

Opinion Statement PAC 5/2018 on the legal professional privilege reporting waiver set out in Article 8ab(5) of the Council Directive (EU) 2018/822 of 25 May 2018 (DAC6)

**Issued by the CFE Professional Affairs Committee
Submitted to the European Institutions in July 2018**

CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, representing more than 200,000 tax advisers. CFE is part of the European Union Transparency Register no. 3543183647-05. We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Wim Gohres, Chair of the CFE Professional Affairs Committee or Aleksandar Ivanovski, Tax Policy Manager, at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

Statement

Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (“DAC6” or “the Directive”) was adopted on 25 May 2018, and published in the Official Journal of the EU on 5 June 2018.¹ The Directive is effective as of 25 June 2018 and Member States are now obliged to transpose the Directive into national legislation before 1 January 2020. Taxpayers and tax intermediaries, including tax advisers, are obliged to disclose information on potentially aggressive cross-border arrangements under certain circumstances, in accordance with the Directive and its hallmarks. The Directive also sets out rules on administrative exchange of this information. The reporting should commence on 1 July 2020, however, cross-border arrangements of which the first step of implementation was made between 25 June 2018 and 1 July 2020 are equally reportable before 30 August 2020.

In spite of the fact that this new obligation is imposed on intermediaries, such as tax advisers, the Directive itself respects legal professional privilege in accordance with Article 8ab(5)² and recital 8 thereof. The waiver set out in Article 8ab(5) allows Member States to exempt tax advisers from the reporting obligation where such a disclosure would be in breach of the legal professional privilege under national laws.

Tax advisers’ confidentiality is one of their fundamental obligations, the objective of which is to primarily protect the rights and legitimate interests of the taxpayer. It is equally an essential part of the trust between a tax adviser and a client, the taxpayer.

CFE appreciates the diversity of legal professional regulations for tax advisers in individual Member States of the European Union including non-uniform rules that allow tax advisers to be considered within scope of legal professional privilege. Accordingly, the CFE expects that Member States will implement this Directive, and in particular the reporting waiver as set out in Article 8ab(5) in a manner which fully respects legal professional privilege in those Member States where such rights exist. For instance, where the profession of tax advisers, including their rights and duties, including professional confidentiality, is regulated by law, CFE expects that the exception of Article 8ab(5) is fully respected by Member States in the transposition of the Directive into national legislation. CFE therefore considers of utmost importance that those states apply this exception in the course of the implementation, as set out in the Directive.

Such an implementation will not endanger disclosing of reportable cross-border arrangements, due to the shift of this reporting obligation to other intermediaries or ultimately to the taxpayer, in cases where the tax adviser is prevented from reporting due to legal professional privilege. This exception is in accordance with the objectives of the Directive, which sets out that the waiver (the reporting exception) is applicable to the extent that the intermediaries operate within the limits of the relevant national laws that define their profession.

¹ Official Journal of the European Union, L 139, 5.6.2018, pp. 1–13

² Article 8ab(5) of Council Directive (EU) 2018/822: “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 under paragraph 6. Intermediaries may only be entitled to a waiver under the first subparagraph to the extent that they operate within the limits of the relevant national laws that define their professions.”

CFE expects that tax advisers will provide assistance to their clients with fulfilment of their disclosure obligations, where applicable. Similarly, where applicable, a taxpayer can also entrust a tax adviser to disclose the information on their behalf. Tax adviser members of the national associations under the umbrella of the CFE stand ready to continue making complex tax systems work and assist their clients to deal with the tax implications of cross-border arrangements, advising on the potential risks too.

About CFE Tax Advisers Europe

CFE Tax Advisers Europe is a Brussels-based umbrella association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, representing more than 200,000 tax advisers.

CFE's role and mission is to:

- Safeguard the professional interests of tax advisers and assure the quality of tax services provided by tax advisers;
- Exchange information about national tax laws and contribute to the co-ordination and development of tax policy in Europe;
- Maintain relations with the European institutions, the OECD and other international and national bodies, and share with the European Union institutions the tax technical experience and insight of our members from all areas of taxation;
- Seek to provide the best possible conditions for tax advisers to carry out their profession;
- Inform the general public about the role, mission and the services that tax advisers provide.