

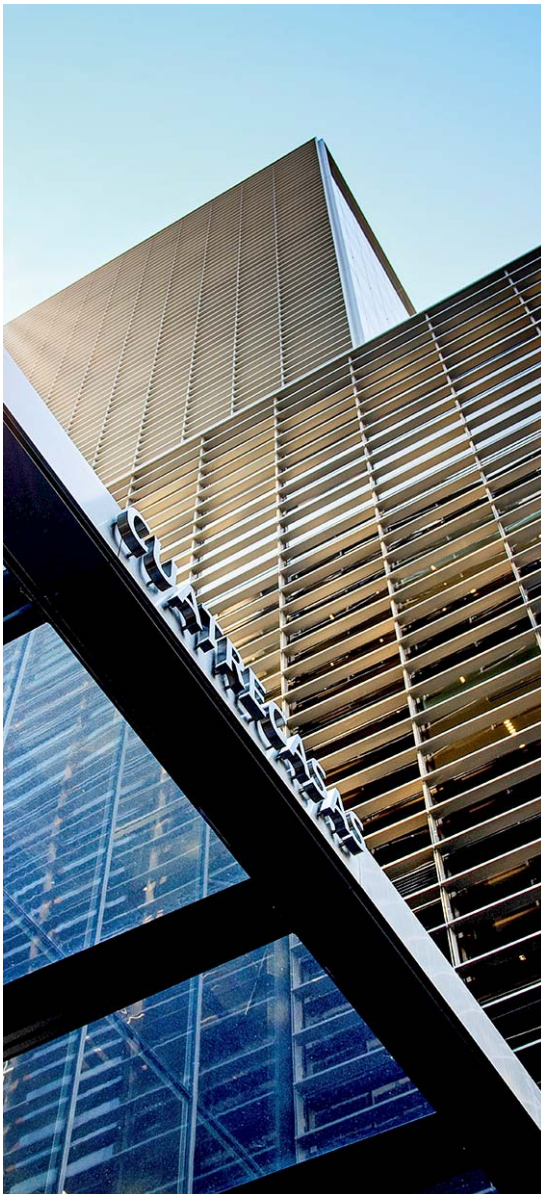
---

# CJEU PARTIALLY ANNULS DAC 6

## Obligation for lawyers subject to legal professional privilege to notify other intermediaries is illegal

Spain - Legal flash

December 19, 2022



---

### Key aspects

- > The obligation to notify other intermediaries under article 8ab(5) of the DAC 6 Directive (DAC 6) imposed on lawyers exempt from disclosing information on crossborder tax planning arrangements due to legal professional privilege entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in article 7 of the Charter of Fundamental Rights of the European Union (EU).
- > Although combating aggressive tax planning arrangements and preventing the risk of tax avoidance and evasion are objectives of general interest that could protect that interference, the mentioned obligation cannot be considered strictly necessary to attain those objectives.
- > The provisions of internal law transposing in Spain the obligation to notify between intermediaries exempt from reporting due to professional privilege and the other intermediaries must not be required of lawyers.



The Court of Justice of the European Union (“CJEU”) issued [judgment of December 8, 2022 \(case C-694/20\)](#), declaring contrary to European Union law the reporting obligation between intermediaries relating to waiver of the obligation of communication due to professional privilege under Directive (EU) 2018/822 of the Council of May 25, 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable crossborder arrangements, commonly known as DAC 6.

---

### Subject of controversy and main proceedings

- The controversial rules that the CJEU analyzed are article 8ab(5) and article 8ab(6) of DAC 6:
  - Article 8ab(5) establishes that the Member States must require intermediaries that are exempt from the reporting obligation due to professional privilege to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations.
  - Article 8ab(6) establishes that when the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver due to professional privilege under paragraph 5, the obligation to file information on a reportable crossborder tax planning arrangement lies with the other notified intermediary, or, if there is no such intermediary, with the relevant taxpayer.
- The judgment resolves a question the Belgian Constitutional Court referred to the CJEU for preliminary ruling in relation to an internal lawsuit started by the Flemish Bar Association, the Belgian Association of Tax Lawyers and three lawyers against the Flemish government in which the applicants had requested that certain provisions of Belgian legislation transposing DAC 6 be rendered invalid.
- In their statement, the applicants stated that it was impossible for them to meet the obligation to notify other intermediaries established by the mentioned rules in cases in which they were exempt from the obligation to file information on a crossborder tax planning arrangement due to professional privilege, because the content of that communication related to information they obtained in the course of the essential activities of their profession, namely, representing or defending clients in legal proceedings and giving legal advice, which are covered by professional privilege, regardless of whether the mentioned communication was to be given to their client or to another intermediary.
- They also argued that this reporting obligation to intermediaries or the interested taxpayer established under DAC 6 was not necessary to guarantee that the tax authorities were informed of crossborder tax planning arrangements, given that clients can themselves inform the other intermediaries and request them to meet their reporting obligation.



- In this context, the Belgian Constitutional Court referred to the CJEU for preliminary ruling whether the reporting obligation to other intermediaries imposed by article 8ab(5) of DAC 6 on lawyers exempt from reporting due to legal professional privilege is contrary to articles 7 and 47 of the EU Charter of Fundamental Rights, which recognize, respectively, the right to respect for private life in relation to communications and the right to a fair trial and by an impartial tribunal.

---

### CJEU's opinion and conclusions

- The CJEU upheld the applicants' arguments, giving priority to primary law (Charter of Fundamental Rights) over secondary law (DAC 6), and concluding that the obligation to inform other intermediaries imposed by article 8ab(5) of DAC 6 interferes with the right to respect for communications between lawyers and their clients guaranteed in article 7 of the Charter of Fundamental Rights, and that this interference is twofold:
  - (i) This obligation necessarily means that the other intermediaries receiving the communication from the lawyer exempt from the obligation to inform due to legal professional privilege will be aware of the identity of the lawyer making the communication, of his or her assessment that the matter in question is subject to communication, and that the lawyer has been consulted on the matter.
  - (ii) The third-party intermediaries that receive the communication will disclose the identity of the lawyer-intermediary and of his or her having been consulted to the tax authorities when those third-party intermediaries meet the reporting obligation themselves.
- Regarding whether those interferences may be justified based on objectives of general interest, the CJEU considered that, although the fight against aggressive tax planning and the prevention of the risk of tax avoidance and evasion are objectives of general interest that could protect that interference, the reporting obligation cannot be considered necessary to attain those objectives because the reporting obligation imposed on other intermediaries not subject to professional privilege and, in the absence of those intermediaries, the obligation imposed on the relevant taxpayer, guarantees, in principle, that the tax authorities are informed of the crossborder tax arrangements subject to the reporting obligation.
- The CJEU concluded that article 8ab(5) of DAC 6 is invalid in light of article 7 of the Charter of Fundamental Rights where its application by the Member States has the effect of requiring a lawyer acting as an intermediary and that is subject to legal professional privilege to notify, without delay, any other intermediary who is not his or her client, of their reporting obligations.



---

## Effect on Spanish law

- > The provisions of internal law transposing in Spain the reporting obligation between intermediaries exempt from reporting due to professional privilege and the other intermediaries or the interested taxpayers are section 1 of the 24th additional provision of the General Tax Act, its implementing regulation contained in article 45.4.b.1 of the Regulation on Tax Application, and the resolution of the tax authorities' tax management department of April 8, 2021, approving the official communication letters between intermediaries.
- > Due to the EU provision being declared illegal, it can be interpreted that the mentioned regulations are also illegal and, therefore, the lawyers that are exempt from the reporting obligation due to legal professional privilege should not be required to notify of that exemption, in a legally valid manner, to the other intermediaries participating in the crossborder tax planning arrangements subject to communication.
- > The other provisions of DAC 6 and the internal transposed law remain valid and, therefore, the obligations to notify information regarding crossborder tax planning arrangements will continue to apply in their current wording.

---

For additional information, please contact our [\*Knowledge and Innovation Group\*](#) lawyers or your regular contact person at Cuatrecasas.

©2022 CUATRECASAS

All rights reserved.

This document is a compilation of legal information prepared by Cuatrecasas. The information and comments in it do not constitute legal advice.

Cuatrecasas owns the intellectual property rights over this document. Any reproduction, distribution, assignment, or any other full or partial use of this document is prohibited, unless with the consent of Cuatrecasas.

