

<https://doi.org/10.18778/1509-877X.2023.04.09>

Ewa Prejs* 

REPORTING TAX SCHEMES VIOLATES LEGAL PROFESSIONAL PRIVILEGE

Summary. In this article, the author discusses the judgment of the CJEU in the case C-694/20 *Orde van Vlaamse Balies and Others*, which extends the protection of professional secrecy for lawyers. In the context of combating aggressive tax planning, the CJEU ruled that requiring licensed lawyers to inform other intermediaries involved in a tax scheme is unnecessary and violates the right to respectful communication with the client. The CJEU's view that legal professional privilege takes precedence over tax objectives and obligations is the main novelty of the judgment under review. Individuals who consult a lawyer, as well as a tax advisor, have a reasonable expectation that their communications will remain private and confidential. Therefore, except in exceptional circumstances, they have a legitimate expectation that their lawyer will not, without their consent, disclose to anyone the fact that they are the subject of his or her advice. Following the judgment, the European Commission will legislate to amend the DAC6 Directive so that it meets the requirements of EU primary law as identified by the Court.

The judgment is also important because it recognises that legal professional privilege is not limited to advice given in the context of litigation, which has been a restrictive view in antitrust cases.

In *Orde van Vlaamse Balies and Others*, in which the Court held that the duty to inform other intermediaries imposed by Article 8ab(5) DAC 6 interfered with the right to respect for communications between lawyers and their clients guaranteed by Article 7 of the Charter of Fundamental Rights, the Court gave primacy to primary law (the Charter of Fundamental Rights) over secondary law (DAC 6). In this context, a new jurisprudential trend can be observed in which a substantive review of the Tax Directive was carried out on the basis of the Charter of Fundamental

* Doktor nauk prawnych, adiunkt, Nicolaus Copernicus University, Faculty of Law and Administration, Department of Public Finance Law, Toruń, e-mail: eprejs@umk.pl, <https://orcid.org/0000-0003-2784-2227>



Received: 5.09.2023. Verified: 21.09.2023. Accepted: 22.09.2023.

© by the author, licensee University of Lodz – Lodz University Press, Lodz, Poland. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution license CC-BY-NC-ND 4.0 (<https://creativecommons.org/licenses/by-nc-nd/4.0/>)

Rights. In general, the CJEU has been reluctant to get involved in substantively reviewing EU secondary legislation. More recently, however, the CJEU seems to be carefully analysing provisions of EU directives that are not in line with fundamental rights.

Keywords: legal professional privilege, tax schemes, MDR, Charter of Fundamental Rights, right to privacy

1. THE OBLIGATION TO REPORT TAX SCHEMES – LEGAL FRAMEWORK

The obligation to report a possible potentially aggressive tax planning arrangement (hereinafter also referred to as a tax scheme) to the competent authorities was introduced in the European Union by Council Directive (EU) 2018/822 of 25th May, 2018 (OJ 2018 L 139, p. 1) (hereinafter DAC 6), which amended Council Directive 2011/16/EU of 15th February, 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), establishing a system of cooperation between the national tax authorities of the Member States and the principles and procedures applicable to the exchange of information for tax purposes.

The information obligations imposed by this Directive are primarily aimed at combating potentially aggressive tax planning arrangements which may lead to tax avoidance and tax evasion. By virtue of Article 1(2) of DAC 6, Article 8ab, entitled “*Scope and conditions of the mandatory automatic exchange of information on notifiable cross-border arrangements*”, was added to Directive 2011/16, among other things. According to its wording, each Member State was required to take the necessary measures to impose an obligation on intermediaries to provide the competent authorities with information on notifiable cross-border arrangements that is known to them or is in their possession or under their control. An “intermediary” within the meaning of the Directive is a person who prepares, markets, organises, or arranges for the implementation of a notifiable cross-border arrangement or manages the implementation of such an arrangement. The term also includes a person who, having regard for the relevant facts and circumstances and on the basis of the information available and the relevant expertise and knowledge required to provide such services, is aware or can reasonably be expected to be aware that he/she has undertaken to provide, directly or through others, assistance, support or advice in relation to the preparation, marketing, organisation, making available for implementation, or overseeing the implementation of a notifiable cross-border arrangement. Each person must be able to demonstrate that they did not know, or could not reasonably be expected to know, that they were involved in a reportable

cross-border arrangement. For this purpose, that person may rely on all relevant facts and circumstances, available information and his/her relevant expertise and orientation. The above intermediaries, whether directly or through others, are also required to provide information within 30 days of the day following the provision of assistance, support, or advice.

In parallel, Article 8ab(5) of DAC 6 allows the intermediary to exclude themselves from the obligation to provide information on the tax regime. According to the text, any Member State may take the appropriate measures to allow an intermediary to be exempted from the obligation to provide information concerning cross-border agreements subject to notification if such information is in breach of the obligation of confidentiality under the national law of that Member State. In such cases, each Member State shall take the necessary measures to oblige intermediaries to inform without delay any other intermediary or, where there is no such intermediary, the taxpayer concerned of their obligation to report under its paragraph 6 of the DAC 6. Only in so far as intermediaries act within the limits of the relevant national provisions governing their profession may they be exempted from the obligation laid down in the first subparagraph of Article 8ab DAC 6. Each Member State should also take the necessary measures to provide that, where there is no intermediary or where an intermediary notifies the relevant taxable person or another intermediary that the exemption provided for in paragraph 5 applies, the obligation to provide information on the notifiable cross-border arrangement shall lie with that other notified intermediary or, in the absence of such an intermediary, with the relevant taxable person.

The purpose of DAC 6 is to ensure that Member States' tax authorities have complete and relevant information on potentially aggressive tax planning arrangements, so that they can act more quickly to combat harmful tax practices and to eliminate loopholes, either through legislation or through appropriate risk assessments and tax audits. However, this ambition of the directive is striking the self-regulation and independence that are the cornerstones of the secrecy of the legal profession, which serves the rule of law by enabling lawyers to provide completely independent legal advice.

The reporting obligation under the DAC 6 applies to all entities that are habitually involved in the design, marketing, organisation, or supervision of the implementation of a reportable cross-border transaction or series of transactions, as well as to entities that provide assistance or advice in this respect. This means that the obligation also extends to entities

providing legal assistance, including members of the professions bound by legal professional privilege such as solicitors, barristers, or tax advisers. It is precisely because of the national rules in force in the Member States on professional secrecy that a Member State may exempt intermediaries from this obligation. However, DAC 6 considers that the provision of information to the tax authority on a cross-border tax arrangement is crucial to the Directive's objective of combating tax avoidance and, therefore, *inter alia*, it is necessary in such circumstances to shift the reporting obligation to the taxpayer using the arrangement or to another intermediary who is also involved in the design and implementation of the arrangement. In such circumstances, the taxpayers acting as intermediaries are required to promptly inform any other intermediary or the relevant taxpayer of their obligation to report to the competent tax authorities.

Member States were required to adopt and publish the laws, regulations, and administrative provisions necessary to implement DAC 6 by 31st December, 2019, at the latest and to apply them from 1st July, 2020. They have not been implemented in any of the other EU Member States, nor have they been implemented in Poland, before 2019. The Polish legislator transposed DAC 6 into national law by the Act of 23rd October, 2018, amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Act, and certain other acts¹ as of 1st January, 2019, by adding the provisions of Chapter 11a to the Tax Ordinance Act². These provisions provide for the obligation to offer information on the tax scheme to the tax authorities. This obligation applies to both cross-border and domestic tax schemes, whereas DAC 6 imposes such an obligation only on cross-border schemes. This is not the only deviation from DAC 6 that has been introduced by the Polish legislator at the implementation level.

DAC 6 refers to two groups of operators: an intermediary and a beneficiary, whereas Polish provisions introduce the notion of a promoter, an intermediary, and a beneficiary. An intermediary under DAC 6 is any person that designs, markets, organises, but also makes available for implementation or manages the implementation of a reportable cross-border arrangement. Under Article 86a § 1 point 8 of the Tax Ordinance Act, a promoter means any person, in particular a tax adviser, advocate,

¹ Journal of Laws of 2018, item 2193; hereinafter: the amending act.

² Act of 29th August, 1997, Tax Ordinance, Journal of Laws of 2022, item 2651, as amended.

legal counsellor, an employee of a bank or other financial institution who advises clients, also in the case where such subject does not have its place of residence, seat or management office on the territory of the country, that develops, offers, makes available, or implements an arrangement or manages the implementation of an arrangement. An intermediary (a supporter) means, in turn, any person, in particular an expert auditor, a notary, a person providing services of keeping the account books, an accountant or a finance director, a bank or other financial institution, including their employee, which or who, while exercising the diligence generally required from the performed acts, having regard for the professional nature of activity, the area of specialisation, and the object of performed acts, undertook to grant, directly or via other persons, assistance, support or advice as regards developing, entering into circulation, organising, making available for implementation or supervising the implementation of an arrangement. Pursuant to Article 86b § 4 of the Tax Ordinance Act, if a legal advisor (in particular, a tax advisor, advocate or legal counsel) who is a promoter (or intermediary) and who has not been released from this obligation by the beneficiary, provides information on a tax scheme that is not a standardised tax scheme in breach of the obligation to maintain legally protected professional secrecy, he/she is obliged to inform the beneficiary in writing without delay and within the time limit of the obligation to submit the tax scheme to the Head of the National Fiscal Administration and to provide the beneficiary with the data referred to in Article 86f § 1 concerning the tax scheme. Furthermore, § 5 of the same article stipulates that in such a case, if more than one entity is obliged to communicate the information on the tax scheme, the entity referred to in this provision shall, at the same time as it informs the beneficiary, inform in writing the other entities known to it which are obliged to communicate the information on the tax scheme, that it will not communicate the information on the tax scheme to the Head of the National Fiscal Administration. Within 30 days of informing the beneficiary or other entities of the obligation to provide information on the tax scheme, the promoter shall also inform the Head of the National Fiscal Administration of the date on which the tax scheme was made available to the beneficiary or other entities of the obligation to provide information on the tax scheme, indicating the date on which the tax scheme was made available or the activity related to the implementation of the tax scheme was carried out, and the number of entities that they have informed of the obligation to provide information. The provision of

Article 86b § 7 of the Tax Ordinance Act specifies the cases in which the provision of information does not constitute a breach of the obligation to maintain professional secrecy protected by law. Among the cases covered by this exclusion, this provision indicates the transmission of information to the Head of the National Fiscal Administration when the beneficiary or other entities have been informed of the need to provide information on the tax scheme to tax authorities.

2. DOUBTS ABOUT THE COMPATIBILITY OF THE TAX REPORTING PROVISIONS WITH THE EU LAW

Member States have proceeded with the implementation of DAC 6 in the emotive context. In most countries, doubts have been raised if DAC 6 is compliant with EU law, as far as the obligation to provide information to legal aid practitioners is concerned.

Doubts of this kind have also been raised with regard to the provisions implementing DAC 6 in Belgium. The Directive 2011/16/EU of 15th February, 2011, was transposed in Belgium by the Decree of 21st June, 2013, on administrative cooperation in the field of taxation. This Decree was amended by the Decree of 26th June, 2020, on the mandatory automatic exchange of information in the field of taxation for reportable cross-border arrangements, which transposed the DAC 6 into the national system. Subsection 2 of Section 2 of Chapter 2 of the Decree of 21st June, 2013, introduced the mandatory provision of information on notifiable cross-border arrangements by intermediaries or relevant taxpayers. In turn, Article 11/6 of the same Decree established the relationship between the reporting obligation and the professional secrecy that certain intermediaries were obliged to maintain. It transposed Article 8ab(5) and (6) of Directive 2011/16. Like the aforementioned provisions of the Tax Ordinance Act, Article 11(6) of the Decree of 21st June, 2013, provides in paragraph 1 that an intermediary subject to professional secrecy is obliged:

- 1) to inform another intermediary or intermediaries, in writing and in a reasonable manner, that he/she or they cannot comply with the obligation to notify, with the result that the obligation to notify is automatically imposed on the other intermediary or intermediaries;
- 2) in the absence of another intermediary, to inform the competent taxpayer or taxpayers concerned in writing and in a reasonable manner of their obligation to report.

Where an intermediary has informed the taxpayer or another intermediary of the application of the exemption provided for in Article 11(6) of the Decree, the obligation to provide information on the notifiable cross-border arrangement falls on the other intermediary who has been informed or, in the absence of another intermediary, on the taxpayer. The Decree transposing the Directive into Belgian law thus provided that an intermediary involved in a cross-border tax planning arrangement bound by professional secrecy must inform the other intermediaries that he/she cannot make such a declaration himself.

Two associations of legal professionals brought an action before the Belgian Constitutional Court, claiming, *inter alia*, that the mere fact of informing other intermediaries of the transfer was a breach of professional secrecy. By letters dated 31st August, 2020, and 1st October, 2020, two Belgian lawyers also brought actions before the Constitutional Court for the suspension of the application of the Decree of 26th June, 2020, and for its annulment in whole or in part, challenging in particular the obligation for a lawyer acting as an intermediary, when bound by professional secrecy, to inform the other intermediaries concerned in writing and with reasons that he/she cannot comply with his/her obligation to notify the tax scheme. The Belgian Constitutional Court stayed the proceedings and asked the European Court of Justice (ECJ) whether Article 1(2) of DAC 6 infringes the right to a fair trial guaranteed by Article 47 of the Charter and the right to respect for private life guaranteed by Article 7 of the Charter in so far as it introduces the new provision 8ab(5) into Directive 2011/16, which provides that where a Member State adopts the necessary measures to allow intermediaries to dispense with the obligation to provide information on notifiable cross-border arrangements for reasons of professional secrecy, that Member State must oblige intermediaries to inform any other intermediary or, failing that, the relevant taxable person, without delay, of their obligation to provide information. This obligation has the effect of obliging the intermediary lawyer to disclose to other intermediaries, who are not his/her clients, information that he/she has obtained in the course of his/her professional activity.

The information that intermediary lawyers are required to provide to the competent authority in relation to their clients is protected by professional secrecy if it relates to activities connected with the provision of legal advice or legal representation.

The Constitutional Court of Belgium has held that the mere fact of using the services of a lawyer is also covered by professional secrecy. Information protected by professional secrecy *vis-à-vis* public authorities is also protected *vis-à-vis* other parties, such as other intermediaries. Moreover, the Court considered that the obligation to provide information is not necessary to ensure that cross-border arrangements are notified where the client, whether or not he/she is assisted by a lawyer, can himself/herself inform the other intermediaries and ask them to comply with their obligation to notify the competent tax authorities. The national court pointed out that the information which lawyers are required to communicate to the competent authority concerning their clients is protected by professional secrecy in so far as it relates to activities falling within the scope of their specific tasks of defending or representing clients in legal proceedings and providing legal advice. The court notes that the mere fact of the use of a lawyer's services is covered by professional secrecy, *a fortiori* the identity of the lawyer's client. Information which is protected by professional secrecy with regard to public authorities is also protected with regard to other parties, such as other intermediaries.

On 5th April, 2022, Advocate General Rantos recommended the ECJ to consider the requirement for intermediaries claiming legal professional privilege under the DAC 6 to inform other intermediaries (or the relevant taxpayer) of their reporting obligation “does not violate their rights under the EU Charter of Fundamental Rights, as long as the name of the intermediary claiming the privilege is not disclosed to the tax authorities”³.

Similar request for a preliminary ruling was lodged on 28th June, 2021, by the French *Conseil d'État* (France) in the case C-398/21 *Conseil national des barreaux, Conférence des bâtonniers, Ordre des avocats du barreau de Paris v Premier ministre, Ministre de l'Economie, des Finances et de la Relance*⁴. The *Conseil d'État* has doubts whether Article 8ab(5) of DAC 6 infringes the right to a fair hearing guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union and Article 6

³ Opinion of Advocate General Rantos delivered on 5th April, 2022, case C-694/20, *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering*, ECLI:EU:C:2022:259.

⁴ Request for a preliminary ruling from the *Conseil d'État* (France) lodged on 28th June, 2021 – *Conseil national des barreaux, Conférence des bâtonniers, Ordre des avocats du barreau de Paris v Premier ministre, Ministre de l'Economie, des Finances et de la Relance*, Case C-398/21.

of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that it does not exclude, in principle, lawyers participating in judicial proceedings from the scope of intermediaries who must supply the tax authorities with the information necessary for reporting a cross-border tax arrangement or who must notify another intermediary of that obligation. In the opinion of *Conseil d'État*, Article 8ab(5) of DAC 6 infringes also the rights in respect of correspondence and private life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in that it does not exclude, in principle, lawyers assessing their client's legal situation from the scope of intermediaries who must supply the tax authorities with the information necessary for reporting a cross-border tax arrangement or who must notify another intermediary of that obligation.

Additionally, *Cour Constitutionnelle* in Belgium lodged on 29th September, 2022, further questions to CJEU on DAC 6⁵. The *Cour Constitutionnelle* in Belgium questions whether DAC 6 infringes Article 6(3) of the Treaty of the European Union and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union and, more specifically, the principles of equality and non-discrimination as guaranteed by those provisions, in that the directive does not limit the reporting obligation in respect of cross-border arrangements to corporation tax, but makes it applicable to all taxes falling within the scope of directive 2011/16/EU. The court asks also whether DAC 6 violates the principle of legality in criminal matters as guaranteed by Article 49(1) of the Charter of Fundamental Rights of the European Union and by Article 7(1) of the European Convention on Human Rights, the general principle of legal certainty and the right to respect for private life as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and by Article 8 of the European Convention on Human Rights, in that the concepts used in the directive are not sufficiently clear and precise. A similar objection is raised against the DAC 6 use of the 30-day period during which the intermediary or relevant taxpayer must fulfil its reporting obligation in respect of a cross-border arrangement as in the court's view it is not fixed in a sufficiently clear and precise manner.

⁵ Request for a preliminary ruling from the *Cour constitutionnelle* (Belgium) lodged on 29th September, 2022, in the case C-623/22 *Belgian Association of Tax Lawyers and Others v Premier ministre/ Eerste Minister*.

The Court also upholds the plea of incompatibility of the new Article 8ab(5) of DAC 6 with the right to respect for private life as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and by Article 8 of the European Convention on Human Rights, as it requires 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/her client, information which he/she obtains in the course of the essential activities of his/her profession. It also alleges that DAC 6 infringes the right to respect for private life in that the reporting obligation in respect of 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.

3. JUDGMENTS OF THE ECJ OF 8TH DECEMBER, 2022 (C-694/20),
AND OF 7TH MARCH, 2023 (C-398/21)

On 8th December, 2022, the ECJ delivered its judgment in case C-694/20 concerning the compatibility with EU law of the obligation for intermediaries who benefit from the professional secrecy exemption from providing information on cross-border arrangements of potentially aggressive tax planning to inform another intermediary of the obligation to provide such information⁶.

The Court held that Article 8ab(5) of Directive 2011/16/EU, as amended by DAC 6, is invalid in the light of Article 7 of the Charter of Fundamental Rights of the European Union in so far as its application by the Member States has the effect of imposing on a lawyer acting as an intermediary within the meaning of Art. 3(21) of that directive, where they are exempted from the obligation to notify cross-border agreements by reason of the professional secrecy which he/she is bound to observe, an obligation to inform without delay any other intermediary who is

⁶ Judgment of the ECJ of 8th December, 2022, *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering*, C-694/20, EU:C:2022:963.

not his/her client of his/her obligation to notify under Article 8ab(6) of that Directive. The Court found that the mere obligation to inform a person who is not a client of such an obligation to provide information impermissibly interferes with the right to respect for legal professional privilege, as guaranteed by Article 7 of the EU Charter of Fundamental Rights, by again giving priority to fundamental rights over considerations of general interest. The judgment applies to all legal aid providers subject to legal professional privilege and upholds the fundamental principles of the protection of the right to legal aid. The Court ruled that the obligation to notify was invalid in the light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, in particular the right to respect for communications between a lawyer and his client (Article 7).

In its judgment, the Court first recalled Article 7 of the Charter of Fundamental Rights of the EU, which protects the confidentiality of all correspondence between individuals and natural persons. Article 7 of the Charter recognises that everyone has the right to respect for their private and family life, their home, and their communications. These provisions correspond to Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), while Article 47, which guarantees the right to an effective remedy and to a fair trial, corresponds to Article 6(1) of the ECHR. The Charter must be interpreted in a manner consistent with the ECHR⁷. The ECJ must therefore take into account the interpretation of the European Court of Human Rights (ECtHR) as a minimum standard when interpreting the rights guaranteed by the Charter.

It is clear from the case-law of the ECtHR that Article 8(1) of the ECHR protects the confidentiality of all correspondence between individuals and affords greater protection to exchanges between lawyers and their clients. Like this provision, the protection of which extends not only to defence but also to legal advice, Article 7 of the Charter necessarily guarantees the

⁷ In accordance with Article 52(3) of the Charter, which seeks to ensure the necessary coherence between the rights enshrined in the Charter and the corresponding rights guaranteed by the ECHR without undermining the autonomy of Union law, the Court should, when interpreting the rights guaranteed by Articles 7 and 47 of the Charter, the corresponding rights guaranteed by Articles 8(1) and 6(1) of the ECHR, as interpreted by the European Court of Human Rights, as a threshold of minimum protection, see, similarly, the judgment of 2nd February, 2021, *Consob*, C-481/19, EU:C:2021:84, paragraphs 36, 37.

secrecy of such legal advice, both as to its content and as to its existence. As the ECtHR has pointed out, persons who consult a lawyer have a reasonable expectation that their communication will be private and confidential. Those persons must, therefore, save in exceptional circumstances, have a legitimate expectation that their lawyer will not disclose to anyone the fact that they are consulting him without their consent⁸.

The specific protection afforded by Article 7 of the Charter and Article 8(1) of the ECHR to legal professional privilege, which takes the form, first and foremost, of obligations on lawyers, is justified by the fact that lawyers have a fundamental role to play in a democratic society, namely that of defending litigants⁹. That fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that every person must be able to consult freely a lawyer whose profession by its very nature involves the giving of independent legal advice to all those who need it and, on the other hand, the correlative duty of the lawyer to act in good faith towards his client¹⁰.

The obligation laid down in Article 8ab(5) of Directive 2011/16, as amended, for a lawyer-intermediary, where he/she is exempted from the reporting obligation laid down in Article 8ab(1) by virtue of legal professional privilege under national law, to inform without delay other intermediaries who are not his/her clients of their obligation to report under Article 8ab(6) of that directive, necessarily entails the consequence that those other intermediaries become aware of the identity of the notifying lawyer-intermediary, of his/her assessment that the arrangement in question is reportable and of his/her having been consulted in connection with the arrangement. In those circumstances, and to the extent that those other intermediaries do not necessarily have knowledge of the identity of the lawyer-intermediary and of the fact that he/she has been consulted on the reportable cross-border arrangement, the obligation to notify laid down in Article 8ab(5) of Directive 2011/16, as amended, in the opinion of

⁸ See, ECtHR judgment of 9th April, 2019, *Altay v. Turkey* (No 2), CE:ECHR:2019:0409JUD001123609, § 49; ECtHR judgment of 6th December, 2012, *Michaud v. France*, CE:ECHR:2012:1206JUD001232311, §§ 117 and 118.

⁹ ECtHR, judgment of 6th December, 2012, *Michaud v. France*, CE:ECHR:2012:1206JUD001232311, §§ 118 and 119.

¹⁰ See, to that effect, judgment of 18th May, 1982, *AM & S Europe v Commission*, 155/79, EU:C:1982:157, § 18.

the ECJ entails an interference with the right to respect for communications between lawyers and their clients, guaranteed by Article 7 of the Charter.

In addition, the ECJ stated that the obligation to report indirectly leads to a further infringement of this right, which results from the fact that the third party intermediaries thus notified disclose to the tax authorities the identity of the lawyer-intermediary and the fact that he has been consulted. It follows from Article 8ab(1), (9), (13) and (14) of the amended Directive 2011/16 that the identification of the intermediaries is one of the items of information to be provided under the reporting obligation, this identification being the subject of an exchange of information between the competent authorities of the Member States.

The rights enshrined in Article 7 of the Charter are not absolute rights, but must be considered in relation to their function in society. Accordingly, the ECJ examined whether those restrictions on the right to respect for communications between lawyers and their clients, guaranteed by Article 7 of the Charter, could be justified. As can be seen from Article 52(1) of the Charter, that provision allows limitations to be imposed on the exercise of those rights, provided that such limitations are provided for by law, that they respect the essence of those rights and that, in accordance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others¹¹.

In that regard, the ECJ held, first, that Article 8ab(5) of Directive 2011/16, as amended, expressly imposes on a lawyer-intermediary who is exempted from the obligation to provide information by virtue of the legal professional privilege to which he/she is subject an obligation to inform other intermediaries of their obligation to provide information under Article 8ab(6). Secondly, as has been pointed out by the ECJ, the interference with the right to respect for communications between lawyers and their clients, as enshrined in Article 7 of the Charter, is the direct consequence of such a notification by the lawyer to another intermediary who is not his/her client, in particular where, up to the time of that notification, that client was unaware of the identity of that lawyer and of the fact that he/she had been consulted on the cross-border arrangement to be notified.

¹¹ See, to that effect, judgment of 6th October, 2020, *Privacy International*, C-623/17, EU:C:2020:790, §§ 63 and 64.

The principle of legality has been complied with. Article 8ab(5) of Directive 2011/16, as amended, expressly requires a lawyer-intermediary who is exempted from the obligation to provide information by virtue of legal professional privilege to inform other intermediaries of their obligation to provide information under its Article 8ab(6).

With regard to the interference resulting indirectly from that obligation to notify, by reason of the disclosure by the notified third party intermediaries of the identity of the lawyer- intermediary and of the fact that he/she has been consulted to the tax authorities, that disclosure is due to the extent of the obligations to provide information resulting from Article 8ab(1), (9), (13) and (14) of Directive 2011/16, as amended.

Secondly, as regards respect for the essence of the right to respect for communications between lawyers and their clients, guaranteed by Article 7 of the Charter, in the Court's opinion, the obligation to provide information laid down in Article 8ab(5) of Directive 2011/16, as amended, entails, to a limited extent only, the lifting of the confidentiality of communications between the lawyer-intermediary and his/her client *vis-à-vis* a third party intermediary and the tax authorities. In particular, this provision does not oblige, or even authorise, the lawyer-intermediary, without the consent of his/her client, to communicate information on the content of those communications to other intermediaries, and those intermediaries will therefore not be able to communicate such information to the tax authorities. In those circumstances, in the Court's view, it cannot be considered that the obligation to provide information laid down in Article 8ab(5) of the amended Directive 2011/16 undermines the essence of the right to respect for communications between lawyers and their clients enshrined in Article 7 of the Charter.

Thirdly, as regards compliance with the principle of proportionality, that principle requires that the restrictions which may be imposed, in particular by acts of EU law, on the rights and freedoms enshrined in the Charter must not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous. Moreover, a general interest objective may not be pursued without taking into account the need to reconcile it with the fundamental rights affected by the measure, by striking a proper balance between the general interest objective and the rights in question, in order to ensure that the disadvantages caused by

the measure are not disproportionate to the objectives pursued. Thus, the possibility for Member States to justify a limitation of the rights guaranteed by Article 7 of the Charter must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the general interest objective pursued by that limitation is proportionate to that seriousness¹². Thus, the ECJ underlined that the possibility for Member States to justify a limitation of the rights guaranteed by Article 7 of the Charter must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the general interest objective pursued by that limitation is proportionate to that seriousness. If so, ECJ pointed out that it is necessary to ensure, first, that the obligation is proportionate to the achievement of that objective and, second, that the interference with the fundamental right to respect for communications between lawyers and their clients which may result from that obligation to report is limited to what is strictly necessary, in the sense that the pursued objective could not reasonably be achieved as effectively by other means less restrictive of that right and, thirdly, if that is indeed the case, that that interference is not disproportionate to that objective, which implies in particular a balancing of the importance of the objective and the gravity of the interference¹³.

The amendment made to Directive 2011/16 by DAC 6 falls within the scope of international tax cooperation to combat aggressive tax planning, which is manifested in the exchange of information between Member States. The fight against aggressive tax planning and the prevention of the risk of tax avoidance and tax evasion constitute an objective of general interest recognised by the European Union within the meaning of Article 52(1) of the Charter, which may make it possible to restrict the exercise of the rights guaranteed by Article 7 of the Charter¹⁴.

However, in the ECJ's view, the obligation laid down in Article 8ab(5) of amended Directive 2011/16 cannot be regarded as being strictly necessary in order to achieve those objectives and, in particular, to ensure

¹² See ECJ judgments of 26th April, 2022, *Poland v Parliament and Council*, C-401/19, EU:C:2022:297, § 65, and of 22nd November, 2022, *Luxembourg Business Registers and Sovim*, C-37/20 and C-601/20, EU:C:2022:912, § 64.

¹³ See, the ECJ judgment of 22nd November, 2022, *Luxembourg Business Registers and Sovim*, C-37/20 and C-601/20, EU:C:2022:912, § 66.

¹⁴ See also ECJ judgment of 6th October, 2020, *État luxembourgeois*, C-245/19 and C-246/19, EU:C:2020:795, § 87.

that the information relating to the reportable cross-border arrangements is filed with the competent authorities. The ECJ confirmed that the second subparagraph of Article 8ab(5) of Directive 2011/16, as amended, provides that lawyer-intermediaries may only be entitled to a waiver under the first subparagraph of that provision to the extent that they operate within the limits of the relevant national laws that define their profession. However, the purpose of the reporting and notification obligations laid down in Article 8ab of that Directive is not to check whether lawyer-intermediaries operate within those limits, but to combat potentially aggressive tax practices and to prevent the risk of tax avoidance and evasion by ensuring that information on reportable cross-border arrangements is filed with the competent authorities. The ECJ noted that the Directive ensures that such information is communicated to the tax authorities without the necessity to disclose to them the identity of the lawyer-intermediary and the fact that he/she has been consulted. In those circumstances, the possibility that lawyer-intermediaries might wrongly invoke legal professional privilege in order to avoid their obligation to report cannot lead to the conclusion that the obligation to report laid down in Article 8ab(5) of that Directive and the disclosure to the tax authorities of the identity of the reporting lawyer-intermediary and of the fact that he/she has been consulted are strictly necessary.

The Court therefore concluded in case C-694/20 that Article 8ab(5) of the Directive is invalid under Article 7 of the Charter if its application has the effect of requiring a lawyer acting as an intermediary and covered by legal professional privilege to inform any other intermediary – who is not his/her client – of his reporting obligations. It is not necessary to know the identity of the lawyer, since legal professional privilege would exempt the lawyer from answering any questions which might subsequently be asked by the tax administration.

In the light of the judgment delivered on 8th December, 2022, in case C-694/20 the *Conseil d'État* in France informed the Court that it did not intend to maintain its reference for a preliminary ruling in case C-398/21 and this case has been removed from the Court's register. Request for a preliminary ruling from the *Cour Constitutionnelle* in Belgium lodged in the case C-623/22 is still pending.

4. THE IMPLICATIONS FOR THE COURT'S JUDGMENT

In the case of *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering* (C-694/20), the CJEU confirmed its jurisdiction to give preliminary rulings in the specific case where the Member State's national law refers to the provisions of a directive in order to determine the application of the relevant provision to the purely internal situation of that State. The court clarified the exemption of lawyers from the obligation to report information to the tax authorities under EU law. The ECJ ruled that the obligation imposed on lawyers under the DAC6 to inform intermediaries other than their own clients infringes the right to respect for communications between lawyers and their clients, as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union.

The CJEU emphasises that information obtained by a lawyer in the course of the provision of legal advice, both as to its content and as to its existence, remains covered by the obligation of professional secrecy even outside the context of litigation. In the *Reyners* judgment of 21st June, 1974¹⁵, it was held that, notwithstanding the differences in the organisation of the legal profession in the various Member States, the most typical activities of the legal profession are, on the one hand, to provide legal advice and assistance and, on the other, to represent and defend parties before the courts. In the opinion of the CJEU, the exemption of lawyers from the obligation to provide information to the tax authorities applies to all typical activities of the legal profession, since the function of a lawyer is broader than simply representing a client in court. Until Case C-694/20, the CJEU had only explicitly recognised that legal professional privilege covers communications with EU qualified external counsel made for the purposes and in the interests of a client's defence in competition proceedings¹⁶.

With regard to the implications of the judgment in case C-694/20, it should also be emphasised that the CJEU gave priority to primary law (Charter of Fundamental Rights) over secondary law (DAC 6). It follows directly from this ruling that the legal professional privilege of lawyers takes precedence over their obligation to report to the authorities

¹⁵ See CJEU judgement of 21st June, 1974, in the case *Asia 2/74 Jean Reyners v. Belgian valtio*, ECLI:EU:C:1974:68.

¹⁶ See CJEU judgment of 18th May, 1982, *AM&S v. Commission*, Case 155/79, EU:C:1982:157, § 21.

various activities carried out by their clients that are considered to be aggressive tax planning. The reporting obligation is contrary to legal professional privilege, because it infringes the right to respect for private life and the right to a fair trial and because the obligation is not strictly necessary to ensure that relevant cross-border arrangements are reported. In order to ensure compliance with the judgment, Member States will need to review their rules on reporting obligations. It may be that the obligations of intermediaries subject to legal professional privilege will be limited to informing only the taxpayer concerned of their respective obligations.

It should also be noted that, in the light of this ruling, the protection of legal professional privilege under EU law covers communications relating to legal advice beyond those relating to litigation¹⁷. The CJEU made it clear that legal professional privilege under EU law applies to legal advice in general, such as regulatory or commercial advice, and not only to advice given in the context of the client's right to be heard in legal proceedings. Furthermore, in the author's view, the case generally may affect the position of approved tax advisers and accountants, as there is a possibility that tax advisors and accountants could invoke the same professional privilege, even though the *Orde van Vlaamse Balies* case was brought by the Flemish Bar and is therefore framed in the context of lawyers subject to legal professional privilege. Clarifications in national laws may be necessary in this respect as to whether approved tax advisers and accountants as intermediaries could still have an obligation to notify other intermediaries, whereas lawyers clearly now do not have such an obligation following the CJEU's decision. These intermediaries (who may at this stage still be obliged by national laws to notify other intermediaries) should at the same time consider the compatibility of this obligation with the rules on professional secrecy that apply to them. In Poland, according to article 37 sec. 1 of the Tax Advisers Act, tax advisers are obliged to maintain secrecy about facts and information that come to their knowledge in connection with the exercise of their profession, so there is no doubt that the judgment also applies to them.

¹⁷ Enrico Salmini Sturli, Thibault Henry, Extension of EU Legal Professional Privilege: Case C-694/20 *Orde Van Vlaamse Balies*, *Journal of European Competition Law & Practice*, vol. 14, Issue 3, April 2023, pp. 165–167, <https://doi.org/10.1093/jeclap/lpad016>

However, the main consequence of the CJEU judgment in case C-694/20 is that lawyers in EU Member States are no longer obliged to inform other intermediaries who are not their clients. This conclusion also applies to Polish tax advisors, lawyers, and legal counsellors, who, under Polish law, are obliged to inform not only other intermediaries who are not their clients of their obligation to notify the tax authority of the tax scheme, but also the beneficiary itself and, in addition, the Head of the National Fiscal Administration.

The situation in which the CJEU annuls a directive (in whole or in part) is relatively rare and complex in its implications. For this reason, the case law of the CJEU does not provide comprehensive guidance on the implications of such preliminary rulings, both in terms of the validity of the DAC 6 at the level of the EU legal system and the consequences for national measures transposing the Directive into national law. Following a judgment of the CJEU on the basis of Article 263 TFEU, an act of EU law which has been declared invalid ceases to have effect in the EU legal order. When the Court of Justice annuls an act of the EU institutions in proceedings under Article 267 of the Treaty on the Functioning of the European Union, the consequence of this judgment is that the relevant EU institutions must take the necessary measures to put an end to the illegality established in accordance with Article 266 of the Treaty on the Functioning of the European Union. A preliminary ruling by the CJEU annulling a directive at EU level has no direct bearing on the validity of the act transposing the directive into national law, although it is binding on the national court which made the reference to the CJEU for a preliminary ruling. In particular, a judgment of the CJEU does not automatically invalidate an act of national law implementing a directive. Such a ruling may constitute sufficient grounds for any other national court to consider that the decision which it is called upon to take is invalid, although it is addressed only to the court which made the reference.

It should also be noted that, in the past, the CJEU had been reluctant to undertake a substantive review of secondary Union law, particularly where legislation has been adopted unanimously by the Member States. In this judgment, however, the Court reviewed a tax directive on the basis of the Charter of Fundamental Rights. More recently (22nd November, 2002), it also ruled that the conditions for access to beneficial ownership information under the EU's Fifth Anti-Money Laundering Directive 2018/843 (AMLD) violated the fundamental rights enshrined in Articles 7

and 8 of the Charter of Fundamental Rights¹⁸. In particular, the AMLD was adopted under the ordinary legislative procedure, which requires only a qualified majority of Member States for adoption by the Council. In the *Sovim SA* case, the Court of Justice ruled that the AMLD requirement that information on beneficial ownership registers be displayed online and remain accessible to all members of the public violated the EU right to the protection of personal data. The European Court of Justice is emboldened to strike down any new EU legislation that may be in breach of fundamental rights, including tax directives. In this situation, a challenge to the Council Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large domestic groups in the Union, or to the possibly adopted amended version of the Directive setting out rules to prevent the abuse of shell companies for tax purposes, the so-called “Anti Tax Avoidance Directive 3” (ATAD3), could be considered¹⁹.

5. CONSTITUTIONAL DOUBTS RAISED BEFORE THE POLISH CONSTITUTIONAL TRIBUNAL AGAINST THE PROVISIONS ON THE REPORTING OF TAX SCHEMES

As of 1st January, 2019, the provisions of Chapter 11a of the Tax Ordinance entered into force in Poland. Tax Ordinance, as amended by Article 3(22) of the Act of 23rd October, 2018, amending the Act on Income Tax of Natural Persons, the Act on Income Tax of Legal Persons, the Act on tax on the income of legal persons, the Act – Tax Ordinance and certain other acts²⁰, introduced an obligation to notify Polish tax authorities of tax arrangement schemes. The provisions were aimed at implementing DAC 6. Poland was one of the first countries in Europe to incorporate the recommendations of the DAC 6 into its legal system and to significantly expand the definition of tax arrangements subject to reporting requirements, including, for example, the need to report on domestic tax arrangements.

Under article 86b § 1 of the Tax Ordinance, the promoter shall provide to the Head of the National Fiscal Administration the information

¹⁸ See, joined CJEU judgement dated from 22nd November, 2022, cases C-37/20 and C-601/20, *WM and Sovim SA v. Luxembourg Business Registers*, EU:C:2022:912.

¹⁹ Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU.

²⁰ Journal of Laws of 2018, item 2193; hereinafter: the Amending Act.

on the tax arrangement scheme within 30 days of: the next day after making the tax arrangement scheme available, the next day after preparing to the tax arrangement scheme implementation or the day of performing the first act related to the tax arrangement scheme implementation – whichever comes first²¹. These provisions provide also for the possibility of exempting a tax advisor or a lawyer who is a promoter (or an assisting person) from the obligation of legal professional privilege (Article 86b § 4 of the Tax Ordinance) and specify situations in which the provision of information does not constitute a breach of the obligation to legally protected professional secrecy (Article 86b § 7 of the Tax Ordinance). Provisions introduced to implement DAC 6 raise more than constitutional concerns²².

The rules governing the various professions of public trust treat professional secrecy as a duty incumbent on the members of these professions and not as a right. Moreover, the obligation of confidentiality is part of the code of ethics of the members of these professions, the breach of which constitutes the basis for disciplinary and criminal sanctions²³.

The National Council of Tax Advisers in Poland, by its resolution of 17th December, 2009, declared that the provisions of Article 86b, Article 86d, Article 86e and Article 86f of the Tax Code, as amended by the Act of 5th July, 1996, on Tax Advisers, in conjunction with Article 37(4) of the Act of 5th July, 1996, on Tax Advisers, to the extent that the implementation of the provisions of these regulations concerning the provision of information on the tax system results in the tax adviser's obligation to observe professional secrecy are incompatible with Article 2, Article 17(1) in conjunction with Article 31(3), Article 47, Article 49, Article 51(2) and Article 58(1) of the Constitution of the Republic of Poland, insofar as the implementation of

²¹ M. Wilk, *Ujawnianie schematów podatkowych a tajemnica zawodowa doradcy podatkowego*, "Przegląd Podatkowy" 2019, no. 2, p. 16

²² See A. Ladziński, D. Wasiul, *O nieprawidłowej implementacji dyrektywy 2018/822 (MDR) i jej konsekwencjach*, "Przegląd Podatkowy" 2019, no. 5, p. 9.

In addition, on 15th September, 2022, also the Belgian Constitutional Court issued a judgment in a joint case between Belgian lawyers and the Institute of Tax Advisers and Accountants concerning the implementation of DAC6 in Belgian law. In a new judgment, the Belgian Constitutional Court recognised the application of legal professional privilege for lawyers, tax advisers and accountants and declared the "non-privileged" periodic reporting of market contracts invalid.

²³ Article 266, paragraph 1 of the law of 6th June, 1997, Criminal Code, Journal of Laws of 2018, item 1600, as amended.

the provisions of these regulations concerning the provision of information on the tax regime results in an obligation on the part of the tax adviser to breach professional secrecy.

According to the National Council of Tax Advisors in Poland, the contested provisions lack clarity, precision and definition. Their entry into force on 1st January, 2019, violates the principle of trust in the State and the laws it enacts, the principles of proper legislation and the principle of proper *vacatio legis*, as enshrined in Article 2 of the Constitution. Furthermore, the legislation introducing the obligation to provide information on tax arrangements is restricting the freedom of establishment and the freedom to exercise the profession of tax advisor, and thus violates the principle of legal certainty, as well as the provision of Article 31(3)(1) of the Constitution of the Republic of Poland, according to which restrictions of freedom must be regulated by law, and in line with the principle of the rule of law (Article 2 of the Constitution of the Republic of Poland).

The contested provision, in so far as it requires a promoter (or promoters) who is a tax adviser to provide the Head of the National Fiscal Administration with information relating to a tax scheme implemented before the date on which the amending law entered into force, is incompatible with the Constitution, since it infringes the principle of *lex retro non agit*.

Furthermore, in the opinion of the National Council of Tax Advisors in Poland, Articles 86a–o of the Tax Code, added as of 1st January, 2019, by Article 3(22) of the Amending Act, to the extent that their entry into force violates the principle of trust in the State and the law enacted by it, the principles of correct legislation and the principle of proper *vacatio legis*, are inconsistent with Article 2 of the Constitution and with Articles 22 and 65(1) in conjunction with Article 2, Article 7, Article 17(1) and Article 31(3) of the Polish Constitution.

The National Council of Tax Advisors also pointed out that these provisions are incompatible with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, no. 61, item 284), in conjunction with Article 2 and the Preamble of the Constitution, as well as Articles 17(1) and 45(1) of the Constitution, in that they violate the principles of the rule of law with regard to the constitutional right of citizens to benefit from the services of the self-government of a public profession and the right to a court, by creating a public institution in a form that prevents it from functioning in a reliable and efficient manner.

Finally, it challenged the provision of Article 28 of the Amending Law, to the extent that it obliges a promoter or facilitator who is a tax advisor to provide the Head of the National Fiscal Administration with information regarding a tax scheme that was implemented before the Amending Law entered into force, as being inconsistent with Article 2 of the Constitution.

The request submitted by the National Council of Tax Advisers to review the constitutionality of the above provisions was received by the Constitutional Court on 30th December, 2019, and registered under the reference number K 13/20. It has not yet been examined. If the mechanism provided by DAC 6 violates the right to respect for private life because it consists in obliging the lawyer or a tax adviser who has invoked the legal professional privilege to provide information about the evasion of the obligation to inform the authorities about the cross-border arrangement, even more so the Polish solutions violate the right to privacy referred to in Article 47 of the Constitution, which has been indicated in the motion of the National Council of Tax Advisers to the Polish Constitutional Tribunal²⁴. This conclusion applies equally to reporting on cross-border as well as domestic tax arrangements.

A lawyers' obligation to inform other intermediaries involved is not necessary and infringes also the constitutional right to respect for communications with his/her client. Since the request for a preliminary ruling from the Belgian *Cour Constitutionnelle* in case C-623/22 also raises doubts as to the compatibility of the provisions of DAC 6 with the principle of legal certainty, the Polish Constitutional Tribunal should suspend the proceedings pending the judgment in that case²⁵. The vague nature of certain concepts of the DAC 6 and, in particular, the concepts of 'intermediary', 'arrangement', 'participant', 'associated enterprise', the terms 'cross-border', various 'hallmarks', and the 'main benefit test' raise legitimate doubts whether there are sufficiently precise and clear and provide legal

²⁴ See also A. Franczak, *Zwolnienie z obowiązku zachowania tajemnicy zawodowej w zakresie raportowania schematów podatkowych narusza art. 7 Karty Praw Podstawowych Unii Europejskiej. Uwagi na tle wyroku Trybunału Sprawiedliwości z 8.12.2022 r., C-694/20, Orde van Vlaamse Balies i in., "Przegląd Podatkowy" 2023, no. 4, pp. 8–16; A. Franczak, *Granice ingerencji w prawo do zachowania tajemnicy zawodowej doradcy podatkowego w świetle międzynarodowych i unijnych standardów ochrony praw podatnika – część 1, "Kwartalnik Doradca Podatkowy" 2021, no. 1.**

²⁵ See request for a preliminary ruling from the *Cour constitutionnelle* (Belgium) lodged on 29th September, 2022, in the case C-623/22 *Belgian Association of Tax Lawyers and Others v Premier ministre/ Eerste Minister*.

certainty. Since the contested Polish provisions reproduce those of the DAC 6 and taking into account the fact that those concepts cannot be interpreted differently from one Member State to another, it is necessary, before ruling on the substance, to refer to the CJEU ruling in this respect.

6. CONCLUSIONS

The judgment of the CJEU in case C-694/20 *Orde van Vlaamse Balies and Others* extends the protection of legal professional privilege. In the context of combatting aggressive tax planning, a lawyers' obligation to inform other intermediaries involved is not necessary and infringes the right to respect for communications with his/her client. The main novelty of this case is that the CJEU has recognised that lawyers' legal professional privilege prevails over tax objectives and obligations. Individuals who consult a lawyer as well as a tax adviser can reasonably expect that their communication is private and confidential. Therefore, other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him/her. The judgment shall be followed by a legislative initiative by the European Commission to amend the DAC 6 to bring it into line with the requirements of EU primary law, as indicated by the Court.

The judgement is important also because it recognises that legal professional privilege is not limited to advice given in the context of legal proceedings, which was the restrictive view taken by European competition authorities.

In the CJEU *Orde van Vlaamse Balies & Others* upheld judgement concluding that the obligation to inform other intermediaries imposed by article 8ab(5) of the DAC 6 interferes with the right to respect for communications between lawyers and their clients guaranteed in Article 7 of the Charter of Fundamental Right, the Court gave priority to primary law (Charter of Fundamental Rights) over secondary law (DAC 6). A new jurisprudential trend can be observed in this context: there was a substantive review of a tax directive on the basis of the Charter of Fundamental Rights. The CJEU has generally been reluctant to undertake substantive review of EU secondary legislation. Recently, however, the CJEU seems to be closely considering the provisions of EU directives that are not in line with the fundamental rights. The Court of Justice has not said the last word on the DAC 6, given that another case is pending to

see if it complies with the Charter of Fundamental Rights. In a judgment dated 11th July, 2023, the Luxembourg Higher Administrative Court referred several questions to the CJEU for a preliminary ruling²⁶. The questions focus on the application of legal professional privilege in the context of the exchange of information upon request in tax matters introduced by the Directive 2011/16/EU.

Due to the fact that the DAC 6 has been declared unlawful by the Court of Justice, it can be interpreted that the Polish regulations implementing the above-mentioned regulations in the Polish legal system in relation to both cross-border and domestic tax arrangements are also unlawful, and, therefore, the lawyers and tax advisors who are exempt from the obligation to report on the basis of legal professional privilege should not be obliged to disclose this exemption in a legally valid manner to the other intermediaries involved in the tax planning arrangements subject to the obligation to report. Therefore, such lawyer-intermediaries cannot be held accountable in case of incomplete, inaccurate, or late notification of another intermediary.

The Constitutional Tribunal is also due to rule on the compatibility of the reporting requirements with the Polish Constitution, and it appears that taking into account the scope of constitutional protection in the light of Article 47 of the Constitution it shall follow the CJEU in its criticism of these requirements, although the chances of resolving this issue in the near future appear to be low.

BIBLIOGRAPHY

- Franczak A., *Granice ingerencji w prawo do zachowania tajemnicy zawodowej doradcy podatkowego w świetle międzynarodowych i unijnych standardów ochrony praw podatnika – część 1*, “Kwartalnik Doradca Podatkowy” 2021, no. 1.
- Franczak A., *Zwolnienie z obowiązku zachowania tajemnicy zawodowej w zakresie raportowania schematów podatkowych narusza art. 7 Karty Praw Podstawowych Unii Europejskiej. Uwagi na tle wyroku Trybunału Sprawiedliwości z 8.12.2022 r., C-694/20, Orde van Vlaamse Balies i in.*, “Przegląd Podatkowy” 2023, no. 4.
- Ladziński A., Wasiul D., *O nieprawidłowej implementacji dyrektywy 2018/822 (MDR) i jej konsekwencjach*, “Przegląd Podatkowy” 2019, no. 5.

²⁶ The case is registered under the number C-432/23.

Salmini Sturli E., Thibault H., *Extension of EU Legal Professional Privilege: Case C-694/20 Orde Van Vlaamse Balies*, "Journal of European Competition Law & Practice" 2023, vol. 14, Issue 3, April.

Wilk M., *Ujawnianie schematów podatkowych a tajemnica zawodowa doradcy podatkowego*, "Przegląd Podatkowy" 2019, no. 2.

ZGŁASZANIE SCHEMATÓW PODATKOWYCH NARUSZA TAJEMNICĘ ZAWODOWĄ

Streszczenie. W niniejszym artykule Autorka omawia wyrok TSUE w sprawie C-694/20 Orde van Vlaamse Balies i inni, który rozszerza ochronę tajemnicy zawodowej prawników. W kontekście zwalczania agresywnego planowania podatkowego Trybunał Sprawiedliwości orzekł, że obowiązek informowania przez prawników licencjonowanych innych zaangażowanych pośredników w schemat podatkowy nie jest konieczny i narusza prawo do poszanowania komunikacji z klientem. Główną nowością w analizowanym wyroku jest to, że TSUE uznał, że przywilej zawodowy prawników ma pierwszeństwo przed celami i obowiązkami podatkowymi. Osoby, które konsultują się z prawnikiem, a także doradcą podatkowym, mogą zasadnie oczekiwać, że ich komunikacja pozostanie prywatna i poufna. Dlatego też, poza wyjątkowymi sytuacjami, osoby te mają uzasadnione oczekiwanie, że ich prawnik nie ujawni nikomu, bez ich zgody, że się z nim konsultują. W ślad za wyrokiem, Komisja Europejska podejmie inicjatywę legislacyjną mającą na celu zmianę dyrektywy DAC 6, tak aby była ona zgodna z wymogami unijnego prawa pierwotnego, na co wskazał Trybunał.

Wyrok jest ważny również dlatego, że uznaje, że tajemnica zawodowa prawników nie ogranicza się do porad udzielanych w kontekście postępowania sądowego, co było restrykcyjnym poglądem przyjmowanym w sprawach dotyczących ochrony konkurencji.

W wyroku TSUE Orde van Vlaamse Balies i inni, w którym stwierdzono, że obowiązek informowania innych pośredników nałożony w art. 8ab ust. 5 DAC 6 koliduje z prawem do poszanowania komunikacji między prawnikami a ich klientami zagwarantowanym w art. 7 Karty Praw Podstawowych, Trybunał przyznał pierwszeństwo prawu pierwotnemu (Karta Praw Podstawowych) przed prawem wtórnym (DAC 6). W tym kontekście można zaobserwować nowy trend orzeczniczy, w którym dokonano merytorycznej kontroli dyrektywy podatkowej na podstawie Karty Praw Podstawowych. TSUE generalnie niechętnie podejmował się merytorycznej kontroli unijnego prawa wtórnego. Ostatnio jednak TSUE wydaje się uważnie analizować przepisy dyrektyw UE, które nie są zgodne z prawami podstawowymi.

Słowa kluczowe: tajemnica adwokacka, schematy podatkowe, MDR, Karta Praw Podstawowych, prawo do prywatności