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EU Pilot 10870/25/TAXU

## **EU Pilot 10870/25/TAXU**

**Object: The scope of the reporting waiver for legal professional privilege (LPP) under article 8ab(5) of the Directive on Administrative Cooperation (DAC6)**

The Commission services would like to confirm the scope of the reporting waiver laid down in the national legislation of Estonia transposing Article 8ab(5) of the Directive on Administrative Cooperation (DAC) (as introduced by Directive (EU) 2018/822 and later amended by Directive (EU) 2023/2226). This request for information should be seen against the backdrop of the ruling of the Court of Justice of the European Union (CJEU) of 29 July 2024 in Case C-623/22. It is intended to gain a better understanding of the extent to which Member States' current national legislation transposing Article 8ab(5) of DAC adequately reflects the CJEU's case law to ensure a horizontal level playing field and coherent application of the scope of the waiver to report cross-border arrangements across Member States.

### **1. Relevant EU legislation and case law**

Article 8ab(5) of Directive 2011/16/EU on administrative cooperation in the field of taxation, as amended by Council Directive (EU) 2023/2226 of 17 October 2023:

*“5. 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 any intermediaries that have been granted a waiver to notify, without delay, their client, if that client is an intermediary or, where there is no such intermediary, that client is the relevant taxpayer, of that client's reporting obligations under paragraph 6.”*

This provision of DAC6 was subject to a ruling by the CJEU in Case C-623/22, “Belgian association of tax lawyers and others”. The CJEU's ruling can be summarised as follows:

Firstly, the CJEU discussed the **scope of the waiver for legal professional privilege**. It noted discrepancies in the linguistic versions of the DAC6 (paragraphs 95-97) and the varying interpretations of professional secrecy across Member States. The Court therefore turned to the object and purpose of the rules of DAC6 (paragraph 98), the

preparatory work at OECD level (paragraphs 100-104) and to the need of consistent application of the rules and a level playing field across Member States (paragraph 107).

Accordingly, the CJEU interpreted the term “legal professional privilege” to cover cases of application of secrecy rules specifically to the legal profession and in addition to that only to other professionals who, like lawyers, are authorised under national law to ensure legal representation. The relevant paragraphs of the ruling are setting out the Court’s view:

105 *In the third place, it must be held that the reference made in Article 8ab(5) of amended Directive 2011/16 to the legal professional privilege applicable ‘under the national law’ is explained by the fact that, although enhanced protection of exchanges between a lawyer and his or her client is already guaranteed at EU level on the basis of Articles 7 and 47 of the Charter, the detailed rules governing that protection and, above all, the conditions and limits within which other professionals bound by legal professional privilege may, where appropriate, rely on comparable protection, are governed by national laws. In that regard, it is apparent from the documents before the Court that certain Member States extend the capacity to ensure legal representation to professions other than lawyers.*

106 *While it is therefore justified, as provided for in Article 8ab(5) of amended Directive 2011/16, for the Member States to have, in that context, a measure of discretion in the exercise of their power to substitute the obligation to notify for the reporting obligation, in order to allow them to take account of professions, other than lawyers, which they authorise to ensure legal representation, the fact remains that that discretion is not intended to allow those Member States to extend the benefit of that substitution of obligations to professions which do not ensure such representation.*

107 *It should also be added that a different interpretation of Article 8ab(5) of amended Directive 2011/16, and of the power of the Member States to substitute the obligation to notify for the reporting obligation would risk creating distortions between Member States, since a broad exercise of that power by some of them in relation to professions bound by legal professional privilege but not ensuring legal representation, could lead to the relocation of potentially aggressive tax-planning activities in their territory, thereby undermining the effectiveness and the uniformity, at EU level, of the fight against tax avoidance and evasion in the internal market.*

108 *In view of the foregoing considerations, it must be held that the power of the Member States to substitute the obligation to notify for the reporting obligation was given by Article 8ab(5) of amended Directive 2011/16 only in respect of professionals who, like lawyers, are authorised under national law to ensure legal representation.*

Secondly, the CJEU **ruled on the question whether those other professionals who are not lawyers, but who, like lawyers, are authorised under national law to ensure legal representation, shall be prevented from notifying other intermediaries of their reporting obligation on a reportable cross-border arrangement<sup>1</sup>:**

118 *In the light of those considerations, and of the unique position which they accord to the profession of lawyer within society and for the purposes of the proper administration of justice, it must be held that the solution thus adopted in the judgment of*

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<sup>1</sup> as per the CJEU judgement in case C-694/20 *Orde van Vlaamse Balies and others*

8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963) as regards lawyers can extend only to persons pursuing their professional activities under one of the professional titles referred to in Article 1(2)(a) of Directive 98/5.

119 Therefore, as regards the other professionals who, although authorised, as the case may be, by the Member States to ensure legal representation, do not meet the abovementioned characteristics, such as, for example, university professors in certain Member States, there is nothing to support the conclusion that Article 8ab(5) of amended Directive 2011/16 is invalid in the light of Article 7 of the Charter, in so far as the obligation to notify, where it is substituted by the Member State for the reporting obligation, has the consequence that the existence of the consultation link between the notifying intermediary and his or her client is brought to the attention of the notified intermediary and, ultimately, the tax administration.

## **2. National legislation**

The Commission services understand that the following legal acts are relevant for the purposes of assessing the compliance of Member States's legislation with the clarifications brought by the CJEU on the scope of the waiver of reporting in Case C-623/22.

### **Article 45 of the Bar Association Act:**

#### **§ 45. Attorney-client privilege**

(1) *The attorney is required to maintain the confidentiality of data disclosed to them in the course of provision of a legal service, the fact that they have been addressed for the purpose of receiving a legal service and the size of the fee paid for a legal service. The attorney-client privilege does not have a time limit and it remains in force also after the attorney's legal practice has terminated. The attorney-client privilege also applies to the employees of the law firm and to the employees of the Bar and to civil servants who have learned information subject to the attorney-client privilege in the course of performance of their service duties. The duty to maintain confidentiality of the fact that the attorney has been addressed for the purpose of receiving a legal service and the size of the fee paid to the attorney for a legal service does not apply to the provision of state-funded legal aid and the fee paid for it. [RT I 2004, 56, 403 – entry into force 01.03.2005]*

(2) *The client or their legal successor may discharge the attorney from the attorney-client privilege by written consent.*

(3) *The attorney-client privilege does not apply to the recovery of the legal service costs of an attorney that participated in the case.*

(4) *Disclosure of information to the Board exercising oversight and to the Ethics Tribunal hearing a disciplinary offence case is not considered a violation of the attorney-client privilege.*

(4<sup>1</sup>) *Disclosure of information to the Ministry of Justice in connection with regulatory enforcement in matters concerning the practice of a bankruptcy trustee is not considered a violation of the attorney-client privilege. [RT I, 31.05.2018, 2 – entry into force 10.06.2018]*

(5) *To prevent a criminal offence of the first degree, an attorney has the right to submit to the president of the administrative court or to an administrative judge of the same*

*court appointed by the president of the court a reasoned written application requesting that the attorney-client privilege be revoked. The judge hears the application without delay and either revokes the privilege or refuses to revoke it.*

## **Article 48 of the Auditors' Activities Act:**

### **§ 48. Obligation to maintain professional secrecy**

*(1) An audit firm and a sworn auditor representing an audit firm on the basis of law are required to maintain confidentiality of information and documents which have become known thereto in the course of professional practice. The obligation to maintain professional secrecy shall have an unspecified term and shall also apply after the termination of the professional practice of a sworn auditor.*

*(2) The obligation to maintain professional secrecy extends to the members of the bodies of the Board of Auditors, the public servants of the Ministry of Finance and other persons to whom the professional secrecy of a sworn auditor has become known during the performance of the functions.*

*(3) Disclosure of information or documents shall not be deemed to be a violation of professional secrecy if the information or documents are disclosed:*

*1) to the president, management board and supervisory board of the Board of Auditors for the performance of its functions; [RT I, 23.12.2014, 2 – entry into force 01.01.2015]*

*2) to the Ministry of Finance for the performance of the functions assigned to it by this Act;*

*3) to a court on the basis of a court ruling or court judgment;*

*4) to an investigative body in connection with a criminal proceeding;*

*5) to the Financial Intelligence Unit for the performance of its functions on the basis provided for in the Money Laundering and Terrorist Financing Prevention Act; [RT I, 21.11.2020, 1 – entry into force 01.01.2021]*

*6) to the person providing an auditing service to the parent undertaking of the client;*

*7) to the person carrying out internal quality control in the event of membership of the sworn auditors network;*

*8) on the basis of subsection 16 (2) or clause 51 (2) 4) of the Money Laundering and Terrorist Financing Prevention Act; [RT I, 10.07.2020, 1 – entry into force 20.07.2020]*

*8<sup>1</sup>) in the cases specified in subsections 14 (4)–(8) of the Covered Bonds Act; [RT I, 28.02.2019, 1 - entry into force 01.03.2019]*

*9) to other persons with the written permission of the client.*

*(4) Disclosure of information shall not be deemed to be a violation of professional secrecy if the information is disclosed to:*

*1) the National Audit Office for the performance of its functions;*

*2) 2) the Financial Supervision Authority for the performance of its functions.*

*(5) Upon the election of a new audit firm or substitution of an audit firm, the audit firm substituted shall disclose information concerning a client, which has become known to it in the course of the professional practice of a sworn auditor, to the elected or substituting audit firm requiring it in accordance with the standards for professional practice of a sworn auditor established on the basis of § 46 of this Act.*

## **Article 20<sup>14</sup> of the Tax Information Exchange Act**

### **§ 20<sup>14</sup>. Transfer of obligations of information provider**

*(1) An information provider has the right not to perform the obligations provided in § 20<sup>13</sup> of this Act in case performance of the obligations would constitute a violation of the obligation to keep professional secrecy arising from the law.*

*(2) An information provider notifies another information provider related to the reportable arrangement or, in the absence of such information provider, the taxable person concerned of a failure to perform the obligations provided in § 20<sup>13</sup> of this Act.*

*(3) Upon failure to comply with the obligations provided in § 20<sup>13</sup> of this Act, the obligations of the information provider are transferred to the other information provider concerned who has been notified thereof or, in the absence of such information provider, to the taxable person concerned. [RT I, 21.12.2019, 22 – entry into force 01.01.2020]*

Based on the legislation above, it appears that the legal professional privilege for attorneys covers in a general manner the activity of providing legal service, as well as the information disclosed, the fact that attorneys have been addressed for the purpose of receiving a legal service and the size of the fee paid for a legal service.

In addition, Estonian legislation regulates professional secrecy of auditors. In this case, the secrecy extends to information and documents which have become known in the course of professional practice of the auditor. The auditors' obligation to maintain professional secrecy can be lifted in a much broader number of cases. The personal scope includes audit firms and sworn auditors representing audit firms.

Finally, Estonia has transposed article 8ab(5) in article 20<sup>14</sup> of the Tax Information Exchange Act. The NIM sets out a waiver for intermediaries when their reporting obligations would constitute a breach of professional secrecy. In contrast with the Directive, as interpreted by the CJEU, which refers to potential breach of the legal professional privilege, the national provision appears to refer to a broader concept of professional secrecy.

### **3. Legal analysis of Commission services**

According to article 8ab(5) of the DAC, as amended by Directive (EU) 2018/822 and later by Directive (EU) 2023/2226, intermediaries who are subject to reporting of cross-border arrangements may be subject to a waiver to report, if that reporting obligation would breach the legal professional privilege under the national law. In such cases, intermediaries would have to notify their clients - either an intermediary who is their client or the taxpayer who is their client - of their own reporting obligations.

Following the ruling of the CJEU in Case C-623/22 of 29 July 2024, three categories of professionals in the context of the reporting obligations of DAC 6 exist:

1) intermediaries that are subject to professional secrecy can represent clients in courts and are lawyers as per Article 1(2) of Directive 98/5/EC: the waiver to report set by DAC 6 applies and they do not need to notify other intermediaries of their duty to report to tax authorities. In line with article 8ab(5) of DAC6, as amended by DAC8, they will, however, need to notify their clients of their reporting obligations.

2) intermediaries that are subject to professional secrecy can represent clients in courts, but are not lawyers as per Article 1(2) of Directive 98/5/EC: the waiver to report set by DAC 6 applies (as per paragraph 108 of case C-623/22), but they must notify other intermediaries of their duty to report to tax authorities (as per paragraph 118 of case C-623/22);

3) intermediaries that are subject to a professional secrecy provision in the broad sense of that term, as understood in the national legislation of the Member States concerned, but cannot represent clients in courts: the waiver to report set by DAC 6 does not apply and all reporting obligations under DAC 6 are applicable (as per paragraph 108 of Case C-623/22).

It appears to the Commission services that under Estonian legislation, the scope of the legal professional privilege for the purpose of waiver from reporting cross-border arrangements under DAC 6 is extended to intermediaries subject to professional secrecy, but that are not lawyers, e.g. auditors. In case there might be other national legislation on professional secrecy, this could potentially cover other professionals such as accountants and advisors, or other operators/actors/professions

The Commission services would like to remind the Estonian authorities that, in line with the CJEU's ruling in Case C-623/22, in order for an intermediary to be able to benefit from the waiver to report cross-border arrangements, these intermediaries would have to be legally able to represent their clients in court.

In addition, the waiver to report a cross-border arrangement set under DAC 6 does not exempt them from notifying other intermediaries of their duty to report to tax authorities, as per the clarifications of the CJEU in Case C-623/22.

#### **4. Questions**

In light of the above, the Commission services would appreciate it if the Estonian authorities could provide answers to all of the following questions:

1. What is the scope of the notion of legal professional privilege used for the purpose of application of the reporting waiver as per the national legislation transposing Article 8ab(5) of the Directive on Administrative Cooperation in your Member State?  
In particular, which of the three categories of intermediaries resulting from the CJEU's judgement in Case C-623/22 referred to in section 3 above are covered by the concept in your jurisdiction? Please refer to the relevant legal basis and/or jurisprudence in that field, applicable to your Member State.
2. Could you confirm that the scope of the waiver to report, according to your national legislation transposing Article 8(ab)5 of DAC, is extended to intermediaries subject to professional secrecy that are not lawyers as per Article 2 of Directive 98/5/EC?

Please refer/mention all types of professions that are considered covered intermediaries and whether those intermediaries may represent clients in courts.

3. Does your national legislation contain a provision under which professionals, other than lawyers under Article 2 of Directive 98/5/EC, who can defend their clients before courts, must notify other intermediaries of their reporting obligations?
4. What measures will the Estonian authorities take to ensure compliance with the conclusions of the CJEU's ruling in Case C-623/22?