activities and arrangements without disclosing a commercial or other secret should be sufficient to comply with the reporting obligation requirements.

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

85. Moreover, the Court makes a formal analysis of the suitability test, relying on the recitals 2,6 and 7 of the Directive, and not on any other evidence which was probably not given by the claimants either. In that regard, the mandatory reporting obligation was established by the DAC6 as a mechanism to ensure a prompt reaction from national legislatures and tax administrations despite differences in national laws or regulatory loopholes, which justifies the short term to report and the evaluation of the potential economic and tax advantages, before the arrangement is really developed. There is limited evidence of legislative action that appears to have followed extensive DAC6 reporting until now. The Directive itself neither constrains Member States from reacting promptly nor invites Member States to review or adapt their tax systems to prevent the disparities and close the loopholes generated by the aggressive tax planning identified as a result of the information exchanged.

86. The Court also does not take into consideration the evaluation of the effectiveness of the broad reporting mechanism introduced affecting any and each intermediary that intervenes in the design, marketing, organization, availability for implementation, management for the implementation, or provides aid, assistance or advice with respect to these services, affecting not only potential aggressive tax planning arrangements but also lawful arrangements, where many of them have already been neutralized by counteracting legal measures both at EU and domestic level. An analysis from a cost-benefit perspective could shed light on the necessity test under the proportionality analysis, both from the taxpayer and the tax administration perspective. [98] The breadth of the obligation was only considered as regards the lack of clarity of the obligations established by DAC6 but not from the analysis of the proportionality.

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[95] Opinion AG Emiliou, 29 February 2024, C-623/22, cited, p. 178.

[96] CJEU C-623/22, cited, p. 136.

[97] DAC6 identifies intermediaries subject to the reporting obligation by a reasonable expectation of knowledge and not simply by the evidence of the provision of the services to the relevant taxpayers.

[98] CJEU C-623/22, cit. p 148: The Court of Justice considers that that interference is certainly not negligible, combating aggressive tax planning and preventing the risks of tax avoidance and evasion are important objectives, the pursuit of which depends not only on the protection of the tax base, and therefore the tax revenue of the Member States, and the establishment of a fair tax environment in

IV. The Statement

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

Despite the fact that the Court does not find a violation of the principles of legal certainty and legality, DAC6 still leads to very complex compliance analysis, both as regards the identification of the reportable arrangements and the identification of the information to be reported, as the evaluation assessment program launched by the European Commission shows [99]. This complexity leads to a diverse implementation and interpretation of the hallmarks and the different obligations by Member States. Therefore, potential simplification of the reporting obligations could be considered.

the internal market… but also on the safeguarding of the balanced allocation of the Member States' powers of taxation and the effective collection of tax

[99] European Commission. Directorate General for Taxation and Customs Union. Press Release. Evaluation of administrative cooperation in the field of direct taxation. 8 May 2024. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13678-Cooperation-on-direct-taxation-evaluation/public-consultation_en