



TAX

Obligation to notify intermediaries violates the EU Charter of Fundamental Rights

In response to the request for a preliminary ruling made to it by the Constitutional Court of Belgium, the Court of Justice of the European Union (“CJEU”) has held that lawyers who are exempt from reporting cross-border arrangements to their tax authorities under their duty of professional secrecy should also be exempt from the obligation to notify other intermediaries.

Brief introduction obligations to report arrangements with a tax impact

In 2018, the Council of the European Union enacted Directive 2018/822 of 25 May 2018 (“DAC 6”). This Directive introduced an obligation to report certain cross-border arrangements with a tax impact to the tax authorities of each country with the aim of combating aggressive tax planning.

The reporting obligation must be complied with by any intermediary involved in the design, marketing, organisation or implementation of these types of arrangements, unless the intermediary is subject to a duty of professional secrecy. In such cases, the intermediary subject to professional secrecy must notify the other intermediaries involved in the transaction that it will not report the arrangement.

The reporting obligation may also be the responsibility of the client itself when no intermediary is considered subject to the reporting obligation.

The Orde van Vlaamse Balies Case (C-694/20)

When incorporating DAC 6 into national law, the Belgian State considered that lawyers are subject to professional secrecy and, as such, are excluded from the obligation to communicate arrangements to the tax authority. Despite this exclusion, the obligation to notify other intermediaries (e.g., accountants, consultants,...) that they will not communicate a given arrangement to the Belgian tax authority is nevertheless maintained.

The CJEU has held that lawyers who are exempt from reporting cross-border arrangements to their tax authorities should also be exempt from the obligation to notify other intermediaries.

In Portugal, the law states that, even if covered by the duty of professional secrecy, an intermediary is obliged to communicate an arrangement to the tax authorities when the client confirms that he or she will not do so.

Considering this, the Constitutional Court of Belgium made a request for a preliminary ruling to the CJEU. In the request, it questioned the compatibility of the Belgian implementation of DAC 6 with Articles 7 and 47 of the Charter of Fundamental Rights of the European Union.

In its decision, the CJEU found that this legislation is primarily aimed at lawyers and is not compatible with Article 7 of the EU Charter of Fundamental Rights, which protects the inviolability of citizens' correspondence and the confidentiality of the relationship between client and lawyer. Therefore, the CJEU considers that if, by virtue of professional secrecy, lawyers are not obliged to communicate certain arrangements to the tax authorities, they should also not be obliged to reveal that they advise a certain client to other intermediaries.

Finally, the general interest in combating aggressive tax planning and preventing the risk of tax avoidance and evasion is clearly recognised. However, the CJEU considers that any limitation on the rights guaranteed under Article 7 of the EU Charter of Fundamental Rights must be appropriate, necessary and proportionate to the pursuit of that purpose. Specifically, the CJEU held that this will not be the case with the obligation to notify other intermediaries.

Potential impact in Portugal

In Portugal, Law 26/2020 of 21 July, which incorporated DAC 6 into national law, states that, even if covered by the duty of professional secrecy, an intermediary is obliged to communicate an arrangement to the tax authorities when the client confirms that he or she will not do so. The Portuguese legislation thus appears less protective of lawyers' professional secrecy when compared with the Belgian rules.

Despite these differences, the CJEU ruling in the *Orde van Vlaamse Balies* case has significant importance in Portugal too. Even if the ruling determines that only the obligation to notify other intermediaries violates Article 7 EU Charter of Fundamental Rights, the same reasoning may be applicable *mutatis mutandis* to the obligation itself to communicate arrangements with a taxation impact to the tax authorities.

The pending requests for preliminary rulings (cases no. C-398/21 and C-623/22) will also be particularly important. In response to these requests, the CJEU will once again rule on the safeguarding of the duty of professional secrecy. It will also rule on the use of indeterminate concepts and whether or not they are compatible with the principle of legality in criminal matters and the principle of legal certainty.

PLMJ's tax team will continue to monitor any significant developments in the enactment and implementation of DAC 6 and, as always, the team is available to answer any questions on this matter. ■