

ECJ Advocate General Opines Examination of Preliminary Ruling Questions Concerning DAC6 Has Not Disclosed Any Issues Affecting Validity of Directive - Details

4 March 2024

Report from Dr René Offermanns, Principle Associate, IBFD

On 29 February 2024, Advocate General Emiliou of the Court of Justice of the European Union (ECJ) gave his opinion in the case of *Belgian Association of Tax Lawyers and Others v. Premier ministre/ Eerste Minister* (Case C-623/22) on the compatibility of the DAC6 directive with the principles of equality and non-discrimination, the principle of legality in criminal matters, the general principle of legal certainty and the right to respect for private life (see [ECJ Advocate General Opines That Examination of Preliminary Ruling Questions Concerning DAC6 Has Not Disclosed Any Issues Affecting Validity of Directive \(29 February 2024\)](#)). Details of the opinion are summarized below.

(a) Facts. The Belgian law implementing [Amending Directive to the 2011 Directive on Administrative Cooperation \[on reportable cross-border arrangements\] \(2018/822\) \(DAC6\)](#) closely follows the definitions, requirements and hallmarks A-E of the Directive. The obligation to report applies to all taxes, except value added tax, customs duties and compulsory security contributions. The law exempts intermediaries from the obligation to report where the reporting obligation would breach their legal professional privilege.

(b) Issues. See [Constitutional Court Partially Nullifies DAC6 Implementation, Requests Preliminary Ruling from ECJ on Validity – Details \(29 September 2022\)](#).

(c) Advocate General's Opinion. With regard to the material scope of the reporting obligation and the principle of equality, the AG referred to the ECJ decision in [RPO \(Case C-390/15\)](#) in which it was held that the legislature, in the exercise of the powers conferred on it, has broad discretion in tax matters. This means that only if a measure adopted in this field is manifestly inappropriate in relation to the objectives that the competent institutions are seeking to pursue, the lawfulness of such a measure can be affected. In the AG's view, the EU legislature concerning DAC6 has not exceeded its margin of discretion by treating different situations in the same manner without any objective justification. The AG noted that the aim of the directive is to improve the functioning of the internal market by discouraging the use of aggressive cross-border tax-planning arrangements. Therefore, the directive intends to develop administrative cooperation between the Member States' tax authorities to overcome the negative effects that the creation of the internal market may have on the Member States' ability to assess taxes due properly. Therefore, corporate tax and other taxes must be treated the same because the risks posed by one tax or another for the Member States' treasuries appear comparable for the integrity of the internal market. The AG regards the broad scope of DAC6 reasonable and consistent with its subject matter and

purpose. This broad scope is particularly relevant, because potentially aggressive cross-border tax arrangements for taxes other than corporate tax exist. Consequently, no reason exists for taking the view that, by including taxes other than corporate tax, the EU legislature breaches the principle of equality.

Secondly, concerning the legality of penalties, the AG considered that it is for the Member States to transpose the provisions of DAC6 in a manner that complies with that principle. The AG takes the view that DAC6 for the large majority of cases contains clear and precise rules allowing individuals to predict which acts and omissions are liable to be subject to penalties of a criminal nature.

For the precision and clarity of various DAC6 definitions, the AG indicated that its preamble provides crucial indications and many terms are included in other directives. Furthermore, the definitions are in line with the scope and objective of the Directive, which applies to the main actors involved in tax-planning activities. For the hallmarks, the AG indicated that those describe very specific and concrete (fact-based) characteristics of the tax arrangements which, generally, should not be particularly difficult for tax professionals and taxpayers taking appropriate legal advice to identify. Its choice falls within the (ample) margin of manoeuvre that the EU legislature enjoys when adopting legislative acts that require the balancing of various public and private interests. The AG also regards the main benefit test as sufficiently clear because the relevancy is placed not on the subjective view of the taxpayer or intermediary, but on the expectation that a prudent and reasonably informed person would have. Of importance is if there are genuine, plausible and significant non-tax related reasons which may explain the decision to put the arrangement in question in place and if a logical and straightforward application of the tax laws is relied on that is consistent with the object and purpose of those laws.

The AG also considers the 30-day rule as sufficiently clear and the period for notification begins only when the tax arrangement in question goes from its conceptual stage to its operational stage, which provides a precise day that time limit starts to run.

Consequently, the AG held that none of the definitions examined appear to make it impossible or unreasonably difficult to ascertain when and within what time frame the reporting obligations introduced apply which means that the principle of legality of penalties is not infringed.

Hereafter, the AG indicated that that interference on private life is justified as it is necessary and proportionate to attain certain objectives in the public interest recognized by the European Union. Moreover, the interference results from rules that are sufficiently clear and predictable and the AG considers that the essence of respecting private life is met.

For realizing its objectives and the suitability of the measure, the AG also regards DAC6 proportionate. Moreover, DAC6 has limited the interference with the private life of intermediaries and taxpayers to what is strictly necessary. Therefore, the reporting obligation in his view does not go beyond what is necessary to attain the objectives pursued by the EU legislature. Lastly, the AG held that DAC6 strikes a fair balance between the interests at stake because the inconvenience for those required to file the information concerned is minimized. Consequently, the AG reasons that there is no impermissible interference with the right to private life of intermediaries and taxpayers.

Based on the impact assessment of DAC6, the AG also considers that the restriction of the legal professional principle to lawyers is justified because it is consistent with the historical foundations of that principle and in line with the objective and purpose of the directive and the system envisaged in the related OECD acts. He regards the restriction also indirectly supported by the judgment of the Court in

Orde van Vlaamse Balies (see [ECJ Decides That Transfer of DAC6 Reporting Obligations Due to Professional Secrecy Is Not Compatible with Charter of Fundamental Rights of European Union: Orde van Vlaamse Balies and Others \(Case C-694/20\) \(Direct\) \(8 December 2022\)](#)).

Finally, the AG also regards the obligation to notify other intermediaries justified by the objectives of general interest of the directive.

European Union; Belgium - ECJ Advocate General Opines Examination of Preliminary Ruling Questions Concerning DAC6 Has Not Disclosed Any Issues Affecting Validity of Directive - Details (04 Mar. 2024), News IBFD.

Exported / Printed on 9 Mar. 2024 by hkermadi@deloitte.lu.