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# Is the Privilege Too Privileged? the Orde van de Vlaamse Balies Case Revisited

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*The objective of this article is to analyse the concept of the legal professional privilege in the field of taxation. First, the Orde van de Vlaamse Balies case is examined in which the CJEU struck down an element of the mandatory disclosure regime contained in the fifth amendment to the Directive on Administrative Cooperation (DAC 6) as it was considered a disproportionate infringement of the legal professional privilege. The article challenges whether the CJEU was correct in simply further developing its own and the ECtHR's precedence to reach the conclusion that all activities of lawyers as targeted by the DAC 6 fall within the scope of the strengthened protection of legal professional privilege. Additionally, it is concluded that the CJEU insufficiently took into account the DAC 6's broader goals. Next, the article investigates ethical considerations concerning legal professional privilege, discussing particularly how it should be delineated in the field of taxation. The article concludes that the scope of legal professional privilege should not be expanded to include the activities of lawyers in tax planning.*

**Keywords:** Legal professional privilege, attorney-client privilege, DAC 6, mandatory disclosure regime, legal ethics.

## 1 Introduction

It is often said that sunshine is the best disinfectant. To more effectively counter tax avoidance, some of the OECD/G20's Base Erosion and Profit Shifting (BEPS) actions were focused on increasing tax transparency which is broadly defined as the ease with which information is collected and shared among the relevant tax authorities. This was to be partly realized through the increased exchange of information, especially automatic exchange of financial data and transfer pricing data. Additionally, the OECD/G20, through BEPS Action 12, argued that a beneficial tool for increasing tax transparency could be found in mandatory disclosure regimes.[1] As a response to BEPS Action 12, a mandatory disclosure regime was introduced within the EU for certain cross-border reportable arrangements through what is commonly known as *the fifth amendment to the Directive on Administrative Cooperation (*DAC 6).[2] The *Orde van de Vlaamse Balies* case challenged this provision on the basis that the obligation to report that is placed on lawyers was in breach with legal professional privilege.[3]

Legal professional privilege is central in the *Orde van de Vlaamse Balies* case and is the principle that creates a derogation from the general principle that all relevant information should be available to the legal system. In general, it ensures that communication between lawyers and their clients is no longer compellable, i.e., that the communications between a lawyer and his or her client cannot form part of the evidence used by a court to adjudicate a case.[4] On the one hand, it is an essential element to ensure clients feel comfortable divulging all elements of their case to a lawyer who only then can give proper legal counselling. On the other hand, it is also basically a tool of secrecy to keep crucial information from those who might have suffered from the acts of the clients of those lawyers. Thus, it is 'not only a principle of privacy, but also a device for cover-ups'.[5]

## Notes

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1 OECD/G20 Base Erosion and Profit Shifting Project, *Mandatory Disclosure Rules: Action 12: 2015 Final Report* (OECD Publishing 2015).

2 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

3 CJEU Case C-694/20, *Orde van de Vlaamse Balies, 8 Dec. 2022, ECLI:EU:C:2022:963.*

4 Jonathan Auburn, *Legal Professional Privilege: Law and Theory* 1 (Hart Publishing).

5 Geoffrey Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 California L. Rev. 1062 (1978), doi: 10.2307/3479905.

In tax law, the victim of these cover-ups is the treasury and intrinsically society at large through either a loss of tax revenues or an increase in the taxation of other taxpayers. The way the boundaries are established on the scope of legal professional privilege must depend on the moral choice made by the legislature. It must weigh the extended right to privacy in the relationship between a client and its tax lawyer or even tax advisor with the necessity of discovery of the relevant facts to determine a person's tax liability.[6] In tax law, it seems to have allowed for a wide definition of legal professional privilege both concerning the personal and the material scope of this principle with broad protection of tax advice offered by lawyers but also sometimes by accountants or other tax professionals on legal advice notwithstanding its link with legal proceedings. However, as always in matters of tax, any choice made on setting the scope of legal profession privilege reflects the difficult balance between what Avi-Yonah and Mazzoni have referred to as the 'the social and economic human rights' on the one hand and the more individual human rights such as the right to privacy on the other hand.[7]

This article discusses the *Orde van de Vlaamse Balies* case in an attempt to evaluate how the CJEU[8] struck this balance between the right to privacy and the societal need for transparency to counter aggressive tax planning and whether this is justified taking into account some broad ethical considerations underlying legal professional privilege. Section 2 analyses the *Orde van de Vlaamse Balies* case focusing on two major questions. How did the CJEU set the scope of legal professional privilege, and how did it balance it with the general interest of countering aggressive tax planning? section 3 discusses the ethics of legal professional privilege. First, its origins are examined. Second, the ethical grounds for granting it and its current limitations are considered in order to assess what ethical limits are already set by society. Finally, it is addressed specifically in the context of tax law. Finally, in section 4, concluding remarks are provided, and *the Orde van de Vlaamse Balies* case is re-evaluated taking into account the ethical consideration discussed in the previous section to determine whether these justify such a ruling.

## 2 ORDE VAN DE VLAAMSE BALIES CASE

### 2.1 *DAC 6: Intermediaries and the Legal Professional Privilege*

Within the EU, a mandatory disclosure regime and the subsequent automatic exchange of information between tax administrations was introduced through an amendment of the directive on administrative cooperation. The DAC 6 was inspired by BEPS Action 12 and shares its objectives of creating more transparency to allow for a fairer tax system (more on this is in section 2.4.).[9] Crucially, it is to allow tax authorities to obtain comprehensive and relevant information about potentially aggressive arrangements. The preamble states that 'such information would enable authorities to react promptly against harmful aggressive tax practices and to close loopholes by enacting legislation or by undertaking adequate risk assessment and carrying out tax audits'.[10] Thus, importantly, the purpose of the DAC 6 is not only to close loopholes but also to improve risk assessment at the level of the tax authorities which is meant to increase the effectiveness of their struggle against aggressive tax planning. Additionally, the DAC 6 specifically refers to the BEPS Action 12 in the preamble, creating a clear link between the OECD's work on mandatory disclosure regimes and the actual provision of EU secondary law.[11]

Stated briefly, the DAC 6 works in two steps. First, intermediaries are obligated to report on reportable cross-border transactions[12] to the relevant competent authorities.[13] Transactions become reportable when they contain certain hallmarks of which some are general while others are specific.[14] For certain categories of hallmarks, a main benefits test must be performed. Only when one of the main benefits of the arrangement that a person can reasonably expect to derive from the arrangement is a tax advantage must such arrangements be reported.[15] For the purpose of the DAC 6, intermediaries are defined as 'any

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6 *Ibid.*, at 1085.

7 Rueven Avi-Yonah & Gianluca Mazonni, *Taxation and Human Rights: A Delicate Balance, in Tax, Inequality, and Human Rights* 259 (Philip Alstom & Nikki Reisch eds, Oxford Academics Books 2019).

8 Court of Justice of the European Union.

9 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ EU 5 Jun. 2018, L 139 (DAC 6), recitals 1, 2, 4, 5, 6, 7, 8, and 9.

10 *Ibid.*, recital 2.

11 *Ibid.*, recital 4.

12 Cross-border arrangement meaning arrangements concerning either more than one Member State or a Member State and a third country.

13 Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ EU 11 Mar. 2011, L 64/1 (DAC), Art. 8ab para. 1.

14 *Ibid.*, annex IV part II. .

15 *Ibid.*, annex IV part I.

person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement' and include persons who have undertaken to provide aid, assistance, or advice for such activities.[16] When the reporting by an intermediary would be contrary to its legal professional privilege, however, Member States may grant them the right to waive reporting on reportable cross-border arrangements.[17] In such a case, other intermediaries or the taxpayer itself will be required to report.[18] Second, the DAC 6 ensures the automatic exchange of the collected data between EU Member States.[19]

The DAC 6 thus introduced a mandatory disclosure regime throughout the EU[20] for which much criticism can be found in literature. Questions were raised as to the interaction between it and EU primary law both in the form of the fundamental freedoms and the rights of taxpayers as found in the Charter of Fundamental Rights (hereinafter CFR).[21] Some authors even went to the extent of comparing the DAC 6 to the 'minority report' portraying a rather dystopian view on it.[22] Importantly for this article, some assessments (before the *Orde van de Vlaamse Balies* case) were made as to whether the DAC 6 constituted a breach of the legal professional privilege, though differing outcomes could be found in literature.[23]

## 2.2 *The Questions Raised in the Orde van de Vlaamse Balies Case*

It was the provision concerning legal professional privilege that was central to the questions raised by the Belgian Constitutional Court to the CJEU in the *Orde van de Vlaamse Balies-case* (C-694/20).[24] Both the Flemish Bar Association and the Belgian Association of Tax Lawyers had filed for the annulment of the provision transposing the DAC 6 within the Flemish region. The applicants argued that the obligation to inform other intermediaries infringed on their legal professional privilege and that doing so is not necessary to ensure the reporting of the arrangement in itself.[25] The constitutional court referred the question to the CJEU of whether the obligation to notify other intermediaries infringed on the right to a fair trial as guaranteed by Article 47 CFR[26] and the right to respect for private life as guaranteed by Article 7 CFR.[27] The constitutional court clarified that, under domestic law, legal professional privilege would be infringed by this notification to the other intermediary as the existence of a relationship between a lawyer and a client is considered to be privileged information. The essential question of *the Orde van de Vlaamse Balies* case, however, is not concerning domestic law but whether EU primary law in the form of the CFR was infringed by EU secondary law, specifically the DAC 6.[28]

Lawyers fall within the scope of the DAC 6 if they perform the function of intermediary as defined in it (*see* section 2.1.). Thus, it is in their role of designing, marketing, organizing, making available for implementation, or managing the implementation of reportable cross-border arrangements, or providing aid, assistance, or advice in relation to such activities that they fall within its scope.[29] Not included in this list of activities are those of lawyers advising, defending, and representing clients in civil or criminal proceedings. Such a link cannot exist as the legal advice provided for creating a reportable cross-border arrangement must necessarily occur prior to any possible legal proceedings.[30] Consequently, the CJEU concluded that the requirements of the DAC 6 cannot be in breach of the right to a fair trial as provided for in Article 47

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16 *Ibid.*, Art. 3.

17 *Ibid.*, Art. 8ab para. 5.

18 *Ibid.*, Art. 8ab para. 5.

19 *Ibid.*, Art. 13.

20 Both bespoke and marketable arrangements must be disclosed, contrary to some claims in literature; *see* Marco Greggi, *Shades of Transparency: DAC6 and the Client-Attorney Privilege*, 32 EC Tax Rev. 73 (Wolters Kluwer 2023), doi: 10.54648/ECTA2023012.

21 Daniel Blum & Andreas Langer, *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1,* 59 European Taxation (2019); Nevia Čičin-Šain, *New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another 'Bite' into the Rights of the Taxpayer?*, 11 World Tax J. (2019), doi: 10.59403/3q0ctyx.

22 Carlos Weffe, *Mandatory Disclosure Rules and Taxpayers' Rights: Where Do We Stand?*, 4 ITAXS – International Tax Studies (2021).

23 Andreas Ballacin & Francesco Cannas, *The 'DAC 6' and Its Compatability with Some of the Founding Principles of the European Legal System(s)*, 29 EC Tax Review (2020); Čičin-Šain, *supra* n. 21.

24 CJEU Case C-694/20, *supra* n. 3.

25 *Ibid.*, para. 13.

26 Charter of Fundamental Rights.

27 CJEU Case C-694/20, *supra* n. 3, para. 17.

28 On the interesting interplay between EU secondary and primary law, *see* Marta Papis-Almansa, *The End Does Not Justify the Means: On How the Secondary EU Law Infringes the Primary EU Law in the Light of the Recent Judgments of the CJEU*, 51 Intertax (2023), doi: 10.54648/TAXI2023055.

29 Council Directive 2011/16/EU (DAC), *supra* n. 13, Art. 3 para. 21.

30 CJEU Case C-694/20, *supra* n. 3, para. 62–65.

CFR.[31] Thus, it did not rule on the question of the right of a fair trial which is much more closely connected to the rights of a client. The CJEU ultimately only considered the issue of the legal professional privilege from a right to privacy perspective.

## 2.3 *The Material Scope of the Legal Professional Privilege*

### 2.3.1 *The View of the CJEU: Right to Privacy and the 'Strengthened Protection'*

Next, the CJEU turned its attention towards the question concerning the right to privacy. Briefly, when considering the right to privacy as foreseen in Article 7 CFR, the CJEU established that the legal professional privilege at an EU level also protected the existence of a relationship between a lawyer and a client and that the mandatory disclosure to third parties and the tax administrations of such a relationship was a disproportionate breach of the right to privacy. To come to this conclusion, the CJEU first had to delineate the scope of the legal professional privilege as protected by the right to privacy. If advice outside of the scope of legal proceedings would not be protected (or in a less strict way), this would impact the CJEU's ruling. Several authors welcomed the decision as it properly emphasized the fact that EU secondary law must comply with EU primarily law and, importantly, also the CFR.[32]

The ECtHR's jurisprudence[33] and its rulings on the parallel provisions found in the ECHR[34] are important in the CJEU's decision making when discussing on cases concerning the CFR. Based on Article 52(3) CFR, the ECHR forms the minimum threshold of protection for similar rights enumerated in the CFR.[35] Thus, the precedence set by the ECtHR must be taken into account.

Consequently, the CJEU investigated the rulings on legal professional privilege and the right to privacy at the ECtHR. More specifically, it made reference to the *Michaud v. France* case.[36] Therefrom, the CJEU referred to paragraphs 118 (drawing some conclusions from the precedence referred to by the ECtHR) and 119 (which formulates the protection of the privilege). It is also beneficial here to refer to paragraph 117 of the *Michaud v. France* case to highlight the references to precedence made by the ECtHR:

> It has pointed out in this connection that, by virtue of Article 8 [ECHR], correspondence between a lawyer and his client, whatever its purpose (strictly professional correspondence included … ), enjoys privileged status where confidentiality is concerned ( … ; this applies, as mentioned earlier, to all forms of exchanges between lawyers and their clients). It [ECtHR] has also said that it 'attaches particular weight' to the risk of impingement on the lawyer's right to professional secrecy, 'since it may have repercussions on the proper administration of justice' and professional secrecy is the basis of the relationship of confidence between lawyer and client.[37]

In paragraphs 118 and 119, the ECtHR states the following:

> The result is that while Article 8 protects the confidentiality of all 'correspondence' between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is this relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of the accused persons not to incriminate themselves;

and:

> This additional protection conferred by Article 8 on the confidentiality of lawyer-client relations, and the grounds on which it is based, lead the Court to find that, from this perspective, legal professional privilege, while primarily imposing certain obligations on lawyers, is specifically protected by that Article.[38]

**Notes**

[31] This element was thoroughly analysed in Papis-Almansa, *supra* n. 28, at 615–617. Papis-Almansa has some critical considerations concerning the, in her view, narrow scope assigned to Art. 47 CFR by the CJEU. However, she also notes that, in Case C-398/21, *Conseil national des barreaux and Others*, the CJEU will have a new opportunity to further delve into this question.

[32] For instance, Michael Stöber, *The Charter of Fundamental Rights and EU Tax Directives*, Vol. 32 EC Tax Rev. 203–213 (2023), doi: 10.54648/ECTA2023026.

[33] European Court of Human Rights.

[34] European Convention for the Protection of Human Rights.

[35] CJEU Case C-694/20, *supra* n. 3, para. 26.

[36] ECtHR, 6 Dec. 2012, *Michaud v. France Judgement, Application no. 12323/11.*

[37] *Ibid.*, para. 117.

[38] *Ibid.*, paras 118–119.

Thus, the ECtHR concluded that Article 8 of the ECHR afforded strengthened protection to correspondence between lawyers and clients. However, it also specified that this was justified due to the lawyer's participation in litigation and in ensuring the proper administration of justice.

This terminology of strengthened protection to certain aspects of a person's private life is not uncommon in the ECtHR's rulings. For instance, it has held that the freedom to engage in sexual relationships in accordance with one's sexual orientation forms part of the most intimate aspects of one's private life and thus requires particularly serious reasons before there can be interference with it.[39] It leads to the conclusion that cases concerning the right to privacy require not only an assessment of the severity of the interference but also an assessment of the importance of the element of the private life that has been infracted. Thus, taking the above paragraphs from the ECtHR in the *Michaud v. France* case, strengthened protection must be given to confidential information shared between a client and a lawyer based on the latter's role of defending clients in legal proceedings and ensuring the proper administration of justice.

Building on paragraphs 117 and 118, among others, of the *Michaud v. France* case, the CJEU concluded that communication between lawyers and their clients is afforded a strengthened protection that covers both the activity of defence and legal advice for both the content and the existence. The CJEU stated that:

> it is apparent from the case-law of the ECtHR that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients (see, … Michaud v. France case, … §§ 117 and 118). Like that provision, the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence. As the ECtHR has pointed out, individuals who consult a lawyer can reasonably expect that their communication is private and confidential ( … Altay v. Turkey (No 2), … § 49). 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 or her.[40]

Again referring to the *Michaud v. France* case, the CJEU justifies a strengthened right to privacy on the basis of the fundamental role assigned to a lawyer in a democratic society. This is defined by the CJEU (referring to the *AM & S Europe v. Commission* case) as any person must be able, without constraints, to consult a lawyer whose profession encompasses giving legal advice and the corresponding duty of that lawyer to act in good faith towards its client.[41] The CJEU formulated this as such:

> The specific protection which Article 7 of the Charter and Article 8(1) ECHR afford to lawyers' legal professional privilege, which primarily takes the form of obligations on them, is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants ( … Michaud *v.* France … §§ 118 and 119). That fundamental task entails, on the one hand, the requirement, the importance of which is recognized in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client ( … AM & S Europe *v.* Commission, … , paragraph 18).[42]

In referencing the *Michaud v. France* case, the CJEU refers to the link between the role a lawyer assumes in the defence of his clients yet moves beyond this without providing a clear explanation to also afford that same strengthened protection granted to lawyers by virtue of their role in defence to all communications between lawyers and their clients.

### 2.3.2 *The Precedents Rulings Analysed: Expansion of Scope?*

Delving deeper into the precedents cited by the CJEU, questions can be raised as to whether what it presents as a continuation of the ECtHR and its own jurisprudence is not, in fact, a noted expansion of the scope and protection provided for by the right to privacy when it concerns the legal professional privilege. In this context, it is important to bear in mind the complexity of the right to privacy and the gradation of the protection afforded to certain elements of it. This expansion of scope was not unnoticed in literature in which the deviation from precedence was highlighted along with the practical consequences this

**Notes**

[39] Karin De Vries, *Right to Respect for Private and Family Life (Article 8), in Theory and practice of the European Convention on Human Rights* 685 (Pieter Van Dijk et al. eds, Intersentia 5th ed. 2017).

[40] CJEU Case C-694/20, *supra* n. 3, para. 28.

[41] *Ibid.*, para. 28.

[42] *Ibid.*, para. 27.

would have on other fields of EU law.[43] The question then becomes how such an expansion of scope fits in with previous case law of both the ECtHR and the CJEU and how it is being justified.

First, the *Michaud v. France* case needs to be further discussed. It similarly considered a mandatory disclosure regime, the EU's anti-money laundering directive, obligating lawyers to report on 'suspicions' of money laundering. This provision had previously led to the *Ordre des Barreaux francophones et Germanophone* case in which the CJEU had dismissed the notion that such an obligation was in breach of the right to a fair trial.[44] The CJEU held that it could not infringe on that right when the legal advice was provided in situations not regarding legal proceedings as would mostly be the case when dealing with the anti-money laundering provisions.[45] However, the question of the compatibility of such an obligation with the right to privacy was never discussed in the *Ordre des Barreaux Francophones et Germanophones* case as this aspect had not formed part of the question referred by the Belgian Constitutional Court.

The question on the conformity of the obligation of a lawyer to notify his suspicions was subsequently challenged at the ECtHR by a French lawyer who claimed such a provision not only breached his clients' right to a fair trial but also his right to privacy.[46] The ECtHR established that the requirement to report on suspicions did constitute a breach of the lawyer's right to privacy (both the right to confidential correspondence and the right to a private life which includes activities of a professional or business nature) under Article 8 ECHR.[47] The ECtHR subsequently reiterated the criteria under which a breach of the right to privacy as found in that article would be valid. These criteria are analogous to the criteria the CJEU uses in analysing cases concerning the CFR and as can be found in Article 52 CFR. Briefly, the ECtHR states that 'such interference violates Article 8, unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" to achieve the aim or aims concerned'.[48] The ECtHR first addresses the question of legality, concluding that the obligation to report is sufficiently accessible and particularly that the concept of 'suspicion' is sufficiently clear, especially to the target audience of lawyers, as to attain the status of a law.[49]

More important is the assessment of the ECtHR on the necessity of the interference to the right to privacy taking into consideration the legitimate aim of preventing disorder and crime. The ECtHR set out its precedence concerning the interaction between Article 8 ECHR concerning privacy and the communications between a lawyer and its clients. It stipulated that any communication between them enjoys the status of confidentiality which is given a particular weight when there is a risk of impingement on the lawyer's right to professional secrecy due to the repercussions this would have on the proper administration of justice.[50] As lawyers are assigned the fundamental role in a democratic society of defending litigants, their communication with their clients is afforded strengthened protection.[51] It is for this reason, and taking this perspective, that legal professional privilege enjoys strengthened protection of the right to privacy.[52]

The ECtHR then proceeded further to investigate whether the French Conseil d'Etat was correct in holding that the interfering provision both served the general interest and that it contained sufficient safeguards as the requirement excluded lawyers from reporting on suspicions when they arose during legal proceedings or in their capacity as legal counsel.[53] The ECtHR agreed with the assessment of the Conseil d'Etat. It noted that the obligation to report only existed under certain circumstances when lawyers perform tasks similar to those of other professions and outside of the scope of their role in defending clients in legal proceedings.[54] The tasks enumerated by the CJEU (citing the French regulation) as possibly creating the reporting obligation include:

> where, in the context of their business activity, they take part for and on behalf of their clients in financial or real-estate activities or act as trustees; and where they assist their clients in preparing or carrying out

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[43] Enrico Salmini Sturli & Thibault Henry, *Extension of EU Legal Professional Privilege: Case C-694/20 Orde van Vlaamse Balies*, 14 J. Eur. Comp. L. & Prac. 165–167 (2023), doi: 10.1093/jeclap/lpad016.

[44] CJEU Case C-305/05, *Ordre des Barreaux francophones et germanophones, 26 June 2007, ECLI:EU:C:2007:383.*

[45] *Ibid.*

[46] *Michaud v. France Judgement*, *supra* n. 36.

[47] *Ibid.*, para. 90–91.

[48] *Ibid.*, at 93.

[49] *Ibid.*, para. 94–98.

[50] *Ibid.*, para. 117.

[51] *Ibid.*, para. 118.

[52] *Ibid.*, para. 119.

[53] *Ibid.*, para. 121.

[54] *Ibid.*, para. 127.

> transactions concerning certain defined operations (the buying and selling of real estate or businesses; the management of funds, securities, savings accounts, securities accounts or insurance policies; the organization of the contributions required to create companies; the formation, administration or management of companies; the formation, administration or management of trusts or any other similar structure; and the setting-up or management of endowment funds). The obligation to report suspicions therefore only concerns tasks performed by lawyers, which are similar to those performed by the other professions subjected to the same obligation, and not the role they play in defending their clients. Furthermore, the Monetary and Financial Code specifies that lawyers are not subjected to the obligation where the activity in question 'relates to judicial proceedings, whether the information they have was received or obtained before, during or after said proceedings, including any advice given with regard to the manner of initiating or avoiding such proceedings, nor where they give legal advice, unless said information was provided for the purpose of money-laundering or terrorist financing or with the knowledge that the client requested it for the purpose of money-laundering or terrorist financing' (Article L. 561-3 II of the Monetary and Financial Code … ).[55]

The ECtHR thus notes that the obligation under review did not interact with the role of lawyers in defending their clients. The ECtHR specifically notes that 'the obligation to report suspicions does not therefore go to the very essence of the lawyer's defence role which, as stated earlier, forms the very basis of legal professional privilege'.[56] It is in that light that the ECtHR considered the obligation to report on suspicions as not constituting a disproportionate interference with the privilege of lawyers.[57] It should be noted that the provision under review also exempted lawyers from the obligation to report in the case they provided legal advice. Arguably, this is not limited to only such advice given by a lawyer in its role of defence and may very well be obtained outside of any legal proceedings. As such, it could be that the mere obtaining of legal advice is given the same strengthened protection as any other communication between a lawyer and a client as communications for legal proceedings. This expansion makes sense from the perspective of the proper functioning of justice as it allows legal subjects to operate within the law and avoid any need for judicial proceedings in the first place. However, when the activities of lawyers were not linked to this role, the ECtHR appears to have been reluctant to provide any strengthened protection (as is evident from the *Michaud v. France* case).

In the *Orde van de Vlaamse Balies* case, the CJEU relies on the *Michaud v. France* case to conclude that the strengthened protections afforded to the privilege under Article 7 CFR and Article 8 ECHR is justified by the fundamental role played by lawyers in defending litigants. The CJEU states that this task entails, on the one hand, the requirement that any person must be able without constraint to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all of those in need of it and the correlative duty of the lawyer to act in good faith towards his or her client.[58] For this conclusion, the court also refers to its own precedence, specifically the *AM & S Europe* case and particularly paragraph 18 of that ruling[59] which stated:

> Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.[60]

However, when considering the full ruling of the *AM & S Europe* case, and particularly its paragraphs 21 and 22, it becomes clear that the scope of the legal professional privilege recognized by the CJEU at that time was limited to only communication that is made for the purposes and in the interests of the client's rights of defence.[61] While it had used further rulings to clarify the scope of these criteria, it had not deviated from this principle until the *Orde van de Vlaamse Balies* case.[62] To the contrary, in the *Akzo Nobel Chemicals Ltd* case, the CJEU had concluded:

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[55] *Ibid.*, para. 127.

[56] *Ibid.*, para. 128.

[57] *Ibid.*, para. 131.

[58] CJEU Case C-694/20, *supra* n. 3, para. 28.

[59] CJEU Case C-155/79, *AM & S v. Commission*, 18 May 1982, ECLI:EU:C:1982:157, para. 18.

[60] *Ibid.*, para. 18.

[61] *Ibid.*, para. 21–22.

[62] Salmini Sturli & Henry, *supra* n. 43, at 165.

> Accordingly, the Court concludes that such preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by LPP, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence. On the other hand, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection.[63]

### 2.3.3 *The Opinion of Advocate General Rantos*

Thus, the question remains: How should legal advice be treated when given outside of the scope of legal proceedings? Is it, as appears from the *Orde van de Vlaamse Balies* case, absolute whenever there is communication between a lawyer (in that capacity) and a client, or are there limits to the scope of the legal professional privilege as it would seem from precedent? In this context, it is interesting to consider the opinion of AG[64] Rantos in which it becomes clear that a different conclusion from the *Michaud v. France* case and the *AM & S Europe* case could have been drawn.

AG Rantos recognizes that Article 8 protects the confidentiality of correspondence between individuals and their lawyer but notes that the protection is more restrictive in those cases when the lawyer's tasks are linked to the client's defence in legal proceedings.[65] This does not mean that special consideration could not be given to legal advice from lawyers outside of the scope of legal proceedings but, when it is given to the communication between a lawyer and his client in these, it is still different. AG Rantos notes that the ECtHR decided that the strengthened protection allotted by the ECtHR did not extend to all activities of a lawyer which leads him to voice serious doubts over whether their activities targeted by the DAC 6 would fall within the scope set by the ECtHR.[66] AG Rantos argues that some activities traditionally form part of a lawyer's task and are thus covered by the legal professional privilege while other activities are outside of the lawyer's usual role in which case the strengthened legal professional privilege cannot be afforded.[67] It is clear that, for AG Rantos, providing even ad hoc legal advice outside of legal proceedings must be severely protected while activities performed by other professionals may be protected less strictly.

However, distinguishing between a lawyer's activity of providing legal advice and other activities will be difficult in practice.[68] For instance, when a lawyer is involved in designing a marketable reportable arrangement, AG Rantos has serious doubts as to how this would fit into a lawyers normal activities of providing legal assessments.[69] However, they could still provide these for cross-border arrangements in which case such a service may well require the strengthened legal professional privilege.[70] For instance, the case of a bespoke arrangement for which a lawyer provides legal advice would be protected in the same way as when a lawyer gives a client advice for 'any design or management activity, … , arrangements under company law or social law, or even the legal strategy'.[71] Thus, for AG Rantos, it is crucial to consider when a lawyer is acting as a lawyer and when he is not.

This line of reasoning should be considered alongside the one provided by the ECtHR in the *Michaud v. France* case wherein the legal professional privilege's strengthened protection is clearly linked to a lawyer's role in providing legal defence that is an essential function in a democratic society, and should be considered as such. When legal advice ensures that the subjects of the law act with full knowledge of what the law is, this enhances the proper functioning of the democratic society in that it ensures subjects of the law act within the boundaries of the law and thus avoid the risk of requiring legal proceedings. For a lawyer to be able to provide such legal advice, it must be able to count on receiving the full and detailed provision of the arrangement under consideration by the client. This seems to be the essential difference that AG Rantos indicates when considering the difference between designing and assessing an arrangement. When a lawyer designs an arrangement for his clients, he is essentially creating a possible legal constellation that requires no information from his clients. However, when he is asked to assess a cross-border arrangement, it must depend upon the information as provided by the clients to be able to provide the correct legal advice. It is argued here that the *Michaud v. France* case afforded the strengthened protection of legal advice only on lawyers providing a legal assessment (which is a task only they can perform) while

**Notes**

63 CJEU Case T-125/03, *Akzo Nobel Chemicals Ltd v. Commission*, 17 Sep. 2007, ECLI:EU:T:2007:287, para. 123.

64 Advocate General.

65 *Opinion of AG Rantos in Case C-694/20, Orde van Vlaamse Balies*, 5 Apr. 2022, ECLI:EU:C:2022:259, para. 48.

66 *Ibid.*, paras 53–61.

67 *Ibid.*, paras 54–55.

68 *Ibid.*, para. 56.

69 *Ibid.*, paras 60–61.

70 *Ibid.*, para. 62.

71 *Ibid.*, para. 66.

other services that could likewise be provided by other tax professionals, such as designing cross-border arrangements, would not be granted it. Extending the protection of legal professional privilege beyond such a scope exceeds legal precedence. However, the CJEU did not consider such arguments in the *Orde van de Vlaamse Balies* case and drew no such distinction.

### 2.4 *Balancing General Interests and Individual Rights*

The CJEU ultimately established an extended scope for the strengthened protection of legal professional privilege due to its necessity in a democratic society also covering the activities of lawyers well beyond pure legal advice but also covering designing, marketing, organizing, making available, implementing, or managing the implementation of reportable cross-border activities or, failing that, even the mere provision of aid or assistance for such activities. The CJEU continued by investigating whether there was an interference with the right to privacy and whether it could be considered justified. The right to privacy as contained in Article 7 CFR is inherently not absolute and may be limited under the conditions provided for by Article 52(1) CFR. Thus, the CJEU investigates whether the infraction of the right to privacy is provided for by law, that it respects the essence of the right to privacy, and that it is necessary and genuinely meets the objective of general interest as recognized by the EU or the need to protect the rights and freedoms of others in a proportionate way. The CJEU first established that the principle of legality is fulfilled and that the provision respects the essence of the right to privacy.[72]

The CJEU mostly focused on the principle of proportionality. In its judgment, it recognized that the general interest underlying the obligation to report is preventing tax avoidance and tax evasion.[73] Several arguments were then raised by Member States and the commission requesting to explain the appropriateness and necessity of the provision. For instance, it was argued that the obligation of lawyers would lead to an increased awareness of the other intermediaries of their obligation to notify. The CJEU dismissed this argument as the DAC 6 already contains strenuous obligations on all other intermediaries that would ensure the reporting of the arrangement.[74] Notably, such an assessment differs at least partly from that of AG Rantos who considered a system placing the burden to report solely on the taxpayer as less effective.[75] Further, he also states that such an obligation to notify other intermediaries is an effective means to ensure reporting which is an assessment clearly not shared by the CJEU.

Neither did the CJEU consider the notification of the identity of the lawyer-intermediary as strictly necessary as, among other things, such information would not provide additional information on the arrangement, the reporting of which is the objective of DAC 6.[76] Therefore, the CJEU finds the provisions on privilege in the DAC 6 disproportionate and thus infringing on the right of privacy.[77] On this point, AG Rantos shared his opinion with the CJEU.

Here, it is necessary to take a step back and consider the objectives of the DAC 6. When doing so, it is impossible to neglect the direct link between it and BEPS action 12 to which the DAC 6's preamble even explicitly refers.[78] The executive summary of the final report on BEPS Action 12 concerning mandatory disclosure regimes begins as follows: 'The lack of timely, comprehensive and relevant information on aggressive tax planning strategies is one of the main challenges faced by tax authorities worldwide'.[79] Additionally, 'Early access to such information provides the opportunity to quickly respond to tax risks through informed risk assessment, audit, or changes to legislation or regulation'.[80] Furthermore, it stated:

> The main objective of mandatory disclosure regimes is to increase transparency by providing the tax administration with early information regarding potentially aggressive or abusive tax planning schemes and to identify the promoters and users of those schemes. Another objective of mandatory disclosure regimes is deterrence: taxpayers may think twice about entering into a scheme if it has to be disclosed. Pressure is also placed on the tax avoidance market as promoters and users only have a limited opportunity to implement schemes before they are closed down.[81]

**Notes**

[72] Papis-Almansa, *supra* n. 28, at 618. Referring to; Case C-694/20, *Orde van de Vlaamse Balies*, para. 38 and 40.

[73] *Opinion of AG Rantos in Case C-694/20, supra* n. 65, paras 43–44.

[74] *Ibid.*, paras 45–50.

[75] *Ibid.*, paras 20.

[76] CJEU Case C-694/20, *supra* n. 3, para. 52.

[77] *Ibid.*, para. 59.

[78] Council Directive (EU) 2018/822 (DAC 6), *supra* n. 9, recital 4.

[79] OECD/G20 Base Erosion and Profit Shifting Project, *Mandatory Disclosure Rules: Action 12: 2015 Final Report, supra* n. 1, at 9.

[80] *Ibid.*, at 9.

[81] *Ibid.*, at 9.

The OECD summarizes the objectives pursued by those countries[82] that had previously implemented mandatory disclosure regimes as follows:

- To obtain early information about potentially aggressive or abusive tax avoidance schemes in order to inform risk assessment;
- to identify schemes, and the users and promoters of schemes in a timely manner;
- to act as a deterrent, to reduce the promotion and use of avoidance schemes;[83]

From this, it becomes clear that the objective of mandatory disclosure regimes is not only to identify the reportable arrangement but also the promoters (that is the word used in BEPS Action 12, but it can be used interchangeably with intermediary for the purpose of this article) of such schemes. One of the reasons for this focus on the promoters may have been that this would better allow charting the network of users of the scheme and thus provide for rapid information on the risk of the arrangement for the revenue. Additionally, by involving not just the users but also the promoters of certain schemes, tax administrations are likely to obtain the desired information more quickly. As is clear, obtaining the information at the earliest possible moment would enable a better response to the risks posed by such schemes by both the tax administrations and the tax legislators. A poignant example of such a legislative action seems to have originated in the United Kingdom that has had a statutory mandatory disclosure regime since 2004. Up to 2013, of the 2366 avoidance schemes disclosed under the regime, 925 had been made obsolete by legislative changes.[84]

BEPS Action 12 also discussed the interaction of mandatory disclosure regimes and legal professional privilege. According to the OECD, when such a privilege leads to the inability of the promoter of certain schemes to report, the reporting obligations are shifted to the clients of those promoters.[85] The OECD further noted that the legal professional privilege would, in the United Kingdom and Ireland, only extend to the legal advice in itself though not to the documentation prepared in the ordinary course of the transaction nor to the identity of the parties involved.[86] It is noteworthy that the OECD observes the importance of imposing the reporting requirements on the promoters and not on the taxpayers. The OECD noted that:

> promoters have a greater knowledge of a scheme's tax effects and are better placed to know whether a scheme constitutes a tax avoidance and to be aware of any risks inherent to that scheme. For this reason tax compliance strategies, including mandatory disclosure rules, are likely to be more effective if they focus on promoters, and improving tax compliance via the supply side, rather than focusing exclusively on the end user, i.e. the taxpayer.[87]

The objective of BEPS Action 12, and thus also the DAC 6, is broader than the mere collection of information concerning the specifics of a reportable arrangement. The purpose is to assess the risk to the treasury of certain schemes which requires more information than merely how one operates. To identify the rapidity with which the tax authorities (through audits or public notices concerning the abusive nature of the scheme) or the tax legislators must react to a scheme in practice depends on the risk it poses to the treasury. To assess this, having knowledge of the existence of all of the intermediaries involved, any of which may be the central spoke in designing and marketing the scheme, is crucial information. Without it, the tax authorities and tax legislators may simply observe numerous reports on a reportable arrangement (which they may or may not be able to easily link) while, if the centre of the network is known, the risk to the treasury will be much more easily assessed. This is not an insignificant consideration for the efficiency of the system. Furthermore, it seems arguable from the fact that the reporting obligations under the DAC 6 are not limited to only the facts of the arrangement but also to the identity of the intermediaries[88] that obtaining their identity is likewise an objective of the DAC 6. However, in its decision, the CJEU did not consider such objectives and focused purely on the limited goal of obtaining the facts of the reportable scheme itself.

## 2.5 *Intermediary Conclusions*

It is concluded here that the *Orde van de Vlaamse Balies* case can be criticized on two points. First, the extended scope of the strengthened protection granted to communication between lawyers and clients is justified in its paragraph 28 by reference to the precedence found in the rulings of the ECtHR and the CJEU. However,

### Notes

[82] Countries considered in the BEPS Action 12 report are: Canada, Ireland, Portugal, South Africa, the United Kingdom, and the United States.

[83] OECD/G20 Base Erosion and Profit Shifting Project, *supra* n. 1, at 18.

[84] *Ibid.*, at 25.

[85] *Ibid.*, para. 70.

[86] *Ibid.*, at 65, footnote 2.

[87] *Ibid.*, para. 197.

[88] At least in marketable schemes where obtaining an overview of the network seems important for assessing the risk to tax revenue that a scheme possesses.

neither of the referred to precedent rulings come to the conclusions drawn by the CJEU in the *Orde van de Vlaamse Balies* case. Using the ECtHR's *Michaud v. France* case, the CJEU grants strengthened protection to all legal advice between lawyers and their clients. This is contrary to the ECtHR's conclusion which limits such strengthened protection to communication when lawyers act in their role of defending clients or when the legal advice should be strengthened considering its function in a democratic society. Whether this is the case for the activities targeted by the DAC 6 is not investigated by the CJEU, though this seems highly doubtful in certain cases considering the observations of AG Rantos.

Furthermore, the CJEU states in the *Orde van de Vlaamse Balies* case that the *AM & S Europe* case extended the scope of the privilege to the provision of independent legal advice no matter its purpose. Again, this seems contrary to the *AM & S Europe* case. Consequently, the CJEU in the *Orde van de Vlaamse Balies* case extended the scope of the strengthened protection of the privilege without providing proper reasoning. This is intrinsically a problem as it is currently ambiguous on what grounds the CJEU has decided to afford such strengthened protection to legal advice beyond the scope set by precedence. Consider, for instance, a lawyer designing a reportable cross-border arrangement and subsequently selling it to multiple clients. Under the CJEU's current ruling, the communication of such lawyer with its client would be privileged notwithstanding the lack of any proper legal assessment and certainly lacking any fundamental need in a democratic society to protect such communications to ensure complete and sincere communication between a client and his lawyer. This is also notwithstanding the fact that, in the *Michaud v. France* case, such services that can similarly be provided by other professionals[89] would not be granted such strengthened protection.

Another unfortunate consequence of this is that it will now remain unclear as to how the CJEU would have ruled if it had remained within the scope of precedence (though pending cases might elucidate this).[90] If these specific types of communication between lawyers and clients do not fall within the scope as discussed above, the right to privacy still provides protection to the communication between them, perhaps even some form of strengthened protection.[91] Whether the latter would have sufficed to protect the communication with which the DAC 6 interferes is now unknown. In the future, it would be beneficial for legal certainty if the CJEU more clearly defined the scope of the legal professional privilege in the many facets in which it exists and how these then are protected by the right to privacy.

Second, questions can be raised as to whether the CJEU correctly considered the full objectives of the DAC 6. The objective of the mandatory disclosure regime it introduces is not limited to solely obtaining the information on the existence and content of the reportable arrangement itself. Concluding otherwise would argue that the legislature had included a purposeless provision into the DAC 6 in ensuring the collection and exchange of information on the identity of the intermediaries. It also seems to be in accordance with the objectives of mandatory disclosure regimes as identified by the OECD in BEPS Action 12. It is argued here that such an obligation to report is based on the need to allow the legislators and tax authorities to have all of the information to better estimate the risk posed by reportable arrangements to the treasury and to consequently be able to more effectively judge how quickly they need to respond to such an arrangement. Unfortunately, the CJEU took a much more limited view to the objectives of the DAC 6. Based on this assessment and the extended scope of the legal professional privilege, the CJEU struck down an element of it that was designed to protect society from the negative effects of aggressive tax planning. The remainder of this contribution will now discuss how such an approach fits into ethical considerations concerning the privilege.

## 3 THE ETHICS OF THE LEGAL PROFESSIONAL PRIVILEGE

### 3.1 *The Origins of the Legal Professional Privilege*

In the Western world, the legal professional privilege traces its roots at least as far back as Elizabethan England.[92] Interestingly, the legal professional privilege was more often attributed by English courts to barristers who were historically more directly linked with litigation then to attorneys who provided for legal advice often outside of a litigation.[93] Thus, for courts in the past, the connection with an actual or imminent litigation was oftentimes decisive.[94] Notably, in the *Orde van Vlaamse Balies* case, the CJEU also appears to recognize a certain distinction between providing legal advice and representing a client

Notes

[89] Such as tax accountants.

[90] For an overview of these pending cases, *see* Papis-Almansa, *supra* n. 28, at 619–620.

[91] Though not based upon the fundamental role that a lawyer plays in providing defence in legal proceedings.

[92] Hazard, *supra* n. 5, at 1070.

[93] *Ibid.*, at 1071.

[94] *Ibid.*, at 1081.

during litigation but nonetheless extended the privilege to both activities based on the strengthened right to privacy.[95]

The privilege has often been applied by common law courts to ensure that certain evidence was thus not compellable as a means to ensure evidentiary fairness. Common law courts developing the privilege have expanded it at times to the collection of evidence at other stages of administrative or investigative procedures.[96] Similarly, within EU Member States at least, courts have protected communication between lawyers and clients as was already noted by the CJEU in the *AM & S Europe* case.[97] Additionally, several jurisdictions have enacted statutes to ensure or expand[98] the privilege. However, different EU Member States have set different limits to the privilege.[99] Concretely, jurisdictions recognize the need to ensure some form of legal professional privilege. Thus, it seems clear that some ethical grounds support such a universal recognition. The following section deals with this question. The ethics of the legal professional privilege are first discussed as a delicate balancing between general interests and individual rights, and then the particularities of the legal professional privilege in the field of taxation will be examined.

### 3.2 *The Ethics of the Legal Professional Privilege: A Balance Between General Interests and Individual Rights*

Legal professional privilege, whether existing as a principle, statute, or through regulation, is the translation into law of certain moral values held by society. This section attempts to identify the moral grounds for granting it for which reference will be made to literature and case law. This exercise will then help in formulating some ideas on how to determine the limits of legal professional privilege in tax law and thus to allow to better evaluate the CJEU's ruling in the *Orde van de Vlaamse Balies* case.

The basic moral justification of legal professional privilege is simple, i.e., to ensure the proper administration of justice. However, English common law often distinguishes between legal privilege in litigation (which can extend into preparatory advice) and the privilege for legal advice.[100] Similarly, both the ECHR and the CFR provide for two separate sources for the privilege in the right to a fair trial[101] and the right to privacy.[102] At its basic level, it appears that the privilege is founded on the two fundamental values of the need to ensure that individuals are afforded a fair trial and their right to privacy (including confidential correspondence between lawyers and clients). These private correspondences could be given strengthened protection when this would be justified by the need to ensure the proper administration of justice.

The right to a fair trial seems easily justified as it is an essential requirement for the proper working of the rule of law. The ECtHR stated in the section *v. Switzerland* case that:

> the court considers that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from article 6 Paragraph 3(c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.[103]

Thus, within the confines of a legal proceeding, the idea of equality of arms intrinsically justifies a strong (near absolute) privilege.

However, even outside legal proceedings, complete and sincere communication between lawyers and their clients is a requirement to ensure all subjects of the law can operate within it efficiently and effectively. Without the privilege, a lawyer's function would be gravely undermined as its legal advice (whether on matters of litigation or outside of such legal proceedings) would potentially be based on inadequate information. This would occur if the client withholds certain information out of fear of it being disclosed to third parties. As such, lawyers have a crucial role in ensuring the rule of law which is a moral goal in itself.[104] Thus, the legal professional privilege in its extended form may well be justified by its role in ensuring the proper functioning of justice. As an example, in the United States, the Supreme Court formulated the

**Notes**

[95] CJEU Case C-694/20, *supra* n. 3.

[96] Auburn, *supra* n. 4, at 31.

[97] Case C-155/79, *AM & S v. Commission*, para. 2.

[98] Consider, for instance, 26 U.S.C. § 7525 which expands the confidentiality to all federally authorized tax practitioners providing tax advice.

[99] Julia Holtz, *Legal Professional Privilege in Europe: A Missed Policy Opportunity*, 4 J. Eur. Comp. L. & Prac. 4, doi: 10.1093/jeclap/lpt030. Though this lack of the privilege under civil law is softened by laws on professional confidentiality and the right to refuse giving testimony granted to lawyers.

[100] Auburn, *supra* n. 4, at 41.

[101] Article 6 ECHR and Art. 47 CFR.

[102] Article 8 ECHR and Art. 7 CFR.

[103] ECtHR, 28 Nov. 1991, *S v. Switzerland, Application no. 12629/87 and 13965/88*, para. 48.

[104] Brian Z. Tamanaha, *On the Rule of Law – History, Politics, Theory* 58–59 (Cambridge University Press 2004).

purpose of the privilege as follows in the *Upjohn v. United States* case: 'to encourage full and frank communication between attorneys and clients, and thereby promote broader public interests in the observance of law and administration of justice'.[105] Thus, the proper observance of the rule of law, which is a concept broader than the right to a fair trial, would support stronger protection of legal professional privilege. In paragraph 117 of the *Michaud v. France* case, the ECtHR reflects such considerations.[106]

The right to privacy as an ethical grounding for legal professional privilege is more clearly highlighted in the *Orde van de Vlaamse Balies* case.[107] As the disclosure of a relationship between the lawyer and client happened before the occurrence or even the contemplation of a trial, it logically cannot be that such a disclosure could infringe upon the right to a fair trial. However, it is clear that society values privacy in and of itself (next to the effective and efficient operation of the legal system). The moral basis of the right to privacy can be found in several ideas: respect for persons, more instrumental reasons (such as its necessity in forming relationships of love and friendship, creating diverse social relationships, and increasing personal autonomy), and on an intrinsic basis (i.e., privacy in and of itself can be valued because a life without surveillance is more worthwhile as compared to a life with).[108] This seems to be in accordance with the ECtHR's rulings that, in the past, have confirmed that the right to private life includes rights to personal development, to establish relationships with others, and to self-determination.[109] As discussed above in the *Orde van de Vlaamse Balies* case, the CJEU recognized the need for such a right to privacy and argues that it should be afforded strengthened protection for the exchanges between lawyers and clients.[110]

The CJEU specified that such an extended privacy protection is justified by the fundamental role assigned to lawyers in defending litigants. According to the CJEU, such a task 'entails, on the one hand, the requirement […] that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it'.[111] In doing so, it has extended the scope of the privilege significantly to include general legal advice (and seemingly all professional contacts between lawyers and clients).[112] Considering the moral grounds for the right to privacy, it seems reasonable to conclude here that the justification for this extension is purely instrumental in being a necessity for the proper workings of the legal system and increasing the autonomy of legal subjects when dealing with the law. That stated, other ethical justifications for the right to privacy also still cover it in the communication between a client and his or her lawyer.

The need for confidentiality may have to be balanced, however, by the need to discover the truth. Justice requires a discovery of facts. When ensuring the proper functioning of the legal system justifies the confidentiality granted to the communication between a lawyer and his or her client, it also justifies the legal system providing itself with instruments to discover the true facts of a case. Thus, in practice, a balancing act has to be performed when applying the privilege,[113] which has led to certain exceptions to it.

The crime-fraud exception is a commonly applied exception[114] which states that communication for a criminal or fraudulent purpose are outside of the scope of the legal professional privilege. One justification for this is that the law is not to be used for the purpose of evading the law in itself.[115] Thus, the crime-fraud exception is an exception based on the interest of public policy.[116] This conclusion may be quite relevant in the case of using the privilege in tax law. Adopting a public policy justification for the crime-fraud exception allows properly balancing the values underlying the exception to the legal professional privilege.[117] Other exceptions to the privilege have been similarly rooted on this need to properly balance the instrumental value it has in ensuring the proper functioning of justice through full and frank communication between clients and lawyers on the one hand. On the other hand

## Notes

[105] *Upjohn Co. v. United States*, No. 449 U.S. 383 (Supreme Court 1981).

[106] *Michaud v. France Judgement* (2012), para. 117.

[107] Case C-694/20, *Orde van de Vlaamse Balies.*

[108] James Moor, *The Ethics of Privacy Protection*, 39 Library Trends 80–81 (1991).

[109] De Vries, *supra* n. 39, at 670.

[110] Case C-694/20, *Orde van de Vlaamse Balies*, para. 27. Herein, the CJEU refers to the *Michaud v. France* case decided by the ECtHR on 6 Dec. 2012.

[111] *Ibid.*, para. 28.

[112] Salmini Sturli & Henry, *supra* n. 43, at 165.

[113] Jonathan Auburn, *Legal Professional Privilege: Law and Theory, supra* n. 4, at 149.

[114] *Ibid.*, at 149–151.

[115] *Ibid.*, at 155.

[116] *Ibid.*, at 157.

[117] *Ibid.*, at 159.

is the need for justice to discover the truth. Examples are the criminal exculpatory evidence exception[118] and the fairness-based loss of privilege.[119]

To conclude, both the underlying moral grounds for granting the legal professional privilege and its limits stipulated by the law are created by the need to ensure the proper administration of justice. It is argued here that, as its underlying value is instrumental, the limits of the legal professional privilege should be set on a practical basis. It should be a constant weighing with the practical effects on the proper administration of justice being taken into account. As the justification for the privilege is at least partly instrumental, the focus on its practical outcome is justified in and of itself. Auburn concludes, using empirical research conducted in the United States concerning the privilege, that its actual limits in practice have minimal impact on the overall confidence that clients will demonstrate in their lawyers and the completeness of the information that he receives.[120] This leads Auburn to conclude that 'all this is not to say that the privilege is undeserving of protection; rather, that we should be more sceptical of the claims made for the privilege, and more willing to challenge its application in specific areas where this application appears to be producing unjust results'.[121]

### 3.3 *The Privilege in the Field of Taxation*

With this information at hand, it is finally possible to consider certain aspects of the privilege in tax law. As has been discussed, it is not an absolute principle but has certain limits informed by the difficult weighing of two grounds, on the one hand, ensuring full facts for a lawyer advising a client (to ensure subjects of the law can apply it effectively and efficiently) and, on the other hand, promoting justice by ensuring that the legal system has all of the relevant facts necessary to make correct and founded decisions. These considerations will also be a factor when discussing the legal professional privilege in tax, and the remainder of this section examines certain aspects to better understand how this weighing could happen. The final outcome of this section will not be to conclude on any definitive, single delineation of the privilege in tax law. The concept of justice does not allow this, and particular cases may lead to differences from a generally held principle. Thus, this section will not come to a conclusion such as the need to abolish or strengthen any form of the legal professional privilege in tax. What it will attempt to do is discuss certain factors specific to tax law that may shift the balance of what a just delineation is in one way or another. Finally, this will help for reconsidering the *Orde van de Vlaamse Balies* case.

A first aspect to discuss is the inherent complexity of tax law. When the law is simple, it may well be argued that there is a lesser need for legal advice for the subject of the law to correctly apply law. The fair, efficient, and effective operation of justice would then not depend on legal specialists if the law is so easy that it is understood effortlessly by all. In such a case, the underlying value for granting the privilege would be absent. Contrary to this, when the law is complex to such a degree that it is incomprehensible to all except for those specialists who have spent years studying it, the ethical grounds for granting the privilege are especially firm. It is often argued, and this author agrees with the sentiment, that tax law is complex[122] and that this is caused by certain unavoidable facts that tax law intends to regulate (such as imposing a periodicity on income).[123] If tax law is inherently complex, then there may well be a strong case for extending the boundaries of the privilege in this field. Taxpayers faced with complex tax law require the assistance of tax law specialists in order to correctly comply with the applicable tax law and neither pay too much nor too little tax.

On the contrary, the question needs to be asked whether the loss of confidentiality between a taxpayer and his tax advisor would actually remove the incentive of taxpayers to engage with a tax advisor and fully disclose the affairs pertaining to his tax situation. Ultimately, the goal of taxpayers should be to pay the correct amount of tax which would not leave it open to any unpleasant surprises were tax authorities to discover the fact as had been presented to their advisor.

Still, it might discourage those taxpayers who may be looking for the boundaries of what is legal in tax law. As such, there may well be some value in granting legal professional privilege to tax advice. However, even for those taxpayers who wish to look for the boundaries of

**Notes**

[118] *Ibid.*, at 179. As Auburn explains, this exception covers those cases in which a witness has evidence that may exculpate a person accused of a crime, but that evidence is normally covered by the privilege. It has been convincingly argued by Auburn that giving an accused access to information that may lead to clearing the charges has a strong moral weight that may well outweigh the grounds for granting the privilege in such cases.

[119] *Ibid.*, at 215. Auburn discussed the ideas that underlie the concept of fairness-based losses of privilege. The example is given of partial disclosure for which the privilege is waived but only over parts of the communication between the client and the lawyer. Auburn argues that it is a fairness consideration that has led judges to sometimes fully set aside the privilege. The underlying justification is that it would be unfair to allow the privilege to be waived only selectively. Again, the integrity of the legal system is the value at hand.

[120] *Ibid.*, at 261.

[121] *Ibid.*, at 261.

[122] *See* for instance, Snape who considers tax law complexity as a truism; John Snape, *Tax Law: Complexity, Politics and Policymaking*, 24 Soc. & Legal Stud. 155–163 (SAGE Publications 2015).

[123] John Prebble, *Why is Tax Law Incomprehensible?*, 4 Brit. Tax Rev. 381 (1994).

what is legal in tax law, there seems to be little to be gained by not disclosing all of the facts of his situation to his advisor. Not doing so would only lead to paying for advice that the client knows was given without the full set of facts and may very well be faulty. Additionally, a distinction must be made between what is generally known as tax planning (including designing, organizing and making available a certain structure) and any subsequent legal assessment of it. It does not seem necessary that both activities should be performed by the same advisor. In essence, a taxpayer would still be perfectly free to ensure the legality of any planned action by seeking legal advice from a lawyer who only assesses it.

A second and connected practical consideration for the legal professional privilege in tax law is the prevalence, at least to a certain extent, of aggressive tax planning, tax avoidance, and tax evasion. The complexity of tax law that leads to the consideration that it may be fair to set broader limits to legal professional privilege also leads to the observation that aggressive tax planning and tax avoidance are not actually possible without the cooperation of tax specialists. The author opines that societal fairness depends on people paying their taxes correctly as taxation is an essential element in distributional justice.[124] Good tax law should reflect what society considers a fair distribution of the tax burden. When tax advice leads to a different distribution of the tax burden, this undermines societal fairness.

For tax law to be effective, it must be correctly applied. By nature, law is general. If a law is so specific as to have a precise solution for all possible particular situations, it would become so complex that it would lose its function of being a guide to practical conduct and thus its characteristic as law in itself.[125] When the law is stated in general rules, the morality of its application will depend on its users and thus, in the field of taxation, largely on the ethical conduct of tax specialists. However, as examples of aggressive tax planning and tax avoidance evidence, it cannot be assumed that this will occur.[126] Of course, this does not necessitate the disclosure of privileged documentation if the authorities could obtain such information otherwise. However, several elements contained in the communication between a taxpayer and his or her tax advisor could make it valuable for those instructed with ensuring properly applying tax law.[127] First, due to the complexity of tax structures, the best overview of the structure for the tax administrations, public prosecutors, and courts may well only be obtainable through the underlying documents used to create the structure. Second, the intent of the taxpayer may be relevant as a legal fact for deciding on the existence of tax avoidance (for which a subjective element is often required) as well as in the discovery of *mens rea* (in criminal cases). Thus, certain arguments would support limiting the privilege, especially in the case of tax advice. Legal professional privilege may well be outweighed by the just interest of society to counter aggressive tax planning and tax avoidance and certainly when such an infraction would not touch upon the most fundamental ethical grounding of the legal professional privilege, i.e., the right to a fair trial or the administration of justice.

To go beyond the discussion of the legal professional privilege, it could be noted that such considerations also become a factor in the entire operation of the DAC 6. For instance, the identification of the taxpayer applying the reportable arrangement infringes its right to privacy. However, if the DAC 6 was to require only reporting on the structure in an anonymized form, this would keep information from the tax administrations, and they would not be able to quickly deal with such a scheme. Again, individual interests must be weighed with the general interest.

To conclude, tax law appears to be different and may require some particular rules on the privilege. Its complexity may justify the need to extend the privilege to other tax professionals (such as accountants). It also justifies the extension of the privilege to legal advice. However, the contradiction between an individual taxpayer's wish to pay less in taxes and societies' needs to ensure distributional fairness may require some limits on the privilege, especially during the phase of tax advice. This then leaves one question that still needs to be answered in this article: Did the CJEU in the *Orde van de Vlaamse Balies* case strike the right balance? Should the privilege protect tax advice on the designing of potentially aggressive tax structures when they would prevent distributional justice? In the author's view at least, there is no need for such a protection. In practice, the benefits to the functioning of the legal system of granting the privilege to someone providing tax advice seems to be limited while the detrimental effect it has on the general interest appear much larger.

## Notes

[124] Without going into detail, such a conclusion could also be drawn from, for instance, Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2005).

[125] Timothy Edicott, *Law is Necessarily Vague*, 7 Legal Theory 3833 (2001), doi: 10.1017/S135232520170403X.

[126] This article does not wish charge all or even a majority of tax advisors with unethical behaviour. However, events have shown that society should be cautious with assuming that no unethical behaviour will ever be conducted by them. *See* e.g.. L. Jackson, *Exclusive: PwC Australia Ties Google to Tax Leak Scandal, Sources Say*, Reuters (5 Jul. 2023), https://www.reuters.com/technology/pwc-australia-ties-google-tax-leak-scandal-sources-2023-07-05/ (accessed 31 Jul. 2023); D. Neidle, *The Outrageous £50m Tax Scheme that Was KC-Approved. Part 2: The Opinion.*, Tax Policy Associates (2023), https://www.taxpolicy.org.uk/2023/07/04/kc/#comments (accessed 31 Jul. 023).

[127] For instance, the tax authorities, public prosecutors, and judges.

## 4 Concluding remarks

The purpose of this article is not in itself to relitigate the *Orde van de Vlaamse Balies* case. However, several concluding remarks remain. First of all, the ruling itself is open for criticism. The CJEU failed to properly take into account precedence and has therefore extended the strengthened protection of the legal professional privilege to certain services provided by tax lawyers beyond the limits previously set by itself and the ECtHR on the strengthened protection of legal professional privilege without explaining its reasons. Similarly, it has used a very narrow view on the objectives of the legislature in deciding that the infraction of legal professional privilege was disproportionate. In future cases, the CJEU should clarify how it exactly delineates the scope of the 'strengthened protection' for it and how it justifies this.

Fortunately, such an opportunity appears upcoming as, in the pending *Ordre des avocats du Barreau de Luxembourg* case[128] the CJEU is asked exactly to clarify the scope of the strengthened protection of exchanges between lawyers and clients. In the main question, the Luxembourg Administrative Court asks whether legal advice provided by a lawyer on matters of company law (setting up a corporate investment structure) falls within the scope of the strengthened protection of exchanges between lawyers and their clients as afforded by Article 7 CFR. Hopefully, the CJEU will delve deeper into the precedence and discuss why it has made the decisions that it has.

The CJEU may also want to more clearly explain how it actually arrives at its decision and on what moral grounds it based itself. Several questions should be answered. If the legal advice of lawyers is protected, then why is that of other professions that may be well placed to provide such advice also not protected? It seems reasonable to assume that, in many Member States, it is much more common for accountants who are usually similarly well trained in tax law to provide this. None of the considerations above would explain why an exception should be made for lawyers. However, if the CJEU was to come to a similar conclusion, this would severely undermine the effectiveness of the DAC 6 as only the taxpayer himself would be responsible for presenting the reportable arrangements.

Additionally, if the right to privacy is grounds on which to provide a strengthened legal professional privilege, the question should be raised as to whether this affects advice provided to individuals and corporations in the same way. It has previously been argued in literature that the concept of the right to privacy does not apply to corporations or legal entities, or at least not to those legal entities that are so large that they are clearly separate from their owners and employees.[129] Thus, does the *Orde van de Vlaamse Balies* case similarly protect advice provided to legal entities or only to individuals? The above discussion on the ethical considerations for legal professional privilege should give the CJEU some ideas as to what elements it could weigh in the upcoming cases that deal with the questions raised above.

In the *Orde van de Vlaamse Balies* case, the CJEU arguably established legal professional privilege as a near absolute principle. Apparently, almost all communication between a lawyer and its client is afforded strengthened protection. The CJEU held that even the mere passing on of the existence of the relationship between a lawyer and a client in providing any type of legal advice firmly outside of the scope of any legal proceedings is a large enough infringement of the right to privacy to nullify a provision that may well have been an important objective of the legislature in allowing for the better protection of society against aggressive tax planning. However, it has been argued here that there is no ethical need for such an absolutism and that the CJEU should consider the practical effects it has both on the instrumental ethical grounds underlying the legal professional privilege and the general interest of society in ensuring that aggressive tax planning does not make it impossible to achieve the goal of distributional justice. Such a practical approach should not, however, be a source of legal uncertainty. It would be better for the CJEU to make a clear decision. When the role of a lawyer is limited to tax planning and thus precedes both legal proceedings and the provision of legal advice to ascertain the legal qualification of certain structures, no strengthened protection should be afforded to the communication between a client and its lawyer as this does not serve the purpose of ensuring the proper functioning of the legal system.

### Notes

[128] CJEU Case C-432/23, *Ordre des avocats du Barreau de Luxembourg*, pending.

[129] Avi-Yonah & Mazonni, *supra* n. 8, at 264.