

Legal Professional Privilege under DAC6 in the Wake of Recent ECJ Judgements

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Ruxandra Vlasceanu | IBFD European Knowledge Group

The author can be contacted at r.vlasceanu@ibfd.org

On 26 September 2024, the Court of Justice of the European Union (ECJ) delivered its decision in *Ordre des avocats du barreau de Luxembourg* ([Case C-432/23](#)) on legal professional privilege in tax matters in the context of the cross-border exchange of information provided for under [Amending Directive to the 2011 Directive on Administrative Cooperation \[on reportable cross-border arrangements\] \(2018/822\) \(DAC6\)](#). DAC6 imposes obligations on certain intermediaries (or, in cases in which those intermediaries are exempt under legal professional privilege, the taxpayers themselves) to notify tax authorities of arrangements that meet the hallmarks set out under the directive. Such information is automatically exchanged between tax authorities of the various Member States with the view to combat aggressive tax planning. The decision in [Case C-432/23](#) is the latest ECJ judgement addressing issues related to the validity of certain requirements under DAC6 against EU law.

This note provides an overview of [Case C-432/23](#), as well as references to earlier decisions addressing the matter (in particular *Orde van Vlaamse Balies and Others* ([Case C-694/20](#)) and *Ordre des barreaux francophones et Germanophone et al.* ([Case C-623/22](#))), covering the main points raised by the referring courts, as follows:

- whether the mere requirement to disclose the existence of the lawyer-client relationship though notifying other intermediaries of the latter's notification obligation under DAC6 is in breach of EU law;
- whether limitations may be imposed on the confidentiality of lawyer-client information, such as, for example, that this applies only in cases in which the client is at risk of criminal proceedings following the disclosure;
- whether DAC6 itself is valid under EU law; and
- whether other professionals advising in tax matters are conferred a similar protection as regards disclosure of information as lawyers engaged in such activities.

1. Is the obligation to notify other intermediaries of the existence of the lawyer-client relationship permitted?

One of the aspects analysed in the 8 December 2022 decision in [Case C-694/20](#) is the confidentiality of the communication between lawyers and their clients arising in light of the obligation of lawyers that qualify as intermediaries under DAC6 to notify other intermediaries of such intermediaries' reporting obligations. The same had been pinned by other national courts as potentially being in breach of EU law (i.e. on 25 June 2021, the French Supreme Administrative Court also requested a preliminary ruling from the ECJ regarding this matter).

The ECJ emphasized the scope of the protection of professional secrecy as guaranteed by article 7 of the Charter of Fundamental Rights of the European Union (the Charter) which includes not only the lawyer-client communication, but also the disclosure of its very existence. As such, an obligation for a lawyer to notify another intermediary (which is not their client) of the latter's notification obligation under DAC6 implicitly means that they are disclosing the existence of the lawyer-client relationship. This was deemed by the ECJ to be against EU law.

The decision in Case C-649/20 led the French referring court to confirm that intermediaries subject to legal professional privilege may be exempt from the obligation to notify other intermediaries (which are not their clients) of the latter's obligations to report certain cross-border arrangements under DAC6. In addition, the wording of the directive itself was amended accordingly, excluding intermediaries subject to legal professional privilege from such obligations. The amendments to the wording of DAC6 need to be adopted by Member States by 31 December 2025, applying from 1 January 2026.

2. Are limitations to the lawyer-client privilege permitted?

Another point to consider, which was analysed in detail by the ECJ in Case C-432/23, refers to limitations imposed on the lawyer-client privilege, for example that this applies only when a disclosure would lead to the client being subjected to criminal proceedings.

The case addressed the following scenario: in the context of a request for information from the Spanish tax authorities under the cross-border exchange of information provided for under DAC6, the Luxembourg tax authorities requested F to provide them with all documentation and information in connection with services provided to their client (a company incorporated under Spanish law), including all communication with their client, regarding acquisitions in other Spanish entities. F refused to comply with the request on account of the lawyer-client privilege, which led to the Luxembourg tax authorities imposing a fine for non-compliance.

In making its analysis, the ECJ reiterated that the rights included in article 7 of the Charter are not absolute rights, as limitations may be imposed on those rights, as specified under the law. However, such limitations must comply with the principle of proportionality, must be necessary and must meet the objectives of general interest recognized by the European Union. In this specific case, under Luxembourg law, such limitations are imposed in the sense that a lawyer subject to a disclosure of information requirement from the tax authorities is prohibited from refusing to share the information that they have been entrusted with, except in the case that the disclosure of such information would expose the client to the risk of criminal proceedings. The provision under Luxembourg law essentially excludes tax lawyers from professional secrecy, with only a very limited exception applicable (i.e. in the case that a risk of criminal proceedings arises). The ECJ deemed that such exception is infringing the right under article 7 of the Charter by the extent of the derogation from the legal privilege that they allow regarding the disclosure of lawyer-client communication.

Through its decision, the ECJ strengthened the client-lawyer privilege, highlighting that while limitations on the lawyer-client privilege may be imposed, those should be confined to exceptional situations and, with very limited exceptions, should not extend to the entire area of tax law.

3. Is DAC6 valid under EU law?

The mere validity of DAC6 has been questioned by the referring courts, with several aspects of the directive challenged in [Case C-623/22](#) and [Case C-432/23](#).

The dispute in [Case C-623/22](#) focused on the compatibility of some of the directive's provisions with fundamental rights as included in the Charter (including equal treatment, non-discrimination, legal certainty, legality in criminal matters and the right to respect for private life in so far as certain terms referred to in the directive have been considered by the referring court not to be defined in a sufficiently clear and precise manner). The ECJ found that DAC6 does not infringe any of those rights and that the provisions included under the directive are clear, justified and proportionate to DAC6's objectives, i.e. combatting tax avoidance within the European Union.

The fact that the directive does not include limitations on the rights recognized by the Charter – limitations that need to be provided for by law – was one of the aspects pointed out in Case [C-432/23](#). In this regard, the ECJ claimed that the directive merely determines the obligations that Member States have towards each other, while the way the information needed for the exchange is to be gathered remains a matter for domestic law. In addition, the directive authorizes Member States not to comply with information requests, in cases in which the collection of such information would be contrary to domestic provisions. As such, the lack of specificity with regard to such limitations in the wording of DAC6 itself does not lead to the directive being invalid under EU law.

4. Are other tax consultants also protected from disclosing client information?

The question of whether other professionals engaged in providing tax advice to their clients benefit from a similar protection as lawyers is also worth mentioning.

As explicitly confirmed by the ECJ in [Case C-623/22](#), tax consultants, accountants, notaries, etc. do not benefit from the same protection as regards the confidentiality of the information that they share with their clients. The ECJ confirmed that the legal professional privilege is limited to “persons pursuing their professional activities under one of the professional titles referred to in article 1(2)(a) of Directive 98/5” (Advokat, Avocat, Barrister/Solicitor, Rechtsanwalt, etc.). The limited scope of the application of the legal privilege is justified by the fundamental role that lawyers occupy in society, i.e. to defend litigants. Moreover, extending this enhanced protection to other tax professionals would call into question the effectiveness of the DAC6.

As such, depending on the applicable domestic rules, in cases in which tax professionals are protected by professional secrecy, said professionals may be exempt from their reporting obligations to the tax authorities but remain liable to inform their client of that client’s reporting obligations under DAC6.

IBFD references

- For IBFD summaries of ECJ judgments, see the [Case Law IBFD](#) collection.
- For an overview of the implementation of the latest DACs across the European Union, see the [DAC8 - DAC7 - DAC6 Implementation Status Tax Dossier](#).
- P.-J. Wouters, [Mandatory Disclosure Regime for Cross-Border Tax Planning Arrangements \(DAC6\): ECJ Confirms Compatibility with EU Law](#), 64 Eur. Taxn. 11 (2024), Journal Articles & Opinion Pieces IBFD.
- A. Xygka, [Professional Secrecy in the Era of the Administrative Cooperation Directive: Ordre des Avocats du Barreau de Luxembourg \(Case C-432/23\)](#), 64 Eur. Taxn. 12 (2024), Journal Articles & Opinion Pieces IBFD.
- For more details on Administrative Cooperation in the European Union, see [C. Valério & D. Arsenovic, Direct Taxation](#), Global Topics IBFD.
- EU tax law developments are reported in the daily IBFD [Tax News Service](#).