

# CCBE position paper on the proposal for a Directive regarding VAT rules for the digital age and its potential impact on professional secrecy

10/11/2023

## EXECUTIVE SUMMARY

In this paper, the CCBE analyses the proposal of the Commission for a Directive regarding VAT rules for the digital age and its potential impact on professional secrecy. The document sets out possible problems that the introduction of e-reporting and e-invoicing could create for lawyers, recalling that in principle, the identity of the client and the lawyer and the existence of their relationship are covered by professional secrecy and that lawyers cannot disclose in detail what type of services they provide to their clients. The CCBE suggests introducing in the proposal concrete amendments that will preserve the lawyer-client confidentiality. Although the CCBE understands that it is necessary to include lawyers in the proposal, tailored exceptions should be foreseen to e-invoicing and e-reporting by lawyers in order to avoid violations of the professional secrecy.

## 1. Introduction

On 8<sup>th</sup> December 2022, the Commission published a series of measures to “address challenges in the area of VAT raised by the development of the platform economy.” These include a Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules for the digital age (“ViDA proposal”).<sup>1</sup>

According to the proposals from the Commission, mandatory electronic invoicing is to be introduced by Member States by 2026. The new system introduces real-time digital reporting for VAT purposes based on e-invoicing. The intention is to give Member States valuable information they need to step up the fight against VAT fraud, especially carousel fraud.

The CCBE notes the following elements of the proposal.

- **E-invoicing will be the general rule**, a default system for the issuance of invoices since Member States will need to accept electronic invoices if they are according to the standard set in the proposal. Prior to this proposal, the issuance of electronic invoices was subject to the acceptance of the recipient – the proposal removes this provision. Paper invoices will be permitted if authorised by Member States (but for some types – Chapter 6 title XI (Recapitulative statements) - it will not be possible to authorise them). In addition, Member States may impose electronic invoicing [Articles 217, 218 and 232].

<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0701>

- Article 223 is deleted with effect as of January 2028, with the result that there will be **no possibility to continue issuing summary invoices**. In the new reporting system, information on transactions is to be transmitted to the tax administrations in quasi-real time. The data for each individual transaction must be sent two working days after the invoice has been issued (Art 263 in the version applicable as of 1 January 2028).
- **Content of the invoices** will be as in Article 226 of the current Directive in force,<sup>2</sup> but with new elements added by the proposal which will come into effect as of 1 January 2028. The new data elements which will be added to the content of the invoice are the identifier of the bank account in which the payment for the invoice will be credited, the agreed dates and amount of each payment related to a concrete transaction, and, in the case of an invoice that amends the initial invoice, the identification of that initial invoice [Article 226].
- **Digital reporting system will be mandatory only for cross border transactions** (intra-Community). The transmission of the data has to be carried out electronically, and Member States will provide the means for that transmission. The information can be submitted directly by the taxable person or by a third party on their behalf. The first paragraph of Article 264 provides for **the information that has to be submitted for each transaction** (the same that had to be submitted in the recapitulative statements but detailed for each transaction instead of aggregated by customer, plus new fields that have been added to improve the detection of fraud (Article 226). Pursuant to Art. 264 in the version applicable on 1 January 2028 the name and address of the taxpayer (Article 226 point (5)) and the delivery date (Article 226 point (7)) need not be included in the data to be transmitted [Articles 262 to 271].
- **For domestic transactions, digital reporting will be possible (not mandatory)**. However, if Member States opt for that, standards must be met (as set out in Article 271b - The features of the reporting system in Article 271b are similar to the ones designed for intra-Community transactions). The second paragraph of Article 271a allows Member States to put in place reporting systems for any other type of transaction. This second paragraph covers, for instance, **the reporting of supplies of goods or services carried out by a taxable person to a private individual**. Article 271a constitutes an option, but not an obligation for Member States [Articles 271a to 273].
- Member States which already have reporting systems in place for these transactions will have to adapt them to the features of the harmonised reporting system. For that purpose, the initiative requires that this adaptation takes place by 2028 at the latest.

**The CCBE is concerned that this new system could undermine professional secrecy/legal professional privilege.**

## 2. Setting out the problem

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The issue is relevant as several elements of invoices issued by lawyers may be subject to confidentiality. This includes the name of the client and the services provided to the client.

Indeed, professional secrecy means that in principle:

<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006L0112-20220701>

The identity of the client and the lawyer should remain confidential, as well as the existence of their relationship.

Lawyers must not disclose what type of services they are providing to clients.

This has been recently reiterated by the CJEU in its ruling of 8<sup>th</sup> December 2022 in Case C-694/20:

*“it is apparent from the case-law of the ECtHR that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients (see, to that effect, ECtHR, judgment of 6 December 2012, Michaud v. France, CE:ECHR:2012:1206JUD001232311, §§ 117 and 118). Like that provision, the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence. As the ECtHR has pointed out, individuals who consult a lawyer can reasonably expect that their communication is private and confidential (ECtHR, judgment of 9 April 2019, Altay v. Turkey (No 2), CE:ECHR:2019:0409JUD001123609, § 49). Therefore, other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.”<sup>3</sup>*

The Belgian constitutional Court, on 20 July 2023 reiterated the principles laid down previously by the CJEU in its ruling of 8<sup>th</sup> December 2022 (applied to Belgian law implementing DAC6).<sup>4</sup>

Therefore, in principle, lawyers cannot give to the authorities information that is privileged, i.e. regarding the identity of the client and services provided to the client.

The changes that the ViDA proposal attempts to introduce could pose problems in this regard at least in some Member States. For example, in France, details regarding services provided had to be attached by lawyers as a separate document to the invoice and thus, it could easily be split from the invoice when the latter was communicated to the authorities. The ViDA proposal could create a situation where the fact of moving to electronic invoicing and reporting would render it difficult to split this information and thus it would end up being communicated to authorities in violation of professional secrecy.

In Belgium, authorities accept that certain details of the services rendered by a lawyer to their client are not disclosed to the VAT authorities, provided the authorities have sufficient information to determine whether or not the VAT charged by the lawyer is deductible or not for the client. In other words, the Belgian VAT authorities are respecting the fact that the precise description of a lawyer’s services remains undisclosed in order to prevent that the client-attorney privilege would be infringed. It would be unacceptable if the new digital VAT reporting system would make it impossible to maintain this tolerance applied under the “traditional” reporting system.

Lawyers handle privileged information that cannot be automatically sent to the authorities. Revealing information about the existence of a relationship with a client and the nature of the legal services provided as part of e-invoicing and e-reporting could lead to violating professional secrecy. Therefore, solutions must be found to avoid such violations. As an example, a note on the invoice “provision of legal services” without any details on the invoice should be sufficient to satisfy the objectives of the Directive.

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<sup>3</sup> Par.27, available here :

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=268430&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=158443>

<sup>4</sup> Belgian Constitutional Court, n° 111/2023, available [here](#).

It is established by the ECtHR that the specific protection which Article 7 of the Charter and Article 8(1) ECHR afford to lawyers' legal professional privilege, which primarily takes the form of obligations on them, is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants.<sup>5</sup>

There has also been case law from outside the EU that confirms that legal invoices are privileged.<sup>6</sup>

**Although professional secrecy is not an absolute right and can be limited, courts have held that limitations are possible only under specific conditions.**

In this regard, first, the ECtHR Guide on Article 8<sup>7</sup> states the following:

*"241. In spite of its importance, the right to confidential communication with a lawyer is not absolute but may be subject to restrictions. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim or aims under paragraph 2 of Article 8, and are "necessary in a democratic society", in the sense that they are proportionate to the aims sought to be achieved.*

*242. The margin of appreciation of the State in the assessment of the permissible limits of interference with the privacy of consultation and communication with a lawyer is narrow in that only exceptional circumstances, such as to prevent the commission of serious crime or major breaches of prison safety and security, might justify the necessity of limitation of these rights (§ 52)."*

The CCBE also finds it relevant to recall the judgment of the ECtHR in case *Saber v. Norway*<sup>8</sup>, in which the Court found a violation of Article 8 ECHR because of *"the lack of clarity in the legal framework and the lack of procedural guarantees relating concretely to the protection of LPP"*. The Court took into consideration *"the lack of provisions suited to situations where LPP data form part of batches of digitally stored data"*. This case law should apply *mutatis mutandis* to a situation where privileged data from invoices forms part of e-invoices or invoices reported digitally.

Second, at national level, courts also require strict conditions to be met in order to limit professional secrecy. For example, it is worth mentioning the ruling of the Belgian Constitutional Court of 14th March 2019<sup>9</sup>. In this ruling, the court did not consider as invalid the obligation to disclose the VAT ID number of the clients (yearly annual listing of VAT liable clients of the lawyer) because the communication was addressed only to the VAT administration on which secrecy obligations are strictly applicable. Professional secrecy is not absolute and exceptions are possible provided: a) they are of strict interpretation; b) the legal professional privilege can only be disregarded in case of a "superior nature" of collective interest; and c) the exception to secrecy is strictly proportionate to the pursuance of major goals.

Finally, the proposal risks creating additional issues. For instance, the prohibition of summary invoices may prove problematic when dealing with long term clients who require an array of legal work over a period of time, such as clients who require ongoing compliance. Therefore, the CCBE sees as useful to keep the possibility of issuing summary invoices in general (which may be the case for many professions). There are many service providers performing identical services within one day (week,

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<sup>5</sup> ECtHR, judgment of 6 December 2012, *Michaud v. France*, , par. 118-119, available [here](#).

<sup>6</sup> <https://law.justia.com/cases/california/supreme-court/2016/s226645.html>

<sup>7</sup> ECtHR, Guide on Article 8 of the European Convention on Human Rights, Updated on 31.08.2022, available [here](#).

<sup>8</sup> ECtHR, judgment of 17 December 2020, *Saber v. Norway*, par. 56-57, available [here](#).

<sup>9</sup> Belgian Constitutional Court, ruling of 14 March 2019, nr 43/2019, available [here](#).

month) and cancellation of summary invoices would bring an enormous administrative burden on them.

### 3. Amendments proposed by the CCBE

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For the aforementioned reasons, the CCBE calls on the legislators to amend the text as follows: The CCBE suggests to:

- Oblige Member States to foresee exceptions for lawyers from e-invoicing when the process would lead to disclosing information covered by professional privilege according to the law of the Member State, and
- Oblige Member States to foresee exceptions for lawyers so that they are not obliged to report digitally information that is covered by legal professional privilege/professional secrecy under the law of the Member State.

This could be achieved by adding **a new paragraph 3 to Article 218** in the version applicable as of 1 January 2024 and the same amendment to the wording applicable as of 1 January 2028.

Proposal	CCBE's suggestion
<p>Article 218</p> <p>1. For the purposes of this Directive, Member State shall accept documents or messages on paper or in electronic form as invoices if they meet the conditions laid down in this Chapter.</p> <p>2. Member States may impose the obligation to issue electronic invoices. Member States imposing this obligation shall allow for the issuance of electronic invoices which comply with the European standard on electronic invoicing and the list of its syntaxes pursuant to Directive 2014/55/EU of the European Parliament and of the Council. The issuance of electronic invoices by taxable persons and their transmission shall not be subject to a prior mandatory authorisation or verification by the tax authorities, without prejudice to the special measures authorised under Article 395 and already implemented at the time this Directive enters into force.</p>	<p>Article 218</p> <p>1. For the purposes of this Directive, Member State shall accept documents or messages on paper or in electronic form as invoices if they meet the conditions laid down in this Chapter.</p> <p>2. Member States may impose the obligation to issue electronic invoices. Member States imposing this obligation shall allow for the issuance of electronic invoices which comply with the European standard on electronic invoicing and the list of its syntaxes pursuant to Directive 2014/55/EU of the European Parliament and of the Council. The issuance of electronic invoices by taxable persons and their transmission shall not be subject to a prior mandatory authorisation or verification by the tax authorities, without prejudice to the special measures authorised under Article 395 and already implemented at the time this Directive enters into force.</p> <p><b><i>3. As an exception to paragraph 2, in order to avoid situations leading to breaches of professional secrecy/legal professional privilege, which constitutes a fundamental part of the right to a fair trial and privacy, Member States shall not impose the obligation to issue electronic invoices on lawyers when issuing such an invoice would lead to disclosing information that is covered by legal</i></b></p>

	<b><i>professional privilege under the national law of that Member State.</i></b>
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The wording of Article 218 applicable with effect as of 1 January 2028 should also include par. 3 stated above as par. 2 accordingly.

Proposal	CCBE's suggestion
<p>Article 218</p> <p>For the purposes of this Directive, invoices shall be issued in a structured electronic format. However, Member States may accept documents on paper or other formats as invoices for transactions not subject to the reporting obligations laid down in Title XI Chapter 6. Member States shall allow for the issuance of electronic invoices which comply with the European standard on electronic invoicing and the list of its syntaxes pursuant to Directive 2014/55/EU of the European Parliament and of the Council. The issuance of electronic invoices by taxable persons and their transmission shall not be subject to a prior mandatory authorisation or verification by the tax authorities.';</p>	<p>Article 218</p> <p><b>1.</b> For the purposes of this Directive, invoices shall be issued in a structured electronic format. However, Member States may accept documents on paper or other formats as invoices for transactions not subject to the reporting obligations laid down in Title XI Chapter 6. Member States shall allow for the issuance of electronic invoices which comply with the European standard on electronic invoicing and the list of its syntaxes pursuant to Directive 2014/55/EU of the European Parliament and of the Council. The issuance of electronic invoices by taxable persons and their transmission shall not be subject to a prior mandatory authorisation or verification by the tax authorities.';</p> <p><b>2. As an exception to paragraph 1, in order to avoid situations leading to breaches of professional secrecy/legal professional privilege, which constitutes a fundamental part of the right to a fair trial and privacy, Member States shall not impose the obligation to issue electronic invoices on lawyers when issuing such an invoice would lead to disclosing information that is covered by legal professional privilege under the national law of that Member State.</b></p>

A new paragraph 3 should also be added to Article 263 applicable with effect as of 1 January 2028.<sup>10</sup>

Proposal	CCBE's Suggestion
<p>Article 262 par 1. introductory wording</p> <p>Every taxable person identified for VAT purposes shall submit to the Member State in which that person is established or identified for VAT purposes the following data on each supply and transfer of goods carried out in accordance with Article 138, on each intra-Community acquisition of goods in accordance with Article 20 and each supply of a service that is taxable in a Member State other than that in which the supplier is established:'</p> <p>Article 263</p>	<p>Article 262 par 1. introductory wording</p> <p>Every taxable person identified for VAT purposes shall submit to the Member State in which that person is established or identified for VAT purposes the following data on each supply and transfer of goods carried out in accordance with Article 138, on each intra-Community acquisition of goods in accordance with Article 20 and each supply of a service that is taxable in a Member State other than that in which the supplier is established:'</p> <p>Article 263</p>

<sup>10</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0701>

1. The data referred to in Article 262(1) shall be transmitted for each individual transaction carried out by the taxable person no later than 2 working days after issuing the invoice, or after the date the invoice had to be issued where the taxable person does not comply with the obligation to issue an invoice. The data shall be transmitted by the taxable person or by a third party on that taxable person's behalf. Member States shall provide for the electronic means for submitting such data.

Member States shall allow for the transmission of data from electronic invoices which comply with the European standard on electronic invoicing and the list of its syntaxes pursuant to Directive 2014/55/EU of the European Parliament and of the Council.

Member States may allow for the transmission of the data from electronic invoices using other data formats which ensure interoperability with the European Standard on electronic invoicing.

2. The common electronic message for providing the data referred to in paragraph 1 shall be determined in accordance with the procedure provided for in Article 58(2) of Regulation (EU) No 904/2010.;

1. The data referred to in Article 262(1) shall be transmitted for each individual transaction carried out by the taxable person no later than 2 working days after issuing the invoice, or after the date the invoice had to be issued where the taxable person does not comply with the obligation to issue an invoice. The data shall be transmitted by the taxable person or by a third party on that taxable person's behalf. Member States shall provide for the electronic means for submitting such data.

Member States shall allow for the transmission of data from electronic invoices which comply with the European standard on electronic invoicing and the list of its syntaxes pursuant to Directive 2014/55/EU of the European Parliament and of the Council.

Member States may allow for the transmission of the data from electronic invoices using other data formats which ensure interoperability with the European Standard on electronic invoicing.

2. The common electronic message for providing the data referred to in paragraph 1 shall be determined in accordance with the procedure provided for in Article 58(2) of Regulation (EU) No 904/2010.;

***3. Member States shall provide for an exemption to the electronic transmission of data, where the data is linked to services provided by lawyers and is covered by the professional secrecy/legal professional privilege under the law of the Member State.***

**Articles 271a to 273** regarding digital reporting system for supplies of goods and services for consideration carried out within the territory of one Member State should be amended in the same way.

Finally, independently of the options preferred by the legislators, the CCBE also suggests adding an explanatory recital.

***Recital ... (new)***

***Taking into account the fact that any invoices issued by lawyers should preserve the confidentiality of relations with their clients, special rules should apply to them. This is due to the special role lawyers play in the administration of justice and the importance of legal professional privilege/professional secrecy for the right to a fair trial and privacy, as set in the case law of the European Court of Justice and European Court of Human Rights. According to this case law, the content of the legal advice is covered by professional secrecy/legal professional privilege, as is the sole existence of the relationship between the lawyer and the client. Therefore, rules on electronic invoices and digital reporting should not lead to disclose to the authorities these elements and information protected under the legal professional privilege under the law of the Member States.***