



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

26 September 2024*

(Reference for a preliminary ruling – Administrative cooperation in the field of taxation – Directive 2011/16/EU – Exchange of information on request – Decision ordering a lawyer to communicate information – Legal professional privilege – Article 7 and Article 52(1) of the Charter of Fundamental Rights of the European Union)

In Case C-432/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour administrative (Higher Administrative Court, Luxembourg), made by decision of 11 July 2023, received at the Court on 12 July 2023, in the proceedings

F SCS,

Ordre des avocats du barreau de Luxembourg

v

Administration des contributions directes,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, F. Biltgen, N. Wahl, J. Passer (Rapporteur) and M.L. Arastey Sahún, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Ordre des avocats du barreau de Luxembourg, by P. Mellina and A. Steichen, avocats,
- the Luxembourg Government, by A. Germeaux and T. Schell, acting as Agents,
- the German Government, by J. Möller, J. Heitz and M. Hellmann, acting as Agents,

* Language of the case: French.

- the Spanish Government, by L. Aguilera Ruiz, acting as Agent,
- the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,
- the Council of the European Union, by K. Pavlaki, S. Santoro and A. Sikora-Kaléda, acting as Agents,
- the European Commission, by A. Ferrand and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2024,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 17(1) and (4) and Article 18(1) 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), and of Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), and the validity of Directive 2011/16 in the light of Article 7 and Article 52(1) of the Charter.
- 2 The request has been made in proceedings between F SCS, a law firm incorporated as a limited partnership in Luxembourg, and the Ordre des avocats du barreau de Luxembourg (the Luxembourg Bar; 'the OABL') and the Administration des contributions directes (Luxembourg Inland Revenue) concerning a decision issued by the latter to F ordering F to provide information and documents, and a fine imposed on F for failing to comply with that decision.

Legal context

European Union law

Directive 2011/16

- 3 Directive 2011/16 establishes 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 between Member States for tax purposes.
- 4 Article 1(1) of that Directive provides:

'This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2.'

5 Article 3 of that directive, entitled ‘Definitions’, states:

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

...

8. “exchange of information on request” means the exchange of information based on a request made by the requesting Member State to the requested Member State in a specific case;

...’

6 Article 5 of Directive 2011/16, which is the first provision of Section I, entitled ‘Exchange of information on request’, of Chapter II of that directive, reads as follows:

‘At the request of the requesting authority, the requested authority shall communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries.’

7 Under the terms of Article 6 of that directive, entitled ‘Administrative enquiries’:

‘1. The requested authority shall arrange for the carrying out of any administrative enquiries necessary to obtain the information referred to in Article 5.

...

3. In order to obtain the requested information or to conduct the administrative enquiry requested, the requested authority shall follow the same procedures as it would when acting on its own initiative or at the request of another authority in its own Member State.

...’

8 Article 17, entitled ‘Limits’, in Chapter IV, ‘Conditions governing administrative cooperation’, of the same directive, provides as follows:

‘1. A requested authority in one Member State shall provide a requesting authority in another Member State with the information referred to in Article 5 provided that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives.

2. This Directive shall impose no obligation upon a requested Member State to carry out enquiries or to communicate information, if it would be contrary to its legislation to conduct such inquiries or to collect the information requested for its own purposes.

...

4. The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.

...’

9 Article 18, entitled ‘Obligations’, also in the Chapter IV of Directive 2011/16, provides as follows:

‘1. If information is requested by a Member State in accordance with this Directive, the requested Member State shall use its measures aimed at gathering information to obtain the requested information, even though that Member State may not need such information for its own tax purposes. That obligation is without prejudice to paragraphs 2 ... and 4 of Article 17, the invocation of which shall in no case be construed as permitting a requested Member State to decline to supply information solely because it has no domestic interest in such information.

2. In no case shall Article 17(2) and (4) be construed as permitting a requested authority of a Member State to decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

...’

Directive 2018/822

10 Directive 2011/16 has been amended on several occasions, most notably by Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ 2018 L 139, p. 1), which introduced an obligation to report potentially aggressive cross-border tax planning arrangements to the competent authorities.

11 Article 8ab, entitled ‘Scope and conditions of mandatory automatic exchange of information on reportable cross-border arrangements’, of Directive 2011/16, as amended by Directive 2018/822, states as follows, in paragraphs 1 and 5:

‘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 ...

...

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.’

Luxembourg law

The loi du 29 mars 2013 (Law of 29 March 2013)

- 12 Article 6 of the loi du 29 mars 2013 portant transposition de la directive 2011/16 et portant 1) modification de la loi générale des impôts, 2) abrogation de la loi modifiée du 15 mars 1979 concernant l'assistance administrative internationale en matière d'impôts directs (Law of 29 March 2013 transposing Directive 2011/16 and (1) amending the General Tax Law and (2) repealing the amended Law of 15 March 1979 on international administrative assistance in the field of direct taxation; 'the Law of 29 March 2013') (*Mémorial* A 2013, p. 756), provides as follows:

'At the request of the requesting authority, the Luxembourg requested authority shall communicate to it the information that is foreseeably relevant for the administration and application of the domestic legislation of the requesting Member State relating to the taxes referred to in Article 1 that it has in its possession or that it obtains as a result of administrative enquiries.'

- 13 Article 7(1) and (3) of the Law of 29 March 2013 is worded as follows:

'(1) The Luxembourg requested authority shall arrange for the carrying out of any administrative enquiries necessary to obtain the information referred to in Article 6.

...

(3) In order to obtain the requested information or to conduct the administrative enquiry requested, the Luxembourg requested authority shall follow the same procedures as it would when acting on its own initiative or at the request of another Luxembourg authority.'

- 14 Article 18(2) and (4) of that law provides as follows:

'(2) The Luxembourg requested authority shall not be obliged to carry out enquiries or to communicate information if it would be contrary to its legislation to conduct such inquiries or to collect the information requested for its own purposes.

...

(4) The provision of information may be refused where it would lead 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.'

The loi du 25 novembre 2014 (Law of 25 November 2014)

- 15 The loi du 25 novembre 2014 prévoyant la procédure applicable à l'échange de renseignements sur demande en matière fiscale et modifiant la loi du 31 mars 2010 portant approbation des conventions fiscales et prévoyant la procédure y applicable en matière d'échange de renseignements sur demande (the Law of 25 November 2014 laying down the procedure applicable to the exchange of information on request in tax matters and amending the Law of 31 March 2010 approving tax conventions and laying down the procedure applicable to such conventions in respect of the exchange of information on request; 'the Law of 25 November

2014’) (*Mémorial A*, 2014, p. 4170), as amended by the loi du 1^{er} mars 2019 (Law of 1 March 2019) (*Mémorial A* 2019, No 112), transposed the procedural aspects of Directive 2011/16 into Luxembourg law.

16 Article 1(1) of that law provides:

‘This law shall apply from its entry into force to requests for exchange of information in tax matters made by the competent authority of a requesting State pursuant to:

...

(4) The [Law of 29 March 2013];

...’

17 Article 2(1) and (2) of the Law of 25 November 2014 states:

‘(1) Tax administrations shall be authorised to request information of any kind required in order to implement the exchange of information provided for by Conventions and laws from the holder of that information.

(2) The holder of the information shall be obliged to provide the requested information in its entirety, accurately and without alteration, within one month of notification of the decision requiring the requested information to be provided. That obligation shall extend to the transmission of unaltered documents on which the information is based.’

18 Article 3(3) and (5) of that law is worded as follows:

‘(3) If the competent tax administration is not in possession of the requested information, the director of the competent tax administration or his or her authorised representative shall notify the holder of the information by registered letter of his or her decision requiring the requested information to be provided.

...

(5) In addition to the order procedure provided for in paragraph 3, the competent tax administration shall have the same powers of investigation as used in taxation procedures for the assessment or inspection of taxes, duties and charges, with all the guarantees provided for therein.’

The AO

19 Article 171(2) of the loi générale des impôts du 22 mai 1931 (General Tax Law of 22 May 1931), known as the ‘Abgabenordnung’ (*Mémorial A* 1931, No 900), as amended (‘the AO’), provides as follows:

‘[The taxable person] must, on request, produce the notes, books and business registers as well as the documents relevant to the assessment of the tax (Article 207), for consultation and inspection.’

20 Article 175(1) and (2) of the AO provides:

‘(1) Any person who is not a taxable person, with the exception of persons designated as close relatives ..., must also provide the tax inspection authority with information on facts that are relevant to the exercise of the tax inspection or as part of a tax investigation procedure for the purpose of establishing tax claims. ...

(2) The information must be requested and provided in writing, in so far as this is practicable and exceptions are not necessary for special reasons; the tax inspection office may, however, order the appearance of the person required to provide the information.’

21 Article 177 of the AO is worded as follows:

‘(1) The following may refuse access:

1. defence counsel and lawyers who have acted in criminal cases,

...

3. lawyers in respect of information entrusted to them in the exercise of their profession,

4. the assistants of the persons referred to in points 1 to 3 above in respect of facts they have learned in that capacity.

(2) This provision shall not be applicable to the persons referred to in points 3 and 4 in respect of facts of which they became aware in connection with advice or representation in tax matters, unless an affirmative or negative response to questions would put their clients at risk of criminal prosecution.’

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

22 Having received a request for information based on Directive 2011/16 from the Spanish tax authorities, on 28 June 2022 the Administration des contributions directes (Luxembourg Inland Revenue) issued F with a decision ordering it to provide all available documents and information concerning the services provided by it to K, a company incorporated under Spanish law, in connection with the acquisition of a business and the acquisition of a majority shareholding in a company, both also incorporated under Spanish law.

23 That decision was worded as follows:

‘...’

Could you please provide, for the period from 1 January 2016 to 31 December 2019, the following information and documents no later than 3 August 2022.

- ... all available documentation (engagement letter, contracts with the client, reports, memoranda, communications, invoices etc.) relating to services provided by F to the Spanish company K in connection with:
 - o the acquisition in 2015 of 80% of the shares in N by the investment group O (invoice No of 4 March 2016);
 - o the acquisition of another Spanish undertaking by the group in 2018 (invoice No of 13 December 2018);
- ... a detailed description of the manner in which the abovementioned transactions were conducted, from the time when the services of F were engaged until their completion, as well as an explanation of its involvement in those processes and the identity of its interlocutors (vendors, buyers and third parties) and invoices;
- ... copies of all relevant documents relating to the preceding indents.

I would like to draw your attention to the fact that, in accordance with Article 2[2] of the [Law of 25 November 2014] ..., the information holder is required to provide the information requested and the documents on which that information is based in full, accurately and without alteration.

...'

- 24 By email of 8 July 2022, F responded that it had acted as legal counsel for the group to which K belongs and was therefore prevented by law from communicating information concerning its client in so far as it is covered by its legal professional privilege.
- 25 By email of 11 July 2022, l'administration des contributions directes (Luxembourg Inland Revenue), referring to Article 2(1) and (2) of the Law of 25 November 2014, asked F to comply with the decision of 28 June 2022.
- 26 By letter of 8 August 2022, F replied that it did not have any information not covered by legal professional privilege as laid down in Article 177(1) of the AO, stating that the instruction from its client in the case to which the decision relates did not cover tax matters but concerned only company law.
- 27 By decision of 19 August 2022, the Administration des contributions directes (Luxembourg Inland Revenue) again ordered F to provide the information and documents requested, on pain of a fine, noting that the communication of such information and documents in full, accurately and without alteration was mandatory under Article 2(2) of the Law of 25 November 2014.
- 28 By decision of 16 September 2022, the Administration des contributions directes (Luxembourg Inland Revenue) imposed a fine on F for failing to comply with the decision of 19 August 2022.
- 29 On 18 October 2022, F brought an action before the Tribunal administratif (Administrative Court, Luxembourg) seeking the annulment of the decision of 16 September 2022 and, on 25 November 2022, an action seeking the annulment of the decision of 19 August 2022 ('the decision at issue'). The OABL sought leave to intervene in support of F in this second action.

- 30 By judgment of 23 February 2023, that court dismissed the action for annulment and, consequently, the application to intervene filed by the OABL as inadmissible *ratione temporis*.
- 31 F and the OABL appealed that judgment to the Cour administrative (Higher Administrative Court, Luxembourg), which is the referring court.
- 32 By judgment of 4 May 2023, that court held that the action for annulment brought by F against the decision at issue and the application to intervene brought by the OABL were admissible, and decided to consider the case.
- 33 As to the merits of the case, the referring court notes that the appellant and the intervener have based their arguments relating to the unlawfulness of the decision at issue on Article 17(2) and (4) of Directive 2011/16 and Article 18(2) and (4) of the Law of 29 March 2013 transposing that directive into Luxembourg law and that, in that context, they rely on the judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, ‘the judgment in *Orde van Vlaamse Balies and Others*’, EU:C:2022:963), and the provisions of the Charter, in particular Article 7.
- 34 In that regard, the referring court considers that, for it to be in a position to rule on that argument and to resolve the dispute before it, there is a need for the Court of Justice to provide various clarifications that will allow the referring court to assess whether the decision at issue complies with EU law, irrespective of whether, in the present case, F could – where applicable – also be exempted from the obligation to provide some or all of the information and documents requested under Article 177 of the AO in so far as the advice given by that party was not ‘in tax matters’ within the meaning of paragraph 2 of that article.
- 35 Thus, the referring court notes, first of all, that the Court held in the judgment in *Orde van Vlaamse Balies and Others*, that the obligation laid down by Article 8ab of Directive 2011/16, as amended by Directive 2018/822, on a lawyer who designs, markets or organises a cross-border arrangement, to disclose to a third party his or her identity, his or her assessment of the content of the cross-border arrangement and the fact of his or her having been consulted, and the disclosure of that information to the tax authorities, entail an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter. In this case, the decision at issue would require F to provide the Administration des contributions directes (Luxembourg Inland Revenue) with all the documentation relating to its relations with its client, concerning the setting up of certain corporate investment structures. It would therefore seem logical to infer that this decision also entails an interference with that right. However, in view of the difference between the systems for exchanging information and the corresponding acts at issue in the judgment in *Orde van Vlaamse Balies and Others* and in the case before the referring court, that court considers that it is necessary to seek confirmation of that analysis.
- 36 The referring court then points out, in the event that the protection afforded by Article 7 of the Charter were to be applicable in the present case and the existence of an interference were to be established, the Court observed – in paragraph 34 of the judgment in *Orde van Vlaamse Balies and Others* – that the rights enshrined in Article 7 of the Charter do not appear to be absolute rights, but must be considered in relation to their function in society and that, 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, in particular, that those limitations are provided for by law. The referring court asserts, however, that, beyond Article 17(4), Directive 2011/16 does not include any provision,

with regard to the exchange of information on request, that establishes a particular system entailing specific limitations on the obligation to provide information incumbent on a lawyer, as a third party holding information. Consequently, in the absence of provisions providing for such a special regime, the question of the compliance of Directive 2011/16 with Articles 7 and 52(1) of the Charter arises.

- 37 The referring court considers, moreover, that, if the Court were to find that Directive 2011/16 complied with the Charter from the perspective referred to in the preceding paragraph, the question arises as to whether the scope of the system of cooperation by lawyers in the exchange of information on request governed by Directive 2011/16, which takes into account the effect of their legal professional privilege, may be determined by the provisions of the domestic law of each Member State in accordance with the reference made by Article 18(1) of that directive. It points out that, if so, Article 177 of the AO should be applied in the present case as a provision of domestic law regulating the duty of cooperation of lawyers as third parties.
- 38 On this specific point, the referring court also observes that, in paragraph 39 of the judgment in *Orde van Vlaamse Balies and Others*, the Court held that, in order to ensure respect for the essence of confidentiality of communications between lawyers and their clients, only a limited lifting of that confidentiality would be permissible. In this case, the decision at issue requires F to provide all the documentation relating to its relations with its client concerning the setting up of certain corporate investment structures. In these circumstances, it cannot be ruled out that this decision affects the essence of the right to respect for communications between lawyers and their clients. However, because the decision at issue is consistent with Article 177 of the AO, the question also arises as to whether both the national provision and the decision at issue comply with Article 7 of the Charter.
- 39 Lastly, the referring court observes that, if these texts were to be found not to comply with the latter provision, this conclusion would not, however, automatically entail the annulment of that decision in its entirety since it is in fact a decision that can be divided according to the information requested. The Luxembourg courts could therefore uphold the lawyer's obligation to provide information that is not deemed to affect the essence of the right to respect for communications with its client.
- 40 Consequently, the referring court should not confine itself to examining potential interference with the essence of the confidentiality of the communications between lawyers and their clients, but should continue by examining whether other considerations set out by the Court in the judgment in *Orde van Vlaamse Balies and Others*, in particular concerning the principle of proportionality, are, as the case may be, such as to delimit the information that may legitimately be requested from a lawyer in the context of an exchange of information on request based on Directive 2011/16.
- 41 In those circumstances the Cour administrative (Higher Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Does legal advice provided by a lawyer on matters of company law – in this case on setting up a corporate investment structure – fall within the scope of the strengthened protection of exchanges between lawyers and their clients afforded by Article 7 of the Charter?

- (2) If the first question is answered in the affirmative, does a decision by the competent authority of a requested Member State adopted in response to a request from another Member State in the context of an exchange of information on request on the basis of Directive 2011/16, ordering a lawyer to provide it, broadly speaking, with all available documentation relating to its relations with its client, a detailed description of the operations on which it advised and an explanation of its involvement in those processes and the identity of its interlocutors, constitute an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter?
- (3) If the second question is answered in the affirmative, does Directive 2011/16 comply with Articles 7 and 52(1) of the Charter in so far as it does not include, beyond Article 17(4), any provision which formally permits interference with the confidentiality of exchanges between lawyers and their clients in the context of the system of exchange of information on request and which itself defines the scope of the limitation on the exercise of the right in question?
- (4) If the third question is answered in the affirmative, can the arrangements relating to the duty of cooperation of lawyers (or of a law firm) as third parties holding information in the context of the application of the mechanism for the exchange of information on request established by Directive 2011/16, in particular specific limitations to take into account the effect of their legal professional privilege, be governed by the provisions of domestic law of each Member State regulating the duty of cooperation of lawyers, as third parties, in a tax investigation in the context of the application of domestic tax legislation in accordance with the reference made by Article 18(1) of that directive?
- (5) If the fourth question is answered in the affirmative, in order to comply with Article 7 of the Charter, must a national legal provision establishing the arrangements relating to the duty of cooperation of lawyers as third parties holding information, like that applicable in the present case, include specific provisions which:
 - ensure respect for the essence of the confidentiality of the communications between lawyers and their clients; and
 - introduce specific conditions to ensure that the lawyer’s obligation to cooperate is reduced to what is appropriate and necessary for the achievement of the objective of Directive 2011/16?
- (6) If the fifth question is answered in the affirmative, must the specific conditions to ensure that cooperation by lawyers with the tax investigation is reduced to what is appropriate and necessary for the achievement of the objective of Directive 2011/16 include the obligation for the competent authority of the requested Member State:
 - to carry out an enhanced check of whether the requesting Member State has, beforehand, actually exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of those objectives, in accordance with Article 17(1) of Directive 2011/16; and/or
 - to have, beforehand, unsuccessfully contacted other potential information holders in order to be able, as a last resort, to contact a lawyer in his or her capacity as a potential information holder; and/or

- properly to balance, in each individual case, the objective of general interest against the rights at issue in such a manner that a decision ordering that information be provided could validly be issued in respect of a lawyer only if additional conditions are met, such as the requirement that the financial implications of the ongoing check in the requesting [Member] State reach or are likely to reach a certain significance or are likely to fall within the scope of criminal law?’

The jurisdiction of the Court of Justice

- 42 The Austrian Government expressed doubts about the Court’s jurisdiction, arguing, in essence, that, since Directive 2011/16 does not specify the conditions under which investigations or communications may be lawfully carried out and, in particular, the conditions under which a person subject to the law may refuse to provide information on the ground of professional secrecy, such matters are exclusively a matter for national law, such that the dispute in the main proceedings does not fall within the scope of that directive or, consequently, that of EU law.
- 43 It should be borne in mind that Directive 2011/16 organises the exchange of information on request between Member States and, in that context, provides, in Article 18(1) thereof, that the requested Member State must use its information-gathering measures to obtain the information requested by the requesting Member State. Thus, when the requested Member State, following a request for exchange of information made pursuant to Section I of Chapter II of Directive 2011/16, carries out an investigation in accordance with its national procedures and issues a decision ordering the holder of the information to communicate that information, it is implementing that directive and, consequently, EU law.
- 44 In that respect, the Court has held that the adoption, by a Member State, of legislation specifying the details of the procedure for the exchange of information on request established by Directive 2011/16 – in particular where that legislation provides for the possibility, for the competent authority, of taking a decision that obliges a person holding information to provide it with that information – constitutes such an implementation of EU law, meaning that the Charter is applicable in accordance with Article 51(1) thereof (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, paragraphs 45 and 46 and the case-law cited).
- 45 In those circumstances, it must be concluded that the Court has jurisdiction to examine whether, and to what extent, the provisions of the Charter preclude the application by a Member State of national provisions such as those at issue in the main proceedings in the context of, and for the purposes of, executing a request for exchange of information under Section I of Chapter II of Directive 2011/16.

The first and second questions referred

- 46 By the first two questions, which should be considered together, the referring court asks, in essence, whether Article 7 of the Charter must be interpreted as meaning that legal advice given by a lawyer in company law matters falls within the scope of the strengthened protection of communications between lawyers and their clients guaranteed by that article, with the result that a decision requiring a lawyer to provide the authorities of the requested Member State – for the purposes of an exchange of information on request in accordance with Directive 2011/16 – with

all the documentation and information relating to his or her relations with his or her client, concerning such legal advice, constitutes an interference with the right to respect for communications between lawyers and their clients guaranteed by that article.

- 47 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') (the judgment in *Orde van de Vlaamse Balies and Others*, paragraph 25).
- 48 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 by the ECHR without adversely affecting the autonomy of EU law, the Court must take into account – when interpreting the rights guaranteed by Article 7 of the Charter – the corresponding rights guaranteed by Article 8(1) of the ECHR, as interpreted by the European Court of Human Rights, as the minimum threshold of protection (the judgment in *Orde van Vlaamse Balies and Others*, paragraph 26).
- 49 As the Court has already stated, it is apparent from the case-law of the European Court of Human Rights that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. Like that provision, which protects not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal advice, both with regard to its content and to its existence. Individuals who consult a lawyer can reasonably expect that their communication is private and confidential. 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 (the judgment in *Orde van Vlaamse Balies and Others*, paragraph 27 and the case-law cited).
- 50 The specific protection that 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. That fundamental role 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 (the judgment in *Orde van Vlaamse Balies and Others*, paragraph 28 and the case-law cited).
- 51 It follows from the foregoing considerations that, whatever the area of law to which it relates, legal advice given by a lawyer enjoys the strengthened protection guaranteed by Article 7 of the Charter to communications between lawyers and their clients. It follows that a decision such as that at issue in the main proceedings constitutes an interference with the right to respect for communications between lawyers and their clients guaranteed by that article.
- 52 The answer to the first two questions referred for a preliminary ruling is therefore that Article 7 of the Charter must be interpreted as meaning that legal advice given by a lawyer in company law matters falls within the scope of the strengthened protection of communications between lawyers and their clients guaranteed by that article, with the result that a decision requiring a lawyer to provide the authorities of the requested Member State – for the purposes of an

exchange of information on request in accordance with Directive 2011/16 – with all the documentation and information relating to his or her relations with his or her client, concerning such legal advice, constitutes an interference with the right to respect for communications between lawyers and their clients guaranteed by that article.

The third and fourth questions referred

- 53 By the third and fourth questions referred, which should be considered together, the referring court asks, in essence, whether Directive 2011/16 is invalid in the light of Article 7 and Article 52(1) of the Charter, in that, beyond Article 17(4), that directive does not include any provision that, first, expressly permits interference with communications between lawyers and clients in the context of the system of exchange of information on request and, second, itself defines the scope of the limitation on the exercise of the right guaranteed by Article 7 of the Charter, while providing – as follows from Article 18(1) of that directive – that the law of the Member States is to determine the extent to which a lawyer’s legal professional privilege may preclude a request for information made by the requested Member State.
- 54 In that respect, it is apparent, *inter alia*, from the reference for a preliminary ruling that the referring court has doubts as to whether Directive 2011/16 complies with Article 52(1) of the Charter, in particular in so far as that provision provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law.
- 55 Directive 2011/16 concerns administrative cooperation and the exchange of information between Member States in the field of taxation. Article 1(1) of that directive thus provides that it ‘lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2’.
- 56 In the context of the exchanges of information on request provided for in Section I of Chapter II of that directive, which is at issue in the present case, that directive organises the relationship between the requesting Member State and the requested Member State and their reciprocal obligations. Article 6(1) and (3) of that directive establishes that the requested authority must arrange for the carrying out of any administrative enquiries necessary to obtain the information requested and that, in that context, that authority must follow the same procedures as it would when acting on its own initiative or at the request of another authority in its own Member State. In Chapter IV of Directive 2011/16, concerning the conditions governing administrative cooperation, Article 18(1) of that directive stipulates that the requested Member State must use its measures aimed at gathering information to obtain the requested information.
- 57 However, Directive 2011/16 does not lay down, in respect of the exchange of information on request, any reporting obligation for persons or operators holding information, unlike other types of exchanges of information that it organises, such as the mandatory automatic exchange of information provided for in Section II of Chapter II of that directive, as amended by Directive 2018/822.
- 58 As for Article 17(4) of Directive 2011/16, while this concerns the relationship between the requested Member State and the requesting Member State and establishes the right of the former to refuse to communicate certain information to the latter, it does not determine what

needs to be done in the context of national information-gathering procedures. Similarly, Article 17(2) of that directive provides that the directive does not require the requested Member State to carry out enquiries or to communicate information if it would be contrary to its legislation to conduct such inquiries or to collect the information requested for its own purposes. However, it does not determine the requirements to be met in the context of national information-gathering procedures.

- 59 It follows from the foregoing considerations that, for the purposes of the exchange of information on request provided for by Directive 2011/16, the EU legislature has merely determined the obligations that the Member States have towards each other, while authorising them not to comply with a request for information if carrying out the investigations requested or collecting the information in question would be contrary to their legislation. Thus, the EU legislature has, inter alia, left it to the Member States to ensure that their national procedures for gathering information for the purposes of this exchange comply with the Charter, and in particular Article 7 thereof.
- 60 It follows that the fact that the system for exchange of information on request established in Section I of Chapter II of Directive 2011/16 does not include provisions relating to the protection of the confidentiality of communications between lawyers and their clients – in the context of the information gathering that is the responsibility of the requested Member State – does not mean that that directive infringes Article 7 and Article 52(1) of the Charter. Indeed, it follows from that directive that, in accordance with Article 51(1) of the Charter, it is for each Member State to guarantee, in the context of the national procedures implemented for the purposes of that information gathering, the strengthened protection of communications between lawyers and their clients guaranteed by Article 7 of the Charter. Thus, each Member State must, inter alia, ensure that any limitation on the exercise of the rights guaranteed by Article 7 arising from those national procedures is ‘provided for by law’ within the meaning of Article 52(1) of the Charter.
- 61 In those circumstances, the answer to the third and fourth questions referred for a preliminary ruling is that the examination of the aspects to which those questions relate has not disclosed anything that could affect the validity of Directive 2011/16 in the light of Article 7 and Article 52(1) of the Charter.

The fifth and sixth questions referred

- 62 As can be seen from the statements in the order for reference, the decision at issue requires F to produce all documents relating to its relations with its client associated with the creation of corporate investment structures, a detailed description of the transactions to which its advice related, an explanation of its involvement in those processes and the identity of its interlocutors. That decision, which is a repetition of an earlier decision having the same purpose, was issued by the tax authorities after F had objected to the communication of the information and documents thus previously requested, arguing that such communication would have infringed the legal professional privilege by which F was bound and that, in the event, the consultations concerned had not, moreover, been of a tax nature. In the decision at issue, the tax authorities informed F that it was required, under pain of a fine, to provide the previously requested information in its entirety, accurately and without alteration, without being able to invoke legal professional privilege. Finally, as F had still not complied with the decision, the tax authorities imposed the fine previously threatened.

- 63 On that point, the referring court states that, in view of the extent of the information requested, which relates, in substance, to the content of F's entire file, including in particular details of the content of all communications between F and its client, the question arises, first and foremost, whether such a decision – which is, moreover, consistent with national law and in particular with Article 177 of the AO – does not affect the essence of the right to respect for communications between lawyers and their clients enjoying strengthened protection under Article 7 of the Charter.
- 64 As regards the extent of the information requested and the status of national law on the basis of which the decision at issue and the subsequent fine imposed on F were adopted, the referring court pointed out, at the same time, it follows from Article 177 of the AO that, on being served with such a decision, a lawyer may in principle refuse to provide any information, but where that lawyer is acting as an adviser or representative exclusively in tax matters, he or she must provide all the information requested, except where the communication of that information might put his or her client at risk of criminal prosecution.
- 65 In those circumstances, it should be held that, by the fifth and sixth questions referred, which should be considered together, the referring court is essentially asking whether Article 7 and Article 52(1) of the Charter must be interpreted as precluding a decision such as that described in paragraph 52 above, based on national legislation under which advice and representation by a lawyer in tax matters do not enjoy, except where there is a risk of criminal prosecution against the client, the strengthened protection of communications between lawyers and clients guaranteed by Article 7 of the Charter.
- 66 In that connection, it should be noted from the outset that this strengthened protection of communications between lawyers and their clients is applicable, as is clear from paragraph 51 above, irrespective of the area of law in which the advice or representation is provided to the client.
- 67 That being said, it should 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. 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 29 July 2024, *Belgian Association of Tax Lawyers and Others*, C-623/22, EU:C:2024:639, paragraph 134 and the case-law cited).
- 68 In the present case, Article 177(2) of the AO prohibits a lawyer who is the subject of a request for disclosure of information to the authorities from refusing access to information entrusted to him or her in the exercise of his or her profession in so far as it concerns facts of which that lawyer has become aware in the course of providing advice or representation in tax matters and unless it concerns questions where the answers would expose his or her client to the risk of criminal proceedings. The consequence of such a prohibition is that none of the content of exchanges between lawyers and their clients in tax matters, whether in consultation or in the context of legal representation, other than content that would expose the client to a risk of criminal prosecution, may be kept secret from the authorities.

- 69 As for the decision at issue – which reiterated the requirement, on pain of a fine, to produce, in full, accurately and without alteration, the information referred to in paragraph 62 above, after F had indicated that it believed that the legal professional privilege by which it is bound prevented the production of that information – it, in line with Article 177 of the AO, also has the consequence that none of the content of the exchanges between F and its client relating to the creation of the corporate investment structures concerned can be kept secret from the authorities which issued that decision.
- 70 In that respect, it should be remembered that Article 7 of the Charter guarantees the confidentiality of legal advice given by a lawyer, as regards both its existence and its content. Thus, people who consult lawyers can reasonably expect their communications to remain private and confidential and, apart from exceptional situations, have confidence in the fact that their lawyers will not disclose the fact that they are consulting them to anyone without their agreement.
- 71 It is true that, in that connection, the Court has held, inter alia, that it cannot be considered that the obligation to notify laid down in Article 8ab(5) of Directive 2011/16, as amended by Directive 2018/822, undermines the essence of the right to respect for communications between lawyers and their clients enshrined in Article 7 of the Charter. However, it reached that conclusion after noting that that obligation entailed 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 and, in particular, that that provision did 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 (the judgment in *Orde van de Vlaamse Balies and Others*, paragraphs 39 and 40).
- 72 In the present case, as the Advocate General pointed out in point 50 of her Opinion, Article 177 of the AO, by excluding the content of advice given by lawyers in tax matters – and thus an entire branch of law in which lawyers are likely to advise their clients – almost entirely from the strengthened protection that legal professional privilege must enjoy under Article 7 of the Charter, that text renders that protection devoid of its very substance in that branch of law. As for the decision at issue, in so far as it seems to be based on the presupposition that the non-applicability of legal professional privilege arising from Article 177 of the AO authorises the tax authorities to demand the entire file held by F, including in particular details of the content of all communications between F and its client, even though the advice given by F – relating to the setting up of certain corporate investment structures – does not, according to F, relate to tax matters, it further extends the scope of the infringement of the substance of the right protected by Article 7 of the Charter.
- 73 In those circumstances, it must be held that a national provision such as Article 177 of the AO and the application of that provision in the present case by means of the decision at issue, far from being confined to exceptional situations, infringe the essence of the right guaranteed by Article 7 of the Charter by reason of the very extent of the derogation from legal professional privilege that they authorise in respect of communications between lawyers and their clients.
- 74 It follows from all the foregoing considerations that a decision such as the decision at issue based on national legislation such as Article 177(2) of the AO undermines the essence of the right to respect for communications between lawyers and their clients, and therefore constitutes an interference that cannot be justified.

- 75 In the light of the above, the answer to the fifth and sixth questions referred for a preliminary ruling is that Article 7 and Article 52(1) of the Charter must be interpreted as precluding a decision such as that described in paragraph 52 above, based on national legislation under which advice and representation by a lawyer in tax matters do not enjoy – except where there is a risk of criminal prosecution against the client – the strengthened protection of communications between lawyers and clients guaranteed by Article 7 of the Charter.

Costs

- 76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Second Chamber) hereby rules:

1. Article 7 of the Charter of Fundamental Rights of the European Union

must be interpreted as meaning that legal advice given by a lawyer in company law matters falls within the scope of the strengthened protection of communications between lawyers and their clients guaranteed by that article, with the result that a decision requiring a lawyer to provide the authorities of the requested Member State – for the purposes of an exchange of information on request in accordance with Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC – with all the documentation and information relating to his or her relations with his or her client, concerning such legal advice, constitutes an interference with the right to respect for communications between lawyers and their clients guaranteed by that article.

- 2. The examination of the aspects to which the third and fourth questions referred relates has not disclosed anything that could affect the validity of Directive 2011/16 in the light of Article 7 and Article 52 of the Charter of Fundamental Rights.**

3. Article 7 and Article 52(1) of the Charter of Fundamental Rights

must be interpreted as precluding a decision such as that described in paragraph 1 of this operative part, based on national legislation under which advice and representation by a lawyer in tax matters do not enjoy – except where there is a risk of criminal prosecution against the client – the strengthened protection of communications between lawyers and clients guaranteed by Article 7 of the Charter.

[Signatures]