



Reports of Cases

Case C-623/22

Belgian Association of Tax Lawyers and Others

v

Premier ministre/Eerste Minister

(Request for a preliminary ruling from the Cour constitutionnelle (Belgium))

Judgment of the Court (Second Chamber) of 29 July 2024

(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(1) – Reporting obligation – Article 8ab(5) – Subsidiary obligation to notify – Legal professional privilege – Validity – Articles 7, 20 and 21, and Article 49(1) of the Charter of Fundamental Rights of the European Union – Right to respect for private life – Principles of equal treatment and non-discrimination – Principle of legality in criminal proceedings – Principle of legal certainty)

1. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Mandatory automatic exchange of information – Reporting obligation in respect of potentially aggressive cross-border tax-planning arrangements – Scope – No limitation solely to corporate tax – Breach of the principle of equal treatment – None (Charter of Fundamental Rights of the European Union, Arts 20 and 21; Council Directive 2011/16, as amended by Directive 2018/822, Art. 8ab(1), (6) and (7)*

(see paragraphs 29, 30, 33, 34, operative part 1)

2. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Mandatory automatic exchange of information – Reporting obligation in respect of potentially aggressive cross-border tax-planning arrangements – Concepts of arrangement, cross-border arrangement, marketable arrangement, bespoke arrangement, intermediary and associated enterprise – Sufficiently clear and precise concepts – Infringement of the principles of legal certainty and legality in criminal matters – None – Interference with the private life of the intermediary and the relevant taxpayer defined in a sufficiently precise manner (Charter of Fundamental Rights of the European Union, Arts 7 and 49(1); Council Directive 2011/16, as amended by Directive 2018/822)*

(see paragraphs 49, 52, 53, 56-60, 64, 66, 87, 89, 90, operative part 2)

3. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Mandatory automatic exchange of information – Reporting obligation in respect of potentially aggressive cross-border tax-planning arrangements – Hallmarks of those arrangements – Sufficiently clear and precise identification – Infringement of the principles of legal certainty and legality in criminal matters – None – Interference with the private life of the intermediary and the relevant taxpayer defined in a sufficiently precise manner (Charter of Fundamental Rights of the European Union, Arts 7 and 49(1); Council Directive 2011/16, as amended by Directive 2018/822, Annex IV)*

(see paragraphs 71, 73-75, 87, 89, 90, operative part 2)

4. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Mandatory automatic exchange of information – Reporting obligation in respect of potentially aggressive cross-border tax-planning arrangements – Starting point of the 30-day period for fulfilment of that obligation – Determination sufficiently clear and precise – Infringement of the principles of legal certainty and legality in criminal matters – None – Interference with the private life of the intermediary and the relevant taxpayer defined in a sufficiently precise manner (Charter of Fundamental Rights of the European Union, Arts 7 and 49(1); Council Directive 2011/16, as amended by Directive 2018/822, Art. 8ab(1), first subpara.)*

(see paragraphs 80-87, 89, 90, operative part 2)

5. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Mandatory automatic exchange of information – Reporting obligation in respect of potentially aggressive cross-border tax-planning arrangements – Power of the Member States to substitute the obligation to notify another intermediary for the reporting obligation – Scope – Power available only in respect of professionals authorised to ensure legal representation (Council Directive 2011/16, as amended by Directive 2018/822, Art. 8ab(5))*

(see paragraphs 99, 104, 106, 108)

6. *Fundamental rights – Respect for private and family life – Affirmed both by the Charter of Fundamental Rights of the European Union and by the European Convention on Human Rights – Level of protection provided for by the Charter not infringing that guaranteed by that convention (Charter of Fundamental Rights of the European Union, Art. 7)*

(see paragraphs 113, 124)

7. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Mandatory automatic exchange of information – Obligations on lawyers to provide information and cooperate – Professional secrecy of lawyers – Waiver of the reporting obligation in favour of the intermediary lawyer who is bound by legal professional privilege – Obligation of that intermediary lawyer to notify any other intermediary, other than his or her client, of that other intermediary's reporting obligations – Infringement of*

*respect for private and family life – Invalidity – Scope – Persons referred to in Article 1(2)(a) of Directive 98/5
(Charter of Fundamental Rights of the European Union, Art. 7; Council Directive 2011/16, as amended by Directive 2018/822, Art. 8ab(5))*

(see paragraphs 116, 118-120, operative part 3)

8. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Mandatory automatic exchange of information – Reporting obligation in respect of potentially aggressive cross-border tax-planning arrangements – Right to respect for private life – Freedom of any person to organise his or her life and activities, both personal and professional or commercial – Interference – Justification – Respect for the principle of legality, the essence of fundamental rights and the principle of proportionality
(Charter of Fundamental Rights of the European Union, Art. 7; Council Directive 2011/16, as amended by Directive 2018/822, Art. 8ab(1), (6) and (7))*

(see paragraphs 127, 129-132, 136-138, 140-150, operative part 4)

Résumé

In the context of a reference for a preliminary ruling on validity, the Court of Justice holds that the reporting obligation in respect of potentially aggressive cross-border tax-planning arrangements to the competent authorities laid down by amended Directive 2011/16,¹ does not infringe fundamental rights, in particular the principle of equal treatment and the right to respect for private life, or the principle of legal certainty.

In the present case, a Law of 20 December 2019 had transposed amended Directive 2011/16 into Belgian law.

A number of associations and professionals, active in the field of legal, tax or consultancy services, asked the Cour constitutionnelle (Constitutional Court, Belgium) to annul that law in whole or in part. In essence, they challenged both the lack of precision of that law as regards the breadth of scope and reach of the reporting obligation in respect of the cross-border arrangements which it includes and certain effects of that obligation.

In so far as the contested national provisions have their origin in the provisions of amended Directive 2011/16, the Cour constitutionnelle (Constitutional Court) referred a number of questions to the Court for a preliminary ruling concerning the assessment of the validity of the reporting obligation in respect of cross-border arrangements, laid down in Article 8ab(1), (6) and (7) of that directive, and of the subsidiary obligation to notify, laid down in Article 8ab(5) of that directive, in the light of Articles 7, 20, 21 and Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), and of the general principle of legal certainty.

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

Assessment of the Court

In the first place, as regards the assessment of whether there has been a possible infringement of the principle of equal treatment laid down in Article 20 of the Charter by amended Directive 2011/16, in that that directive does not limit the reporting obligation in respect of cross-border arrangements to the field of corporation tax, but makes it applicable to all taxes falling within its scope, the Court states, first of all, that the reference criterion to be taken into account is that of the risk of aggressive tax planning and of tax avoidance and evasion by the cross-border arrangements concerned which the EU legislature sought, in the present case, to combat. Any type of tax or duty is susceptible to aggressive tax planning, whether it be corporation tax, other direct taxes or indirect taxes which are not the subject of specific EU legislation.²

Therefore, the different types of taxes subject to the reporting obligation laid down by amended Directive 2011/16 fall within comparable situations in the light of the objectives pursued by that directive, and being subject to that obligation is not manifestly inappropriate in that respect in the light of those objectives.

In the second place, the Court considers that the concepts³ and the starting point of the 30-day period prescribed for fulfilling the reporting obligation, which amended Directive 2011/16 uses and lays down in order to determine the scope and reach of that obligation, are sufficiently clear and precise in the light of the requirements stemming from the principle of legal certainty and the principle of legality in criminal matters enshrined in Article 49(1) of the Charter.

Furthermore, since Article 7 of the Charter does not impose any obligation that is stricter than Article 49 of the Charter in terms of the requirement for clarity or precision of the concepts used and the time limits laid down, the interference with the private life of the intermediary and the relevant taxpayer entailed by the reporting obligation is itself defined in a sufficiently precise manner in view of the information that that reporting must contain.

In the third place, as regards a possible breach of legal professional privilege by an intermediary other than a lawyer, resulting from the subsidiary obligation to notify laid down in Article 8ab(5) of amended Directive 2011/16, in that that obligation has the effect of bringing to the attention of a third party, and ultimately the tax authorities, the existence of the consultation link between that intermediary and his or her client, the Court states, first of all, that the power of the Member States to substitute the obligation to notify for the reporting obligation was made available by that article only in respect of professionals who, like lawyers, are authorised under national law to ensure legal representation.

Next, it is only because of the special position occupied by the profession of lawyer within the judicial organisation of the Member States that the Court, in the judgment in *Orde van Vlaamse Balies and Others*,⁴ held that the subsidiary obligation to notify, when it is imposed on the lawyer, infringes Article 7 of the Charter.

² Value added tax, customs duties and excise duties are excluded from the scope of amended Directive 2011/16.

³ The concepts in respect of which the referring court expressed doubts as to their precision and clarity are 'arrangement', 'cross-border arrangement', 'marketable arrangement', 'bespoke arrangement', 'intermediary', 'participant' and 'associated enterprise', and the description 'cross-border', the various 'hallmarks' defined in Annex IV and the 'main benefit test'.

⁴ Judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963).

Thus, the solution adopted in that judgment applies only to persons who pursue their professional activities under one of the professional titles referred to in Article 1(2)(a) of Directive 98/5,⁵ and does not extend to other professionals not having those characteristics, even though they are authorised by the Member States to ensure legal representation.

Finally, in the fourth place, as regards the possible infringement, by the reporting obligation, of the right to protection of private life, where that obligation concerns an arrangement pursuing a tax advantage in a lawful and non-abusive manner, which would then limit, as the referring court highlights, the taxpayer's freedom to choose – and the intermediary's freedom to design and advise that taxpayer on – the least taxed route, the Court refers to the case-law of the European Court of Human Rights,⁶ from which it is apparent that the concept of private life is a broad concept that includes the concept of personal autonomy, which covers the freedom of any person to organise his or her life and activities, both personal and professional or commercial.

Having regard to that case-law, the Court considers that the reporting obligation in respect of cross-border arrangements constitutes an interference with the right to respect for private life guaranteed in Article 7 of the Charter, in so far as it results in revealing to the administration the result of tax design and engineering work relying on disparities between the various applicable national rules, carried out in the context of personal, professional or business activities by the taxpayer him or herself or by an intermediary, and is therefore liable to deter both that taxpayer and his or her advisers from designing and implementing cross-border tax-planning mechanisms.

However, such an interference, which does not adversely affect the essence of the right to respect for private life, and which is proportionate and does not outweigh the public interest objective of combating aggressive tax planning and preventing the risks of tax avoidance and evasion, pursued in the present case by amended Directive 2011/16, is justified in the light of that objective. It follows that the reporting obligation at issue does not infringe the right to respect for private life, understood as the right of everyone to organise his or her private life, as guaranteed by Article 7 of the Charter.

⁵ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36).

⁶ See, in particular, ECtHR, 18 January 2018, *FNASS and Others v. France*, ECLI:CE:ECHR:2018:0118JUD 004815111, § 153 and the case-law cited. In that regard, Article 7 of the Charter corresponds to Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, in accordance with Article 52(3) of the Charter, the Court takes account, in the interpretation of the rights guaranteed by Article 7, of the corresponding rights guaranteed by Article 8(1), as interpreted by the ECtHR.