
On 21 September 2022, the ECJ was asked to determine whether the European disclosure regime for cross-border tax planning arrangements violates the principles of equality, non-discrimination and legal certainty, as well as the right to a private life. Will this eventually result in redesigning the EU DAC6 framework?

1. Introduction: Increased EU Administrative Cooperation in the Field of Taxation

The globalized economy (with its very mobile taxpayers, an increasing number of cross-border transactions and the internationalization of financial instruments and structures) makes it difficult for the Member States of the European Union (the “Member States”) to assess properly the taxes due. This situation may give rise to tax avoidance or tax evasion in a cross-border context, while the powers of control remain at a national level. In turn, such a state of affairs may distort the functioning of the internal market, and give rise to unfair competition. For the Member States to manage efficiently their direct tax systems, the receipt of information from other Member States is necessary. This viewpoint constituted the basis of the EU Directive on Administrative Cooperation (the “DAC”).

In order to accommodate additional initiatives in the field of tax transparency, the DAC regime has been subject to consecutive amendments. Initially, the DAC regime focused on the mandatory and automatic exchange of information relating to income from employment, director’s fees, pensions, life insurance products, the ownership of and income from immovable property. Later, such information exchanges between taxpayers and the competent authorities and/or between the competent authorities were extended to cover dividends, interest and similar types of income (the DAC2), advance cross-border rulings and advance pricing arrangements (the DAC3), country-by-country (CbC) reporting (the DAC4), the identification of the beneficial owners of intermediary structures so as to counter money laundering (the DAC5), cross-border tax planning arrangements (the DAC6), and, finally, income derived from digital online platforms (the DAC7).

Almost certainly, the seventh aspect of the DAC regime will not be the last. Since 2021, the European Commission (the “Commission”) has been working on designing rules for the exchange of information on the owners of crypto-assets and electronic(e) -money across the European Union, given need to combat tax avoidance and tax evasion. The purpose for national tax authorities is to be able to access automatically cryptocurrency information involving their taxpayers from the most appropriate stakeholders. Subsequently, this information will be exchanged automatically between the Member States.

2. The DAC6: Reporting Obligations Regarding Certain Cross-Border Arrangements

2.1. Introductory remarks

Following Action 12 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project, the Commission initiated

8. See OECD, Action Plan on Base Erosion and Profit Shifting (OECD 2013), Primary Sources IBFD.
the mandatory disclosure of information with regard to potentially aggressive tax planning arrangements, i.e. DAC6. Such information should enable the Member States to: (i) promptly react to counter harmful tax practices; (ii) close legislative loopholes; and (iii) undertake tax audits. However, the DAC6 disclosure requirements only apply to “reportable cross-border arrangements”, which are defined as “any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV” (see sections 2.2. and 2.3.).

2.2. Cross-border arrangements

Although countering cross-border arrangements is one of the crucial concepts of DAC6, the term “arrangement” is not separately defined. Article 3 (18) of the DAC only indicates that an arrangement includes “a series of arrangements”, and “may comprise more than one step or part”. Guidance can be found in the Final Report on Action 12 of the OECD/G20 BEPS initiative, indicating that the definition of an arrangement “should be sufficiently broad and robust to capture any scheme, plan or understanding”, which incorporates “a cross-border outcome that gives rise to material tax consequences”.

Even though an arrangement is not defined, the DAC distinguishes a marketable arrangement from a bespoke arrangement. A marketable arrangement is designed, marketed and ready for implementation (or made available for implementation) without the need to be substantially customized. In contrast, a bespoke arrangement is specific to the taxpayer and/or the transaction in question, requiring a high level of customization. This distinction is relevant, as the DAC introduces an additional reporting obligation in respect of marketable arrangements (see section 2.5.).

An arrangement has cross-border characteristics if it involves more than one Member State, or a Member State and a third country, where at least one of the following five conditions is satisfied:

1. not all the participants in the arrangements are tax residents in the same jurisdictions;
2. one or more of the participants in the arrangements is simultaneously resident for tax purposes in more than one jurisdiction;
3. one or more of the participants in the arrangement performs business activities in another jurisdiction by means of a permanent establishment (PE) in that jurisdiction, and the arrangement forms part of the PE’s business;
4. one or more of the participants in the arrangement performs business activities in another jurisdiction without being a tax resident or having a PE in that jurisdiction; and/or
5. the arrangement has a possible effect on the automatic information exchange or the identification of beneficial ownership.

In this regard, the term “participant in the arrangement” plays a crucial role in determining the cross-border characteristics. Again, the DAC fails to provide a separate definition. In light of the rationale in DAC6, a participant can be considered to be any person who may obtain a tax benefit resulting from the arrangement, who is actively involved in the arrangement, or whose situation is intended to be influenced by the arrangement. Although the “relevant taxpayer” criterion is likely to meet this definition, the “intermediary” could also be considered to be a participant in certain situations.

This state of affairs can be illustrated by an example. A multinational group wants to merge two Belgian sister companies. This arrangement is coordinated entirely by a Dutch group company, which functions as the shared service centre for the Europe, the Middle East and Africa (EMEA) region (with an in-house tax team). The Dutch shared service centre can be regarded as an intermediary to the merger transaction, but as the Dutch company only administers the transaction, and is not affected by it, the company is not considered to be a participant in the transaction. Accordingly, the horizontal merger is a merely domestic transaction, and does not meet the definition of a “cross-border arrangement”.

2.3. Hallmarks and the main benefit test

A cross-border arrangement is only reportable if at least one of the hallmarks is met. The DAC includes an exhaustive list of hallmarks to capture potentially aggressive tax planning arrangements. Rather than defining the concept of aggressive tax planning, these hallmarks constitute features or characteristics presenting “an indication of a potential risk of tax avoidance”. The hallmarks can apply to legitimate and business-driven transactions. Moreover, the mere fact that an arrangement is reportable does not imply automatically that a tax rule is violated or abused (see Table).

Even when a cross-border arrangement fulfills one or more hallmarks, the reporting obligation can still be avoided when successfully arguing that the main benefit test (MBT) is not satisfied. This test requires that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person “may reasonably expect to derive from an arrangement is the

9. Art. 3(19) DAC.
11. Art. 3(18) DAC.
13. Article 3(21) of the DAC defines an intermediary as “any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement”. Based on article 3(22) of the DAC, the relevant taxpayer is “any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement”.
14. Art. 3(20) DAC.
<table>
<thead>
<tr>
<th>Category</th>
<th>Main benefit test (MBT)</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td><strong>Generic hallmarks linked to the MBT</strong></td>
<td></td>
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</tr>
<tr>
<td>A.1.</td>
<td>Yes</td>
<td>An arrangement whereby the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality, which may require them not to disclose how the arrangement could secure a tax advantage with regard to other intermediaries or the tax authorities.</td>
</tr>
<tr>
<td>A.2.</td>
<td>Yes</td>
<td>An arrangement where the intermediary is entitled to receive a fee (or similar remuneration) for the arrangement and that fee is fixed by reference to: (i) amount of the tax advantage derived from the arrangement; or (ii) whether a tax advantage is derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.</td>
</tr>
<tr>
<td>A.3.</td>
<td>Yes</td>
<td>An arrangement that has substantially standardized documentation and/or a structure, and is available to more than one relevant taxpayer without a need to be substantially customized for implementation.</td>
</tr>
<tr>
<td><strong>Specific hallmarks linked to the MBT</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B.1.</td>
<td>Yes</td>
<td>An arrangement whereby a participant in the arrangement takes contrived steps, which consist in acquiring a loss-making company, discontinuing the main activity and using its losses to reduce its tax liability, including by way of a transfer of losses to another jurisdiction or by the acceleration of the use of those losses.</td>
</tr>
<tr>
<td>B.2.</td>
<td>Yes</td>
<td>An arrangement that has the effect of converting income into capital, gifts or other categories of revenue that are taxed at a lower level or exempt from tax.</td>
</tr>
<tr>
<td>B.3.</td>
<td>Yes</td>
<td>An arrangement that includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function, or transactions that offset or cancel each other, or that have other similar features.</td>
</tr>
<tr>
<td><strong>Specific hallmarks relating to cross-border transactions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.1.</td>
<td></td>
<td>An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions arises:</td>
</tr>
<tr>
<td>C.1.a.</td>
<td>No</td>
<td>the recipient is not resident for tax purposes in any tax jurisdiction;</td>
</tr>
<tr>
<td>C.1.b.i.</td>
<td>Yes</td>
<td>the recipient is resident for tax purposes in a jurisdiction that does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero;</td>
</tr>
<tr>
<td>C.1.b.ii.</td>
<td>No</td>
<td>the recipient is resident for tax purposes in a jurisdiction that is included in a list of third-country jurisdictions, which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative;</td>
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<tr>
<td>C.1.c.</td>
<td>Yes</td>
<td>the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes; and</td>
</tr>
<tr>
<td>C.1.d.</td>
<td>Yes</td>
<td>the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.</td>
</tr>
<tr>
<td>C.2.</td>
<td>No</td>
<td>Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.</td>
</tr>
<tr>
<td>C.3.</td>
<td>No</td>
<td>Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.</td>
</tr>
<tr>
<td>C.4.</td>
<td>No</td>
<td>There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.</td>
</tr>
<tr>
<td><strong>Specific hallmarks concerning the automatic exchange of information and beneficial ownership</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D.1.</td>
<td>No</td>
<td>An arrangement that may have the effect of undermining the reporting obligation under the laws implementing EU legislation or any equivalent agreements on the automatic exchange of financial account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements.</td>
</tr>
<tr>
<td>D.2.</td>
<td>No</td>
<td>An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures: (i) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and (ii) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and (iii) where the beneficial owners of such persons, legal arrangements or structures, as defined in EU 4th Anti-Money Laundering Directive (2015/849) (4AMLDD) are rendered unidentifiable.</td>
</tr>
</tbody>
</table>
obtaining of a tax advantage. Following this definition, it is irrelevant whether the participant of the arrangement effectively obtains the tax advantage. It is sufficient that this tax advantage can reasonably be expected.

Accordingly, if obtaining a tax advantage is reasonably expected to be rather incidental and not one of the main benefits, the MBT will not be fulfilled. As a result, an arrangement that fulfils one or more hallmarks should not be reported. However, it should be noted that the MBT (providing the possibility to still get out of the reporting requirement) only applies to certain hallmarks, as indicated in the Table.

2.4. Who should report?

In primary order, the intermediary must report a cross-border arrangement (that fulfils at least one hallmark). This arrangement is “any person that designs, markets, organizes, or makes available for implementation or manages the implementation of a cross-border arrangement.” As taxpayers usually rely on intermediaries, such as lawyers, consultants, financial institutions, etc., to set up certain arrangements, these intermediaries have the lead in complying with this reporting obligation. In addition, imposing a primary obligation on the intermediaries may influence their commercial behaviour, for example, regarding the promotion of certain tax structures.

The DAC implicitly distinguishes two types of intermediaries: the advising intermediary (the “promotor”) and the merely executing intermediary (the “service provider”). Only the second category can still avoid the reporting obligation by using its right to provide evidence that it did not know, and could not reasonably be expected to know, that assistance or advice was given in relation to a reportable cross-border arrangement. The first category cannot apply this possibility, as the promoter of an arrangement obviously cannot argue that it did not know of the existence of such a reportable cross-border arrangement.

Intermediaries do have the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach legal professional privilege under the domestic legislation of that Member State. However, if legal professional privilege is invoked, the intermediaries are required to timely notify other intermediaries, or the relevant taxpayer, accordingly. The scope of this exception is vague, and further elaboration on this particular item is almost entirely left to the discretion of the Member States concerned.

In principle, all of the intermediaries involved must share information on a reportable cross-border arrangement with the relevant authorities. However, in order to avoid multiple reports containing the same information, a filing exemption can be obtained if the intermediary can demonstrate that the particular cross-border arrangement has been filed already by another intermediary in any Member State.

In secondary order, the reporting obligation moves to the relevant taxpayer if: (i) no intermediary with EU-nexus was involved (for example, the arrangement was designed and implemented in-house); or (ii) the intermediaries involved invoke their legal professional privilege.

2.5. Reporting deadlines

A cross-border arrangement (that meets at least one hallmark) should be reported within a 30-day period, start-
ing from the day after the arrangement is made available for implementation, is ready for implementation, or when the first step of the implementation process has been made – whichever is earliest. This rule equally applies to each marketable and bespoke cross-border arrangement that meets at least one hallmark (and provided that the MBT is fulfilled, at least for certain hallmarks – see the Table in section 2.3). With regard to marketable arrangements, intermediaries are also required to file a periodic report, every three months, providing an updated list of intermediaries and relevant taxpayers (including an indication of the Member States) involved or affected by a particular marketable arrangement. 21

In order to enforce the effectiveness of the DAC6 reporting requirements, penalties for non-compliance should be imposed. Defining the appropriate penalties is a domestic competence, but these penalties should in any case be “effective, proportionate and dissuasive”. 22

3. Aspects of DAC6 Challenged by the Belgian Constitutional Court

On 21 December 2020, the Belgian Hof van Cassatie/Cour de Cassation (Constitutional Court, or HvC/CdC) 23 asked the Court of Justice of the European Union (ECJ) for a preliminary ruling regarding the possibility for intermediaries to invoke their legal professional privilege (Orde van Vlaamse Balies and Others (Case C-694/20)), 24 in particular whether such a possibility is compatible with article 7 (the right to respect a private life) and article 47 (the right to a fair trial) of the European Charter of Fundamental Rights. 25 This was the first case that has been referred to the ECJ following the introduction of the DAC6 reporting. On 28 June 2021, a similar preliminary question was raised by the French Conseil d’État (Council of State, CE) in Conseil national des barreaux and Others (Case C-398/21). 26

Advocate General Rantos issued his Opinion in Orde van Vlaamse Balies and Others (Case C-694/20) on 5 April 2022. 27 At the time of writing this article, this case was still awaiting the final judgment of the ECJ.

On 15 September 2022, the Belgian Constitutional Court 28 again ruled on the DAC6 legislation, annulling two particular provisions where the law does not provide the intermediary with the possibility to invoke legal professional privilege. The Constitutional Court also raised an additional question regarding another request for a preliminary ruling from the ECJ in Belgian Association of Tax Lawyers and Others (Case C-623/22), 29 covering multiple aspects of the DAC6 disclosure rules. The important aspects of both of these cases in question are discussed in sections 4.4., 5., 6. and 7.

4. Legal Professional Privilege

4.1. Introductory remarks

Not only is the possibility for intermediaries to invoke legal professional privilege the subject of the Belgian Constitutional Court’s judgment of 21 December 2020 30 (and, therefore, the first preliminary question referred to the ECJ regarding the DAC6), it is also one of the key elements in the judgment of the Belgian Constitutional Court of 15 September 2022. 31 The issues raised by these cases are examined in sections 4.2. to 4.5.

4.2. Periodic reporting of marketable arrangements

As stated in sections 2.2. and 2.5., marketable arrangements with a cross-border character and meeting at least one hallmark, are subject to a double reporting obligation. In addition to the disclosure of each individual marketable arrangement, where the standard 30-day rule applies, the intermediary must periodically file an updated overview of the relevant taxpayers and the intermediaries involved in a particular marketable arrangement. In contrast to the individual disclosures, the Belgian DAC6 legislation explicitly prohibits the possibility of invoking legal professional privilege with regard to the periodic reporting obligation. 32 Accordingly, an intermediary cannot be exempt from disclosing client-related information.

The Belgian Constitutional Court 33 has confirmed that the reporting obligation can cover activities covered by legal professional privilege. According to the Belgian Strafwetboek/Code Pénal (Criminal Code, SW/CP), legal professional privilege applies to all persons who, by virtue of their status or profession, have knowledge about secrets entrusted to them (for example, certified accountants and tax advisors, lawyers and notaries). Disclosing such information can be sanctioned by criminal law, unless these persons are called to testify in court or before a parliamentary committee, or such disclosure is required by law. 34 Nonetheless, based on established Belgian case law, 35 legal professional privilege can be overruled in a case of emergency. This is the case when a higher rule of law should be safeguarded. Not applying legal professional privilege should then not result in any criminal sanctions.

21. Id., at art. 8ab(1) and (2).
22. Art. 25a DAC.
24. BE: ECJ, pending, Case C-694/20, Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v. Vlaamse Regering, Case Law BFID.
25. The Charter of Fundamental Rights of the European Union, OJ C 326 (2012), Primary Sources BFID.
27. BE: Opinion of Advocate General Rantos, 5 Apr. 2022, Case C-694/20, Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v. Vlaamse Regering, Case Law BFID.
29. BE: ECJ, pending, Case C-623/22, Belgian Association of Tax Lawyers and Others (Case C-623/22).
31. Case No. 103/2022 (2022), supra n. 28.
33. Case No. 103/2022 (2022), supra n. 28.
34. BE: Strafwetboek/Code Pénal (Criminal Code, SW/CP), art. 458.
Despite the possibility to apply for certain exceptions in respect of legal professional privilege (supported by case law), the Constitutional Court has struggled with the legal prohibition to invoke legal professional privilege. Under the Belgian DAC6 legislation,36 such a prohibition is “absolute”, and does not provide for any exceptions. This situation was defended by the legislator, arguing that the periodic reporting requirement of marketable arrangements cannot be transferred to the relevant taxpayer, as the latter is not supposed to have the required information to do the reporting.37 The Constitutional Court disagreed with this viewpoint, and concluded that it is still possible for the intermediary to invoke its legal professional privilege, and at the same time assist the relevant taxpayer with its DAC6 reporting requirement. After all, such an approach already applies to the disclosure of the individual arrangements. Consequently, the Constitutional Court decided that the prohibition is not in proportion to the rationale of the DAC6 legislation, and should be annulled. The annulment applies to every intermediary that is covered by legal professional privilege under Belgian law.

4.3. Administrative request for information

Based on Belgian tax law and within the general statutes of limitations, the Belgian tax authorities can request any relevant information from intermediaries. Such requests relate to information that is required under the DAC6 rules, but was not (completely) disclosed by the intermediary. According to the Belgian Constitutional Court, this provision under Belgian tax law does not meet the proportionality test to the extent that the intermediary in question cannot invoke legal professional privilege. As the possibility to invoke legal professional privilege was not foreseen in the Belgian Wetboek inkomstenbelastingen 1992 (Income Tax Code 1992, WIB) with regard to registration duties and inheritance taxes, the Constitutional Court annulled the corresponding provisions.38

4.4. Notification requirement

As noted in section 2.4., an intermediary can invoke legal professional privilege so as to be exempt from disclosing a reportable cross-border arrangement to the relevant authorities. However, under article 8ab(5) of the DAC, such an exemption can apply only when the intermediary in question timely notifies the other intermediaries (or the relevant taxpayers when no other intermediary is involved) that he or she is not in a position to fulfil the DAC6 reporting obligation. Given this notification requirement, the intermediary, in principle, is still required to disclose client-related information regarding a particular cross-border arrangement to another party that is not his client, being the other intermediaries.39 As this basically is a minimum standard in the DAC, all of the Member States have implemented this notification requirement into their domestic legislation.

The Belgian Constitutional Court40 has requested the ECI41 to clarify whether this notification requirement may infringe article 7 of the European Charter of Fundamental Rights and article 8 of the European Convention on Human Rights (ECHR), both of which protect the right to respect a private and family life. This preliminary question is very similar to the first question raised by the Constitutional Court on 21 December 2020.42 There are two important differences, however.

First, the preliminary question raised on 21 December 202043 only relates to the application of legal professional privilege by lawyers (as this case was brought before the Constitutional Court by the Belgische Vereniging van Fiscalisten/Association belge des avocats fiscalistes (Belgian Association of Tax Lawyers). However, the preliminary question raised on 15 September 202244 applies to all intermediaries covered by legal professional privilege in Belgium.

Second, the preliminary question of 21 December 202045 also referred to a potential violation of article 47 of the European Charter of Fundamental Rights (the right to a fair trial). However, the preliminary question of 15 September 202246 exclusively focuses on the right to protect the private and family life. This state of affairs is unsurprising, as this second question covers a larger group of intermediaries (not only lawyers), and as a potential violation of the right to a fair trial was considered not to be relevant in the context of DAC6, following Advocate General Rantos’s Opinion regarding the first preliminary question. Indeed, Advocate General Rantos has already confirmed that legal professional privilege is one of the general principles of EU law, which is guaranteed and protected under articles 7 and 47 of the European Charter of Fundamental Rights and articles 6 and 8 of the ECHR.47 However, Advocate General Rantos emphasized that the DAC6 rules are preventative in nature, and that the notification requirement, in principle, applies before any disputes with the tax authorities are initiated. As a result, the notification requirement should not violate the right to a fair trial, as this is basically outside the scope of the DAC6 rules.48

38. See BE: Wetboek der registratie-, hypotheek- en griffierechten/Code des droits d’enregistrement, d’hypothèque et de greffe (Code for Registration Duties), art. 286bis/13; BE: Wetboek der successierschend/Code des Droits de Succession (Code for Inheritance Taxes), art. 148septies; and BE: Wetboek diverserechten en taxe/Code des Droits et Taxes Diverses (Code for Miscellaneous Levies and Taxes), art. 21 bis/12. Here, it should be noted that article 323ter of the CIR/WIB has not been annulled, as article 334 protects the right to invoke legal professional privilege also when applying article 323ter.
39. Art. 326/7, para. 1 CIR/WIB.
40. Case No. 103/2022 (2022), supra n 28.
43. Id.
44. Case No. 103/2022 (2022), supra n 28.
46. Case No. 103/2022 (2022), supra n 28.
47. AG Opinion in Orde van Vlaamse Balies (C-694/20), supra n 27, at paras. 31-34.
48. Id., at paras. 41-45.
With regard to the right to respect private life, Advocate General Rantos noted that the particular scope of legal professional privilege is not harmonized within the European Union, and, therefore, remains at the discretion of the individual Member States.\(^{49}\) Based on the Belgian implementation of DAC6, the limited information to be disclosed was already available to other intermediaries and/or the relevant taxpayer involved in the arrangement. The notification requirement does not entail the disclosure of information regarding the content, the legal assessment of the intermediary, or the communication that took place between the intermediary and the client. Consequently, Advocate General Rantos concluded that the right to respect a private life, which is embedded in article 7 of the European Charter of Fundamental Rights, cannot considered to be violated.\(^{50}\)

However, Advocate General Rantos noted that the notification obligation may interfere with the right in respect of a private life in certain situations. But such interference should be justifiable based on the purpose of DAC6 (i.e., targeting tax avoidance and tax evasion), and provided that it is considered to be both necessary and proportionate (which Advocate General Rantos believes is the case).\(^{51}\) The requirement under Belgian tax legislation to disclose the name of the intermediary claiming legal professional privilege to the tax authorities cannot be regarded as proportionate and necessary to achieve the purpose of combating tax avoidance or evasion. As a result, Advocate General Rantos opined that the Belgian DAC6 legislation is compatible with articles 7 and 47 of the European Charter of Fundamental Rights, subject to the condition that the name of the intermediary is not required to be disclosed to the Belgian authorities.\(^{52}\)

### 4.5. Preliminary conclusions

As noted in section 2.4., the DAC only ensures that the intermediaries are given the right to invoke legal professional privilege, but the scope of this exception is to be defined further by each individual Member State. Consequently, the annulment of these two provisions under the Belgian DAC6 rules are country-specific, and cannot be viewed as a fundamental problem regarding the DAC itself. Moreover, the scope of legal professional privilege itself is domestically defined, and may differ significantly between Member States.

The question as to whether the notification requirement (for intermediaries invoking legal professional privilege) may violate the right to respect a private and family life remains relevant for all Member States, however. Although, according to the Opinion of Advocate General Rantos, this disclosure requirement as envisaged by the DAC (being a minimum standard) should be justifiable.\(^{53}\) Accordingly, those Member States that require the disclosure of any additional information, going beyond what is considered to be required for meeting the notification requirement, may still infringe the right to protect the private or family life.

### 5. Principle of Equality and Non-Discrimination

The DAC generally applies to all taxes of any kind levied by a Member State, with the exception of VAT, customs or excise duties and social security contributions.\(^{54}\) The taxes covered are not defined specifically for the purpose of the DAC6 reporting requirement, so this general rule, which is set out in article 2 of the DAC, equally applies to the DAC6. However, the Explanatory Memorandum to the EU proposal introducing the DAC6 (the “Explanatory Memorandum”) reporting requirement states that “article 115 of the Treaty on the Functioning of the European Union (TFEU) is the legal basis for legislative initiatives in the field of direct taxation.”\(^{55}\) And even though no explicit reference to direct taxation was made:

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\text{article 115 refers to directives for the approximation of national laws as those directly affect the establishment or functioning of the internal market. For this condition to be met, it is necessary that proposed EU legislation in the field of direct taxation aims to rectify existing inconsistencies in the functioning of the internal market.}\]

Given this statement in the Explanatory Memorandum, the Belgian Constitutional Court was of the opinion that DAC6 was intended to only cover direct taxes. Nevertheless, the Member States are currently obliged to apply their domestic DAC6 obligations to indirect taxes, as well as other direct taxes than the corporate income tax. Consequently, different situations are treated equally. As a result, the Constitutional Court\(^ {56}\) has requested the ECJ to clarify whether the principle of equality and non-discrimination (as set out in article 6(3) of the EU Treaty\(^ {57}\) and articles 20-21 of the European Charter of Fundamental Rights), to the extent that the DAC6 rules do not only apply to corporate income tax, but also to other taxes (for example, registration duties and inheritance taxes).

### 6. Principle of Legality and Legal Certainty

As noted in section 2.2., most of the key concepts are not or very vaguely defined in the DAC. In particular, reference is made to an arrangement, an intermediary, a participant in a cross-border arrangement, an associated enterprise, hallmarks and the MBT. The Belgian Constitutional Court questions whether the starting point (being one of the three triggering events) of the standard 30-day reporting period is established with the required degree of accuracy.

\(^{54}\) Art. 2(1) and (2) DAC.


\(^{56}\) Id., at sec. 2, p. 5.

\(^{57}\) Case No. 103/2022 (2022), supra n. 28.

\(^{58}\) Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), OJ C115/01 (2008), art. 6(3), Primary Sources IBFD.
This situation can be illustrated by an example. As discussed in section 2.2., the DAC states that an arrangement may “comprise more than one step or part”, and can “include a series or arrangement”.59 As the concept “arrangement” is not defined in the DAC, it is impossible to determine whether a particular transaction is either a standalone arrangement or part of a larger one. However, this is important to be able to ascertain clarity regarding when the 30-day reporting period starts, and to enable intermediaries or relevant taxpayers to be compliant (particularly when there is a time gap of more than 30 days between the steps or parts of a broader arrangement).

Even if it is clear when the 30-day reporting period starts, there is still a lack of sufficient clarity as to which information should be reported. According to article 8ab(1) of the DAC, the intermediary is required to “file information that is within their knowledge, possession or control”. Does this mean that information should be reported that was at the intermediary’s disposal on the starting point of the 30-day period, or when the reporting effectively occurs? As soon as an arrangement is reported, the mere obtaining of any additional information along the way cannot give rise to additional reporting requirements.60 Under the Belgian DAC6 regime, filing an incomplete DAC6 report results in administrative penalties. It is ironic that the intermediary (or alternatively, the relevant taxpayer) is still sanctioned in Belgium if it can be demonstrated that he acts in good faith, and if this is the first infringement, despite the fact that the reporting obligation is far from unclear on various items.

Another practical concern is whether an amendment or modification to an existing cross-border arrangement constitutes a reportable event. A cross-border arrangement in respect of which the implementation commences before 25 June 2018 (the date on which DAC6 entered into force) is not subject to the reporting obligation. However, it is not clear as such whether an extension, an amendment or a modification (other than a formal renewal) of this cross-border arrangement gives rise to the DAC6 reporting obligation – even when such an extension, amendment or modification does not result in any additional hallmarks that have not been met before, or does not increase the tax advantage that was available before.

ECJ case law on the principle of legal certainty requires that the rules of law are clear and precise, and that their application is foreseeable for those subject to the law. In order to meet these requirements, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons should be able to ascertain unequivocally their rights or obligations and take steps accordingly.61 The Constitutional Court has expressed its doubts in this respect, and requested the ECJ to scrutinize the principle of legality, as well as the general principle of legal certainty (as envisaged in article 49(1) of the European Charter of Fundamental Rights and article 7 of the ECHR), to the extent that: (i) these key concepts of the DAC and (ii) the trigger date for the 30-day reporting period do not seem to be sufficiently clear and precise.

7. Proportionality Principle

The Belgian Constitutional Court noted that it is sufficient for the DAC6 reporting obligation to apply when there is (i) an arrangement that (ii) has a cross-border character, (iii) fulfils one or more hallmarks, and (iv) meets the MBT (if applicable to the hallmarks at stake). Accordingly, it is “not necessarily required that the arrangement is not authentic” 62 Nor is it always necessary that obtaining a tax advantage is the main purpose or one of the main purposes of an arrangement. The MBT only applies to certain hallmarks, and not to all of them. Moreover, based on this MBT, it is not necessary that the tax advantage obtained is contrary to the purpose of the relevant tax rule.

Furthermore, the DAC aims to exchange information that is “foreseeably relevant” to the administration and the enforcement of the domestic laws of the Member States.63 According to the ECJ, the term “foreseeably relevant” should be interpreted in the light of the general principles of EU law, consisting in the protection of both natural or legal persons against the arbitrary or disproportionate interventions by public authorities, in the sphere of their private activities.64 With regard to the DAC6 reporting obligation, fulfilling the three criteria (or four criteria when the MBT is applicable to the hallmark in question) results in an irrebuttable presumption that the information to be reported is “foreseeably relevant”.

In this regard, the Constitutional Court has concluded that the reporting obligation can apply to constructions that are lawful, authentic and not inappropriate, and which are not tax-driven. Consequently, the Constitutional Court requested that the ECJ clarify whether the reporting obligation is necessary and proportionate to achieve its purpose, in particular considering the broad scope of the DAC6 rules and the information that should be disclosed.

In addition to these arguments, reference can also be made to previous ECJ case law, and, in particular SIAT (Case C-318/10),65 confirming that a rule that does not satisfy the requirements of the principle of legal certainty (see section 6.), can as such not be considered to be proportionate to the objectives pursued. In SIAT, the conclusion that a tax rule is not proportionate was based on two grounds. First, the principle of good governance is not served when the key concepts of the legislation are not sufficiently clear.66 And second, the distribution of the

59. Art. 3(18) DAC.
60. Peeters & Vanneste, supra n. 12.
61. See, for example: ECJ, 29 Apr. 2021, Case C-504/19, Banco de Portugal and Others v. V.R., para. 51 and IT: ECJ, 11 July 2019, Joined Cases C-180/18, C-286/18 and C-287/18, Aegrenergy Srl and Fasignano Due Srl v. Ministero dello Sviluppo Economico, paras. 29-30.
62. Case No. 103/2022 (2022), supra n. 28.
63. Art. 1(1) DAC.
65. BE: ECJ, 3 July 2012, Case C-318/10, Société d’investissement pour l’agriculture tropicale SA (SIAT) v. Euit Belge para. 59, Case Law IBFD.
66. Id., at para. 58.
burden of proof between the taxpayer and the tax authorities was not properly foreseen. With regard to the DAC6 reporting obligations, the latter can be addressed easily by extending the MBT to all of the hallmarks.

8. Conclusions

Although Belgian legislation is entirely in line with the DAC6 reporting rules, the DAC only provides for minimum standards, and includes certain concepts that should be refined further by the Member States. The latter point applies, among others, to the scope of the possibility to invoke legal professional privilege for the intermediary to be exempt from the DAC6 reporting obligation. Not only the scope of this exemption, but also the scope of legal professional privilege itself remains at the discretion of the Member States, and, therefore, is not harmonized within the European Union. Nevertheless, the preliminary questions to the ECJ (as raised by the Belgian Constitutional Court in Orde van Vlaamse Balies and Others and Belgian Association of Tax Lawyers and Others) is not only important for Belgium. The question as to whether the notification requirement (which is a minimum standard under the DAC) may violate the right to respect a private and family life is relevant for all of the Member States. And even though Advocate General Rantos opined in Orde van Vlaamse Balies and Others that such notification requirement is justifiable, it is still possible for the ECJ eventually to take a deviating position.

Even more interesting is the fact that the Belgian Constitutional Court questioned certain fundamental concepts and/or mechanics of the DAC6 reporting obligations, requesting the ECJ to scrutinize whether the DAC itself infringes the principle of equality and non-discrimination, the principle of legal certainty and the right to respect a private life. The same – or very similar – concerns were shared by various authors in legal doctrine from the introduction of the DAC6. To the extent that some of these fundamental principles and rights are violated, this state of affairs means that the EU legislator should thoroughly rework DAC6.

67. Id., at para. 55.
68. Orde van Vlaamse Balies (C-694/20), supra n. 24.
69. Belgian Association of Tax Lawyers and Others (C-623/22), supra n. 29.
70. AG Opinion in Orde van Vlaamse Balies (C-694/20), supra n. 27.