



## FOR THE CJEU, THE DAC 6 DIRECTIVE INFRINGES THE PROTECTION OF LEGAL PROFESSIONAL PRIVILEGE

In the judgment dated 8 December 2022 (case C-694/20, *Orde van Vlaamse Balies*), the Court of Justice of the European Union (“CJEU”) stated the invalidity of article 8ab(5) of Directive 2011/16/EU, as amended by Directive (EU) 2018/822 (the so called “DAC 6 Directive, that provide for an obligation to report any potentially aggressive tax-planning cross-border tax arrangements to the competent authorities).

In particular, in this judgement, relating to the DAC 6 Belgian transposition law, the CJEU expressed its view on the legal professional privilege for lawyer acting as an intermediary, in particular with respect to the reporting obligation where this latter cooperates with another intermediary.

In such a case, provision set forth by article 8ab(5) of Directive applies, according to which *«each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations».*

Based on CJEU approach, such provision shall be considered as invalid as it imposes, on a lawyer acting as an intermediary and is exempted from the reporting obligation due to the legal professional privilege, to notify without delay other intermediaries of their reporting obligations, contrary to respect for communications between a lawyer and his or her client, as guaranteed in Article 7 of the Charter of Fundamental Rights of the European Union, according to which *«everyone has the right to respect for his or her private and family life, home and communications».*

In this respect, the CJEU notes that *«individuals who consult a lawyer can reasonably expect that their communication is private and confidential (ECtHR, judgment of 9 April 2019, Altay v. Turkey). Therefore, other than in exceptional situations, those persons must have a legitimate expectation that*



*their lawyer will not disclose to anyone, without their consent, that they are consulting him or her». Conversely, the obligation laid down in article 8ab(5) «entails that other intermediaries become aware of the identity of the notifying lawyer-intermediary, of his or her assessment that the arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement», by implicating an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter.*

Therefore, based on this judgement, a lawyer, that is exempted from the reporting obligation for the DAC 6 Directive purposes due to the legal professional privilege, will not be able to notify other intermediaries involved in a cross-border arrangement of their reporting obligations, since he will infringe the secrecy of the legal consultation rendered to its client, as guaranteed in Article 7 of the Charter of Fundamental Rights of the European Union.

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