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Legal professional privilege vs DAC6 notification requirement: the CJEU rules that the right to a fair trial prevails over the fight against aggressive tax planning.

The DAC6 Directive [1] provides that all intermediaries involved in potentially aggressive cross-border tax-planning are required to report them to the competent tax authorities.

However, each Member State may grant intermediaries a waiver from that obligation where it would breach legal professional privilege protected under its national law. In such circumstances, lawyer-intermediaries are nevertheless required to notify any other intermediary or the relevant taxpayer of their reporting obligations vis-à-vis the competent tax authorities ("**Notification Requirement**").

On December 21, 2020, the Belgian Constitutional Court submitted to the Court of Justice of the European Union ("**CJEU**") a preliminary ruling in *C-694/20 Orde van Vlaamse Balies and Others* seeking clarification as to whether the Notification Requirement applicable to lawyer-intermediaries is compatible with articles 7 and 47 of the EU Charter of Fundamental Rights related to the right to respect for private life and the right to a fair trial.

In its judgment of 8 December 2022, the CJEU rules that article 8ab(5) of the DAC6 Directive infringes the right to respect for communications between a lawyer and his or her client, guaranteed in article 7 of the Charter, in so far as it provides, in essence, that a lawyer-intermediary, who is subject to legal professional privilege, is required to notify any other intermediary who is not his or her client of that other intermediary's reporting obligations.

Furthermore, the CJEU mentions that the said legal professional privilege exists only in the context of judicial proceedings or the preparation for such proceedings and notes that no link with a judicial proceeding has been established in the case under scrutiny before considering that the Notification Requirement does not entail any interference with the right to a fair trial in the case at hand. In conclusion, according to the CJEU, lawyers involved in judicial proceedings are not subject to the Notification Requirement, while lawyers not involved remain subject to it.

The next step should be an alignment of the EU domestic courts approach with the opinion of the CJEU and/or possible legislative amendments.

Our Tax team would be delighted to assist you should you have any queries. Contact us at lionel.bonifazzi@kleyrgrasso.com

[1] Council Directive 2011/16/UE of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011, L 64, p. 1), as amended by Council Directive (EU) 2018/822 of 25 May 2018 (OJ 2018, L 139, p. 1).

EXPERTISE

TAX

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