

## European Court of Justice says article 8ab(5) of Directive 2011/16 is invalid in the light of the Charter of Fundamental Rights

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (“Directive 2011/16” or “DAC3”), repealing Directive 77/799/EEC and amended by Council Directive (EU) 2018/822 of 25 May 2018 (“Directive 2018/822” or “DAC6”) establishes a system of cooperation between the national tax authorities of the member states and lays down the rules and procedures to be applied when exchanging information for tax purposes.

DAC6 introduces an obligation to report any potentially aggressive tax-planning cross-border tax arrangements to the competent authorities and applies to professionals such as tax advisers, accountants and lawyers.



The Belgian Constitutional Court asked the Court of Justice whether privacy and procedural rights under Articles 47 and 7 of the Charter of Fundamental Rights (the “Charter”) are infringed if information must be shared further to the reporting obligations set out in DAC3 and introduced by DAC6, where the ‘tax intermediary’ in question is a lawyer, and the reporting requirement, particularly with respect to third party intermediaries, violates lawyer-client privilege.

Article 7 of the Charter protects the confidentiality of all correspondence between individuals and provides a specific protection to exchanges between lawyers and their clients.

Articles 8ab5 and 6) of DAC3 and introduced by DAC6 provide that a lawyer-intermediary is exempt from the reporting obligation, where he or she is bound by national law to legal professional privilege but that he or she has to notify without delay other intermediaries who are not his or her clients of their reporting obligations. In this case, the obligation to file information on a reportable cross-border arrangement lies with the other notified intermediary, or, if there is no such intermediary, with the relevant taxpayer.

The European Court of Justice considered, in its decision C-694-20 that the obligation for a lawyer-intermediary subject to legal professional privilege to notify other intermediaries of their reporting obligations necessarily implies that those other intermediaries become aware of the identity of the lawyer-intermediary. In those circumstances, the Court of Justice highlighted that the notification requirement laid down in Article 8ab(5) , interferes with the right to respect for communications between lawyers and their clients guaranteed in Article 7 of the Charter.

Thus, the European Court of Justice said that article 8ab(5) is invalid in the light of Article 7 of the Charter.

Please see our website and social media accounts for more information on our services or reach out to our team to discuss your projects.