Lund University

School of Economics and Management
Department of Business Law

Is there a collision between the EU Charter and the obligation to notify that intermediaries with legal professional privilege have under DAC 6?

by

Rayssa Gutterres Costa

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Supervisor: Sigrid Hemels

Examiner: Cécile Brokelind

Author's contact information:

raygutterres@hotmail.com

+46728787650 / +5521994387821

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Summary

This thesis will explore the Directive 2018/822 of May 2018, also known as DAC 6, and the obligation to notify that it placed on intermediaries with legal professional privilege. The research conducted aims at answering the question if the notification obligation brought by DAC 6 is in conflict with EU primary law, namely, the Charter of Fundamental Rights of the European Union.

The DAC 6 was the fifth amendment to the Directive 2011/16/EU, also known as the DAC, and it is associated with the theme of mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. The DAC 6 introduced modifications to the DAC and doubts in terms of a possible collision between the DAC 6 and the Charter of Fundamental Rights of the European Union surfaced. These doubts are based on the fact that the DAC 6 requires that intermediaries, who wish to use their right to a waiver from filing information on a reportable cross-border arrangement by invoking the legal professional privilege, notify another intermediary of the reporting obligations, so the other intermediary files the necessary information and complies with the reporting obligations.

Some scholars argue that the obligation placed by the DAC 6 on intermediaries to notify other intermediaries breaches the legal professional privilege and, consequently, it breaches the Charter of Fundamental Rights of the European Union. Recently, in December 2020, questions were referred by the Belgium Constitutional Court to the Court of Justice of the European Union in relation to a possible collision between these two legislations. At the present moment, the case, known as the case *Orde van Vlaamse Balies and Others*, is still pending a decision and this thesis will focus its investigation on this discussion.

The structure of this thesis aims at guiding the reader through different subjects, such as the legal professional privilege, the Charter of Fundamental Rights of the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms, the DAC, the DAC 6, and the notification obligation.

Preface

This thesis was written during the Master's Programme in European and International Tax Law and I would like to express my sincere gratitude to Lund University, to the School of Economics and Management, and to the Department of Business Law that welcomed me into this new cycle of my life and of my studies in law. I would like to thank the program coordinators, who helped me throughout the program and gave me the assistance I needed, especially during October 2020, at the beginning of my studies.

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List of Abbreviations

AG	Advocate General
Art.	Article
Arts.	Articles
BEPS	Base Erosion and Profit Shifting
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DAC	Directive on Administrative Cooperation
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
IBFD	International Bureau of Fiscal Documentation
LPP	Legal Professional Privilege
OECD	Organization for Economic Co-operation and Development
OECD MC	OECD Model Tax Convention on Income and on Capital
OJ	Official Journal of the European Union
p.	Page
para.	Paragraph
paras.	Paragraphs
pp.	Pages
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 Background

International tax rules, many of them designed over a century ago, are being challenged with the growing integration of national economies and markets in the twenty-first century. For this reason, since 2008, following the global financial crisis that started in 2007, international tax issues are prominent in the political agenda and policy makers are having to deal with the task of understanding the deficiencies of current rules and how these deficiencies are giving rise to opportunities for base erosion and profit shifting (BEPS)[1].

Governments have come to the conclusion that time plays an important role in the access to relevant information that may help to recognize tax planning schemes that pose a tax policy and a revenue risk. Consequently, several countries introduced disclosure initiatives that give tax authorities timely, comprehensive, and relevant information that would be difficult to be obtained in a tax return[2].

In October 2015, following the LuxLeaks scandal, the financial scandal that surfaced in Luxembourg, in November 2014, and brought international attention to how companies were cutting their tax bills in tax avoidance schemes, and following the SwissLeaks scandal, the financial scandal that surfaced in February 2015, revealing a big tax evasion scheme in Switzerland, the OECD released the final report[3] on Action 12 of the BEPS project on Mandatory Disclosure Rules. The LuxLeaks scandal, specifically, motivated the European Commission to initiate investigations against Luxembourg and other Member States to better assess their tax ruling practices.[4] As a consequence, in December 2015, the Council of the European Union adopted a directive[5] with the aim of introducing the mandatory automatic exchange of tax rulings as a tool to fight harmful tax practices.[6] The final report on Action 12 of the BEPS project on Mandatory Disclosure Rules focuses on identifying aggressive or abusive tax planning strategies through mandatory disclosure regimes, which normally contain certain features, such as who should do the reporting, what information should be reported, when the reporting should be done, and which consequences are applicable in a non-reporting scenario[7]. According to the final report, one of the goals of mandatory disclosure

[1] S. Hemels, *Chapter 13: Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims in European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 542; and OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and
Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264241442-en> (accessed 26 May 2021), p. 3.
[2] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264241442-en> (accessed 26 May 2021), pp. 9 and 13.
[3] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264241442-en> (accessed 26 May 2021).
[4] A. Miladinovic, *Chapter 4: The State Aid Provisions of the TFEU in Tax Matters* (M. Lang et al eds., 6th edn, Linde 2020), p. 110.
[5] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2015] OJ L 332.
[6] M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters in Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), pp. 252 and 264.
[7] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and

regimes is the promotion of transparency between different tax jurisdictions by giving tax authorities real-time information relating to potential aggressive or abusive cross-border tax planning schemes and identifying the promoters and users of these schemes[8].

The Action 12 of the BEPS project directs the attention to the international context and to the sharing of information on potentially aggressive or abuse cross-border tax planning arrangements. Differently from domestic tax schemes, cross-border tax planning schemes may comprise different parties and tax benefits in more than one jurisdiction, making these schemes more difficult to be captured using domestic hallmarks, that is, hallmarks found in mandatory disclosure regimes that emphasize domestic tax outcomes for domestic taxpayers[9]. For this reason, the final report concludes that specific hallmarks, such as hallmarks that are directed to BEPS related risks, are the most successful method to target international tax schemes that are a tax policy or a revenue concern to the tax administration of a given jurisdiction[10].

In April 2016, the Panama Papers scandal leaked millions of documents detailing financial information and lawyer-client confidential communications. Motivated by this scandal and Action 12 of the BEPS project, in November 2016, the European Commission set in motion a public consultation[11] to know if an EU action introducing more dissuasive measures to prevent intermediaries from taking part in activities that facilitate tax evasion and tax avoidance is necessary[12]. Following this line of thought, in June 2017, the European Commission proposed an amendment[13] to the Directive on Administrative Cooperation (DAC)[14] that would include the Art. 8aaa in the directive and would require Member States to demand that intermediaries file information with the competent tax authorities on one or more reportable cross-border arrangements. With this measure, the European Commission is signaling its commitment to implement transparency rules that aim at dissuading intermediaries from promoting potentially aggressive cross-border tax planning strategies for their clients[15]. One of the objectives of the aforementioned proposed amendment is

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Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264241442-en> (accessed 26 May 2021), p. 10.

[8] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264241442-en> (accessed 26 May 2021), pp. 9 and 80.

[9] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264241442-en> (accessed 26 May 2021), pp. 10 and 68.

[10] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264241442-en> (accessed 26 May 2021), pp. 69-71.

[11] Consultation on Disincentives for Advisors and Intermediaries for Potentially Aggressive Tax Planning Schemes, <https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations/consultation-disincentives-advisors-and-intermediaries-potentially-aggressive-tax-planning-schemes_en> (accessed 26 May 2021).

[12] J. Voje, 'European Union - EU Implementation of BEPS Action 12 in Light of Human Rights Requirements' (2017), Volume 57/Number 5, European Taxation, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2017_05_e2_2> (accessed 26 May 2021), chapter 1.

[13] Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 21 June 2017, COM (2017) 335 final.

[14] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64.

[15] S. Hemels, *Chapter 13: Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims in*

deterrence: intermediaries and taxpayers would think further before promoting or participating in an abusive tax planning scheme if it has to be reported.

Art. 8aaa (2) of the proposed amendment mentioned above takes into consideration the principle of legal professional privilege (LPP). In EU law, the LPP "has the status of a general legal principle in the nature of a fundamental right"[16] and its main purpose is to protect communications between a client and a lawyer, who is independent of the client and is able to provide, in full independence, legal assistance according to the client's needs.[17] Art. 8aaa (2) of the proposed amendment requires that, when intermediaries are entitled to LPP under the national laws of a certain Member State, the Member State gives them the right to a waiver, so they are not obliged to file information on one or more reportable cross-border arrangements. Here, one interesting point is: the proposed amendment only says that, in a circumstance where the intermediary is entitled to LPP and makes use of its right to a waiver from filing information on reportable cross-border arrangements, the reporting obligation is the taxpayer's responsibility and the intermediary has to inform the taxpayer of this responsibility. The proposed amendment does not take into account the possibility of intermediaries notifying any other intermediary to file the necessary information and fulfill the reporting obligation.

According to Arts. 113 and 115 of the Treaty on the Functioning of the European Union (TFEU)[18], the aforementioned amendment proposed by the European Commission went through a consultation phase with the Economic and Social Committee and the European Parliament, and it was finally adopted by the Council of the European Union, in May 2018, as the Council Directive 2018/822[19], also known as DAC 6. Now, most governments are giving guidance on the DAC 6. Although the guidance given does not have any legal value, it is still very different from country to country, leading to those responsible for applying the law discussing, every day, the mandatory automatic exchange of information and the consequences of the notification obligation placed on intermediaries.

1.2 Research Question

The DAC 6 presents changes in relation to the proposed amendment. Art. 8ab (5) of the DAC, as inserted by Art. 1 (2) of the DAC 6, determines that the intermediary who wishes to invoke its right to a waiver from filing information on a reportable cross-border arrangement, in order not to breach the LPP, has the duty to notify any other intermediary of the reporting obligation. If there is not any other intermediary, the obligation to report is the taxpayer's responsibility. According to Art. 8ab (6) of the DAC, if there is no intermediary, the responsibility to file information on a reportable cross-border arrangement lies with the taxpayer. The same applies if there is an intermediary with LPP that, to fulfill its obligation to

European Tax Law (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 572.

[16] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:229, para. 47.

[17] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:229, para. 48.

[18] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

[19] 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 [2018] OJ L 139.

notify, notifies the relevant taxpayer because there was no other intermediary that could be notified. If the intermediary with the previously mentioned privilege notifies another intermediary, then the onus to file information on a reportable cross-border arrangement lies with the other notified intermediary.

The case *Orde van Vlaamse Balies and Others*[20] illustrates how this topic is significant at the moment because this is the question that many lawyers are asking themselves on a daily basis. How will lawyers, who find themselves in a situation that the reporting obligation of a reportable cross-border arrangement will breach the LPP under the law of a certain Member State, notify any other intermediary, in case there is another intermediary to be notified, so this other intermediary file the necessary information? Notifying another intermediary may already be a breach of professional secrecy.

The identities of clients are protected by the principle of LPP. According to the Arts. 7 and 47 of the Charter of Fundamental Rights of the European Union (CFR or EU Charter)[21] and Arts. 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[22], everyone has the right to have their private life respected, their communications and correspondence kept private, to have a fair trial, which includes the possibility to be legally assisted, represented, and defended, and to have their right to LPP respected. As a result, it is comprehensible why lawyer-intermediaries are conflicted with the obligation to notify another intermediary.

In light of the above-mentioned issues, the question if there is a collision between the EU Charter and the notification obligation that lawyer-intermediaries with LPP have under DAC 6 reveals itself as noteworthy. Moreover, the research question of the present study has its relevance endorsed by the questions asked in the very recent case *Orde van Vlaamse Balies and Others*. In this case, the Belgium Constitutional Court refers an important question to the Court of Justice of the European Union (CJEU): does Art. 8ab (5) of the DAC, as inserted by Art. 1 (2) of the DAC 6, infringe the right that people have to a fair trial and the right they have to maintain their life, communications, and correspondence private? In other words, is Art. 8ab (5) of the DAC incompatible with Arts. 7 and 47 of the EU Charter and Arts. 6 and 8 of the ECHR?[23]

This thesis will investigate how the obligation that lawyer-intermediaries have to notify relates to the principle of LPP and if this obligation respects this principle. This investigation is important because it is not only in Belgium that lawyers and clients are struggling with this question and having doubts about how they should understand the rules. In other countries, intermediaries with LPP are also questioning if they will be able to fulfill their notification obligations without breaching the primary law of the European Union (EU), principles, and international agreements.

This research is based on the materials available as of May 26, 2021.

[20] Pending case C-694/20 *Orde van Vlaamse Balies and Others*.
[21] Charter of Fundamental Rights of the European Union [2012] OJ C 326.
[22] Convention for the Protection of Human Rights and Fundamental Freedoms [1953].
[23] Pending case C-694/20 *Orde van Vlaamse Balies and Others*, p. 2.

1.3 Outline

The introduction of the thesis aims at helping the reader to get familiar with ideas and concepts that will be developed in the following chapters. The reader must understand certain keywords that will be used extensively in this study to explain the problem that many lawyers are facing when they are obliged by the DAC 6 to make notifications that are incompatible with the fundamentals of professional secrecy and the EU Charter.

The second chapter will approach the principle of LPP and aspects of the EU Charter that are important for the development of the research question. Here, the focus is that the reader understands what the LPP is and how the CFR relates to it. As it was mentioned before, the LPP is protected in the EU Charter and the second chapter will explore the extension of this protection by using relevant articles of that legislation.

In the third chapter, the subjects that will be analyzed are the DAC, the DAC 6 and the notification obligation. These three themes are organized in this chapter because the concept of LPP should be already understood by the reader, since references back to this privilege will be made. The focus of the third chapter will mainly be at explaining the DAC 6 and the obligation to notify present in this legislation. It is important that the reader understands that not every particularity of the DAC and the DAC 6 will be examined in this study, only certain aspects of these legislations that are essential for the development and the answer of the research question will be approached.

The fourth chapter will deal with the possible conflict between the CFR and the obligation to notify imposed by the DAC 6 on intermediaries with professional secrecy. Here, arguments will be made to convince the reader if there is indeed an incompatibility or not between these two elements. This chapter will explain where and how exactly the LPP and the EU Charter collide with the DAC 6 and the notification obligation, if they collide at all.

In the fifth chapter, a conclusion of the most important aspects of each topic will be presented to the reader.

1.4 Delimitation

As it was mentioned before, the DAC 6 has many features that will not be investigated in this study because they are not relevant to the development and answer of the research question. The focus of the thesis is the possible incompatibility between the notification obligation that intermediaries with LPP have under the DAC 6 and the EU Charter, which protects the right to LPP. Therefore, a feature of the DAC 6 that will not be discussed in this research, and more specifically in the third chapter, is the hallmarks. The reader needs to know that the DAC 6 introduced hallmarks, but it is inessential for the purposes of this study that the reader understands the main benefit test and what are all the five different categories of hallmarks, separated in generic and specific. When approaching the DAC 6 and other topics, the focus will be on what information the reader needs to know to understand the answer to the research question.

1.5 Method and Materials

According to Sjoerd Douma, both the legal research from an external perspective and the legal-dogmatic research, which take an internal perspective, are equally valuable and it is the problem to be solved that will determine which perspective should be used.[24] The research that will be conducted in this academic work is a legal-dogmatic research because it aims at analyzing the interplay between the EU Charter, the principle of LPP and the obligation to notify that Member States impose on intermediaries with professional secrecy, using current EU and international laws, case law, principles, concepts, doctrine and literature.[25]

The materials that will be used to conduct the research are primary legislation of EU law, that is, the Treaty on European Union (TEU),[26] the TFEU and the EU Charter; secondary legislation of EU law, more specifically the DAC; supplementary sources of EU law, such as case law from the CJEU; and international agreements, especially the ECHR. Additional sources, such as academic books, academic articles, documents and internet sources, will also be used.

There are three main models of adjudication or schools of jurisprudence: legal positivism, legal naturalism, and legal realism. Legal positivism is a legal theory that perceives the law as a social instrument to achieve order.[27] Hans Kelsen and H. L. A. Hart are some of the most famous authors of this methodological approach that values the literal interpretation of the law and gives no leeway to any interpretation of the law that is based on moral concepts.[28] According to this theory, principles of law should not be used by legal operators as an unwritten source of law[29] and, since they do not categorize as valid legal norms, they should not be used by judges as a foundation for their judgment.[30] Evidently, legal positivism will not be the chosen methodological approach because one of the key elements of this study is the principle of LPP, which can be implicitly found in the Arts. 7 and 47 of the EU Charter and Arts. 6 and 8 of the ECHR.

Interpretivism is the theory of law[31] chosen to support the arguments that will answer the proposed research question. Interpretivism is classified as being a theory in between legal positivism and legal naturalism and it has Ronald Dworkin as its main theorist. Dworkin makes it clear that legal principles, which are different from legal rules,[32] are a vital component of the rule of law, and they play a crucial role in supporting judges' decisions.[33] Additionally, due to the unavailability of statistical elements in this study, the research will be conducted following the qualitative method and not the quantitative method of analysis.

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[24] S. Douma, *Legal Research in International and EU Tax Law* (Kluwer 2014), pp. 28 and 29.
[25] S. Douma, *Legal Research in International and EU Tax Law* (Kluwer 2014), p. 18.
[26] Consolidated Version of the Treaty on European Union [2012] OJ C 326.
[27] J. Penner and E. Melissaris, *Textbook on Jurisprudence* (5th edn, Oxford University Press 2012), p. 40; and H. Kelsen, *Pure Theory of Law* (M. Knight tr, University of California Press 1967), p 319.
[28] H. Kelsen, *Pure Theory of Law* (M. Knight tr, University of California Press 1967), pp. 59, 66, 68, 69 and 329.
[29] H. Kelsen, *Pure Theory of Law* (M. Knight tr, University of California Press 1967), p. 233.
[30] C. Brokelind, *Chapter 1: Introduction* in *Principles of Law: Function, Status and Impact in EU Tax Law* (C. Brokelind ed., IBFD 2014), Books IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/pl_c01> (accessed 26 May 2021), chapter 1.3.
[31] J. Penner and E. Melissaris, *Textbook on Jurisprudence* (5th edn, Oxford University Press 2012), pp. 140 and 141.
[32] R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), pp. 23-27.
[33] R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), pp. 28 and 29.

2. The Legal Professional Privilege, the EU Charter and the ECHR

2.1 The Legal Professional Privilege

In order to answer the research question if there is a collision between the EU Charter and the obligation to notify that intermediaries with LPP have under DAC 6, it is necessary to explain what the LPP is, what its scope of protection is in EU law, how it interacts with the EU Charter and the ECHR, and how the EU Charter and the ECHR interact with each other.

In EU law, the LPP "has the status of a general legal principle in the nature of a fundamental right"[34] and it establishes that certain communications between a lawyer and its client cannot be subject to compulsory disclosure in legal proceedings, otherwise they become inadmissible as evidence in the proceedings.[35] Although the LPP is connected to both general legal principles and fundamental rights because it follows from the principles common to the legal systems of the Member States and from Arts. 6 and 8 of the ECHR, as well as Arts. 7, 47 and 48 of the EU Charter,[36] most of the scholars refer to the LPP as a principle and not as a fundamental right. For instance, Michael Frese, Jan Komárek and Theofanis Christoforou refer to the LPP as a principle,[37] while other scholars, such as Nevia Čičin-Šain and Helene Andersson, refer to it both as a principle and as a fundamental right.[38] Furthermore, only clear and unconditional legal principles can have direct effect and entail independent rights.[39] The LPP is associated with both general legal principles and fundamental rights, and it will be referred to in this thesis as a principle because that is mainly how the CJEU referrers to the LPP in its case law.[40]

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[34] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:229, para. 47.

[35] E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance' (2004), Volume 28/Issue 4, Fordham International Law Journal, pp. 967-1048, <https://ir.lawnet.fordham.edu/ilj/vol28/iss4/5> (accessed 26 May 2021), p. 970.

[36] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:229, para. 47.

[37] See how these authors refer to the LPP in M. Frese, 'The Development of General Principles for EU Competition Law Enforcement – The Protection of Legal Professional Privilege' (2011), Amsterdam Center for Law & Economics Working Paper Number 2011-03, European Competition Law Review, <https://ssrn.com/abstract=1762046> (accessed 26 May 2021); J. Komárek, 'Legal Professional Privilege and the EU's Fight Against Money Laundering' (2008), Volume 27/Issue 1, Civil Justice Quarterly, <https://ssrn.com/abstract=1031721> (accessed 26 May 2021); and T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case' (1985), Volume 12/Issue 2, Legal Issues of Economic Integration, pp. 1-45, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/Legal+Issues+of+Economic+Integration/12.2/LEIE1985005> (accessed 26 May 2021).

[38] See how these authors refer to the LPP in N. Čičin-Šain, 'New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?' (2019), Volume 11/Number 1, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2019_01_int_4> (accessed 26 May 2021), chapter 3.1; and H. Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (Department of Law, Stockholm University 2017), pp. 8 and 366.

[39] J. Hettne, *Chapter 2: European Legal Principles and National Legal Challenges* in *Principles of Law: Function, Status and Impact in EU Tax Law* (C. Brokelind ed., IBFD 2014), Books IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/pl_c01> (accessed 26 May 2021), chapter 2.6.

[40] See how the CJEU refers to the LPP in Judgment of the Court of 18 May 1982, *AM & S Europe Limited v Commission of the European Communities*, C-155/79, EU:C:1982:157; Order of the Court of 4 April 1990, *Hilti*

Although the LPP is recognized in all Member States because it follows from the principles common to their legal systems, where this principle can be found vary: in some Member States, the protection of the LPP can only be found in case law, in others, its protection is provided for by statute or by the national constitution. As an example of this, while in Sweden, the protection of the LPP can be found on statutory provisions and it has the status of constitutional law, in Ireland the protection of the LPP can only be found in case law.[41]

There are two types of justification for the LPP: utilitarian and rights-based. According to the utilitarian justification, the reason why the LPP exists is not to protect the confidentiality of communications between a lawyer and its client, which is its immediate result. The reason for the existence of this privilege is to promote a broader societal goal. According to the utilitarian rationale, although the LPP is related to the rights and interests of the client, it cannot serve private interests only, it must enhance the welfare of the society in a way that outweighs the effects of non-disclosure of communications between a lawyer and its client. The broader societal goal that the LPP promotes is the increased compliance with the law. The logic is that the law will be respected more often if people are able to seek legal advice without having to worry about the advice and the information shared with the lawyer being disclosed because people will consult with a lawyer more regularly. In addition, the legal advice that clients will receive from lawyers will be more accurate because clients will feel more comfortable discussing their legal circumstances in a frank and straightforward manner and lawyers will be fully informed of the relevant facts and information. The utilitarian justification for the LPP also requires that for the privilege to apply to communications between a lawyer and its client, the legal advice must be related to future conduct or, at least, ongoing conduct which can still be altered.[42]

According to the rights-based justification, the LPP is an individual right that the client has to confidentiality. The existence of this privilege against compulsory disclosure of communications between a lawyer and its client is not justified in the promotion of a broader societal goal, but in the inherent subjective value it has for the holder of the right. The rights-based rationale uses the protection of individual rights as a justification for the existence of the LPP and it constructs the idea of privileges-as-rights based on fundamental rights that are rights so fundamental that they prevail against broad societal objectives. The rights-based justification allows two possibilities: to view the LPP as emanating from the right to a fair trial or from the right to privacy.[43]

The conclusion that can be inferred from these two types of justification for the LPP, which

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Aktiengesellschaft v Commission of the European Communities, T-30/89, EU:T:1990:27; Judgment of the Court of 17 September 2007, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*, Joined cases T-125/03 and T-253/03, EU:T:2007:287; Judgment of the Court of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:512; and Judgment of the Court of 26 June 2007, *Ordre des Barreaux Francophones et Germanophone and Others v Conseil des Ministres*, C-305/05, EU:C:2007:383.

[41] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:229, para. 47.

[42] E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance' (2004), Volume 28/Issue 4, Fordham International Law Journal, pp. 967-1048, < https://ir.lawnet.fordham.edu/ilj/vol28/iss4/5> (accessed 26 May 2021), pp. 969 and 978-981.

[43] E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance' (2004), Volume 28/Issue 4, Fordham International Law Journal, pp. 967-1048, < https://ir.lawnet.fordham.edu/ilj/vol28/iss4/5> (accessed 26 May 2021), pp. 989 and 990.

has the role to protect communications between a lawyer and its client, is that this principle is both an essential part of the client's rights to privacy, to defense in legal proceedings and to a fair trial, and of the proper administration of justice. If lawyers were obliged, in the context of judicial proceedings, to disclose information that was obtained in the course of legal consultations, they would not be able to conduct their task of advising, defending and representing their clients in a way that is coherent with the proper administration of justice. At the same time, clients would be dispossessed of their rights to a fair trial, to privacy, and to an adequate defense, conferred upon them by Arts. 6 and 8 of the ECHR and by Arts. 7, 47 and 48 of the EU Charter.[44]

On many occasions, the CJEU recognized the existence and the importance of the principle of LPP by calling it the principle of "confidentiality of written communications between lawyer and client".[45] Despite what the name LPP suggests, this principle is not a privilege of the legal profession.[46] It is a potestative right of the client and not a prerogative of the lawyer because it is the client who has the possibility of disclosing the written communications between them without the lawyer's approval.[47] The lawyer, in its turn, cannot disclose these communications without the consent of the client.

Although the concept of LPP and its scope of protection are not harmonized in all Member States, this principle is part of EU law.[48] Jurisprudence dealing with EU competition law and with the possibility for the European Commission to gain access to communications between companies and their lawyers created an EU LPP[49] that is very different in its scope from the LPP recognized by national courts. In England, for example, there are two categories of LPP because the English courts differentiate between legal advice privilege, which protects communications between clients and their lawyers, even if there will not be any legal proceedings, and litigation privilege, which protects documents that were produced to be used in a legal action. The English courts do not distinguish between independent lawyers and in-house lawyers for the purpose of protecting LPP.[50]

In the groundbreaking[51] case *AM & S v Commission*,[52] the CJEU established two main

[44] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:229, paras. 48 and 49.
[45] Judgment of the Court of 18 May 1982, *AM & S Europe Limited v Commission of the European Communities*, C-155/79, EU:C:1982:157, paras. 13, 21-23 and 30.
[46] W. Wils, 'Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure' (2019), Volume 42/Issue 1, World Competition: Law and Economics Review, pp. 21-41, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/World+Competition/42.1/WOCO2019003> (accessed 26 May 2021), p. 22.
[47] Judgment of the Court of 18 May 1982, *AM & S Europe Limited v Commission of the European Communities*, C-155/79, EU:C:1982:157, para. 28; and Judgment of the Court of 17 September 2007, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*, Joined cases T-125/03 and T-253/03, EU:T:2007:287, para. 90.
[48] Judgment of the Court of 18 May 1982, *AM & S Europe Limited v Commission of the European Communities*, C-155/79, EU:C:1982:157, page 1596.
[49] N. Čičin-Šain, 'New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?' (2019), Volume 11/Number 1, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2019_01_int_4> (accessed 26 May 2021), chapter 3.1.
[50] J. Komárek, 'Legal Professional Privilege and the EU's Fight Against Money Laundering' (2008), Volume 27/Issue 1, Civil Justice Quarterly, <https://ssrn.com/abstract=1031721> (accessed 26 May 2021), p. 2.
[51] N. Čičin-Šain, 'New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?' (2019), Volume 11/Number 1, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-

prerequisites for the application of the LPP. The Court held that the European Commission's powers of investigation cannot be used for the disclosure of written communications between clients and their lawyers, as long as the written communications relate to the client's rights of defense and the lawyers are independent, in other words, not committed to the client by an employment contract.[53] Therefore, the CJEU limited the extent of application of the LPP to the right to a fair trial, as it is stated in Art. 6 of the ECHR, particularly the rights of defense, and it associated the LPP to the independence of lawyers from an employment relationship with their clients. In this regard, differently from English courts, the CJEU differentiated between independent and in-house lawyers and determined that the latter's clients should not benefit from the protection of confidentiality of written communications. In connection to the second of the two cumulative conditions, which relates to the personal scope of the LPP, the Court also established that independent lawyers have to be entitled to practice their profession in one of the EU or European Economic Area (EEA) Member States for written communication between them and their clients to be protected by the LPP.[54]

The rights of defense would continue to limit the application of the LPP and play an important role in the CJEU's decisions if written communications between clients and their lawyers should be protected by the principle of confidentiality. In the case *Hilti v Commission*,[55] Hilti, the largest European producer of powder-actuated fastening nail guns, nails, and cartridge strips, claimed confidentiality over documents that were covered by the LPP, according to what was decided by the CJEU in *AM & S v Commission*, and over internal communications reporting legal advice that the company received from independent counselors. In this case, the CJEU enlarged the scope of the LPP by recognizing that if a company receives legal advice from an independent, and thus external, lawyer and the advice is related to the company's rights of defense, internal documents of the company summarizing the legal advice are protected under the LPP.[56]

In the case *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*,[57] although the CJEU reaffirmed some previous decisions in relation to the personal scope of the LPP, it also proved to be willing to expand other aspects of the scope of protection of the LPP. The case involved European Commission officials and representatives of the British competition

org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2019_01_int_4> (accessed 26 May 2021), chapter 3.1.

[52] Judgment of the Court of 18 May 1982, *AM & S Europe Limited v Commission of the European Communities*, C-155/79, EU:C:1982:157.

[53] Judgment of the Court of 18 May 1982, *AM & S Europe Limited v Commission of the European Communities*, C-155/79, EU:C:1982:157, para. 21; and for a better understanding of the concept of rights of defense, as stated in the case *AM & S v Commission*, see T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case' (1985), Volume 12/Issue 2, Legal Issues of Economic Integration, pp. 1-45, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/Legal+Issues+of+Economic+Integration/12.2/LEIE1985005> (accessed 26 May 2021), pp. 6-8.

[54] Judgment of the Court of 18 May 1982, *AM & S Europe Limited v Commission of the European Communities*, C-155/79, EU:C:1982:157, para. 25.

[55] Order of the Court of 4 April 1990, *Hilti Aktiengesellschaft v Commission of the European Communities*, T-30/89, EU:T:1990:27.

[56] Order of the Court of 4 April 1990, *Hilti Aktiengesellschaft v Commission of the European Communities*, T-30/89, EU:T:1990:27, para. 18.

[57] Judgment of the Court of 17 September 2007, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*, Joined cases T-125/03 and T-253/03, EU:T:2007:287; and Judgment of the Court of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:512.

authority who carried out an investigation at Akzo Nobel's and Akcros' premises in the UK. They examined papers and a dispute occurred over the confidential nature of certain documents, especially the ones exchanged between Akcros' general manager and Mr. S, who was a member of the Netherlands bar association and worked in Akzo Nobel's legal department, being employed by this undertaking on a permanent basis.[58] The way investigations are carried out by European Commission officials tell if the targeted companies will have their rights of defense negatively impacted or if they will have their fundamental rights, such as the right to privacy and LPP, respected.[59] In its judgment, the Court followed the opinion of the Advocate General (AG) Kokott[60] and decided to continue to exclude written communications between in-house lawyers and their clients from the scope of protection offered by the LPP, consolidating its ruling in the case *AM & S v Commission*.

Many were hoping that the Court would reconsider its decision in relation to the second of the two cumulative conditions for written communication between clients and their lawyers to be protected by the LPP. Two main arguments were presented. The first argument is that the personal scope of the LPP is explained by different features of the legal profession, such as rules of professional ethics and discipline, and that in-house lawyers who follow these rules the same way as independent lawyers should be within the scope of protection of the LPP, especially, but not necessarily, the ones who are members of an EU or EEA bar association. Therefore, the privileges of the legal profession should not have their application limited to external lawyers, but also encompass in-house lawyers.[61] The second argument is that the non-inclusion of in-house lawyers in the scope of protection of the LPP will cause undertakings to try to circumvent the Court's rulings on the prerequisites for the application of the LPP by, for example, converting their legal departments into separate legal offices, so it does not seem that the lawyers are dependent on the company by an employment contract.[62]

The CJEU decided not to extend the protection offered by the principle of LPP to in-house lawyers and their clients, even if in-house lawyers are members of an EU or EEA bar association and follow rules of professional ethics and discipline in the same way as external

[58] Judgment of the Court of 17 September 2007, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*, Joined cases T-125/03 and T-253/03, EU:T:2007:287, paras. 2-8.
[59] H. Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (Department of Law, Stockholm University 2017), p. 8.
[60] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:229.
[61] M. Frese, 'The Development of General Principles for EU Competition Law Enforcement – The Protection of Legal Professional Privilege' (2011), Amsterdam Center for Law & Economics Working Paper Number 2011-03, European Competition Law Review, <https://ssrn.com/abstract=1762046> (accessed 26 May 2021), p. 4; T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case' (1985), Volume 12/Issue 2, Legal Issues of Economic Integration, pp. 1-45, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/Legal+Issues+of+Economic+Integration/12.2/LEIE1985005> (accessed 26 May 2021), p. 38; and I. Forrester, 'Legal Professional Privilege: Limitations on the Commission's Powers of Inspection Following the AM & S Judgment' (1983), Volume 20/Issue 1, Common Market Law Review, pp. 75-85, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/Common+Market+Law+Review/20.1/COLA1983004> (accessed 26 May 2021), p. 83.
[62] T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case' (1985), Volume 12/Issue 2, Legal Issues of Economic Integration, pp. 1-45, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/Legal+Issues+of+Economic+Integration/12.2/LEIE1985005> (accessed 26 May 2021), pp. 14 and 15.

lawyers. The Court understands that even though the national laws of certain Member States treat in-house and independent lawyers equally, there is a substantial difference between them in terms of personal, professional, and economic independence from their clients.[63] The judgment in the case *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* was influenced by the opinion of the AG Kokott, who explains that in-house lawyers are more financially dependent and have their image more strongly connected to their clients than external lawyers because their clients are their employers. Consequently, in-house lawyers are more inclined to a conflict of interest between their professional obligations and the needs of their clients.[64]

Although the CJEU did not reconsider the personal scope of protection offered by the LPP, it expanded the material scope of the privilege in the case *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*. Sometimes, clients prepare working documents and summaries in order to consult with an independent lawyer with the aim of obtaining legal advice that relates to the client's rights of defense. The Court acknowledged that these preparatory documents are covered by the LPP if the client formulated them to seek legal advice from an external lawyer in the exercise of the client's rights of defense, even if there is no intention for them to be exchanged with the lawyer in any manner.[65] The CJEU made this decision based on the fact that the principle of confidentiality of written communications between lawyer and client is indispensable for the effective exercise of the rights of defense because it ensures that everyone is able to seek legal advice without any constraint.[66]

The case *Ordre des Barreaux Francophones et Germanophone and Others v Conseil des Ministres*[67] also restricted how the LPP in the EU should be understood and applied. This case has some similarities with the case *Orde van Vlaamse Balies and Others*, which was briefly discussed in the first chapter, because, although it is related to the theme of money laundering, it united bar associations to challenge before the Belgium Constitutional Court two different types of obligations imposed on lawyers who participate in particular transactions: the obligation to disclose certain information and the obligation to provide the authorities with all information they request. Moreover, the applicants based their claims on the argument that those obligations imposed on lawyers were a breach of the principle of LPP, which helps to ensure the proper administration of justice by making sure that individuals and companies will be able to obtain confidential advice about their legal situation.[68]

In the case mentioned above, the CJEU decided that both obligations, the obligation to disclose information related to money laundering and the obligation to cooperate with the

[63] Judgment of the Court of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:512, paras. 56-58.
[64] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:229, paras. 83 and 149-151.
[65] Judgment of the Court of 17 September 2007, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*, Joined cases T-125/03 and T-253/03, EU:T:2007:287, para. 123.
[66] H. Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (Department of Law, Stockholm University 2017), pp. 363 and 364.
[67] Judgment of the Court of 26 June 2007, *Ordre des Barreaux Francophones et Germanophone and Others v Conseil des Ministres*, C-305/05, EU:C:2007:383.
[68] J. Komárek, 'Legal Professional Privilege and the EU's Fight Against Money Laundering' (2008), Volume 27/Issue 1, Civil Justice Quarterly, <https://ssrn.com/abstract=1031721> (accessed 26 May 2021), p. 3.

authorities, do not violate the LPP and, consequently, they do not violate the right to a fair trial because for the LPP and the right to a fair trial to be applicable, a link to judicial proceedings must exist.[69] *A priori*, the aforementioned obligations imposed on lawyers are connected to legal advice that is not related to legal proceedings. That being said, if the lawyer assists the client by defending or representing it before the courts or advise it to the way of instituting or avoiding a judicial proceeding, the lawyer is exempt from both obligations and the LPP applies.[70] Therefore, the Court maintained the same understanding of the case *AM & S v Commission*: that the scope of protection offered by the principle of LPP is limited to the right to a fair trial, guaranteed by Art. 6 of the ECHR, and, particularly, to the rights of defense. In other words, the LPP only becomes effective after the initiation of legal proceedings.[71]

All the cases mentioned above from the CJEU contributed to shape the scope of protection of the EU LPP. Moreover, they are vital for the understanding of how the Court applies this principle. After all that was seen from the cases above, it is possible to conclude that the EU LPP is very limited if compared to the LPP recognized in many Member States. The national courts of many Member States gave this principle a wide scope of protection. The Court rulings in the cases presented in this chapter established that the LPP in the EU is limited to protect the following documents: preparatory documents internal to a company that were formulated with the intention of seeking legal advice from an external lawyer, who is allowed to practice its profession in at least one of the Member States, as long as the company is exercising its rights of defense; any written communications between an independent lawyer, who is allowed to practice its profession in at least one of the Member States, and its client, as long as the motivation for the communications is the client's rights of defense; and internal notes to a company which exclusively report the legal advice given by an independent lawyer, who is allowed to practice its profession in at least one of the Member States, in a context where the client is exercising its rights of defense.[72]

2.2 The EU Charter

The EU Charter was proclaimed in December 2000, but it only achieved the same legal value as the Treaties, as stated in Art. 6 (1) of the TEU, constituting primary EU law, when the Treaty of Lisbon[73] entered into force in December 2009. The CFR has two main implications. The first implication is that constitutional principles of Member States gained an EU dimension, which led to a limitation of the interpretative power of national constitutional courts, that is, these courts have to respect the EU Charter when they formulate interpretative

[69] Judgment of the Court of 26 June 2007, *Ordre des Barreaux Francophones et Germanophone and Others v Conseil des Ministres*, C-305/05, EU:C:2007:383, paras. 33, 37 and 38.
[70] Judgment of the Court of 26 June 2007, *Ordre des Barreaux Francophones et Germanophone and Others v Conseil des Ministres*, C-305/05, EU:C:2007:383, paras. 23 and 34.
[71] J. Komárek, 'Legal Professional Privilege and the EU's Fight Against Money Laundering' (2008), Volume 27/Issue 1, Civil Justice Quarterly, <https://ssrn.com/abstract=1031721> (accessed 26 May 2021), p. 7.
[72] M. Frese, 'The Development of General Principles for EU Competition Law Enforcement – The Protection of Legal Professional Privilege' (2011), Amsterdam Center for Law & Economics Working Paper Number 2011-03, European Competition Law Review, <https://ssrn.com/abstract=1762046> (accessed 26 May 2021), p. 5 and 6.
[73] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306.

theories for the fundamental principles present in their national constitutions. This first implication is based on Art. 52 (4) of the EU Charter, which requires the fundamental rights present in the CFR to be interpreted in harmony with the constitutional traditions common to the Member States. Moreover, Art. 52 (4) of the EU Charter imposes an obligation to reconciliatory interpretation between Member States' constitutional law and supranational law without subjecting the interpretation of EU law to any of the constitutional traditions of the Member States.[74] The second implication is that the CFR connected EU fundamental rights to the rights protected by the ECHR. This can be inferred from the Arts. 52 (3) and 53 of the EU Charter, that establish, respectively, that there is a correspondence between the CFR and the ECHR, in terms of the meaning and the scope of fundamental rights that are protected by both, and that the CFR should not be interpreted as restricting or adversely affecting human rights and fundamental freedoms recognized by EU law, international law, international agreements to which the EU or all the Member States are a party, and Member States' constitutions. The interaction between the EU Charter and the ECHR will continue to be explored in section 2.3.[75]

The EU Charter has a significant influence on taxpayer's rights. It is important that the value the Union gives to the collection of taxes does not obliterate the protection of taxpayer's rights, particularly in cross-border situations. There are three main categories of fundamental rights in the CFR that are relevant for taxation: rights related to the imposition of penalties, procedural rights and substantive rights.[76] For this study, the most relevant categories are procedural rights and substantive rights because it is in these categories that two of the most relevant articles connected to the LPP are located. Art. 7 and 47 of the EU Charter approach rights that are relevant for the taxpayer, respectively, the right to privacy, which can be categorized as a substantive right, and the right to an effective remedy and a fair trial, which can be categorized as a procedural right. The rights of the defense, which were mentioned in section 2.1 because of their connection to the LPP, are also present in Art. 48 of the EU Charter. Moreover, besides the articles already brought up in this paragraph that are relevant for taxpayer's rights and are connected to the LPP, Art. 41 (2) of the EU Charter expressly mentions the respect for confidentiality and professional secrecy in regards to administrative decisions by the EU institutions.

2.3 The Interaction between the EU Charter and the ECHR

It is noticeable that in all the cases mentioned in section 2.1, the CJEU assessed the application of the LPP according to Art. 6 of the ECHR, which is very similar to Art. 47 of the EU Charter, and it has not taken into consideration Art. 8 of the ECHR, which is similar to Art. 7 of the EU Charter. The answer to why the CJEU has assessed the cases in this way is found in the interaction between the EU Charter and the ECHR.

Arts. 52 (3) and 53 of the EU Charter regulate the relevance of the ECHR within the EU legal

[74] P. Pistone, *Chapter 4: The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), pp. 154, 160 and 161.
[75] P. Pistone, *Chapter 4: The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), pp. 154, 159 and 160.
[76] P. Pistone, *Chapter 4: The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 155.

order.[77] Art. 52 (3) of the EU Charter states that when there are corresponding rights with the ECHR the meaning and scope of those rights shall be the same in these two legislations. Furthermore, Art. 52 (3) of the EU Charter states that EU law can offer more extensive protection than the ECHR. Whenever there are corresponding rights between the EU Charter and ECHR the latter offers a minimum standard of protection. The argument in the legal doctrine is that since the ECHR offers a minimum standard of protection there could be the case that taxpayer rights could be more protected under the Charter than under national law.[78]

Art. 53 of the EU Charter regulates the level of protection. It entails that nothing in the EU Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms. There is no difference whether the human rights and fundamental freedoms stem from EU law, international agreements such as the ECHR, or from Member States national constitutions. Art. 53 of the EU Charter sets a demand that the interpretation of the EU Charter must conform with human rights.[79]

However, it is important to underline that the ECHR is not part of EU law which is clear from EU case law. The most important point of interaction between the EU Charter and the ECHR is the flow of legal values which is not uncommon. Legal questions already interpreted ECtHR is used by the CJEU. The CJEU has an important task to secure that the legal questions interpreted by the ECtHR are interpreted consistently with EU law.

Although the EU Charter could according to Art. 52 (3) of the EU Charter only offer a more extensive protection than the ECHR there could be situations where the CJEU accepts a lower standard of protection within the EU. This position by the CJEU is absolved by the presumption that Member States comply with the rights given in the ECHR and consequently to appropriate protection is given.[80]

One interesting situation arises whenever there are different interpretations of legal questions between the ECtHR and the CJEU. How this situation is solved has been discussed in the legal doctrine. One argument is that a strong indicator that the CJEU could have a different interpretation is the existence of explanations as to why there is a difference between the two contexts. If there is a more extensive protection in EU law the CJEU could also be argued to keep a different interpretation.[81]

According to Art. 6 (2) TEU the EU shall accede to the ECHR but the accession shall not affect the Unions competences as given in the treaties. A possible EU accession to the ECHR has been assessed. In an opinion by the CJEU the relationship between the EU and the ECHR was discussed in length. The CJEU states that fundamental rights form an integral part of the general principles of EU law. Moreover, the CJEU draws inspiration from both the constitutional traditions of Member States as well as international agreements.

[77] P. Pistone, *Chapter 4: The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 161.
[78] P. Pistone, *Chapter 4: The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 161.
[79] P. Pistone, *Chapter 4: The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 161.
[80] P. Pistone, *Chapter 4: The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), pp. 161-163.
[81] P. Pistone, *Chapter 4: The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 163.

In conclusion, the ECHR is not binding in EU law, but whenever there are corresponding rights there is an opening that the same legal reasoning is used in legal matters that are similar. The effect for the LPP is that case law both from the ECtHR and the CJEU is of relevance when DAC 6 is assessed.

3. The DAC, the DAC 6 and the Notification Obligation

3.1 The DAC

In order to answer the research question if there is a collision between the EU Charter and the obligation to notify that intermediaries with LPP have under DAC 6, it is necessary to explain what the DAC, the DAC 6, and the notification obligation are.

In regards to direct taxation, Member States need to share information with each other to manage their internal taxation systems efficiently. In February 2011, following the global financial crisis that started in 2007, the DAC was adopted because the previous directive, Directive 77/799/EEC,[82] from December 1977, was no longer providing for appropriate measures to give the Member States the tools they needed to efficiently cooperate in the field of taxation and overcome the negative consequences of a more globalized internal market. If compared to the Directive 77/799/EEC, the DAC is considered as a better instrument for effective administrative cooperation because it contains clearer and more precise provisions establishing a larger scope of administrative cooperation between the Member States, especially in regards to the exchange of information.[83]

As it was mentioned in section 1.1, timely access to relevant information is crucial for countries to collect taxes effectively because it allows tax authorities to identify tax planning schemes that pose a tax revenue risk early and take the appropriate measures to respond to the situation.[84] For this reason, the OECD MC 2017[85] included provisions concerning the exchange of information and administrative assistance between the Contracting States for the purpose of tax collection. Arts. 26 and 27 of the OECD MC 2017 seem to recognize that to efficiently avoid double taxation, it is desirable that tax authorities give administrative assistance to each other, reciprocally exchanging information to the largest possible extent, with a view to the application of specific provisions of the convention. Art. 26 of the OECD MC 2017 deals specifically with the exchange of information between the Contracting States and Art. 27 of the OECD MC 2017 deals with the matter of administrative assistance between the Contracting States, both aiming at a more structured and coherent collection of taxes.[86] Therefore, timely access to relevant information is achieved by Member States exchanging information.

The DAC recognizes three types of exchange of information: exchange of information on request, found in Arts. 5-7 of the DAC, mandatory automatic exchange of information, found

[82] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums [1977] OJ L 336.

[83] Recitals 1-7 of the preamble to Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64.

[84] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264241442-en> (accessed 26 May 2021), p. 13; and M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters in Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), p. 253.

[85] OECD (2017), Model Tax Convention on Income and on Capital 2017 (Condensed Version), OECD Publishing, <http://dx.doi.org/10.1787/mtc_cond-2017-en> (accessed 26 May 2021).

[86] OECD (2017), Model Tax Convention on Income and on Capital 2017 (Condensed Version), OECD Publishing, <http://dx.doi.org/10.1787/mtc_cond-2017-en> (accessed 26 May 2021), pp. 45-48, 487, 488, 508 and 509.

in Arts. 8, 8a, 8aa, 8ab and 8b of the DAC, and spontaneous exchange of information, found in Arts. 9 and 10 of the DAC. Before, the Directive 77/799/EEC provided a framework for only one type of exchange of information, namely, the exchange of information on request.[87] The focus of the research is on the mandatory automatic exchange of information because it is in this part of the DAC that modifications were made in May 2018, when the DAC 6 was adopted, bringing discussions in regards to the principle of LPP, that was approached in section 2.1, and the notification obligation, that will be explored in section 3.2.

The mandatory automatic exchange of information is argued to be the most effective type of exchange of information because it provides for the best contribution to the correct assessment of taxes in cross-border situations and to the fight against potentially aggressive or abusive tax planning strategies.[88] The way the mandatory automatic exchange of information between Member States functions does not require any investigation to know if the information will be useful to the receiving Member State or not. The reason for that is the fact that this type of exchange of information is conducted at pre-defined regular intervals. Although the mandatory automatic exchange of information is seen as the most effective type of exchange of information, problems related to taxpayers' rights and the confidentiality of information were identified and connected to this type of exchange of information between Member States.[89]

The mandatory automatic exchange of information at regular intervals was introduced for the first time when the Directive 2003/48/EC[90], also known as the Savings Directive, was adopted in June 2003. The aim of the directive was the taxation of savings income in the form of interest payments made in one Member State to beneficial owners who reside in another Member State. Before this directive, residents of a Member State were able to avoid taxation in the Member State they reside on interest received in another Member State. There was a clear lack of coordination of national tax systems for the taxation of savings income in the form of interest payments. Consequently, this situation created distortions in the movement of capital between Member States, which are incompatible with the internal market.[91] The DAC introduced two important improvements. The first improvement is related to the mandatory automatic exchange of information and it establishes that this type of exchange of information should be applied to other areas than just interest payments. The second improvement brought by the DAC concerns the fact that bank secrecy can no longer be used as a justification to refuse to disclose information that is requested.[92] Before, Directive 77/799/EEC accepted

[87] M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters in Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), p. 251.
[88] Recital 10 of the preamble to Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64.
[89] M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters in Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), p. 257.
[90] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments [2003] OJ L 157.
[91] Recitals 5, 6 and 8 of the preamble to Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments [2003] OJ L 157; and M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters in Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), pp. 294 and 295.
[92] M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters in Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), p. 251.

bank secrecy as a ground for not providing information when it is requested.[93]

Since the DAC was adopted in February 2011, it has been amended several times in an attempt to address the distinct tax challenges that the Member States' tax administrations face in an ever-changing globalized world. As it was briefly mentioned before, one of the amending directives is the DAC 6, which was adopted in May 2018, after a few modifications were made to the proposal presented by the European Commission.

3.2 The DAC 6

The DAC 6 is the fifth amendment to the DAC and it uses the reporting obligations that intermediaries have to capture potentially aggressive tax planning arrangements and subject these arrangements to mandatory automatic exchange of information.[94] According to Art. 3 (21) of the DAC, the intermediaries are the ones who design, market and organize a reportable cross-border arrangement or makes available for implementation or manages the implementation of such arrangements. Lawyers, tax consultants and financial institutions are some examples of intermediaries. Moreover, according to Art. 8ab (1) of the DAC, as inserted by Art. 1 (2) of the DAC 6, intermediaries are required by the Member States to file information on reportable cross-border arrangements with the tax authorities. For answering the research question, it is important that the reader knows that these reporting obligations are being scrutinized and criticized by different scholars as being incompatible with the primary legislation of the EU, namely, the EU Charter.[95]

Although intermediaries are required by the Member States to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the tax authorities, according to Art. 8ab (5) of the DAC, Member States have the possibility to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement, if the reporting obligation would breach the LPP under the national law of that Member State. It is clear that Art. 8ab (5) of the DAC takes into consideration the fact that the concept of LPP is not harmonized in all the Member States. As it was mentioned in section 2.1, the principle of LPP is part of EU law, although its concept and its scope of protection are not harmonized in all Member States. The DAC 6 recognizes that the scope of protection of the LPP varies from Member State to Member State and it accepts the different legislations and traditions of each Member State in relation to the LPP.[96]

According to Art. 8ab (5) of the DAC, in a circumstance that the Member State gives intermediaries the right to a waiver from filing information on a reportable cross-border arrangement, the Member State should take the necessary measures to require intermediaries to notify another intermediary, so the other intermediary does the necessary filing of

[93] S. Hemels, *Chapter 13: Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims in European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 544.
[94] M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters in Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), pp. 267 and 268.
[95] M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters in Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), p. 268.
[96] A. Ballancin and F. Cannas, 'The 'DAC 6' and Its Compatibility with Some of the Founding Principles of the European Legal System(s)' (2020), Volume 29/Issue 3, EC Tax Review, pp. 117-125, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/29.3/ECTA2020038> (accessed 26 May 2021), p. 120.

information and complies with the reporting obligations. If there is not another intermediary to be notified, the Member State should take the necessary measures to require intermediaries to notify the relevant taxpayer of the importance of filing the necessary information and complying with the reporting obligations. The taxpayer is, in this last case, responsible for filing the necessary information and complying with the reporting obligations. The notification obligation is being criticized by some scholars because it would be in conflict with the EU Charter.

The argument that the obligation that intermediaries have to notify other intermediaries would breach the LPP and, consequently, the EU Charter is sustained by the premise that informing other intermediaries in writing and giving reasons would reveal the identity of a lawyer's clients and that the identity of a lawyer's clients is protected by the LPP because the mere recourse to a lawyer would give clients the protection offered by LPP. These were some of the arguments presented by the applicants in the case *Orde van Vlaamse Balies and Others*.[97]

The goal of the DAC 6 is, therefore, to achieve fairer taxation in the internal market by placing an obligation on intermediaries.[98] The project of constantly closing the loopholes to address new tax planning strategies almost seems like a never-ending game of chess. It is in this seemingly ever-expanding legislation that principles, such as the LPP, need to be highlighted and discussed. One could wonder that in a field of law that is constantly amended, legal certainty could be called into question.

The DAC 6 primarily amended Arts. 3 and 8ab of the DAC. Art. 3 of the DAC contains definitions used in the directive and the DAC 6 added additional definitions. The definitions added in DAC 6 will not be discussed in length but it is important with a brief analysis due to the importance these definitions have on the notification obligation.

In Art. 3 (18) of the DAC a cross-border arrangement was added, which means that an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions in Art. 3 (18) of the DAC are met. Hallmarks are found in Annex IV of the DAC and are one of the major additions to the DAC. DAC 6 introduced Art. 3 (19) of the DAC which states that a reportable cross-border arrangement is any cross-border arrangement that contains at least one of the hallmarks.

Analyzing the specific hallmarks falls outside of the scope of the thesis. What can be said about the hallmarks is that they refer to a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance. The definition of a hallmark is found in Art. 3 (20) of the DAC. The hallmark in Annex IV of the DAC contains the so-called main benefit test along with generic and specific hallmarks. An arrangement is subject to reporting obligation if it cumulatively fulfills the main benefit test and at least one general hallmark or one of the specific hallmarks in category B or one of the specifically mentioned hallmarks in category C. The main benefit test does not need to be fulfilled if an arrangement meets one of the residual specific hallmarks in category C or one of the specific

[97] Pending case C-694/20 *Orde van Vlaamse Balies and Others*, p. 5.
[98] Recital 6 of the preamble to 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 [2018] OJ L 139.

hallmarks in either category D or E.[99]

Art. 3 (20) of the DAC was also introduced and it defines an intermediary. Again, a lengthy analysis is not necessary for the purpose of this thesis since the issue does not revolve around what an intermediary is. It is sufficient to state that an intermediary means any person that designs, markets, organizes, or makes available for implementation or manages the implementation of a reportable cross-border arrangement. Furthermore, a few other conditions must be met which is found in Art. 3 (20) of the DAC. It is sufficient to meet one of the conditions laid out in order to qualify as an intermediary. Lawyers meet the conditions to qualify as an intermediary.[100]

The hallmarks in Annex IV of the DAC have been argued to be of general nature which entails that some arrangements will constitute tax evasion or tax fraud. The mandatory disclosure rules could in that case be in conflict with the right to no self-incrimination. Furthermore, the mandatory disclosure rules, especially in relation to the LLP, could prevent potential clients from doing business with tax lawyers which could pose a threat to the freedom to conduct a business. [101]

It is the hallmarks along with the definition of intermediaries that poses several interesting theoretical questions relevant to this thesis. Is it the intermediaries' job to enforce the tax laws of the state? Could the obligations be seen as a way for tax authorities to outsource their regulatory oversight? Separate from what the law is today, what shall the LLP entail?[102] The reporting obligation falls upon the intermediaries. What can be concluded is that the list of hallmarks is both long and complex.[103] One potential issue with the hallmarks is that they could potentially target non-tax-driven behaviors which could force intermediaries to disclose irrelevant information to the tax authorities. The risk is there despite the fact that the legislators' intention is to catch aggressive tax planning arrangements.[104]

It is also of importance to mention Art. 25 (a) of the DAC which regulates penalties. It is up to the Member States to regulate penalties regarding infringements of Art. 8ab DAC. The penalties provided shall be effective, proportionate, and dissuasive. Since it is up to Member States to regulate penalties there could be an issue regarding harmonization regarding infringements of the notification obligation. The field of mandatory disclosure rules and DAC

[99]See Annex IV of the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64; and, for further discussion, see M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters* in *Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), pp. 268 and 269.

[100] S. Hemels, *Chapter 13: Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims* in *European Tax Law* (P. Wattel et al eds., 7th edn, Wolters Kluwer 2019), p. 574.

[101] M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters* in *Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), pp. 279 and 280.

[102] These questions have been treated by other scholars. See, for example, N. Čičin-Šain, 'New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?' (2019), Volume 11/Number 1, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2019_01_int_4> (accessed 26 May 2021).

[103] A. Ballancin and F. Cannas, 'The 'DAC 6' and Its Compatibility with Some of the Founding Principles of the European Legal System(s)' (2020), Volume 29/Issue 3, EC Tax Review, pp. 117-125, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/29.3/ECTA2020038> (accessed 26 May 2021), p. 117.

[104] A. Bianco, 'DAC 6 and the Challenges Arising from Its Disclosure Obligation' (2021), Volume 30/Issue 1, EC Tax Review, pp. 8 – 23, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/30.1/ECTA2021002> (accessed 26 May 2021), pp. 15 and 16.

6 could open up for tax competition. Arguments are brought forward in the legal doctrine that minimum or maximum penalties could be included in the Code of Conduct for Business Taxation to avoid a potential race to the bottom.[105]

Another important part of DAC 6 is the automatic exchange between Member States. Art. 8ab (13) of the DAC regulates that whenever information is filed in one Member State shall communicate the information by way of automatic exchange with the other competent authorities of all the Member States. The information that needs to be exchanged is specified in Art. 8 (14) of the DAC. For example, a summary of the content of the reportable cross-border arrangement must be exchanged according to Art. 8 (14) (c) of the DAC. Furthermore, details of the hallmarks that make the arrangement reportable and the value of the reportable cross-border arrangement are different points of information that need to be exchanged between Member States according to Art. 8 (14) (b) of the DAC and Art. 8 (14) (f) of the DAC. While there are many important aspects of DAC 6 the notification obligation stands out due to the fact that it is essential in order for the objectives of the DAC 6 to be achievable. The next section will cover how the notification obligation.

3.3 The Notification Obligation

As previously stated, Art. 8ab of the DAC was also introduced by DAC 6. One of the core components of DAC 6is the notification obligation which will be developed in this section. As showed in the previous section the existence of a reportable cross-border arrangement is assessed by the main benefit test along with the existence of certain hallmarks, and in some cases the existence of hallmarks without the main benefit test. There are legal questions regarding the existence of a reportable cross-border arrangement, such as lack of clarity in certain assessments by intermediaries, the issue for this thesis is not the existence of a reportable cross-border arrangement or not. Although these issues will be left out since the thesis deals with the issue of the notification obligation and the LPP.

The scope of the notification obligation is found in Art. 8ab (1) of the DAC. It poses obligations on Member States to take necessary measures to require intermediaries to file information that is within their knowledge, possession, or control on reportable cross-border arrangements with the competent authorities within 30 days. The obligation for the intermediary to report starts from one of three situations and it is the situation that occurs first that starts the clock for the 30-day timetable to report. The first situation is found in Art. 8ab (1) (a) of the DAC and it is on the day after the reportable cross-border arrangement is made available for implementation. The second situation is found in Art. 8ab (1) (b) of the DAC and it is on the day after the reportable cross-border arrangement is ready for implementation. The third and final situation is found in Art. 8ab (1) (c) of the DAC and the obligation to report is when the first step in the implementation of the reportable cross-border arrangement has been made. Art. 8ab (1) of the DAC contains additional obligations for tax advisors and lawyers which will be developed in section 3.3.

The notification obligation in DAC 6 is aimed at information that is within intermediaries'

[105] A. Ballancin and F. Cannas, 'The 'DAC 6' and Its Compatibility with Some of the Founding Principles of the European Legal System(s)' (2020), Volume 29/Issue 3, EC Tax Review, pp. 117-125, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/29.3/ECTA2020038> (accessed 26 May 2021), p. 125.

knowledge, possession, or control. The recitals do not give any information on how these prerequisites are to be interpreted. What is clear is that there is no obligation for an intermediary to actively investigate for reportable information that the intermediary does not hold in the first place.[106] The notification obligation seems to be very broad because any information that falls within knowledge, possession or control falls under the notification obligation. With the broad prerequisite, one problematic situation occurs, which is that aggressive tax planning has become more and more complex.[107]

What constitutes knowledge of an aggressive tax planning arrangement is an interesting question. Is it the knowledge that something is going on in terms of aggressive tax planning or knowledge of the transactions in the arrangement? Reasonably there must be knowledge of transactions involved. It seems that knowledge of a reportable cross-border arrangement can only really occur when possession or control is at hand. It is when an intermediary can, for example, verify transactions that knowledge is met. However, the reasoning is purely theoretical, and the situation can probably occur that knowledge is met without possession or control.

Some guidance of how knowledge is to be interpreted could be drawn from what needs to be reported under DAC 6. One issue here is that DAC 6 is silent on what information that intermediaries need to give to the competent authority. Art. 8ab (12) of the DAC only states that information on reportable cross-border arrangements. However, DAC 6 gives specifics on what competent authorities need to include in their automatic exchange in Art. 8ab (14) of the DAC. The lack of clear articles in DAC 6 regarding what information to be filed could lead to different domestic implementations.[108]

Arguments could be found that what the competent authorities in the Member States share under automatic exchange is based upon what is given to them by intermediaries. Since it is given to them by intermediaries it gives clues to what information an intermediary should file.[109] In Art. 8ab (14) (c) of the DAC it is evident that a summary of the reportable cross-border transaction needs to be notified. The summary shall contain a summary of the content of the reportable cross-border arrangement as well as a description in abstract terms of the relevant business activities and arrangements.

The content of the summary could give guidance to when something is within an intermediary's knowledge. If an intermediary does not have the relevant information in order to provide a summary, then the knowledge prerequisite could not be met. It could also be the case that Member State law requires a more detailed description of what a summary should

[106] B. Peeters and L. Vanneste, 'DAC 6: An Additional Common EU Reporting Standard?' (2020), Volume 12/Number 3, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2020_03_e2_1> (accessed 26 May 2021), footnote 144.

[107] Recital 2 of the preamble to 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 [2018] OJ L 139.

[108] B. Peeters and L. Vanneste, 'DAC 6: An Additional Common EU Reporting Standard?' (2020), Volume 12/Number 3, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2020_03_e2_1> (accessed 26 May 2021), chapter 3.1.2.

[109] B. Peeters and L. Vanneste, 'DAC 6: An Additional Common EU Reporting Standard?' (2020), Volume 12/Number 3, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2020_03_e2_1> (accessed 26 May 2021), chapter 3.1.2.

contain. It is evident that the information that tax authorities need to share is very broad.[110] It also seems like the report obligation in DAC 6 is broad since it requires intermediaries to report information that is within their knowledge, possession, or control.

There could also be the cast that an intermediary has to file information on reportable cross-border arrangements in multiple Member States. The situation is solved in Art. 8ab (3) of the DAC where the obligation to file information is going to be filed only in the Member States that meets one of the criteria first. Furthermore, Art. 8ab (4) of the DAC states that an intermediary shall be exempted from the notification obligation if the intermediary could prove that the same information has been filed in another Member State. It has been argued in the legal doctrine that the DAC 6 limits the economic freedom of taxpayers and tax advisors in an excessive way by having an indiscriminate deterrent effect on the tax planning market, both legal and aggressive.[111]

DAC 6 is depending on reporting and the success of DAC 6 rests upon the notification obligation. Since DAC 6 is depending on reporting a central element of DAC 6 is the effectiveness of the notification obligation. If the reporting does not work as intended there is a risk that there will be a restriction on other aims with the Directive which would lead to a less favorable exchange of information.[112] Regarding the notification obligation, the DAC puts an obligation on both intermediaries and taxpayers. It is the intermediaries that are in the center of the reporting obligation and they have a key role in DAC 6.[113]

3.4 DAC 6 Additional Reporting Requirements for Certain Intermediaries

One idea behind the DAC 6 is to deter both taxpayers and tax advisors from implementing structures that would trigger the reporting obligation in the first place.[114] According to Art. 8ab (1) of the DAC, there is an additional burden to report for tax advisors. Art. 3 (21) of the DAC singles out persons who have the relevant expertise to design, market, organize and make available cross-border arrangements. A tax advisor would in most cases fall under Art. 3 (21) of the DAC. Art. 8ab (1) of the DAC, in turn, sets a different timetable for persons that fall under the definition given in Art. 3 (21) of the DAC. A tax advisor or a lawyer needs to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance, or advice.

Another highly important part of DAC 6 is that of marketable arrangements. The definition of

[110] B. Peeters and L. Vanneste, 'DAC 6: An Additional Common EU Reporting Standard?' (2020), Volume 12/Number 3, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2020_03_e2_1> (accessed 26 May 2021), chapter 3.1.2.
[111] C. Weffe, 'Mandatory Disclosure Rules and Taxpayers' Rights:
Where Do We Stand?' (2021), Volume 4/Number 1, International Tax Studies, Journal Articles & Opinion Pieces IBFD (accessed 26 May 2021), chapter 6.
[112] A. Bianco, 'DAC 6 and the Challenges Arising from Its Disclosure Obligation' (2021), Volume 30/Issue 1, EC Tax Review, pp. 8 – 23, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/30.1/ECTA2021002> (accessed 26 May 2021), p. 9.
[113] A. Ballancin and F. Cannas, 'The 'DAC 6' and Its Compatibility with Some of the Founding Principles of the European Legal System(s)' (2020), Volume 29/Issue 3, EC Tax Review, pp. 117-125, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/29.3/ECTA2020038> (accessed 26 May 2021), p. 119.
[114] D. Blum & A. Langer, 'At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law - Part 2' (2019), Volume 59/Number 7, European Taxation, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2019_07_e2_1> (accessed 26 May 2021), chapter 5.2.

a marketable arrangement was introduced in DAC 6 and is found in Art. 3 (24) of the DAC. In essence, a marketable arrangement is a cross-border arrangement that is either designed, marketed, ready for implementation, or made available for implementation without the need for substantial customization. For these marketable arrangements, Art. 8ab (2) of the DAC obligates Member States to ensure that a periodic report is made by the intermediary every three months.

The report should contain any new reportable information as it is stated in of Art. 8ab (14) (a), (d), (g) and (h) of the DAC. For example, the obligation entails that intermediaries have to give out information regarding clients. DAC 6 is structured in a way that the burden to report is always placed upon someone. Arguments in the legal doctrine use Art. 8ab (14) of the DAC as a guide for what information intermediaries have to give which extends to situations where the information reported must contain other intermediaries involved.[115] The DAC 6 is structured in a way that information always needs to be reported regarding reportable cross-border arrangements which inevitably will call into question the effectiveness of the LPP.

3.5 Someone Always Files a Report

Art. 8ab (5) of the DAC entails that an intermediary can use LPP in order to not file information on a reportable cross-border arrangement if the reporting would breach the LPP under that Member States law. The recently mentioned article is included in DAC 6 so that the LPP is protected.[116] The intermediary that benefits from LPP must then notify other intermediaries, or the relevant taxpayer, that they have reporting obligations. The definition of the relevant taxpayer is found in Art. 3 (22) of the DAC which states that any person that to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement. Intermediaries are, according to Art. 8ab (5) of the DAC, only entitled to a waiver due to LPP if they are within the limits of the LPP within the national laws that define the profession.

Art. 8ab (6) of the DAC states that Member States shall take the necessary measures to ensure that whenever an intermediary notifies that they hold LPP, or if there is no intermediary, the relevant taxpayer or any other intermediary, that does not hold LPP, has the obligation to report a cross-border arrangement. In this way, the DAC 6 is structured in such a way that there is always an obligation to report a cross-border arrangement.

The argument in the legal doctrine is that the freedom not to self-incriminate sets limits on the obligation to report.[117] Another argument in the legal doctrine is that intermediaries are left with a lot of work in order to be in compliance with DAC 6 which will put a lot of pressure on certain intermediaries. The amount of work could for some intermediaries lead to

[115] B. Peeters and L. Vanneste, 'DAC 6: An Additional Common EU Reporting Standard?' (2020), Volume 12/Number 3, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2020_03_e2_1> (accessed 26 May 2021), chapter 3.1.2.
[116] A. Ballancin and F. Cannas, 'The 'DAC 6' and Its Compatibility with Some of the Founding Principles of the European Legal System(s)' (2020), Volume 29/Issue 3, EC Tax Review, pp. 117-125, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/29.3/ECTA2020038> (accessed 26 May 2021), p. 120.
[117] M. Schilcher, K. Spies and S. Zirngast, *Chapter 9: Mutual Assistance in Direct Tax Matters* in *Introduction to European Tax Law on Direct Taxation* (M. Lang et al eds., 6th edn, Linde 2020), p. 269 and 280.

reorganizations of their businesses.[118]

It is with this background that the question of what LPP entails, and what it should be, is interesting. Evidently more and more tools are being added to the state's toolbox in order to combat tax evasion and aggressive tax planning. The question of LPP could also be viewed from a different perspective which is that of taxpayer's rights and the right to taxpayer confidentiality as discussed in the legal doctrine.[119] It is the Member States laws regarding the LPP that guides the intermediary's right to waiver from filing information on a reportable cross-border arrangement. Since it is Member State laws that guide the LPP there is a question if the Directive achieves harmonization. There could be differences in how the LPP is regulated in each individual Member State and this is why the Charter of Fundamental Rights is important as it is primary EU law.

What's more interesting regarding DAC 6 is that recital 18 states that the Directive respects the fundamental rights and observes the principles recognized by the Charter of Fundamental Rights of the European Union. It seems odd that it is the legislator that assesses whether a Directive is in line with fundamental rights. It seems more fitting that it is up to the Courts to decide if it is in line with fundamental rights or not.

However, the key issue surrounding Art. 8ab (5) of the DAC is that it puts an obligation on intermediaries to notify other intermediaries which entails that the notification to another intermediary could be a breach of LPP. One could wonder what effect LPP entails between an advisor and client if the advisor is under obligation to notify other advisors of a reportable cross-border transaction. As always, the distinction of what the law is and what it could or should be is important. What is evident is that the proposed amendment had a different wording than the DAC 6 that was enacted. The proposed amendment is interesting to analyze since it dealt with the issue of LPP and who should have obligation to notify. Arguably, it dealt with these subjects in a better way.

3.6 The Proposed Amendment

The key difference between DAC 6 and the proposed amendment is that while DAC 6 puts an obligation for intermediaries to notify other intermediaries the proposed amendment shifts the burden to the taxpayer. Art. 8aaa (2) of the proposed amendment to the DAC entailed that each Member State should allow intermediaries to use LPP in order to not file information regarding a reportable cross-border arrangement.[120] When the LPP has been used by an intermediary the obligation to report the information on the reportable cross-border transaction falls on the taxpayer. The intermediary is under obligation to inform the taxpayer

[118] A. Bianco, 'DAC 6 and the Challenges Arising from Its Disclosure Obligation' (2021), Volume 30/Issue 1, EC Tax Review, pp. 8 – 23, <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/30.1/ECTA2021002> (accessed 26 May 2021), p 9 and 23.

[119] N. Čičin-Šain, 'New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?' (2019), Volume 11/Number 1, World Tax Journal, Journal Articles & Opinion Pieces IBFD, <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/wtj_2019_01_int_4> (accessed 26 May 2021), chapter 3.1.

[120] Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 21 June 2017, COM (2017) 335 final.

that they have an obligation to file information Thus, there is no obligation for an intermediary to notify another intermediary. The proposed amendment puts more of a compliance burden on the taxpayer than with intermediaries compared to DAC 6.

The reasoning behind the idea to shift the burden to the taxpayer in the proposed amendment was that certain arrangements could be designed in-house which would entail that there would be no intermediary. It was also argued that the reporting obligation would not be enforceable upon an intermediary due to LPP. In the two mentioned situations it would be necessary to place the disclosure obligation on the taxpayer that benefited from the arrangement.[121] It does seem like the proposed amendment was better suited for intermediaries in terms of the reporting obligation and the compliance burden. It also seems like the proposed amendment would have been a better fit for intermediaries in terms of LPP.

Following the legal procedure and the different rounds of opinions, it is difficult to ascertain where and for what reasons the proposed Art. 8aaa (2) of the proposed amendment to the DAC was not finally agreed upon. The proposed text from the Commission was altered before the European Parliament. In the European Parliament, it was added in Amendment 22 that whenever the reporting obligation shifted to the taxpayer then the intermediary was obligated to inform the taxpayer about the obligation in writing. The intermediary should then keep an acknowledgment of a receipt signed by the taxpayer. The taxpayer was then under obligation to report the information on the reportable cross-border arrangement to the competent authorities.[122] The final text of Art. 8ab of the DAC was not added in the European Parliament which means it was added when the amendment reached the Council of the European Union.

In the discussions and preparatory rounds before the Council the LPP was discussed. The argument was that some intermediaries, due to legal constraints related to the domestic rules of their profession, would not be able to report. Many stakeholders, leading up to the enactment of the amendment, stressed the need to uphold LPP in order to facilitate full and frank disclosure between those who need legal advice and those who give legal advice. It was argued too important to safeguard this disclosure both from a public interest point of view and for the taxpayer. Furthermore, in some cases, the client has the right to dismiss the LPP. When the LPP is dismissed by the client then the intermediary could report the cross-border transaction. If there was no waiver by the client then, and only then, the obligation to report would shift to the client. The argument was that these two scenarios would ensure that the LPP is not infringed upon and the reporting of a cross-border transaction is secured.[123]

Within EU law the legal document referred to poses no real value as a source of law and could not give rise to any legal effects. However, the argumentation is interesting. Firstly, it argues that LPP is upheld as long as no waiver has been given by the client. Secondly, it mentions nothing about the fact that an intermediary is required to notify another

[121] Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 21 June 2017, COM (2017) 335 final.
[122] See Amendment 22 in the website <https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/03-01/0050/P8_TA(2018)0050_EN.pdf> (accessed 26 May 2021).
[123] Commission Staff Working Document <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10582_2017_ADD_2&from=EN> (accessed 26 May 2021).

intermediary. The LPP is a cornerstone of practices that provides advisory services. One could go as far and argue that the LPP is crucial to the legal profession and to take it away would dilute the role of the lawyer. Furthermore, the client's trust in the advisor is largely depending upon the confidential treatment of the information provided to the advisor. The quality of the advisory service is also depending on good information.[124] Again, it does seem like a better solution to shift the reporting obligation to the taxpayer when the intermediary is bound by LPP.

The question remains unanswered if the obligation on an intermediary to notify another intermediary is in line with the fundamental rights given in the Charter. As mentioned in the introduction one important case that is pending is *Orde van Vlaamse Balies and Others* which deals with this subject. The following chapter will discuss and analyze the case.

[124] C. Weffe, 'Mandatory Disclosure Rules and Taxpayers' Rights:
Where Do We Stand?' (2021), Volume 4/Number 1, International Tax Studies, Journal Articles & Opinion Pieces IBFD (accessed 26 May 2021), chapter 4.2.1.

4. Do We Have a Collision?

4.1 Background

The DAC 6 is a recently enacted Directive, which entails that there is not so much case law. Although, as mentioned in the research question the case *Orde van Vlaamse Balies and Others* deals with the legal question of whether notifying another intermediary may be a breach of LPP itself. The case is yet to be decided by the CJEU. However, the pending case does contain some interesting parts worth analyzing.

The case derives from a complaint lodged by the Orde van Vlaamse Balies which is the Flemish Bar council and the Belgian Association of Tax Lawyers. The case in the national court regarded suspension and annulment of national decrees enacted as a result of DAC 6 and the mandatory automatic exchange of information. The case is referred by a Belgian court and the legal issue is whether if a lawyer who wishes to invoke LPP and who subsequently has to notify other intermediaries of their reporting obligations is in line with Arts. 7 and 47 of the EU Charter. The question referred to the Court is basically if Art. 8ab (5) of the DAC infringe the right to a fair trial as guaranteed by Art. 47 of the EU Charter even in the absence of pending legal proceedings when the reporting obligation would the LPP under the national Member State law?[125]

The argument brought forward by the complaining party is that it is impossible to notify another intermediary of the reporting obligation without breaking the waived LPP. As it is a pending case that will deal with a very important question of law it is possible to conclude that the legal area lacks clarity. It is not possible to fully conclude how the law is as of today which brings questions of legal certainty. From a summary of the request for a preliminary ruling, the following can be found. A lawyer's professional secrecy is an essential component of the right to respect for private life and for the right to a fair trial. The national law at hand and the case-law of the referring court the information about clients that the lawyers are required to pass on to the competent authorities is protected by LPP as long as the information relates to either activity related to the lawyer's tasks in a legal defense or the provision of legal advice.[126] The national case law seems to be very much in line with the arguments brought forward in the legal doctrine as showed in chapter 3.

The arguments brought forward by the Flemish Government are also interesting. They argue that there is no problem when the other intermediary is the client of the lawyer-intermediary or when the client has put him in touch with the lawyer. When the lawyer is not working with the other intermediary the lawyer would also be unaware of other intermediaries' existence and therefore the reporting obligation would shift to the taxpayer.[127]

4.2 Analysis of the Case *Orde van Vlaamse Balies and Others*

Firstly, it is important that a case regarding DAC 6 will be decided in the light of fundamental freedoms since recital 18 of DAC 6, which states that the Directive respects fundamental

[125] Pending case C-694/20 Orde van Vlaamse Balies and Others.
[126] Pending case C-694/20 Orde van Vlaamse Balies and Others, pp. 3 and 4.
[127] Pending case C-694/20 Orde van Vlaamse Balies and Others, p. 3.

rights, is questionable, at best. The case is interesting and it will require a balancing act for the Court between a number of different interests. The area of direct taxation within EU law is mainly directed at combatting tax avoidance and aggressive tax planning which is one important issue for the states. On the other hand, taxation is not voluntary which adds an element of power projection from states towards citizens regarding taxation which actualizes fundamental freedoms and human rights for individuals. Thus, the Court has to balance the interest of States towards fundamental freedoms for individuals in relation to state power. In this sense *Orde van Vlaamse Balies and Others* is an important case.

Secondly, as mentioned in chapter two the LPP is not harmonized within EU law, which makes the pending case interesting from a harmonizing perspective. If the Court would reach the conclusion that the notification obligation intermediaries have according to DAC is incompatible with Arts. 7 and 47 of the EU Charter, it could have far-reaching effects. The Charter is categorized as primary EU law which entails that national provisions must conform with the Charter. However, the Court might take a cautious approach and not give any general principle as to how and if LPP and Art. 8ab (5) of the DAC is compatible or not. The pending case does have the potential to be an important precedent regarding the fundamental freedoms given in the Charter and the DAC.

The aim of the thesis was to investigate how the obligation that lawyer-intermediaries have to notify relates to the fundamental principle of LPP and if this obligation respects this principle. The legal sources do not provide a clear answer to this question. It seems like case law will be important in order to get a clear answer to the research question and *Orde van Vlaamse Balies and Others* is destined to be decisive. As stated, and showed throughout the thesis, the area of law is largely characterized by different interests. Furthermore, this particular area of law is open to arguments both in favor for DAC 6 being in compliance with the fundamental freedoms as well as not being in compliance with the LPP as given in the fundamental freedoms.

The arguments against DAC 6 being in compliance with the LPP and the fundamental freedoms seems to be more rooted in a perception, or opinion, of what the LPP should be, rather than what it is. As showed in the thesis, the LPP is fundamental to the legal profession. It is a reasonable argument that the LPP is voided of its effect if an intermediary is required to notify tax authorities, and thus, a stricter approach is necessary regarding LPP. The strict approach would entail that the LPP would be a higher norm that cannot be diluted due to competing State interests. Another argument could be that the increased compliance burdens and administrative requirements are a step in the direction that intermediaries are beginning to do the job for the tax authorities. Furthermore, it is important that there is a limit within the legal system which entails that states in their pursuit of stopping tax evasion and aggressive tax planning do not obstruct through heavy regulatory compliance burdens sound business structuring. However, the arguments seem, as previously stated, more rooted in a perception of what the law should be.

The conclusion that DAC 6 does not entail a breach of the LPP seems more likely. Chapter 2 in this thesis showed the LPP in previous case law has been limited in a way that it is activated if legal proceedings have been initiated. DAC 6 is not regulating areas where legal proceedings have been initiated which entails that the LPP is not breached. The Court could,

due to legal certainty, take the same approach to the LPP in *Orde van Vlaamse Balies and Others* as in similar case law by the Court. Therefore, the notifying obligation that intermediaries have which entails that an intermediary must notify another intermediary is not a breach of the LPP. However, it is important to underline that this is an area of law where the answers of what the law is not clear until case law has had its say.

5. Concluding Remarks

This thesis has analyzed a research question that is unclear and has problems with practical applicability. The area is in need of clear guidance in the legal sources in order to clarify some of the practical problems with the legislation. As the thesis shows there are competing interests that are starting to emerge where the long-fought battles by states in their effort to stop tax avoidance and aggressive tax planning and on the other hand there are fundamental freedoms for taxpayers. It will be interesting to follow the jurisprudence in the future because at a certain point there will be a line where the interest of the state does not trump the interest of the taxpayer. Where this line will be drawn remains to be seen.

What can be stated is that uncertainty in the legal system is negative. Therefore, a deciding case, as *Orde van Vlaamse Balies and Others*, is important. Independent of which direction the Court will go in the final judgment it is clear that an answer that brings certainty is what is most needed. The most important of all is that an answer to a difficult question is given. A decision will clear some of the problems with the practical applicability of DAC 6 which is an important step.

The proposed amendment which was discussed in chapter 3 where the notification obligation is shifted between the intermediary and the taxpayer seems in the author's opinion as a more appropriate and better solution to article 8ab (5) DAC 6. However, it is unlikely that a change will be enacted. As to *Orde van Vlaamse Balies and Others* it would be good with the Court taking the perspective of taxpayer rights, as the LPP, into serious consideration since a dilution of the LPP would affect the legal profession in a serious way.

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