ECLI:EU:C:2022:963

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

8 December 2022 (*)

(Reference for a preliminary ruling – Administrative cooperation in the field of taxation – Mandatory automatic exchange of information in relation to reportable cross-border arrangements – Directive 2011/16/EU, as amended by Directive (EU) 2018/822 – Article 8ab(5) – Validity – Legal professional privilege of the lawyer – Exemption from the reporting obligation for the benefit of lawyer-intermediaries subject to legal professional privilege – Obligation on that lawyer-intermediary to notify any other intermediary who is not his or her client of that intermediary's reporting obligations – Articles 7 and 47 of the Charter of Fundamental Rights of the European Union)

In Case C-694/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Grondwettelijk Hof (Constitutional Court, Belgium), made by decision of 17 December 2020, received at the Court on 21 December 2020, in the proceedings

Orde van Vlaamse Balies,

IG,

Belgian Association of Tax Lawyers,

CD,

JU

v

Vlaamse Regering,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, K. Jürimäe, P.G. Xuereb, L.S. Rossi and D. Gratsias, Presidents of Chambers, F. Biltgen, N. Piçarra, I. Jarukaitis, N. Jääskinen, N. Wahl, I. Ziemele and J. Passer (Rapporteur), Judges,

Advocate General: A. Rantos,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 January 2022,

after considering the observations submitted on behalf of:

– Orde van Vlaamse Balies and IG, by S. Eskenazi and P. Wouters, advocaten,

– Belgian Association of Tax Lawyers, CD and JU, by P. Malherbe, avocat, and P. Verhaeghe, advocaat,

– the Belgian Government, by S. Baeyens, J.-C. Halleux and C. Pochet, acting as Agents, and by M. Delanote, advocaat,

– the Czech Government, by J. Očková, M. Smolek and J. Vláčil, acting as Agents,

– the French Government, by R. Bénard, A.-L. Desjonquères, E. de Moustier and É. Toutain, acting as Agents,

– the Latvian Government, by J. Davidoviča, I. Hūna and K. Pommere, acting as Agents,

– the Council of the European Union, by E. Chatziioakeimidou, I. Gurov and S. Van Overmeire, acting as Agents,

– the European Commission, by W. Roels and P. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 April 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity of Article 8ab(5) of 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) ('amended Directive 2011/16'), in the light of Articles 7 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between, on the one hand, the Orde van Vlaamse Balies (Flemish Bar Association, Belgium), the Belgian Association of Tax Lawyers, IG, CD and JU, three lawyers, and, on the other, the Vlaamse Regering (Flemish Government, Belgium) concerning the validity of certain provisions of Flemish legislation on administrative cooperation in the field of taxation.

Legal context

European Union law

Directive 2011/16

3 Directive 2011/16 has established a system of cooperation between the national tax authorities of the Member States and lays down the rules and procedures to be applied when exchanging information for tax purposes.

Directive 2018/822

4 Directive 2011/16 has been amended on several occasions, in particular by Directive 2018/822. That directive introduced an obligation to report any potentially aggressive tax-planning cross-border tax arrangements to the competent authorities. In that regard, recitals 2, 4, 6, 8, 9 and 18 of Directive 2018/822 state the following:

'(2) Member States find it increasingly difficult to protect their national tax bases from erosion as tax-planning structures have evolved to be particularly sophisticated and often take advantage of the increased mobility of both capital and persons within the internal market. … It is therefore critical that Member States' tax authorities obtain comprehensive and relevant information about potentially aggressive tax arrangements. Such information would enable those authorities to react promptly against harmful tax practices and to close loopholes by enacting legislation or by undertaking adequate risk assessments and carrying out tax audits. …

…

(4) Recognising how a transparent framework for developing business activity could contribute to clamping down on tax avoidance and evasion in the internal market, the [European] Commission has been called on to embark on initiatives on the mandatory disclosure of information on potentially aggressive tax-planning arrangements along the lines of Action 12 of the [Organisation for Economic Co-operation and Development (OECD)] Base Erosion and Profit Shifting (BEPS) Project. In this context, the European Parliament has called for tougher measures against

intermediaries who assist in arrangements that may lead to tax avoidance and evasion. It is also important to note that in the G7 Bari Declaration of 13 May 2017 on fighting tax crimes and other illicit financial flows, the OECD was asked to start discussing possible ways to address arrangements designed to circumvent reporting under the [Common Reporting Standard (CRS)] or aimed at providing beneficial owners with the shelter of non-transparent structures, considering also model mandatory disclosure rules inspired by the approach taken for avoidance arrangements outlined within the BEPS Action 12 Report.

…

(6) The reporting of potentially aggressive cross-border tax-planning arrangements can contribute effectively to the efforts for creating an environment of fair taxation in the internal market. In this light, an obligation for intermediaries to inform tax authorities … would constitute a step in the right direction. …

…

(8) To ensure the proper functioning of the internal market and to prevent loopholes in the proposed framework of rules, the reporting obligation should be placed upon all actors that are usually involved in designing, marketing, organising or managing the implementation of a reportable cross-border transaction or a series of such transactions, as well as those who provide assistance or advice. It should not be ignored either that, in certain cases, the reporting obligation would not be enforceable upon an intermediary due to a legal professional privilege or where there is no intermediary because, for instance, the taxpayer designs and implements a scheme in-house. It would thus be crucial that, in such circumstances, tax authorities do not lose the opportunity to receive information about tax-related arrangements that are potentially linked to aggressive tax planning. It would therefore be necessary to shift the reporting obligation to the taxpayer who benefits from the arrangement in such cases.

(9) Aggressive tax-planning arrangements have evolved over the years to become increasingly more complex and are always subject to constant modifications and adjustments as a reaction to defensive countermeasures by the tax authorities. Taking this into consideration, it would be more effective to endeavour to capture potentially aggressive tax-planning arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning. Those indications are referred to as "hallmarks".

…

(18) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter …'

Amended Directive 2011/16

5 Article 3 of amended Directive 2011/16 entitled 'Definitions' provides:

'For the purposes of this Directive the following definitions shall apply:

1. "competent authority" of a Member State means the authority which has been designated as such by that Member State. When acting pursuant to this Directive, the central liaison office, a

liaison department or a competent official shall also be deemed to be competent authorities by delegation according to Article 4;

…

18. "cross-border arrangements" means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions is met:

(a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;

(b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;

(c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;

(d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;

(e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

…

19. "reportable cross-border arrangement" means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV;

20. "hallmark" means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in Annex IV;

21. "intermediary" means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.

In order to be an intermediary, a person shall meet at least one of the following additional conditions:

(a) be resident for tax purposes in a Member State;

(b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;

(c) be incorporated in, or governed by the laws of, a Member State;

(d) be registered with a professional association related to legal, taxation or consultancy services in a Member State.

22. "relevant taxpayer" means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

…

24. "marketable arrangement" means a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised.

25. "bespoke arrangement" means any cross-border arrangement that is not a marketable arrangement.'

6 Article 8ab of amended Directive 2011/16, entitled 'Scope and conditions of mandatory automatic exchange of information on reportable cross-border arrangements', was inserted by Article 1(2) of Directive 2018/822 and states:

'1. Each Member State shall take the necessary measures to require intermediaries to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the competent authorities within 30 days beginning:

(a) on the day after the reportable cross-border arrangement is made available for implementation; or

(b) on the day after the reportable cross-border arrangement is ready for implementation; or

(c) when the first step in the implementation of the reportable cross-border arrangement has been made,

whichever occurs first.

Notwithstanding the first subparagraph, intermediaries referred to in the second paragraph of point 21 of Article 3 shall also be required to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

2. In the case of marketable arrangements, Member States shall take the necessary measures to require that a periodic report be made by the intermediary every 3 months providing an update which contains new reportable information as referred to in points (a), (d), (g) and (h) of paragraph 14 that has become available since the last report was filed.

…

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 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.

6. Each Member State shall take the necessary measures to require that, where there is no intermediary or the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under paragraph 5, the obligation to file information on a reportable cross-border arrangement lie with the other notified intermediary, or, if there is no such intermediary, with the relevant taxpayer.

…

9. Each Member State shall take the necessary measures to require that, where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement lie with all intermediaries involved in the same reportable cross-border arrangement.

An intermediary shall be exempt from filing the information only to the extent that it has proof, in accordance with national law, that the same information referred to in paragraph 14 has already been filed by another intermediary.

…

13. The competent authority of a Member State where the information was filed pursuant to paragraphs 1 to 12 … shall … communicate … the information specified in paragraph 14 … to the competent authorities of all other Member States …

14. The information to be communicated by the competent authority of a Member State under paragraph 13 shall contain the following, as applicable:

(a) the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;

(b) details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;

(c) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;

(d) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;

(e) details of the national provisions that form the basis of the reportable cross-border arrangement;

(f) the value of the reportable cross-border arrangement;

(g) the identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement;

(h) the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.

…'

Belgian law

7 The decreet betreffende de administratieve samenwerking op het gebied van belastingen (Decree on administrative cooperation in the field of taxation) of 21 June 2013 (*Belgisch Staatsblad* of 26 June 2013, p. 40587; 'the Decree of 21 June 2013') transposes Directive 2011/16 in the Flemish Region (Belgium).

8 That decree was amended by the decreet tot wijziging van het decreet van 21 juni 2013, wat betreft de verplichte automatische uitwisseling van inlichtingen op belastinggebied met betrekking tot meldingsplichtige grensoverschrijdende constructies (Decree amending the decree of 21 June 2013 as regards the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements) of 26 June 2020 (*Belgisch Staatsblad* of 3 July 2020, p. 49170; 'the Decree of 26 June 2020'), which transposes Directive 2018/822.

9 Subsection 2 of Section 2 of Chapter 2 of the Decree of 21 June 2013 governs the mandatory filing, by intermediaries or relevant taxpayers, of information on reportable cross-border tax arrangements.

10 Article 11/6 of that subsection, as inserted into the Decree of 21 June 2013 by Article 14 of the Decree of 26 June 2020, defines the relationship between the reporting obligation and the legal professional privilege by which certain intermediaries are bound. It transposes Article 8ab(5) and (6) of amended Directive 2011/16. Paragraph 1 of that Article 11/6 provides:

'When an intermediary is bound by legal professional privilege, he or she is required:

1° to notify any other intermediary or intermediaries in writing, giving reasons, that he or she is unable to comply with the reporting obligation, as a result of which that reporting obligation automatically rests with the other intermediary or intermediaries;

2° in the absence of any other intermediary, to notify the relevant taxpayer or taxpayers of their reporting obligation, in writing, giving reasons.

The waiver from the reporting obligation shall take effect only when an intermediary has fulfilled the obligation referred to in paragraph 1.'

11 Article 11/7 of the Decree of 21 June 2013, as inserted into that decree by Article 15 of the Decree of 26 June 2020, states:

‘… if the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under Article 11/6(1), the obligation to file information on a reportable cross-border arrangement shall be incumbent on the other intermediary who has been notified, or if there is no such intermediary, the relevant taxpayer.’

The dispute in the main proceedings and the question referred for a preliminary ruling

12 By applications of 31 August and 1 October 2020, the applicants in the main proceedings brought an action before the Grondwettelijk Hof (Constitutional Court, Belgium), which is the referring court, seeking suspension of the Decree of 26 June 2020 and its annulment in whole or in part.

13 It is apparent from the order for reference that the applicants in the main proceedings dispute, in particular, the obligation provided for in the first subparagraph of Article 11/6(1) of the Decree of 21 June 2013, which was inserted into that decree by Article 14 of the Decree of 26 June 2020, which requires a lawyer acting as an intermediary, where he or she is bound by legal professional privilege, to inform the other intermediaries concerned in writing, stating reasons, that he or she cannot fulfil his or her reporting obligation. According to the applicants in the main proceedings, it is impossible to fulfil that obligation to provide information without infringing the legal professional privilege by which lawyers are bound. Furthermore, that obligation to provide information is not necessary in order to ensure that cross-border arrangements are reported, since the client, whether or not assisted by the lawyer, can him- or herself inform the other intermediaries and ask them to comply with their reporting obligation.

14 The referring court notes that the information which lawyers must file with the competent authority with regard to their clients is protected by legal professional privilege, if that information relates to activities which fall within their specific tasks of defence or representation in legal proceedings and legal advice. It observes that the mere fact of having recourse to a lawyer is covered by legal professional privilege and that the same applies, a fortiori, as regards the identity of a lawyer’s client. Information protected by legal professional privilege vis-à-vis public authorities is also protected with regard to other actors, such as other intermediaries.

15 The referring court states that, according to the *travaux préparatoires* for the Decree of 26 June 2020, the obligation for an intermediary to inform other intermediaries, giving reasons, that he or she is subject to legal professional privilege and that he or she will not therefore fulfil the reporting obligation is required in order to satisfy the requirements of Directive 2018/822 and to ensure that legal professional privilege does not prevent the necessary reporting.

16 That court notes that the actions in the main proceedings thus raise the question of the validity of Directive 2018/822, in so far as it has introduced such an obligation. Therefore, before a final ruling can be given on those actions, it is first necessary to resolve that question.

17 In those circumstances, the Grondwettelijk Hof (Constitutional Court), first, ordered the suspension, inter alia, of the first subparagraph of Article 11/6(1) of the Decree of 21 June 2013, as inserted by Article 14 of the Decree of 26 June 2020, in so far as that provision imposes on a lawyer acting as an intermediary an obligation to provide information to another intermediary who is not his or her client, until the date of publication of the judgment ruling on those actions. Second, that court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 1(2) of [Directive 2018/822] infringe the right to a fair trial as guaranteed by Article 47 of the [Charter] and the right to respect for private life as guaranteed by Article 7 of the [Charter], in that the new Article 8ab(5) which it inserted in [Directive 2011/16], provides that, where a Member State takes the necessary measures to give intermediaries the right to 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, that Member State is obliged to require the intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations, in so far as the effect of that obligation is to oblige a lawyer acting as an intermediary to share with another intermediary, not being his [or her] client, information which he [or she] obtains in the course of the essential activities of his [or her] profession, namely, representing or defending clients in legal proceedings and giving legal advice, even in the absence of pending legal proceedings?’

Consideration of the question referred

18 As a preliminary point, it should be noted that, although the question put refers to the obligation to notify, laid down in Article 8ab(5) of amended Directive 2011/16, both with regard to intermediaries and, in the absence of any intermediary, to the relevant taxpayer, it is nevertheless apparent from reading the request for a preliminary ruling as a whole that the referring court is in fact seeking to ascertain only the validity of that obligation in so far as the notification must be made, by a lawyer acting as an intermediary (‘the lawyer-intermediary’), within the meaning of Article 3(21) of that directive, to another intermediary who is not his or her client.

19 Where the notification provided for in Article 8ab(5) of amended Directive 2011/16 is made by the lawyer-intermediary to his or her client, whether that client is another intermediary or the relevant taxpayer, that notification is not capable of calling into question respect for the rights and freedoms guaranteed by Articles 7 and 47 of the Charter on account, first, of the absence of any obligation of legal professional privilege on the part of the lawyer-intermediary vis-à-vis his or her client and, second, of the fact that, at the stage of the execution by that client of his or her reporting obligations under that directive, the confidentiality of the relationship between the lawyer-intermediary and that client precludes the latter from being required to reveal to third parties and, in particular, to the tax authorities, that he or she has consulted a lawyer.

20 It is thus apparent from the order for reference that, by its question, the referring court asks the Court, in essence, to examine the validity, in the light of Articles 7 and 47 of the Charter, of Article 8ab(5) of amended Directive 2011/16, in so far as the Member States’ application of that provision has the effect of requiring a lawyer acting as an intermediary, within the meaning of Article 3(21) of that directive, where he or she is exempt from the reporting obligation laid down in paragraph 1 of Article 8ab of that directive on account of the legal professional privilege by which he or she is bound, to notify without delay any other intermediary who is not his or her client of that intermediary’s reporting obligations under paragraph 6 of that Article 8ab.

21 In that regard, it must be borne in mind that, in accordance with Article 8ab(1) of amended Directive 2011/16, each Member State is to take the necessary measures to require intermediaries to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the competent authorities within 30 days. The reporting obligation laid down in that provision applies to all reportable cross-border arrangements and, therefore, both to bespoke arrangements, defined in Article 3(25) of amended Directive 2011/16, and marketable arrangements, defined in Article 3(24) thereof.

22 It should be noted that lawyers may, in the performance of their activities, be ‘intermediaries’ within the meaning of Article 3(21) of amended Directive 2011/16, by reason of the fact that they may themselves perform activities relating to designing, marketing, organising, making available for implementation or managing the implementation of reportable cross-border arrangements or, failing that, because they may provide aid, assistance or advice in relation to such activities. Lawyers carrying out such activities are thus, in principle, subject to the reporting obligation laid down in Article 8ab(1) of that directive.

23 However, under the first subparagraph of Article 8ab(5) of amended Directive 2011/16, each Member State may take the necessary measures to give intermediaries, and in particular lawyer-intermediaries, a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the law of that Member State. In such circumstances, each Member State is to 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 of that article. That paragraph provides that, in such a case, the reporting obligation lies with the other notified intermediary or, if there is no such intermediary, with the relevant taxpayer.

24 It must nevertheless be pointed out that, under the second subparagraph of Article 8ab(5) of amended Directive 2011/16, intermediaries may only be entitled to a waiver under the first subparagraph thereof to the extent that they operate within the limits of the relevant national laws that define their profession, which it is, where relevant, for the national court to ascertain when applying that legislation. Therefore, it is only in relation to lawyer-intermediaries who actually operate within such limits that the validity of Article 8ab(5) of that directive must be examined in the light of Articles 7 and 47 of the Charter.

25 In that regard, it should be noted that Article 7 of the Charter, which recognises that everyone has the right to respect for his or her private and family life, home and communications, corresponds to Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’), while Article 47, which guarantees the right to an effective remedy and the right to a fair trial, corresponds to Article 6(1) ECHR.

26 In accordance with Article 52(3) of the Charter, which is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law, the Court must therefore take into account, when interpreting the rights guaranteed by Articles 7 and 47 of the Charter, the corresponding rights guaranteed by Article 8(1) and Article 6(1) ECHR, as interpreted by the European Court of Human Rights (‘the ECtHR’), as the minimum threshold of protection (see, to that effect, judgment of 2 February 2021, *Consob*, C-481/19, EU:C:2021:84, paragraphs 36 and 37).

27 As regards the validity of Article 8ab(5) of amended Directive 2011/16 in the light of Article 7 of the Charter, 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.

28 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 (ECtHR, judgment of 6 December 2012, *Michaud v. France*, CE:ECHR:2012:1206JUD001232311, §§ 118 and 119). That fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client (see, to that effect, judgment of 18 May 1982, *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157, paragraph 18).

29 The obligation laid down by Article 8ab(5) of amended Directive 2011/16 for a lawyer-intermediary where he or she is, on account of the legal professional privilege by which he or she is bound by national law, exempt from the reporting obligation laid down in Article 8ab(1) to notify without delay other intermediaries who are not his or her clients of their reporting obligations under Article 8ab(6) of that directive, necessarily entails the consequence that those other intermediaries become aware of the identity of the notifying lawyer-intermediary, of his or her assessment that the arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement.

30 In those circumstances and in so far as those other intermediaries do not necessarily have knowledge of the identity of the lawyer-intermediary and of his or her having been consulted on the reportable cross-border arrangement, the obligation to notify, laid down in Article 8ab(5) of amended Directive 2011/16, entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter.

31 Furthermore, it must be observed that that obligation to notify leads, indirectly, to another interference with that right, resulting from the disclosure, by the third-party intermediaries thus notified, to the tax authorities of the identity of the lawyer-intermediary and of his or her having been consulted.

32 It is apparent from Article 8ab(1), (9), (13) and (14) of amended Directive 2011/16 that the identification of the intermediaries is one of the items of information to be provided pursuant to the reporting obligation, that identification being the subject of an exchange of information between the competent authorities of the Member States. Consequently, in the event of notification under Article 8ab(5) of that directive, the third-party intermediaries notified, who are thus informed of the identity of the lawyer-intermediary and of his or her having been consulted in connection with the reportable cross-border arrangement and who are not themselves bound by legal professional privilege, must inform the competent authorities referred to in Article 3(1) of that directive not only of the existence of that arrangement and of the identity of the relevant taxpayer or taxpayers, but also of the identity of the lawyer-intermediary and of his or her having been consulted.

33 Accordingly, it is necessary to examine whether those interferences with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter, may be justified.

34 In that context, it must be recalled that the rights enshrined in Article 7 of the Charter are not absolute rights, but must be considered in relation to their function in society. Indeed, as can be seen from Article 52(1) of the Charter, that provision allows limitations to be placed on the exercise of those rights, provided that those limitations are provided for by law, that they respect the essence of those rights and that, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (see, to that effect, judgment of 6 October 2020, *Privacy International*, C-623/17, EU:C:2020:790, paragraphs 63 and 64).

35 In the first place, as regards the requirement that any limitation on the exercise of fundamental rights must be provided for by law, this implies that the act which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned, bearing in mind, on the one hand, that that requirement does not preclude the limitation in question from being formulated in terms which are sufficiently open to be able to adapt to different scenarios and keep pace with changing circumstances. On the other hand, the Court may, where appropriate, specify, by means of interpretation, the actual scope of the limitation in the light of the very wording of the EU legislation in question as well as its general scheme and the objectives it pursues, as interpreted in view of the fundamental rights guaranteed by the Charter (judgment of 21 June 2022, *Ligue des droits humains*, C-817/19, EU:C:2022:491, paragraph 114 and the case-law cited).

36 In that regard, it should be noted that, first, paragraph 5 of Article 8ab of amended Directive 2011/16 expressly lays down the obligation, for a lawyer-intermediary who is exempt from the obligation to file information on account of the legal professional privilege by which he or she is bound, to notify other intermediaries of their reporting obligations under paragraph 6 of that Article 8ab. Second, as has been found in paragraphs 29 and 30 of the present judgment, the interference with the right to respect for communications between lawyers and their clients, enshrined in Article 7 of the Charter, is the direct consequence of such notification by the lawyer to another intermediary who is not his or her client, in particular where that client was not aware, up to the time of that notification, of the identity of that lawyer and of the latter's having been consulted on the reportable cross-border arrangement.

37 Furthermore, as regards the interference resulting indirectly from that obligation to notify on account of the disclosure, by the notified third-party intermediaries, of the identity of the lawyer-intermediary and of his or her having been consulted to the tax authorities, that disclosure is due, as has been found in paragraphs 31 and 32 of the present judgment, to the extent of the obligations to provide information flowing from Article 8ab(1), (9), (13) and (14) of amended Directive 2011/16.

38 In those circumstances, the principle of legality must be considered to have been fulfilled.

39 In the second place, as regards respect for the essence of the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter, it should be noted that the obligation to notify, established by Article 8ab(5) of amended Directive 2011/16, entails only to a limited extent the lifting, vis-à-vis a third-party intermediary and the tax authorities, of the confidentiality of the communications between the lawyer-intermediary and his or her client. In particular, that provision does not provide for an obligation, or even authorisation, for the lawyer-intermediary to share, without his or her client's consent, information on the content of those communications with other intermediaries and those intermediaries will therefore not be in a position to file such information with the tax authorities.

40 In those circumstances, it cannot be held that the obligation to notify laid down in Article 8ab(5) of amended Directive 2011/16 undermines the essence of the right to respect for communications between lawyers and their clients enshrined in Article 7 of the Charter.

41 In the third place, as regards observance of the principle of proportionality, that principle requires that the limitations which may, in particular, be imposed by acts of EU law on rights and freedoms enshrined in the Charter do not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous. In addition, an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure, by properly balancing the objective of general interest against the rights at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued. Thus, the possibility of Member States justifying a limitation of the rights guaranteed in Article 7 of the Charter must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness (judgments of 26 April 2022, *Poland* v *Parliament and Council*, C-401/19, EU:C:2022:297, paragraph 65, and of 22 November 2022, *Luxembourg Business Registers and Sovim*, C-37/20 and C-601/20, EU:C:2022:912, paragraph 64).

42 Therefore, it is necessary to ascertain, first of all, whether the reporting obligation laid down in Article 8ab(5) of amended Directive 2011/16 meets an objective of general interest recognised by the European Union. If so, it must then be ensured, first, that the obligation is appropriate for attaining that objective, secondly, that the interference with the fundamental right to respect for communications between lawyers and their clients which may result from that obligation to notify is limited to what is strictly necessary, in the sense that the objective pursued could not reasonably be achieved in an equally effective manner by other means less prejudicial to that right, and, thirdly, provided that that is indeed the case, that that interference is not disproportionate to that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference (see, to that effect, judgment of 22 November 2022, *Luxembourg Business Registers and Sovim*, C-37/20 and C-601/20, EU:C:2022:912, paragraph 66).

43 As the Advocate General observed in point 88 of his Opinion, the amendment made to Directive 2011/16 by Directive 2018/822 falls within the scope of international tax cooperation to combat aggressive tax planning, manifested by the exchange of information between Member States. In that regard, it is apparent in particular from recitals 2, 4, 8 and 9 of Directive 2018/822 that the reporting and notification obligations established by Article 8ab of amended Directive 2011/16 are intended to contribute to the prevention of the risk of tax avoidance and evasion.

44 Combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute objectives of general interest recognised by the European Union for the purposes of Article 52(1) of the Charter, capable of enabling a limitation to be placed on the exercise of the rights guaranteed by Article 7 of the Charter (see, to that effect, judgment of 6 October 2020, *État luxembourgeois (Right to bring an action against a request for information in tax matters)*, C-245/19 and C-246/19, EU:C:2020:795, paragraph 87).

45 As regards the question whether the obligation to notify laid down in Article 8ab(5) of amended Directive 2011/16 is appropriate and necessary for the attainment of those objectives, the French and Latvian Governments maintain, in essence, that such notification makes it possible, inter alia, to raise awareness among other intermediaries of their duty to comply with the reporting obligation and thus to avoid the possibility that those other intermediaries are not informed of the

fact that the obligation to report the cross-border arrangement has been transferred to them pursuant to Article 8ab(6) of amended Directive 2011/16. Therefore, according to those governments, in the absence of an obligation on the lawyer-intermediary to notify, there is a risk that the cross-border arrangement will not be declared at all, contrary to the objectives pursued by that directive.

46 Even if the notification obligation established by Article 8ab(5) of amended Directive 2011/16 is indeed capable of contributing to the combating of aggressive tax planning and the prevention of the risk of tax avoidance and evasion, it must be held that that obligation cannot, however, be regarded as being strictly necessary in order to attain those objectives and, in particular, to ensure that the information concerning the reportable cross-border arrangements is filed with the competent authorities.

47 First, intermediaries' reporting obligations are clearly set out in amended Directive 2011/16, in particular in Article 8ab(1) thereof. Under that provision, all intermediaries are, in principle, required to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the competent authorities. In addition, in accordance with the first subparagraph of Article 8ab(9) of that directive, each Member State is to take the necessary measures to require that, where there is more than one intermediary, the obligation to file information lie with all intermediaries involved in the same reportable cross-border arrangement. No intermediary can therefore usefully argue that he or she was unaware of the reporting obligations to which he or she is directly and individually subject, merely because he or she is an intermediary.

48 Secondly, as regards the Latvian Government's argument that the obligation to notify reduces the risk that other intermediaries would rely on the fact that the lawyer-intermediary will report the required information to the competent authorities and that they will refrain for that reason from themselves making such a report, it should be noted, on the one hand, that, in so far as the consultation of a lawyer is subject to legal professional privilege, other intermediaries will not, as has been pointed out in paragraph 30 of the present judgment, necessarily be aware of the identity of the lawyer-intermediary and of his or her having been consulted concerning the reportable cross-border arrangement, which in such circumstances precludes such a risk from the outset.

49 On the other hand, even in the opposite situation in which other intermediaries have such awareness, there is no reason to fear that they would rely, without verification, on the lawyer-intermediary making the required report, since the second subparagraph of Article 8ab(9) of amended Directive 2011/16 specifies that an intermediary is to be exempt from filing the information only on condition that it has proof that the same information has already been filed by another intermediary. Furthermore, by expressly providing, in Article 8ab(5) thereof, that legal professional privilege may lead to a waiver from the reporting obligation, amended Directive 2011/16 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.

50 Thirdly, it should be borne in mind that any intermediary who, because of the legal professional privilege by which he or she is bound by national law, is exempt from the reporting obligation laid down in paragraph 1 of Article 8ab of amended Directive 2011/16 is nevertheless still required to notify without delay his or her client of his or her reporting obligations under paragraph 6 of that provision.

51 Fourthly, as regards the disclosure, by notified third-party intermediaries, of the identity of the lawyer-intermediary and of his or her having been consulted to the tax authorities, that disclosure also does not appear to be strictly necessary for the pursuit of the objectives of amended

Directive 2011/16 of combating aggressive tax planning and preventing the risk of tax avoidance and evasion.

52 On the one hand, the reporting obligation on other intermediaries 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 of reportable cross-border arrangements. In addition, the tax authorities may, after receiving such information, request, if necessary, additional information relating to the arrangement in question directly from the relevant taxpayer, who will then be able to consult his or her lawyer for assistance, or they may conduct an audit of that taxpayer's tax situation.

53 On the other hand, in view of the reporting waiver in Article 8ab(5) of amended Directive 2011/16, the disclosure to the tax authorities of the identity of the lawyer-intermediary and of his or her having been consulted will not, in any event, enable those authorities to require that lawyer-intermediary to provide information without the consent of his or her client.

54 At the hearing before the Court, the Commission submitted, however, in essence, that the disclosure of the identity of the lawyer-intermediary and of his or her having been consulted would be necessary in order to enable the tax authorities to ascertain whether that lawyer-intermediary is justified in relying on legal professional privilege.

55 That argument cannot be accepted.

56 It is true that, as has been pointed out in paragraph 24 of the present judgment, the second subparagraph of paragraph 5 of Article 8ab of amended Directive 2011/16 specifies that lawyer-intermediaries may only be entitled to a waiver under the first subparagraph of that provision to the extent that they operate within the limits of the relevant national laws that define their profession. However, the purpose of the reporting and notification obligations laid down in Article 8ab of that directive is not to check that lawyer-intermediaries operate within those limits, but to combat potentially aggressive tax practices and to prevent the risk of tax avoidance and evasion, by ensuring that the information concerning the reportable cross-border arrangements is filed with the competent authorities.

57 As is apparent from paragraphs 47 to 53 of the present judgment, that directive ensures that such information is provided to the tax authorities, without the disclosure to them of the identity of the lawyer-intermediary and of his or her having been consulted being necessary for that purpose.

58 In those circumstances, the possibility that lawyer-intermediaries might wrongly rely on legal professional privilege in order to avoid their reporting obligation cannot permit the inference that the obligation to notify laid down in Article 8ab(5) of that directive and the disclosure to the tax authorities of the identity and consultation of the notifying lawyer-intermediary which is the consequence thereof are strictly necessary.

59 It follows from the foregoing considerations that Article 8ab(5) of amended Directive 2011/16 infringes the right to respect for communications between a lawyer and his or her client, guaranteed in Article 7 of the Charter, in so far as it provides, in essence, that a lawyer-intermediary, who is subject to legal professional privilege, is required to notify any other intermediary who is not his or her client of that other intermediary's reporting obligations.

60 As regards the validity of Article 8ab(5) of amended Directive 2011/16 in the light of Article 47 of the Charter, it must be recalled that the right to a fair trial, guaranteed by that

provision, consists of various elements. It includes, inter alia, the rights of the defence, the principle of equality of arms, the right of access to the courts and the right of access to a lawyer, both in civil and criminal proceedings. Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 47 of the Charter, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations (see, to that effect, judgment of 26 June 2007, *Ordre des barreaux francophones et germanophones and Others*, C-305/05, EU:C:2007:383, paragraphs 31 and 32).

61 It follows from those considerations that the requirements implied by the right to a fair trial presuppose, by definition, a link with judicial proceedings (see, to that effect, judgment of 26 June 2007, *Ordre des barreaux francophones et germanophones and Others*, C-305/05, EU:C:2007:383, paragraph 35).

62 However, it must be stated that such a link has not been established in the present case.

63 It follows from Article 8ab(1) and (5) of amended Directive 2011/16, and in particular from the time limits laid down in those provisions, that the obligation to notify arises at an early stage, at the latest when the reportable cross-border arrangement has just been finalised and is ready to be implemented, and thus outside the framework of legal proceedings or their preparation.

64 As the Advocate General observed, in essence, in point 41 of his Opinion, at that early stage, the lawyer-intermediary is not acting as the defence counsel for his or her client in a dispute and the mere fact that the lawyer's advice or the cross-border arrangement which is the subject of his or her consultation may give rise to litigation at a later stage does not mean that the lawyer acted for the purposes and in the interests of the rights of defence of his or her client.

65 In those circumstances, it must be held that the obligation to notify replacing, for the lawyer-intermediary bound by legal professional privilege, the reporting obligation laid down in Article 8ab(1) of amended Directive 2011/16 does not entail any interference with the right to a fair trial, guaranteed in Article 47 of the Charter.

66 It follows from all the foregoing considerations that the answer to the question referred is 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 Member States' application of that provision has the effect of requiring a lawyer acting as an intermediary, within the meaning of Article 3(21) of that directive, where he or she is exempt from the reporting obligation laid down in paragraph 1 of Article 8ab of that directive on account of the legal professional privilege by which he or she is bound, to notify without delay any other intermediary who is not his or her client of that intermediary's reporting obligations under paragraph 6 of that Article 8ab.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 8ab(5) of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, as amended by Council Directive (EU) 2018/822 of 25 May 2018, is invalid in the light of Article 7 of the Charter of Fundamental Rights of the European Union, in so far as the Member States' application of that provision has the effect of requiring a lawyer acting as an intermediary, within the meaning of Article 3(21) of that directive, as amended, where he or she is exempt from the reporting obligation laid down in paragraph 1 of Article 8ab of that directive, as amended, on account of the legal professional privilege by which he or she is bound, to notify without delay any other intermediary who is not his or her client of that intermediary's reporting obligations under paragraph 6 of that Article 8ab.

[Signatures]

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* Language of the case: Dutch.