
INTERNATIONAL TAX
CASE SUMMARY

**Orde van Vlaamse Balies
vs BELGIUM**

DECEMBER 2022

ACADEMY OF TAX LAW

PUBLISHING SERVICES

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HEAD OF ACADEMICS



Welcome to the Academy of Tax Law's case and judgment summaries. These documents have been carefully curated to support professionals, students, and researchers navigating the complex landscape of international tax and transfer pricing. At the Academy, we understand that tax law is ever-evolving, with key rulings continuously shaping its practice.

Each summary you'll find here is designed to provide not just the facts, but the context and implications of pivotal legal decisions. These case summaries are created to serve as a valuable resource for legal teams, multinationals, revenue authorities, and academics, offering insights that go beyond the surface. Our goal is to ensure you remain informed and prepared, whether you are dealing with tax planning, dispute resolution, or risk management.

We believe that knowledge is the foundation of sound decision-making, and with these resources, we hope to empower you in your professional journey. As you delve into the analysis, remember that staying ahead in tax law requires not just understanding the rules but how to apply them in a dynamic, global environment.

Thank you for choosing the Academy of Tax Law as your partner in this ongoing learning experience.

Sincerely,
Dr. Daniel N Erasmus

PART 1

SUMMARY

JUDGEMENT SUMMARY

CASE OVERVIEW

Court:	European Court of Justice (Grand Chamber)
Case No:	C-694/20
Applicant:	Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU
Defendant:	Vlaamse Regering (Flemish Government, Belgium)
Judgment Date:	8 December 2022
Full Judgment:	https://academyoftaxlaw.com/document/orde-van-vlaamse-balies-vs-belgium-judgment/
View Online:	https://academyoftaxlaw.com/?p=4205&preview=true

JUDGMENT SUMMARY

In Case C-694/20, the European Court of Justice (ECJ) examined the legality of certain reporting obligations imposed on lawyers under Council Directive 2011/16/EU (as amended by Directive 2018/822). This directive, commonly referred to as DAC6, requires intermediaries involved in potentially aggressive cross-border tax arrangements to report these transactions to the relevant tax authorities within 30 days. However, a critical issue arises with intermediaries who are lawyers, as they are bound by legal professional privilege. DAC6 provides an exemption allowing lawyer-intermediaries to abstain from reporting arrangements if doing so would infringe upon this privilege. The directive further mandates that these lawyer-intermediaries notify other involved intermediaries of their reporting obligations. This requirement to notify other intermediaries was contested in the Belgian Constitutional Court by the Flemish Bar Association and several tax lawyers, who argued that it infringed on the right to private life (Article 7) and the right to a fair trial (Article 47) under the Charter of Fundamental Rights of the European Union (Charter).

The ECJ ruled that Article 8ab(5) of Directive 2011/16/EU is invalid in situations where

lawyers are required to inform non-client intermediaries of their reporting obligations. It concluded that such requirements infringe upon the confidentiality of lawyer-client communications, which is a fundamental aspect of legal professional privilege. The court's decision emphasized that the directive's transparency goals must be balanced against fundamental rights, especially in relation to the privacy of legal consultations. However, the court also clarified that this requirement does not impact the right to a fair trial as outlined in Article 47, given that this reporting obligation pertains to advisory functions, not litigation.

This decision has substantial implications for both multinationals and tax authorities, as it reinforces the boundaries of legal professional privilege in tax matters. While revenue authorities are keen to gather information on cross-border tax arrangements to curb aggressive tax planning, this judgment clarifies that legal professional privilege must be protected. Multinationals engaging in tax planning with legal advisers benefit from the assurance that confidential discussions remain protected, allowing them to seek advice on complex tax matters without concern for unwarranted disclosure.

KEY POINTS OF THE JUDGMENT

BACKGROUND

Directive 2011/16/EU established a framework for cooperation among EU Member States in combating tax avoidance through the automatic exchange of information. In response to rising concerns over aggressive cross-border tax schemes, this directive was amended in 2018 (Directive 2018/822, known as DAC6) to require intermediaries to report potentially aggressive tax arrangements. This amendment introduces significant transparency, aiming to prevent tax base erosion by providing tax authorities with early knowledge of high-risk arrangements.

While DAC6 facilitates proactive tax authority responses, it creates challenges for lawyer-intermediaries, who must adhere to legal professional privilege, which protects confidential client communications. Legal privilege is central to the legal profession, guaranteeing that clients can seek advice with assurance that their information remains private. DAC6 acknowledges this

privilege by allowing lawyer-intermediaries to waive reporting obligations in situations where disclosure would infringe on privilege. However, the directive mandates that lawyer-intermediaries, even when exempt, notify any other intermediaries involved in a reportable arrangement of their reporting responsibilities. The directive's inclusion of such notification requirements led the Flemish Bar Association and tax lawyers to file an action in the Belgian Constitutional Court, questioning the validity of DAC6's notification requirement under the Charter of Fundamental Rights of the EU, particularly Articles 7 and 47.

This background illustrates the ECJ's task: it had to determine whether the transparency intentions of DAC6 could justify overriding the fundamental right to privacy that legal professional privilege protects, as well as whether such requirements were proportionate and necessary to achieve DAC6's goals.

KEY POINTS

OF THE JUDGMENT

CORE DISPUTE

The primary issue before the ECJ concerned whether the notification requirement under Article 8ab(5) of DAC6 violated Articles 7 and 47 of the Charter. The applicants argued that legal professional privilege not only protects the content of lawyer-client communications but also the fact of their occurrence. They asserted that requiring lawyer-intermediaries to notify other intermediaries—especially those who are not clients—about their reporting obligations indirectly reveals that privileged consultations occurred, thus infringing upon privacy rights under Article 7 of the Charter.

Moreover, the applicants contended that this requirement impedes the right to a fair trial under Article 47. They argued that the notification requirement could compromise legal privilege, even when no details of the consultation are disclosed, as it forces lawyers

to disclose their involvement in reportable arrangements to non-client intermediaries. This indirect revelation, the applicants argued, could undermine clients' trust in their lawyers, deterring them from seeking legal advice in complex tax matters.

The court had to consider whether the mandatory notification requirement for lawyer-intermediaries, who are exempt due to legal privilege, serves a legitimate and proportionate goal. It needed to determine if the privacy and fair trial rights of lawyers and clients could be safeguarded without compromising the directive's aim of transparency. This balancing act was central to the court's task: to clarify the boundaries between EU tax law objectives and the preservation of fundamental rights within the legal profession.

KEY POINTS

OF THE JUDGMENT

COURT FINDINGS

The ECJ found that Article 8ab(5) of DAC6 disproportionately interfered with legal professional privilege by requiring lawyer-intermediaries to notify other intermediaries, particularly those not bound by privilege, of their reporting obligations. In its ruling, the court emphasized that legal professional privilege serves a critical role in protecting the confidentiality of lawyer-client communications, which is fundamental to the role of lawyers in democratic societies. DAC6's notification requirement, the court noted, breaches the core of this privilege by indirectly revealing consultations with legal advisers to third parties.

In examining the impact on Article 47, the right to a fair trial, the court concluded that the notification requirement did not directly infringe upon fair trial rights. Since the directive's reporting requirements apply to

advisory stages and not necessarily to ongoing or anticipated litigation, the court found that DAC6 does not undermine the essential purpose of legal privilege within the context of judicial proceedings. Therefore, while the notification obligation infringed upon the privacy rights protected by Article 7, it did not compromise Article 47 in the context of this case.

The court ultimately declared that Article 8ab(5) of DAC6 is invalid, to the extent that it obliges lawyer-intermediaries to disclose their involvement in reportable tax arrangements to other intermediaries. The ruling underscores the court's commitment to upholding fundamental rights even amid complex tax enforcement measures, establishing a precedent for the protection of legal professional privilege in tax advisory roles.

KEY POINTS

OF THE JUDGMENT

OUTCOME

The ECJ's ruling invalidates Article 8ab(5) of Directive 2011/16/EU as amended by Directive 2018/822 in cases where lawyer-intermediaries are bound by legal professional privilege. The court clarified that such intermediaries cannot be compelled to notify other intermediaries about reporting obligations when legal privilege is applicable. This decision protects confidential lawyer-client communications, ensuring that such disclosures do not undermine the trust essential to the legal advisory relationship. It reinforces the role of legal professional privilege in preserving the confidentiality of legal advice, even in the face of broader transparency objectives.

The ruling also affirms that legal privilege encompasses not only the content of advice but also the fact that consultations occur, which aligns with the European Convention

on Human Rights (ECHR) and prior case law. By upholding this principle, the court balanced the need for transparency in cross-border tax planning with the fundamental rights guaranteed by the Charter.

For lawyer-intermediaries, this judgment removes the requirement to disclose involvement in potentially reportable arrangements to other intermediaries. The court's decision supports the integrity of lawyer-client relationships by acknowledging that legal advice must remain confidential to preserve the client's trust in seeking guidance on complex tax matters. While tax authorities may face challenges in gathering information on certain arrangements, the ruling clarifies that the EU's commitment to privacy and fair trial rights remains paramount in the legislative landscape.

PART 2

SIGNIFICANCE

MAJOR ISSUES

AREAS OF CONTENTION

The primary contention in Case C-694/20 revolved around balancing DAC6's transparency goals with legal professional privilege, particularly the extent to which privilege protects against mandatory reporting and notification requirements. For tax authorities, the reporting obligation for cross-border arrangements is crucial in combatting tax avoidance. However, the blanket nature of DAC6's notification requirements clashed with the rights of lawyers and their clients, prompting questions about the directive's proportionality and necessity.

Another point of contention lay in the directive's implementation across different EU Member States, with varying interpretations of how privilege affects notification requirements. This inconsistency created potential conflicts between Member States and legal professionals, particularly those advising on tax matters. Additionally, the directive's notification mandate could lead to indirect disclosures, which some argued constituted a breach of client trust, even if substantive arrangement details were not shared.

The court's judgment addressed these concerns by underscoring the importance of legal privilege in fostering client confidence. In ruling that DAC6's notification requirements are disproportionate, the court set a limit on the degree of transparency enforceable under EU tax law. This case illustrates a significant policy debate: ensuring effective tax regulation while respecting the autonomy and confidentiality rights of legal professionals, especially in advisory roles not directly related to litigation.

EXPECTED OR CONTROVERSIAL?

This decision was both expected and controversial, given the longstanding tension between tax transparency and legal professional privilege. Many observers anticipated the ruling because previous ECJ and European Court of Human Rights (ECHR) decisions have consistently upheld the sanctity of lawyer-client communications. Nevertheless, DAC6's broad reporting requirements and the EU's push to combat aggressive tax planning heightened the stakes, creating a challenging legal landscape where transparency and privacy intersect.

The court's emphasis on legal privilege over DAC6's transparency goals may stir further controversy, particularly among tax authorities seeking robust tools to counteract tax avoidance. The judgment underlines that while transparency is critical, it should not disproportionately infringe upon fundamental

privacy rights. This perspective reinforces the European legal tradition of protecting confidentiality, especially for lawyers serving advisory functions rather than participating in litigation.

From a legal standpoint, the ruling could signal to lawmakers that further modifications to DAC6 or similar directives may need to consider fundamental rights more carefully. It also highlights the limitations of blanket regulations that impose uniform requirements on diverse professional roles. For multinational corporations, the decision is a reassurance that seeking legal advice remains a confidential process, though it may lead to additional reporting adjustments for non-privileged intermediaries. Ultimately, the court's judgment underscores the need for legislative clarity, especially where professional rights and regulatory requirements intersect.

SIGNIFICANCE FOR MULTINATIONALS

This ruling has profound implications for multinational enterprises (MNEs), especially those involved in complex cross-border tax planning. The ECJ's decision reinforces the boundaries of legal professional privilege, offering MNEs assurance that confidential communications with legal advisors on sensitive tax issues remain protected. By upholding legal privilege, the court enables MNEs to seek expert legal advice without concern that such consultations may inadvertently expose them to regulatory scrutiny or undermine their competitive strategies.

Multinationals frequently engage in cross-border arrangements that tax authorities might classify as high-risk. Access to confidential legal counsel is therefore essential to ensure these arrangements comply with evolving tax regulations. The ruling in Case

C-694/20 underscores that, while MNEs must meet compliance standards, their right to privileged legal advice remains intact. For MNEs, this is particularly crucial in regions where legal privilege may be subject to varying interpretations, as the court's decision provides a unified EU standard on privileged communication in tax advisory contexts.

Nonetheless, MNEs should be cautious, as the decision does not eliminate reporting obligations for non-lawyer intermediaries involved in cross-border arrangements. MNEs may still need to ensure that their tax arrangements are transparent to a degree, but this ruling confirms that consulting a lawyer in these processes remains protected. For MNEs, understanding these boundaries and seeking counsel from lawyers familiar with EU tax directives ensures they navigate cross-border tax planning with confidence and compliance.

SIGNIFICANCE

FOR REVENUE SERVICES

For revenue services across the EU, this ruling presents challenges in obtaining comprehensive information on cross-border tax arrangements. The court's decision effectively removes a key channel for obtaining insights into potentially aggressive tax planning, as lawyer-intermediaries bound by privilege are no longer required to notify other intermediaries of reporting obligations. Revenue authorities, particularly those relying on DAC6 to address aggressive tax schemes, may need to adjust their enforcement strategies or explore alternative avenues to obtain this information.

The decision underscores the delicate balance revenue services must maintain between enforcing tax laws and respecting fundamental rights. While DAC6 aimed to close loopholes and enhance transparency, the

ruling signals that legal professional privilege remains a protected boundary that revenue authorities cannot easily bypass. This may require tax authorities to focus on non-lawyer intermediaries or direct tax arrangements to gather the information DAC6 intended to cover.

The ruling could also prompt discussions on refining DAC6 to address concerns over confidentiality while achieving transparency goals. Revenue services may face additional obstacles in ensuring compliance but must respect the court's emphasis on privacy and fair trial rights. For EU Member States, this ruling is a reminder to align tax directives with constitutional protections, potentially leading to future adjustments in how tax regulations are applied across various professional services.

SIMILAR CASES

F SCS VS LUXEMBOURG

In *F SCS v Luxembourg*, the Court of Justice of the European Union addressed confidentiality within tax reporting, similar to Case C-694/20. Both cases balance transparency with fundamental rights, particularly legal privilege. In *F SCS*, the court reinforced the importance of protecting privileged information in tax disclosures, echoing C-694/20's stance that legal privilege remains essential despite reporting requirements.

<https://academyoftaxlaw.com/f-scs-ordre-des-avocats-vs-luxembourg-lawyer-client-confidentiality-tax-law/>

CONSCOURT DECISION: 112/2004 (RSA)

In this case, the South African Constitutional Court examined the rights of individuals to access privileged legal counsel when involved in litigation. The Court ruled that lawyer-client privilege is a fundamental right, grounded in constitutional values and the right to a fair trial. This case reinforced privilege protections and clarified its limitations under South African law.

Relevance: This case is essential for South African MNEs as it reinforces legal privilege's constitutional protection in cross-border tax and compliance investigations, making it highly relevant for companies

ÉTAT LUXEMBOURGEOIS

In *État luxembourgeois* (C-245/19 and C-246/19), the CJEU assessed the rights of individuals and entities to challenge information exchange requests from tax authorities under Directive 2011/16/EU.

Relevance: This ruling is significant for MNEs and financial institutions as it establishes the principle that information exchange requests cannot be arbitrary and must allow for judicial review. It emphasizes the importance of observing legal safeguards within cross-border tax matters, providing MNEs with legal grounds to resist overly broad or unjustified requests for confidential information.

PART 3

PREVENTION

Engaging with tax lawyers is crucial for multinational enterprises (MNEs) to navigate the complex landscape of international tax compliance and minimize exposure to risks. Tax laws and regulations vary significantly across jurisdictions, and tax authorities are increasingly collaborating globally to enforce compliance. Tax lawyers provide MNEs with strategic guidance tailored to specific jurisdictions, ensuring that transactions and tax structures align with both local and international tax laws.

One of the primary advantages of consulting tax lawyers is their expertise in safeguarding sensitive information under legal professional privilege, especially in cross-border contexts. This confidentiality is essential for MNEs, as it allows open communication with legal counsel, protecting strategic tax planning discussions from disclosure to tax authorities. Tax lawyers are also well-versed in complex anti-avoidance laws, transfer pricing

regulations, and disclosure obligations, which vary across jurisdictions but significantly impact MNEs.

Moreover, tax lawyers play a vital role in risk management, advising MNEs on compliance strategies and helping establish robust tax governance frameworks. With proactive legal advice, MNEs can adopt preventative measures—such as setting up a tax steering committee or implementing a tax risk management process—that help in identifying, managing, and mitigating tax risks before they escalate into costly disputes or reputational issues.

In an environment where global tax regulations are continually evolving, engaging tax lawyers allows MNEs to stay compliant and responsive to regulatory changes, reducing potential risks while upholding best practices in tax transparency and governance.

PREVENTATIVE

MEASURES TO AVOID SIMILAR CASES

TAX RISK MANAGEMENT PROCESS

- Implementing a comprehensive tax risk management process is essential to identify, assess, and mitigate tax risks associated with cross-border transactions. This process should involve:
- Regular reviews of intra-group transactions to ensure they have genuine economic substance.
 - Proactive engagement with tax authorities to seek clarity on the application of anti-abuse rules.
 - Thorough documentation of the business rationale for each transaction to support

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TAX INTELLIGENCE: THE 7 HABITUAL TAX MISTAKES MADE BY COMPANIES

Tax Intelligence: The 7 Habitual Tax Mistakes Made by Companies” by Dr. Daniel N. Erasmus is a must-read for businesses seeking to navigate the intricate world of tax compliance and risk management. By highlighting common pitfalls and offering strategic solutions, Erasmus equips companies with the knowledge to improve their tax practices and secure financial stability.

<https://support.academyoftaxlaw.com/product/tax-intelligence-by-prof-dr-daniel-n-erasmus/>

PREVENTATIVE

MEASURES TO AVOID SIMILAR CASES

TAX STEERING COMMITTEE

- Establishing a tax steering committee can help ensure that tax policies are aligned with the broader business strategy and that transactions are vetted for both commercial and tax implications. A tax steering committee can:
- Review all significant cross-border transactions before they are executed.
 - Ensure that tax decisions are made in the context of overall business objectives, not solely for tax savings.
 - Monitor changes in international tax laws to ensure ongoing compliance and avoid disputes like the X BV case.

DOWNLOAD FREE E-BOOK

DRIVING TAX COMPLIANCE: THE ESSENTIAL ROLE OF THE TAX STEERING COMMITTEE

The eBook “Driving Tax Compliance: The Essential Role of a Tax Steering Committee” by Prof. Dr. Daniel N. Erasmus, Renier van Rensburg, and Gilbert Ferreira, emphasizes the critical importance of establishing a Tax Steering Committee (TSC) within multinational corporations to ensure tax compliance and manage tax-related risks effectively.

<https://support.academyoftaxlaw.com/product/essential-role-of-the-tax-steering-committee/>

TP CASE
SUMMARY

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