



PRESS RELEASE No 198/22

Luxembourg, 8 December 2022

Judgment of the Court in Case C-694/20 | Orde van Vlaamse Balies and Others

Combatting aggressive tax planning: the obligation for a lawyer to inform other intermediaries involved is not necessary and infringes the right to respect for communications with his or her client

All the other intermediaries involved in such planning, and the taxpayer him- or herself, are subject to that reporting obligation, which makes it possible to ensure that the tax authorities are informed

An EU Directive¹ provides that all intermediaries involved in potentially aggressive cross-border tax-planning (arrangements which could lead to tax avoidance and evasion) are required to report them to the competent tax authorities. That obligation concerns all those who participate in the design, marketing, organisation or management of the implementation of that planning. All those who provide assistance or advice in relation to that planning, or in the absence of such persons, the taxpayer him- or are also covered. However, each Member State may grant intermediaries a waiver from that obligation where it would breach legal professional privilege protected under its national law. In such circumstances, lawyer-intermediaries are however required to notify without delay any other intermediary, or the relevant taxpayer, of their reporting obligations vis-à-vis the competent authorities.

The Flemish decree transposing that directive thus provides that, when an intermediary involved in cross-border tax planning is bound by legal professional privilege, he or she must inform the other intermediaries that he or she cannot make that report him- or herself.

Two lawyers' professional organisations brought actions before the Belgian Constitutional Court. In their submission, it is impossible to provide information to other intermediaries without breaching the legal professional privilege by which lawyers are bound. The Belgian Constitutional Court seeks an answer from the Court of Justice in that regard.

In its judgment today, the Court of Justice recalls first of all that Article 7 of the Charter of Fundamental Rights of the European Union protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. That specific protection afforded to lawyers' legal professional privilege is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. That role requires that any individual is able to seek advice freely from his or her lawyer, a principle recognised in all Member States. Legal professional privilege also covers legal consultation, both with regard to its content and its existence. Other than in exceptional situations, clients must have a legitimate expectation that, without their consent, their lawyer

¹ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive (EU) 2018/822 of 25 May 2018 (OJ 2018 L 139, p. 1).

will not disclose to anyone that they are consulting him or her.

However, the obligation laid down by the Directive ² for a lawyer-intermediary subject to legal professional privilege to notify without delay other intermediaries of their reporting obligations implies that those other intermediaries become aware of the identity of the lawyer-intermediary. They also become aware of his or her analysis that the tax arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement.

That **obligation to notify 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**. Given that other intermediaries are required to inform the competent tax authorities of the identity of the lawyer and of his or her having been consulted, that obligation also leads indirectly to a second interference with the right to legal professional privilege.

The Court then examines whether those interferences may be justified, in particular whether they meet objectives of general interest recognised by the EU and whether they are necessary for the pursuit of those objectives.

The Court recalls that the amendment made in 2018 to the directive forms part of international tax cooperation aimed at contributing to the prevention of the risk of tax avoidance and evasion, which constitutes one of the objectives of general interest recognised by the EU.

The Court considers however that the notification obligation on a lawyer subject to legal professional privilege is not necessary in order to attain that objective. All intermediaries are required to file that information with the competent tax authorities. No intermediary can claim that he or she was unaware of the reporting obligations - which are clearly set out in the Directive - to which he or she is directly and individually subject.

The Directive makes a lawyer-intermediary a person from whom other intermediaries cannot, a priori, expect any initiative capable of relieving them of their own reporting obligations.

The disclosure, by notified intermediary third parties, of the identity of the lawyer-intermediary and of his or her having been consulted to the tax authorities also does not appear to be necessary for the pursuit of the objectives of the Directive. **The reporting obligation on other intermediaries who are not subject to legal professional privilege and, if there are no such intermediaries, that obligation on the relevant taxpayer, ensure, in principle, that the tax authorities are informed. The tax authorities may, after receiving such information, request additional information directly from the relevant taxpayer, who will then be able to consult his or her lawyer for assistance. The tax authorities may also conduct an audit of that taxpayer's tax situation.**

The Court therefore holds that the obligation to notify laid down by the Directive infringes the right to respect for communications between a lawyer and his or her client.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

² Article 8ab(5) of Directive 2011/16.

Pictures of the delivery of the judgment are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106

Stay Connected!

