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Client Alert

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European Union: DAC 6 — a year full of developments and more is to come

In brief

On 8 December 2022, the Court of Justice of the EU (CJEU) rendered its first judgment with respect to the EU directive n° 2018/822 of 25 May 2018, i.e., DAC 6 (please see our prior news alert here for a refresher on DAC 6). The CJEU ruled that the legal obligation for a lawyer-intermediary, subject to legal professional privilege (LPP), to inform other intermediaries is invalid in light of the right to privacy, as protected by Article 7 of the Charter of Fundamental Rights of the European Union (the EU Charter).

The CJEU's decision entails that lawyer-intermediaries subject to LPP should no longer be required to notify other intermediaries. However, the decision does not have any effect on any of the other DAC 6 obligations. In particular, the lawyer-intermediary is still required to inform the relevant taxpayer (client) in case LPP applies.

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2022 was a year full of developments for DAC 6

What does the future hold for DAC 6?

Although the decision is much welcomed as it underscores the importance of the right to privacy and LPP, the practical implications of the decision will remain somewhat limited when it comes to the DAC 6 reporting obligations, which unequivocally remain applicable.

That being said, more is expected to come at the level of the CJEU in the DAC 6 sphere. The CJEU will, in particular, need to consider questions that are far more fundamental to DAC 6 as a whole, as the Belgian Constitutional Court has submitted a new request for preliminary ruling to the CJEU with no less than five pertinent questions relating to the substance of the directive. Additionally, the French Council of State has submitted a request for a preliminary ruling with respect to the application of privilege. It will remain to be seen how the CJEU deals with these requests, hopefully in 2023.

Key takeaways

- The CJEU ruled for the first time on DAC 6 and held that the legal obligation for a lawyer-intermediary, subject to LPP to notify other intermediaries to the arrangement (Article 8ab(5) of the Directive 2011/16/EU), is invalid in light of the right to privacy, enshrined in Article 7 of the EU Charter that protects the confidentiality of exchanges between lawyers and their clients (not only in the activity of legal defense but also in the context of legal advice).
- This decision forms part of a string of decisions by the CJEU that show that the CJEU is particularly firm when it comes to protecting personal and/or privileged data under the EU Charter (for example, the CJEU recently limited the public access to beneficial owner registers when reviewing the Fourth Anti-Money Laundering Directive in its decision of 22 November 2022). The message is clear: even if the objective of the relevant European legislation is considered to be in the general interest, the rules should remain proportionate in that they need to be strictly necessary to meet the objective, considering that they infringe upon the right to privacy protected under the EU Charter.
- Although the CJEU's decision is much welcomed and underscores the importance of the right to privacy and LPP, it only impacts the particular aspect of the notification obligation in the context of LPP applying and does not have an impact on the other DAC 6 reporting obligations. In particular, the lawyer-intermediary subject to LPP will still need to notify the relevant taxpayer (if it is their client). Other intermediaries not subject to LPP or, as the case may be, the relevant taxpayer, will still need to adhere to the applicable DAC 6 reporting obligations.

- That being said, more is expected to come at the level of the CJEU in the DAC 6 sphere. The CJEU will particularly need to consider questions that are far more fundamental to DAC 6 as a whole, as the Belgian Constitutional Court has submitted a new request for preliminary ruling to the CJEU with no less than five pertinent questions. Additionally, the French Council of State — the Supreme Administrative Court — has submitted a request for a preliminary ruling on the conformity of the directive with the right to a fair trial. It will remain to be seen how the CJEU deals with these requests, hopefully in 2023.
- The answer from the CJEU to these questions could have a major impact on the viability of the DAC 6 Directive, as most of the national implementing legislations adopted by the EU member states, including the Belgian and French ones, are literal implementations of the directive itself.

In depth

2022 was a year full of developments for DAC 6

CJEU's decision on notification obligation for lawyer intermediaries

On 8 December 2022, the CJEU rendered its first judgment with respect to DAC 6 (C-694/20). The CJEU ruled that the particular legal obligation for a lawyer-intermediary subject to LPP to notify other intermediaries (who are not their clients) is invalid in light of the right to privacy, enshrined in Article 7 of the EU Charter. The CJEU recalled that this right protects the confidentiality of exchanges between lawyers and their clients, not only in the activity of legal defense but also in the context of legal advice and guarantees the secrecy of legal consultation, both with regard to its content and to its existence.

The relevant DAC 6 provision (Article 8ab (5) of the Directive 2011/16/EU) states that the EU member states may opt to waive the reporting obligation for intermediaries in cases where this reporting would breach LPP under national law. In this case, the member state is required to take measures that oblige the intermediary subject to LPP to notify, without delay, any other intermediary to the arrangement, or if there is no such intermediary, notify the relevant taxpayer of the DAC 6 reporting obligations.

The Flemish Bar Association et al. brought an action before the Belgian Constitutional Court arguing (amongst others) that the obligation for lawyer-intermediaries to notify other intermediaries to the arrangement infringes their LPP. The Belgian Constitutional Court referred the matter to the CJEU for a preliminary ruling.

The CJEU ruled, in essence, that the notification obligation indeed leads to an infringement of the right to respect for communications between lawyers and their clients under Article 7 of the EU Charter, as it entails that a third-party intermediary who was not necessarily aware, becomes aware — as a result of the notification — of the identity of the lawyer intermediary, of the fact that they were consulted on the arrangement, and of the DAC 6 assessment made by that lawyer-intermediary. A second (indirect) infringement results from the fact that the notified intermediary will need to report the identity of the lawyer-intermediary to the tax authorities under the DAC 6 reporting obligation.

These infringements of the right to privacy may be justified, as the latter is not absolute and certain limitations are hence allowed, to the extent that they comply with the legality and proportionality principle. In this context, the CJEU considers that even though the objective of combatting aggressive tax planning and preventing the risk of tax avoidance and evasion is an objective of general interest recognized by the EU and capable of limiting the right to privacy, the notification obligation as such is disproportionate as it goes beyond what is strictly necessary to attain that objective. After all, information that will allow the tax authorities to audit potentially aggressive arrangements may still be duly reported to the tax authorities without any notification, as all intermediaries to the arrangement, or in absence thereof, the relevant taxpayer, are subject to a reporting obligation irrespective of a notification by a lawyer intermediary.

Additionally, the disclosure of the lawyer-intermediary's identity under the DAC 6 reporting is not necessary to attain the objective.

With its decision, the CJEU underscores the importance of the proportionality principle and the application of LPP, even in the context of anti-tax avoidance matters. Relevant taxpayers may rest assured that a lawyer-intermediary is not allowed to divulge information to third parties who are not their clients. It is expected that the relevant EU member states will amend their domestic legislation to the extent that it provides for a notification obligation for lawyer-intermediaries subject to LPP. However, it is unclear to what extent this protection extends to other professions that may be subject to LPP under their domestic legislation as well (such as accountants and tax advisors for whom the requirement of notification to other intermediaries under DAC 6 can be considered a grey area until further clarified by the CJEU).

The Belgian Constitutional Court has submitted a new request for preliminary ruling, extending the question to any intermediary subject to LPP (among others). It is equally important to note, as the CJEU recalls, that the scope of application of LPP and the

extent to which it covers advisory activities, for example, remains subject to the limits of national laws. The LPP's scope of application will hence differ depending on the EU member state involved. This nuance will also be relevant when it comes to the question of whether a client can (directly or implicitly) consent to waive the LPP (in some jurisdictions this is not possible).

We also recall that the decision does not impact the other notification obligations under DAC 6. For example, the lawyer-intermediary will, as a rule, remain obliged to inform the relevant taxpayer of the DAC 6 reporting obligations. However, this assumes that the relevant taxpayer is, in fact, their client. One can imagine situations where it is the third-party intermediary that is the client of the lawyer-intermediary rather than the relevant taxpayer. Although the CJEU decision is not explicit on this, one would expect that in this case, the lawyer-intermediary should notify the other intermediary rather than the relevant taxpayer (as notifying the relevant taxpayer, in this case, would give rise to the same infringement of LPP). Additionally, the reporting obligations for the intermediaries not subject to LPP and the relevant taxpayer remain unequivocally applicable.

Belgian Constitutional Court decisions

As mentioned, the CJEU's decision was the result of a request for a preliminary ruling submitted by the Belgian Constitutional Court. The latter faced multiple requests for suspension and annulment of the federal and regional transposition of DAC 6 in Belgium. In this context, the Belgian Constitutional Court rendered various judgments (i.e., Decision n° 167/2020 and 168/2020 of 17 December 2020; Decision n° 45/2021 and 46/2021 of 11 March 2021, and decisions n° 94/2021, 95/2021 and 96/2021 of 17 June 2021), whereby it suspended and annulled certain regional transposing provisions and requested a preliminary ruling to the CJEU that resulted in the above-mentioned decision of the CJEU.

The most recent decision from the Constitutional Court of 15 September 2022 (i.e., Decision n° 103/2022) again submitted a request for a preliminary ruling to the CJEU with no less than five questions regarding the compatibility of certain DAC 6 provisions with EU law (more on that below).

In its decision, the Constitutional Court also annulled certain Belgian federal DAC 6 transposition provisions with respect to the application of LPP.

- The Court annulled the provision that states that an intermediary cannot invoke LPP in the context of the recurring reporting obligation for marketable arrangements. The latter are arrangements that are offered on a larger scale, without any adaptation to the client's needs. These arrangements are subject to a double-reporting obligation under DAC 6, once at the time the arrangement is first made available or ready for implementation and subsequently on a recurrent (quarterly) basis, whereby the intermediary must provide additional information on the specific arrangement (such as the identity of the taxpayers who made use of it).

  The Court considers that the initial reporting does not divulge any information that can be subject to LPP and therefore sees no harm in LPP not applying in this context. However, the same cannot be said for the recurrent reporting that requires the intermediary to divulge, among others, the taxpayer's identity. In this case, although the application of LPP is not absolute, the Court considers that the legal provision that states that LPP cannot apply is disproportionate as it does not allow for an exception and there is no valid reason why LPP could never apply in the context of the marketable arrangement. The Court confirms that this goes beyond lawyer privilege and that this relates to any intermediary subject to LPP.

- The Constitutional Court further also annulled the provision that allows the Belgian tax authorities to request information from an intermediary in the context of an audit to the extent that there is no legal provision that allows for protection under LPP (i.e., in the Belgian Registration Tax Code, Inheritance Tax Code and the Code of Miscellaneous Levies and Taxes). The Belgian Income Tax Code on the other hand provides for a specific provision stating that the tax authorities must request the disciplinary authority to intervene to verify whether the request is reconcilable with LPP. There is thus no breach of the legal professional privilege in the latter case.

What does the future hold for DAC 6?

Cases pending before the CJEU

Request for a preliminary ruling by the French Supreme Administrative Court

The French Supreme Administrative Court ("**Conseil d'Etat**") submitted a request for a preliminary ruling to the CJEU in June 2021 with two questions on the compatibility of the reporting obligation for lawyer-intermediaries under DAC 6 with European primary law (decisions of 25 June 2021, N° 448486 and 449060).

Firstly, the French Supreme Administrative Court wants to know whether the reporting obligation for lawyer-intermediaries, as transposed in French national law, infringes upon the right to respect for correspondence and private life, as guaranteed by Article 7 of the EU Charter and Article 8 of the European Convention on Human Rights (ECHR) respectively, as it does not exclude lawyers assessing their respective client's legal position from the reporting obligation.

On this point, although we expect that the CJEU will be critical (and it could decide that such national legislation infringes the right to privacy in a disproportionate manner and should be revised accordingly), it remains to be seen how the CJEU will answer as the question goes beyond the one submitted by the Belgian Constitutional Court.

Secondly, the French Supreme Administrative Court raises the question of whether the reporting obligation for lawyer-intermediaries, as transposed in French national law, constitutes an infringement of the right to a fair trial, as guaranteed by Article 47 of the EU Charter and Article 6 of the ECHR, as lawyers participating in judicial proceedings are not excluded from the reporting obligation.

Given the terms of the 8 December 2022 decision, we expect that the Court of Justice will respond that the directive does not infringe the right to a fair trial, as it did in the first Belgian case. In the latter, the CJEU stated that "the right to a fair trial implies, by definition, a link with a judicial procedure and it is inseparable from the existence of a jurisdictional context." The CJEU went on to hold that a link had not been established.

It is clear from the text of the decision that the Court follows the conclusions of its advocate general on this point, who takes the following view:

> The intermediary does not act as the defender of his client in a dispute with the tax authorities. While his advice may potentially give rise to a dispute with the tax administration at a later stage, this does not mean that it was provided "in the course of and for the purposes of the right of defense" within the meaning of the Court's case law.

However, this assessment is in stark contrast to that made by the French public rapporteur before the Council of State, and that had justified the preliminary question by the French Administrative Supreme Court:

> It is difficult to exclude in this case that the intervention of a lawyer subject to the obligation of declaration and notification is never linked to a lawsuit or to the possibility of a lawsuit, in particular from the point of view of the appreciation of a litigation risk in case of implementation of the cross-border system.

It will be necessary to examine the decision of the CJEU when it is rendered — possibly during the first semester — to determine whether the Court continues to rule out any possibility of interference between the DAC 6 reporting obligation and the prospect of possible legal proceedings.

It should be noted that, if the Court were to change its mind on this point, this could also result in significant changes to the text of the DAC 6 with respect to the application of LPP. As a reminder, the right to a fair trial, unlike the right to privacy, which may be subject to infringements proportionate to a general interest objective, is an absolute right from which there can be no derogation (ECHR, 13 September 2016, *Ibrahim and others v. United Kingdom*, C. 50541/08, 50571/08, 50573/08 and 40351/09, § 250).

Second request for a preliminary ruling by the Belgian Constitutional Court

As mentioned above, the Belgian Constitutional Court also recently submitted five questions to the CJEU on 15 September 2022 in a request for a preliminary ruling. It is important to emphasize that these questions do, in contrast to the earlier request, more fundamentally question the reporting obligations under DAC 6 and really go into the substance of the directive as such. The outcome will hence be relevant for all EU member states.

- The first question considers whether the principle of equality and non-discrimination has been infringed upon, insofar as the EU member states are required to implement the DAC 6 reporting obligations not only in the context of corporate income tax, but also with respect to other direct and indirect taxes that fall under the scope of application of the Directive 2011/16/EU (such as transfer tax). In this context, the Belgian Constitutional Court refers to the preamble of DAC 6 and considers that the goal of DAC 6 seems to have been aimed at combatting direct tax avoidance particularly.
- The second question asks whether DAC 6 infringes the principle of legality, the principle of legal certainty and the right to respect for private life, due to the lack of clarity and precision of various notions used therein, i.e., the notions "intermediary," "arrangement", "participant", "associated enterprise", "cross-border", "hallmarks" and the "main benefit test". The Belgian Constitutional Court considers that the penalties imposed by EU member states with respect to DAC 6 qualify as criminal penalties within the meaning of the ECHR and the EU Charter. Hence, these penalties can only be imposed if the relevant law is sufficiently precise and clear so that one can predict whether or not a given behavior is criminal. The Belgian Constitutional Court questions whether the aforementioned notions that determine the scope of

DAC 6 and some of which are not defined (e.g., the notions "participant" and "arrangement"), are sufficiently clear and precise in this context.

- Next, the Constitutional Court asks whether the principle of legality and privacy has been infringed upon insofar as the trigger date of the 30-day reporting term would not have been defined in a sufficiently clear and precise manner as to allow a determination of when it starts.
- The fourth question is the same question that the Court already submitted to the CJEU and that gave rise to the above-mentioned decision, but this time the Constitutional Court extends the question to cover any intermediary subject to LPP (as opposed to only attorneys).
- Finally, the Belgian Constitutional Court questions whether the DAC 6 reporting obligation as such is proportional and considers that its field of application may be too broad, as it can result in the reporting of arrangements that are authentic, justified and not driven by tax purposes. The Belgian Constitutional Court considers in this context that the "main benefit test" (under which it is assessed whether an arrangement is tax driven or not) does not always need to be met for a cross-border arrangement to be reportable under DAC 6. Furthermore, it is not required under the latter test that the tax benefit be contrary to the purpose of the applicable tax law. The Court also further determines there is no requirement for the arrangement to be artificial for it to be reportable. It is hence clear to the Belgian Constitutional Court that the reporting obligation may also apply to arrangements that are authentic and non-tax driven and therefore submit the question of whether this is proportionate, considering the objectives of DAC 6.

An answer from the CJEU on the above-mentioned questions is pending at the time of publication of this alert and is eagerly awaited, as the answer may have a major impact on the viability of DAC 6, due to the fact that the Belgian and French implementations are near-identical to the directive itself. We are eagerly awaiting the CJEU's judgment, and continue to monitor DAC 6 developments.

In case you have any questions or concerns about your DAC 6 reporting obligations, please reach out to your local Baker McKenzie contact or one of the authors of this alert.

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