ECJ Ruled on Reporting Obligations for Aggressive Tax Planning

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News

In its judgment of 29 July 2024, the ECJ upheld the EU's system on reporting obligations for intermediaries to inform tax authorities of certain cross-border arrangements that could potentially be used for aggressive tax planning. The ECJ particularly did not consider that the underlying EU legislation is invalid.

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Questions referred

The case (C-623/22, *Belgian Association of Tax Lawyers and Others*) was referred by the Belgian Constitutional Court. Before this court, a number of associations and professionals, active in the field of legal, tax or consultancy services request annulment of the Belgian law implementing the EU rules due to lack of precision and the unlimited effects of the obligations. Insofar as the contested national provisions have their origin in EU legislation, the Belgian Constitutional Court posed several questions on the validity of the reporting system, as laid down in Directive 2011/16 on administrative cooperation in the field of taxation as amended by Directive 2018/822 (hereinafter DAC-6). It was doubted that the Directive is in line with the fundamental rights of the Charter and other principles of EU law.

Infringement of equal treatment?

First, the referring court asked whether the principles of equal treatment and non-discrimination are infringed, in so far as DAC-6 does not limit the reporting obligation to corporation tax, but makes it applicable to all taxes falling within its scope.

The ECJ found that the reference point for an assessment of a possible breach of these principles is that of the risk of aggressive tax planning and of tax avoidance and evasion in the internal market. The different tax types subject to the reporting obligations fall within comparable situations in the light of these objectives and the legislation is not manifestly inappropriate.

Infringement of legal certainty?

Second, the referring court doubted that the terminology and concepts used in DAC-6 (e.g., "arrangement", "intermediary", "participant" etc.), which determine the scope and reach of the reporting obligation, as well as the starting point of the 30-day period prescribed for fulfilling the reporting obligation are not sufficiently clear and precise and thus infringe the principle of legal certainty, the principle of legality in criminal matters (Art. 49(1) of the Charter) and the right to respect for private life (Art. 7 of the Charter).

By defining the requirements of said principles and fundamental rights from the case law of the European courts and by examining the various aspects of the concepts used in DAC-6, the ECJ held that the degree of precision and clarity does not call into question the validity of DAC-6.

Breach of legal professional privilege?

Third, the ECJ had to clarify the scope of its judgement of 8 December 2022 in Case C-694/20 (*Orde van Vlaamse Balies and Others*) on exemptions from notifying others from the reporting obligation. The dispute refers to the scheme that Member States may grant intermediaries a waiver from the obligation to report aggressive cross-border tax planning where it would breach legal professional privilege protected under its national law. In such circumstances, lawyer-intermediaries are however required to notify without delay any other intermediary, or the relevant taxpayer, of their reporting obligations vis-à-vis the competent authorities (subsidiary obligation), and thus third parties, such as tax authorities, would gain the information (Art. 8a(5) DAC-6).

In the 2022 judgment, the ECJ ruled that the notification obligation on a lawyer subject to legal professional privilege is not necessary and infringes the right to respect for communications with his or her client (Art. 7 of the Charter).

In the present case, the Belgian Constitutional Court asked the ECJ whether this case law also applies to intermediaries who are not a lawyer but authorised to ensure legal representation, such as tax consultants or university professors in certain Member States.

The ECJ clarified now that the solution adopted in the 2022 judgment applies only to persons who pursue their professional activities under one of the professional titles referred to in Art. 1(2)(a) of Directive 98/5, i.e., the lawyer must have a role in collaborating in the administration of justice. Thus, the invalidity of the subsidiary obligation in light of Art. 7 of the Charter does not extend to other professionals not having those characteristics, even though they are authorised by the Member States to ensure legal representation.

Breach of the right to organise one's private life?

Fourth, the referring court raised the question whether the reporting obligation for intermediaries, and, in the absence of an intermediary subject to the reporting obligation, the relevant taxpayer (Art. 8a(6) and (7) DAC-6) infringes the right to respect for private life, understood as the right of everyone to organise his or her private life and activities. The Belgian Constitutional Court in particular pointed to situations in which an arrangement indeed pursues a tax advantage, but in a lawful and non-abusive manner. This would limit the taxpayer's freedom to choose, and the intermediary's freedom to design and advise that taxpayer on, the least taxed route.

The judges in Luxembourg acknowledged that the reporting obligation in respect of cross-border arrangements constitutes an interference with the right to respect for private life guaranteed in Art. 7 of the Charter, in so far as it results in revealing to the administration the result of tax design and engineering work relying on disparities between the various applicable national rules, carried out in the context of personal, professional or business activities by the taxpayer him or herself or by an intermediary. It is therefore liable to deter both that taxpayer and his or her advisers from designing and implementing cross-border tax-planning mechanisms.

However, the judges in Luxembourg conclude that such an interference is justified in the light of the objectives pursued by the amended Directive 2011/16. The interference does not adversely affect the essence of the right to respect for private life, and it does not outweigh the public interest objective of

combating aggressive tax planning and preventing the risks of tax avoidance and evasion. It follows that the reporting obligation at issue does not infringe the right to respect for private life.

Put in focus

In essence, the ECJ backs the system of reporting potentially aggressive tax arrangement from the part of privates to the tax administration, as introduced by the EU legislature in 2018. This also represents a kind of "paradigm shift": the terms "tax evasion/avoidance" or "aggressive tax arrangement" are no longer defined *per se*, but now indicators submitted by privates are to enable tax authorities and legislators to close loopholes in taxation.

Another important point of the judgment is that it reiterates the specific protection of the relationship between a lawyer and his/her client as stated in the 2022 judgment in *Orde van Vlaamse Balies*. Clients will continue to be able to trust that their lawyer will not disclose to anyone without their consent that they are being advised by him and what the advice is about. However, the ECJ clarified that this comprehensible protection does not extend to other professionals subject to professional secrecy. It is limited to lawyers who exercise their profession in the general interest in the proper administration of justice reflecting their unique position accorded to the profession of lawyer within society.

Lastly: The case at issue is not only closely related to the case in *Orde van Vlaamse Balies* but also to Case C-432/23 (*F SCS and Ordre des avocats du barreau de Luxembourg*). In this case, further clarifications on the scope of the lawyer-client-privilege under DAC-6 are sought.

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