Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 5 April 2022 [1]

Case C-694/20

Orde van Vlaamse Balies,
IG,
Belgian Association of Tax Lawyers,
CD,
JU
v
Vlaamse Regering

(Request for a preliminary ruling
from the Grondwettelijk Hof (Constitutional Court, Belgium))

(Reference for a preliminary ruling – Administrative cooperation in the field of taxation – Charter of Fundamental Rights of the European Union – Articles 7 and 47 – Mandatory automatic exchange of information in relation to reportable cross-border arrangements – Lawyers' legal professional privilege – Waiver from the reporting obligation for intermediaries – Request for an assessment of validity)

I. Introduction

1. The present case raises the issue of the extent of the protection of the legal professional privilege of lawyers who participate as 'intermediaries' in the design of tax arrangements and the reporting and notification obligations incumbent on them for the purposes of applying Directive 2011/16/EU. [2]

2. The present request for a preliminary ruling concerns the assessment of the validity of Article 8ab(5) of Directive 2011/16, as inserted by Directive (EU) 2018/822 [3] ('the contested provision'), which requires the 'lawyer-intermediary', who has the benefit of a waiver from the

[1] Original language: French.

[2] Council Directive 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; 'Directive 2011/16'). The solution adopted in the present case will determine that adopted in Case C-398/21 (*Conseil national des barreaux and Others*), which is suspended pending the decision to be given in the present case. The provisions of Directive 2011/16 which are the subject of the question referred for a preliminary ruling in the present case and the grounds on which it is based are identical to those relied on in the request for a preliminary ruling from the Conseil d'État (Council of State, France) in Case C-398/21.

[3] Council Directive of 25 May 2018 amending Directive 2011/16 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; 'Directive 2018/822').

reporting obligation on the ground of the protection of legal professional privilege, to notify any other 'intermediary' of his or her reporting obligations in relation to the tax authorities, in the light of Articles 7 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

3. The request has been made by the Grondwettelijk Hof (Constitutional Court, Belgium) in the context of applications for the suspension in whole or in part of a Flemish decree transposing the contested provision and amending the Flemish legislation on administrative cooperation in the field of taxation, brought by the Orde van Vlaamse Balies (Flemish Bar Association, Belgium) and the Belgian Association of Tax Lawyers ('the applicants').

II. Legal framework

A. European Union law

4. 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 for tax purposes.

5. Directive 2018/822 has established an obligation to report any cross-border tax arrangements [4] of a potentially aggressive nature to the competent authorities. Recitals 2, 6, 8 and 18 of that directive state:

'(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. …

…

(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

[4] This footnote concerns only the Greek version of this Opinion.

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.

…

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

6. Article 3 of Directive 2011/16, entitled 'Definitions', provides, in paragraphs 18 to 22, 24 and 25, as inserted by Article 1(1)(b) of Directive 2018/822:

'18. "cross-border arrangement" 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:

…

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.'

7. With regard to the reporting obligation and the invocation of legal professional privilege, Article 8ab of Directive 2011/16, as inserted by Article 1(2) of Directive 2018/822, 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.

…

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.

…

14. The information to be communicated by the competent authority of a Member State [to the competent authorities of all other Member States] 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;

…'

B. Belgian law

8. 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).

9. 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.

10. Chapter 2, Section 2, Subsection 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.

11. Article 11/6 of that decree, which was inserted 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 Directive 2011/16. Article 11/6 of the Decree of 21 June 2013 provides, in paragraph 1:

'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.

…'

12. Article 11/7 of the Decree of 21 June 2013, as inserted 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.'

III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

13. By applications lodged on 31 August and 1 October 2020, the applicants asked the referring court to suspend the Decree of 26 June 2020 and to annul it in whole or in part.

14. That court declared the suspension until the date of publication of the judgment on the actions for annulment, first, of point 1 of Article 11/6(1) of the Decree of 21 June 2013, as inserted by Article 14 of the Decree of 26 June 2020, solely in so far as it imposes on a lawyer acting as an intermediary an obligation to provide information to another intermediary who is not his or her client and, secondly, of Article 11/6(3) of the Decree of 21 June 2013, as inserted by Article 14 of the Decree of 26 June 2020, solely in so far as it provides that the lawyer may not rely on legal professional privilege with regard to the obligation to periodically report marketable cross-border arrangements, within the meaning of Article 11/4 of the Decree of 21 June 2013.

15. In those circumstances, the referring court decided to stay the proceedings and to refer the following question to the Court 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 her] 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?'

16. Written observations were submitted by the applicants, the Belgian, Czech, French and Latvian Governments, the European Commission and the Council of the European Union. With the exception of the Czech and Latvian Governments, those parties also presented oral argument at the hearing of the Grand Chamber held on 25 January 2022.

IV. Assessment

A. Preliminary observations

17. Directive 2011/16 – known as 'DAC6' – forms part of the fight against aggressive tax planning and is aligned with the measures taken by the Organisation for Economic Co-operation and Development (OECD) at global level to enhance tax transparency and combat the practices of tax evasion and fraud.

18. In that context, that directive provided for the automatic exchange of information relating to cross-border tax arrangements, imposing a reporting obligation on tax intermediaries in order to discourage the design or use of aggressive tax-planning arrangements.

19. The cross-border arrangements subject to the exchange of information provided for by that directive are identified by reference to a list of specific characteristics known as 'hallmarks' contained in Annex IV to Directive 2018/822.

20. The new element introduced by Directive 2018/822 in order to achieve the objective of combating aggressive tax planning is the obligation which is now imposed on all intermediaries, because of their central role in the design of aggressive tax-planning arrangements, as has been noted inter alia by the OECD, to report information to the tax authorities. It is only if there are no such intermediaries or if those intermediaries are prevented from reporting the information that that obligation is transferred to the taxpayer. It follows that the reporting obligation which is incumbent on the taxpayer has been introduced as a measure of last resort, in view of the fact that the EU legislature considered, rightly in my view, that the reporting system would have been much less effective if it was for the taxpayer him- or herself to declare to the tax authorities his or her own decision to enter into an 'aggressive arrangement'.

21. Consequently, interference by the intermediary constitutes the cornerstone of that system and any limitation on its functioning would risk undermining the very core of the objectives of Directive 2011/16. However, the attainment of those objectives must not give rise to infringement of the fundamental rights protected by the Charter. It is therefore necessary to examine whether the system established by Directive 2011/16, and the amendments made to it by Directive 2018/822, are capable of giving rise to such an infringement.

22. Before carrying out a legal analysis of the compatibility of the contested provision with Articles 7 and 47 of the Charter, I consider it important to clarify the features of the notification obligation incumbent on 'lawyer-intermediaries'.

23. In the first place, it would appear that the intention of the EU legislature was to protect the legal professional privilege of lawyers, first by granting them a reporting waiver [5] and, secondly, by limiting the content of the information which the lawyer-intermediary must file with the third-party intermediary in the event of a waiver. [6] Nevertheless, only lawyers who operate 'within the limits of the relevant national laws that define their professions' may rely on legal professional privilege and be granted a reporting waiver. [7] It follows that, in principle, a lawyer operating outside the national framework that defines his or her profession may not rely on legal professional privilege and is in the same position as any other intermediary who does not benefit from a reporting waiver.

24. In the second place, if the lawyer-intermediary does benefit from a waiver, he or she must notify the other intermediaries and inform them of their reporting obligations. It must be noted that, where no other intermediary is concerned by the cross-border arrangement in question, the notification by the lawyer-intermediary of the waiver which he or she enjoys in relation to the relevant taxpayer, in this case his or her client, cannot, hypothetically, infringe the legal professional privilege between the lawyer and his or her client. It is therefore appropriate in the following analysis to focus solely on the lawyer-intermediary's obligation to notify another intermediary who is not his or her client. [8]

25. It should also be clarified that, in respect of another intermediary, his or her reporting obligation already clearly follows from Article 8ab(1) of Directive 2011/16. Even where there is more than one intermediary, under Article 8ab(9) of that directive, each one is required to fulfil that obligation, unless he or she proves that that obligation has already been fulfilled by another intermediary. In other words, notifying another intermediary under the contested provision does not create a new reporting obligation for the person (intermediary) who is notified.

26. In the third place, it should be noted that the contested provision in no way defines the form or manner in which that obligation should be fulfilled, or the exact content of the information that must be transmitted. It would be sufficient for the information provided to identify the cross-border arrangement to which it relates and to remind the other intermediary concerned of the reporting obligation. [9]

27. Fourthly and finally, it should be noted that as a result of their own reporting obligations under Article 8ab(1) of Directive 2011/16, the notified third-party intermediaries, who have thus been informed of the lawyer's involvement and are not themselves bound by legal professional privilege, will notify the tax administration not only of the existence of a cross-border

5 See the contested provision and recital 8 of Directive 2018/822.

6 See Article 8ab(6) of Directive 2011/16.

7 See the contested provision.

8 I note in that regard that, in the order for reference, the Grondwettelijk Hof (Constitutional Court) ordered the suspension of point 1 of Article 11/6(1) of the Decree of 21 June 2013, as inserted by the Decree of 26 June 2020, 'solely in so far as it imposes on a lawyer acting as an intermediary an obligation to provide information to another intermediary who is not his or her client'.

9 It should nevertheless be noted that although the obligation to notify as laid down in the contested provision does not appear to require the lawyer-intermediary to communicate to that other intermediary other information which he or she holds on the client concerned, that does not appear to be the case with the Belgian provision transposing it. Belgian law requires additional reasoning explaining why a lawyer-intermediary is unable to comply with the reporting obligation due to legal professional privilege. I note, however, that the question referred for a preliminary ruling does not concern the Belgian provision transposing the contested provision, but the compatibility of the contested provision with Articles 7 and 47 of the Charter.

arrangement and the relevant taxpayer, but also of the involvement of the lawyer-intermediary. In that regard, it follows from the second subparagraph of Article 8ab(9) and Article 8ab(14) of that directive that the identification of intermediaries is one of the items of information to be provided to fulfil the reporting obligation.

B. The compatibility of the contested provision with Articles 7 and 47 of the Charter

28. I note that the referring court raises the question as to the validity of the contested provision by asking whether that provision infringes the rule of legal professional privilege of lawyers guaranteed by Articles 7 and 47 of the Charter.

29. In that regard, the applicants submit that the notification obligation, particularly as regards third-party intermediaries, infringes the legal professional privilege of lawyers and is contrary to both Article 7 and Article 47 of the Charter. Thus, they argue that the legal professional privilege of lawyers is an essential element of the rights to respect for private life and to a fair trial and that the necessary relationship of trust between client and lawyer can be maintained only if the former is guaranteed that what he or she entrusts to the latter will not be disclosed. The mere fact of instructing a lawyer is already said to fall within the scope of that privilege. Therefore, a lawyer cannot provide third parties or an authority with any information concerning a cross-border arrangement, even if his or her intervention is limited to a simple opinion.

30. The Belgian, Czech, French and Latvian Governments, the Commission and the Council submit that the obligation to notify is compatible with Articles 7 and 47 of the Charter and that, consequently, the contested provision does not infringe legal professional privilege.

31. I note from the outset that both the Court of Justice and the European Court of Human Rights ('the ECtHR') have had the opportunity to rule on several occasions on the extent of the legal professional privilege of lawyers. The Court has thus recognised that legal professional privilege is one of the general principles of EU law which are inspired by the common values and constitutional traditions common to the Member States. [10]

32. It is also important to note that the rule of legal professional privilege between lawyer and client is, according to the case-law of the ECtHR, guaranteed twice, by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') and by Article 8 thereof. [11]

33. The Court of Justice has also made it clear that, while the scope and detailed rules for the protection of lawyers' legal professional privilege remain governed by the national legislation of each Member State, the very principle of that protection must, in accordance with Article 52(3) of the Charter and the case-law of the Court on its application, be regarded as also being guaranteed on the basis of both Article 7 and Article 47 of the Charter.

34. Moreover, Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR, without thereby adversely affecting the autonomy of EU law. The Court must,

[10] Judgment of 18 May 1982, *AM & S Europe* v *Commission* (155/79, EU:C:1982:157, paragraph 18).

[11] See, inter alia, ECtHR, 16 December 1992, *Niemietz* v *Germany*, CE:ECHR:1992:1216JUD001371088, § 37; and, on the right to respect for private life, 24 July 2008, *André and Others* v *France*, CE:ECHR:2008:0724JUD001860303, § 36, and 6 December 2012, *Michaud* v *France*, CE:ECHR:2012:1206JUD001232311, §§ 117 to 119; 'the judgment in *Michaud*'.

accordingly, ensure that its interpretation of Articles 7 and 47 of the Charter ensures a level of protection which does not disregard that guaranteed by Articles 6 and 8 ECHR, as interpreted by the ECtHR. [12]

1. Does the contested provision infringe Article 47 of the Charter?

35. It should be recalled, in the first place, that Article 47 of the Charter guarantees the right to a fair trial and includes the right of everyone whose rights and freedoms guaranteed by the law of the European Union are violated to be informed, defended and represented.

36. According to the settled case-law of the Court, the right to a fair trial under the ECHR consists of various elements, which include, 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. [13]

37. The relationship between the confidentiality of the communication between lawyer and client, on the one hand, and the right to a fair trial, on the other, has been clarified by the Court in a case with strong similarities to the present case. Thus, the *Ordre des barreaux francophones et germanophones and Others* case raised the question of the compatibility of the secrecy of correspondence with the obligation to cooperate with the national authorities responsible for combating money laundering. [14] In that regard, the Court held that the nature of the activities covered by the reporting obligations is such that they take place in a context *with no link to judicial proceedings* and, consequently, those activities fall outside the scope of the right to a fair trial. [15]

38. With regard, more specifically, to the confidentiality of exchanges between a lawyer and his or her client, on the one hand, and the rights of the defence, on the other, the Court stated that '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 6 [ECHR], 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'. [16]

39. Moreover, the ECtHR has recognised that, in the case of a lawyer, a breach of legal professional privilege may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 ECHR. [17]

40. It follows from that case-law of the Court of Justice and the ECtHR that, first, the right to a fair trial presupposes, by definition, a link with judicial proceedings and that it is inseparable from the existence of a judicial context.

[12] Judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraph 165 and the case-law cited).

[13] Judgment of 26 June 2007, *Ordre des barreaux francophones et germanophones and Others* (C-305/05, EU:C:2007:383, paragraph 31 and the case-law cited; 'the judgment in *Ordre des barreaux francophones et germanophones and Others*').

[14] Under Article 2a(5) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77), the role of lawyers was to assist their client in the planning or execution of certain transactions, essentially those of a financial nature or concerning real estate, or to act on behalf of and for their client in connection with such transactions.

[15] Judgment in *Ordre des barreaux francophones et germanophone and Others*, paragraphs 33 and 35.

[16] Judgment in *Ordre des barreaux francophones et germanophone and Others*, paragraph 32. Emphasis added.

[17] See ECtHR, 16 December 1992, *Niemietz* v *Germany* (CE:ECHR:1992:1216JUD001371088, § 37).

41. In the present case, it must be found that such a link has not been established. Thus, in the context of Directive 2011/16, the intermediary is not acting as the defence counsel for his or her client in a dispute with the tax administration. Although the intermediary's advice may potentially give rise to a dispute with the tax administration at a later stage, that does not mean that that advice was given 'for the purposes and in the interests of the … rights of defence', within the meaning of the case-law of the Court.

42. Secondly, the absence of any link with judicial proceedings is all the more evident in respect of the contested provision, since the obligation to notify arises, hypothetically, at an early stage, before the reportable cross-border arrangement has been implemented, and therefore at a point when, in principle, no dispute with the tax authorities concerning that arrangement could have arisen.

43. Moreover, the absence of any link with judicial proceedings is also confirmed by the objectives pursued by Directive 2011/16 which are principally 'preventive'. In that regard, recital 2 of Directive 2018/822 clearly states that the exchange of information is intended precisely to enable the tax 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'.

44. Thirdly, it should be noted that the information obligations provided for in Directive 2011/16 relate to a legal activity, thus a priori one that is not contentious, at least at the initial stage of that reporting. It follows that the absence of any link with judicial proceedings is even more obvious than in the context of the judgment in *Ordre des barreaux francophones et germanophones and Others*, since the reporting obligations here concern activities which are not in direct contravention of any applicable law, unlike operations related to money laundering.

45. In the light of the foregoing, I am of the opinion that the notification of other intermediaries of the obligation to inform a third-party intermediary cannot infringe the rights protected by Article 47 of the Charter since that obligation does not form part of judicial proceedings and, consequently, does not fall within the scope of that provision. [18]

2. Does the contested provision infringe Article 7 of the Charter?

46. It should be recalled that the rights guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 ECHR. [19] Article 7 of the Charter guarantees everyone the right to respect for his or her private and family life, home and communications.

47. In that regard, it is clear from the case-law of the ECtHR that the legal professional privilege of lawyers is specifically protected by Article 8 ECHR. [20]

48. For the purposes of applying Article 7 of the Charter, it should therefore be noted that the protection of legal professional privilege under Article 8 ECHR is not limited to activities relating to the defence of a client in legal proceedings, but has a wider dimension (and broader scope) in the sense that it also protects the relationship between a lawyer and his or her client outside a judicial context (notwithstanding the fact that that protection is more restrictive for activities relating to that task).

[18] The same applies to any other ensuing obligations for that third-party intermediary to notify the tax authorities.

[19] See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

[20] The judgment in *Michaud*, § 118 and 119.

49. Thus, Article 8 ECHR seeks to protect the confidentiality of all correspondence between individuals, in that it affords strengthened protection to exchanges between lawyers and their clients. It should moreover be made clear that that protection also covers legal advice, protecting the secrecy of such legal advice with regard not only to its content (whatever form it takes) but also to its existence. [21]

50. In its judgment in *Michaud*, the ECtHR ruled on the conformity with the ECHR of the obligation imposed on lawyers to report their clients' suspicious activities to the competent authorities in the context of the French legislation transposing Directive 2005/60/EC. [22]

51. In that judgment, the ECtHR noted that, 'in requiring lawyers to report to the administrative authorities information concerning another person which came into their possession through exchanges with that person, the obligation for them to report suspicions constitutes an interference with lawyers' right to respect for their correspondence' and 'also constitutes an interference with their right to respect for their "private life", a notion which includes activities of a professional or business nature'. [23]

52. Nevertheless, according to the ECtHR, the interference with their private life was justified in view of the fact that the obligation to report suspicions concerned only '*tasks performed by lawyers, which are similar to those performed by the other professions subjected to the same obligation, and not the role they play in defending their clients*', namely financial or real-estate transactions, [24] and that lawyers were not subjected to that obligation 'where the activity in question "relates to judicial proceedings, whether the information they have was received or obtained before, during or after said proceedings, including any advice given with regard to the manner of initiating or avoiding such proceedings, *nor where they give legal advice*, unless said information was provided for the purpose of money-laundering or terrorist financing or with the knowledge that the client requested it for the purpose of money-laundering or terrorist financing"'. [25]

53. It follows from the case-law of the ECtHR that the protection of legal professional privilege under Article 8 ECHR does not cover all the activities of a lawyer.

54. Thus, on the one hand, there are the activities which are traditionally part of a lawyer's tasks and which, consequently, are covered by legal professional privilege. Thus, a lawyer who advises his or her client in the context of judicial proceedings or the preparation for such proceedings may of course rely on legal professional privilege. The same applies to a lawyer who is consulted for ad hoc legal advice by his or her client.

55. On the other hand, there are cases where a lawyer may act outside of his or her 'usual role' of representing a client or giving legal advice, with the result that the activities carried out by that lawyer are treated in the same way as those of other professionals. In such cases, the nature of those activities cannot justify the protection of legal professional privilege which, as explained above, has a very specific function in a democratic society, namely to enable lawyers to perform their fundamental task of defending individuals.

21 The judgment in *Michaud*, §§ 118 and 119.

22 Directive of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15).

23 The judgment in *Michaud*, § 91.

24 The judgment in *Michaud*, § 127. Emphasis added.

25 The judgment in *Michaud*, § 127. Emphasis added.

56. I note, however, that that distinction is not absolute and may give rise to difficulties in its practical implementation – as the present case shows – particularly in certain cases where the role of the lawyer is more nuanced. In that regard, I note the divergent positions adopted by the parties in the present case as regards the role of the lawyer as an intermediary in the context of the cross-border arrangement.

57. On the one hand, the applicants submit that the lawyer should always be able to rely on his or her legal professional privilege, irrespective of the nature of his or her activities as an 'intermediary', solely in the light of his or her status as a lawyer. They maintain that the lawyer is thus neither subject to an obligation to report information nor to a subsidiary obligation to notify a third-party intermediary of the waiver.

58. On the other hand, some of the Member States (and in particular the Kingdom of Belgium and the Republic of Latvia) argue that the activity of an intermediary is not the activity of a lawyer, which justifies the reporting and notification obligations imposed on him or her.

59. A reading of Directive 2011/16 appears to suggest that, in principle, the services offered by a lawyer as an intermediary do not fall within the scope of the usual activities of the legal profession of defence and legal assessment. Thus, a lawyer acting as an intermediary should, prima facie, be treated in the same way as other 'intermediaries', some of whom may not enjoy legal professional privilege. [26]

60. To me, it seems doubtful that a lawyer who – alone or with the assistance of other professionals – sets up a cross-border arrangement in order to then offer it to taxpayers is necessarily acting within the framework of his or her profession. The fact, in particular, that the lawyer's involvement in the design of that arrangement may be prior to its marketing to a client seems to me to indicate that the necessary link between a lawyer and his or her client, which would justify the protection of legal professional privilege, is missing. [27]

61. By way of example, it is possible for a lawyer to go beyond 'the limits of the relevant national laws that define [his or her profession]' and, to that end, to lose the benefit of the waiver from the reporting obligation where he or she designs 'marketable' cross-border arrangements [28] the characteristic of which, unlike 'bespoke arrangements', [29] is that they can be implemented without a need to be substantially customised. It is conceivable that a lawyer, without being in an advisory relationship with a client, might design a marketable cross-border arrangement, which he or she then disseminates, either directly to taxpayers or through an intermediary. In that case, it cannot be ruled out that that lawyer is operating outside the limits of his or her profession as set by his or her national legislation, with the consequence that he or she is bound by the reporting obligation (like any other intermediary) as soon as the arrangement is finalised, in accordance with Article 8ab(1) of Directive 2011/16.

62. However, to accept only such a definition of lawyer-intermediary would mean ignoring the advisory role which he or she may be called upon to play in the context of the legal assessment of a cross-border arrangement.

[26] It is only as a second step that Directive 2011/16 provides for the possibility for the Member States to grant the lawyer-intermediary a waiver in respect of the obligation to file information laid down in Article 8ab(1) of that directive, if that obligation would breach the legal professional privilege under national law.

[27] I note, in that regard, that, under Article 8ab(1) of Directive 2011/16, the reporting obligation arises from the point when the arrangement in question is designed.

[28] See Article 3(24) of Directive 2011/16.

[29] See Article 3(25) of Directive 2011/16.

63. I would point out, moreover, that if the activity as an intermediary carried out by a lawyer were to be regarded as never falling within the scope of the activity of providing legal advice, the question would arise as to why Directive 2011/16 provided for the protection of lawyers' legal professional privilege by means of the waiver mechanism laid down in the contested provision. There are, in my view, two main reasons for the choice made by the EU legislature.

64. First, since legal professional privilege is not harmonised at European level, the intention of Directive 2018/822 was thus to avoid any conflict with national rules while ensuring that the fundamental principles recognised by the Charter are respected. [30]

65. Secondly, the distinction between the activities of a lawyer which form part of the 'usual performance of his or her duties' and those which are not is far from always being obvious in practice. Thus, it is quite conceivable that, even in the context of the cross-border arrangement in question, a lawyer may be asked by his or her client to assess that prepared arrangement and would therefore be called upon to provide legal advice. In such a situation, that lawyer should be able to rely fully on legal professional privilege since he or she is providing legal advice to the taxpayer concerned by that arrangement.

66. I note, by way of example, that, in the case of a 'bespoke arrangement', it cannot be ruled out that a lawyer acting as an 'intermediary', within the meaning of Directive 2018/822, intervenes within the framework of his or her profession by offering legal advice in the same way as, in general, a lawyer would offer his or her client for any design or management activity, irrespective of the contract or agreement under civil or commercial law, arrangements under company law or social law, or even the legal strategy.

67. I therefore consider that it is precisely because it is difficult to rule out a priori that the lawyer-intermediary may be called upon to provide legal advice in the abovementioned example that Directive 2011/16 has exempted lawyers from the reporting obligation in order to ensure compliance with the principle of legal professional privilege in their regard.

68. It follows from the foregoing that, although it is not always easy to distinguish between the activities of a lawyer – as they are occasionally complex and indivisible – I think it is possible to separate the situations in which a lawyer, acting 'as a lawyer', should be able to rely on legal professional privilege and, consequently, should benefit from a reporting waiver, from those in which there is no need for such protection. It is therefore necessary to ensure, on the one hand, that the definition adopted for legal professional privilege is not so broad as to cover the activities of a lawyer-intermediary which go well beyond the specific tasks of representation and advice by granting him or her a waiver from certain reporting obligations even though he or she is carrying out the same activity as intermediaries in other professions. On the other hand, a disproportionate restriction of that definition would risk causing intolerable interference in the relationship between a lawyer and his or her client.

69. In that regard, making that distinction is particularly important in the context of the application of Directive 2018/822 in order to safeguard the balance between, on the one hand, the requirement to protect a lawyer's legal professional privilege, which has a specific place in every State governed by the rule of law and, on the other, the objective of combating aggressive tax planning, which is one of the main tools to prevent the erosion of tax bases.

[30] See recital 18 of Directive 2018/822.

70. Thus, while it is primarily for the national court to make this distinction, in particular in view of the fact that legal professional privilege is not harmonised at European level, that task will have to be performed taking into account the abovementioned elements.

(a) The compatibility of the obligation to notify laid down in the contested provision with Article 7 of the Charter

71. In the light of the foregoing considerations, it is necessary to examine the compatibility of the contested provision with Article 7 of the Charter.

72. With regard to the contested provision, it should be recalled that, where a lawyer-intermediary benefits from a waiver in respect of his or her client, that provision requires the lawyer to notify other intermediaries of their reporting obligations under Article 8ab(6) of Directive 2011/16. The notification obligation therefore automatically includes, in addition to identifying the cross-border arrangement concerned and reminding those third-party intermediaries of their own reporting obligations, the identification of the notifying lawyer.

73. I would point out, in the first place, that the contested provision can be applied only where the lawyer-intermediary and the third-party intermediary know each other as a result of their joint participation in the cross-border arrangement.

74. The obligation to notify other intermediaries therefore does not cover the situation where the lawyer-intermediary is unaware of the involvement of another intermediary in the cross-border arrangement since, for example, the taxpayer has sought advice from various intermediaries separately. After all, if the person who satisfies the obligation to provide information was not aware of the other intermediary, he or she would never be able to inform that intermediary. A lawyer-intermediary who satisfies the obligation to provide information is therefore not required to seek out intermediaries of the arrangement in question who are unknown to him or her. In such a situation, he or she will have to notify the relevant taxpayer, namely his or her client, to whom the reporting obligation will be transferred, a situation which does not pose any problems from the point of view of legal professional privilege.

75. In the second place, I would point out that, in the interests of protecting legal professional privilege, Directive 2011/16 substantially limits the content of the information which the lawyer-intermediary must file with the third-party intermediary in the event of a waiver. Thus, that information is limited to notifying the waiver enjoyed by the lawyer-intermediary and the reporting obligation which, consequently, is incumbent on that other intermediary. The obligation to notify laid down in the contested provision does not entail the disclosure of information concerning the content, the legal analysis of the lawyer or communications which he or she may have had with his or her client. [31]

76. In the third place, I note by way of example that it is possible that, with the consent of the relevant taxpayer (or even under his or her coordination), all of the intermediaries involved in the design of a cross-border arrangement have been jointly involved in all the stages of its organisation by also addressing the issue of notifying the tax authorities and their respective obligations. [32] Nor can it be ruled out that an intermediary, who is in any event subject to a

[31] See Article 8ab(14)(c) of Directive 2011/16.

[32] That would be the case, for example, if the client him- or herself 'waives' the legal professional privilege by including other intermediaries in his or her exchanges with his or her lawyer.

reporting obligation, has (already) concluded that the arrangement in question must be reported before the lawyer (with whom he or she jointly set up the arrangement) has informed him or her of the waiver and reminded him or her of his or her notification obligation. After all, the criteria which trigger the reporting obligation are listed in Directive 2011/16, and therefore every intermediary and even the taxpayer him- or herself is able to 'recognise' a tax arrangement that must be reported. In those circumstances – and subject to national rules governing the legal professional privilege of lawyers – it might be considered that legal professional privilege has not been infringed. [33] This is supported by the fact that the information which the lawyer-intermediary is required to notify to the third-party intermediary is limited to the waiver which he or she enjoys and to identifying the file in question. [34]

77. In the light of the foregoing, I am of the opinion that, prima facie, the contested provision is not likely to infringe the rights protected under Article 7 of the Charter since the information transmitted by the lawyer to the third-party intermediary, including the lawyer's name, has already been presented to that third-party intermediary.

78. The fact remains that, irrespective of whether the lawyer-intermediary and the third-party intermediary know each other, it cannot be ruled out that, in certain situations, an interference with the right to respect for private life may arise.

79. In the first place, it should be recalled that Article 8 ECHR protects legal advice not only with regard to its content, but also its existence. [35] Lawyers' legal professional privilege, which is based on the relationship of trust between the lawyer and his or her client, requires the lawyer not to disclose to anyone the existence of that relationship, let alone the content of their communications (unless the client expressly agrees). [36]

80. Thus, when the lawyer is exempted from the reporting obligation which is incumbent on intermediaries, it follows naturally from the relationship of trust which he or she has with his or her client and the duty of confidentiality which he or she owes him or her that he or she should be able to inform the client primarily. It should also be observed that notifying the client of legal obligations incumbent on the lawyer is a professional obligation of the latter, the non-compliance with which is capable of jeopardising his or her professional liability.

81. In the second place, I would point out that legal professional privilege covers not only the communication between a client and his or her lawyer, but also the legal advice given by that lawyer. Thus, even if the lawyer and the third-party intermediary know each other, as a result of their joint participation in the arrangement in question, the fact remains that the lawyer, by informing the third-party intermediary of his or her exemption, shares with the latter his or her assessment that the arrangement in question contains the 'hallmarks' listed in Annex IV to Directive 2018/822 and must, consequently, be notified as a 'cross-border arrangement'. That

[33] In my view, that scenario could be comparable to that in which a lawyer and other professionals (such as, for example, a notary, a banker, an accountant, an estate agent or any other adviser) offer their services to a client in the context of a joint project and may be asked by that client to communicate with each other directly and 'freely', including where that communication concerns the client's obligations towards public authorities. The fact that the lawyer 'reminds' one of those professionals about a reporting obligation which may be imposed on him or her or them in order to safeguard the (common) interests (of their client) should not raise any difficulties from the point of view of legal professional privilege, subject of course to the national rules governing those professions (including that of the lawyer).

[34] See point 75 of this Opinion.

[35] See point 49 of this Opinion.

[36] With the exception, of course, of the situation in which the purpose of the advice sought is for the client to commit a criminal offence, in which case the lawyer who becomes aware of it not only cannot contribute to that offence by his or her advice, but can also be released from his or her obligation of legal professional privilege.

assessment is the result of a factual and legal analysis which constitutes the essence of a lawyer's provision of legal advice. It follows that the latter is protected by legal professional privilege and should be communicated by the lawyer only to his or her client.

82. I note, in the third place, that the situation examined in point 76 of this Opinion may not be transposable in all cases, even if the lawyer and the third-party intermediary or intermediaries know each other as a result of their participation in the design of the same cross-border arrangement. This will be the case in particular where numerous intermediaries are involved at different stages of the design of the arrangement in question and the participation of those various intermediaries in the cross-border arrangement varies according to their respective roles. [37]

83. It follows that, although Directive 2011/16 seeks to limit the infringement of legal professional privilege, the fact remains that, in certain situations, such infringement may be established.

(b) The justification for the contested provision

84. According to the settled case-law of the Court, fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed. [38]

85. It is therefore necessary to examine whether the notification obligation at issue is provided for by law, pursues an objective of general interest recognised by the European Union, is necessary in order to attain that objective and complies with the principle of proportionality.

86. In the first place, the notification by the lawyer-intermediary of the reporting waiver which he or she enjoys to another intermediary who has participated in the same cross-border arrangement is expressly provided for by law, namely, in the present case, the contested provision.

87. I consider, in that respect, that the obligation to notify is laid down by a provision which is sufficiently clear and precise. [39]

88. In the second place, the general interest pursued by EU law in the present case is that of combating aggressive tax planning which is the subject of international tax cooperation, manifested by the exchange of information between Member States.

89. I note, in that regard, that it is settled case-law that the prevention of the risk of tax evasion and tax fraud constitutes an objective of general interest recognised by the European Union. [40] The same applies to combating harmful arrangements, when the accrual of a tax advantage constitutes the essential aim of the transactions at issue. [41]

[37] It may be that the various intermediaries participated in different stages of the design of the arrangement in question and may not all have the same degree of involvement in that arrangement, with the result that there is an asymmetry of information between intermediaries.

[38] Judgment of 13 September 2018, *UBS Europe and Others* (C-358/16, EU:C:2018:715, paragraph 62 and the case-law cited).

[39] It is, of course, for the national courts to assess whether the national provisions which transpose it have the same characteristics.

[40] 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 86 to 88 and the case-law cited).

[41] Judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 53 and the case-law cited).

90. Moreover, the Court has recognised that 'the need to safeguard the balanced allocation between the Member States of the power to impose taxes' is a ground capable of justifying restrictions, in particular, where the national measures in question are designed 'to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory'. [42]

91. In that regard, although Directive 2018/822 does not expressly pursue the objective of combating tax fraud as an 'illegal activity', it is clear from recitals 2, 4, 8 and 9 thereof that the obligations which it imposes on intermediaries are intended to protect national tax bases from erosion by monitoring 'potentially aggressive tax-planning arrangements'. Thus, the reporting obligation laid down therein is intended, first, to facilitate the rapid adaptation of tax legislation to legal but aggressive tax practices and, secondly, in relation to the foregoing, ultimately to discourage the design of such arrangements. [43]

92. While an interference with the right to respect for private life may, in my opinion, be justified in the light of the objective pursued by Directive 2018/822, the fact remains that that interference must be necessary and proportionate.

93. In the third place, it is therefore necessary to examine whether the notification obligation at issue is necessary in order to attain the objective of combating aggressive tax planning and complies with the principle of proportionality.

94. In that regard, it is important to recall, first, that the EU legislature considered that the scope of the notification obligation had to be limited to a strict minimum by establishing guarantees relating to legal professional privilege.

95. Thus, on the one hand, the contested provision is applicable only in certain specific cases, namely where third-party intermediaries actually cooperate with the lawyer-intermediary and with the consent of the taxpayer client. [44] On the other hand, the infringement of the lawyer's legal professional privilege is limited further by the scope and the content of the information which the lawyer-intermediary is required to notify to the third-party intermediary, which, to a large extent, is already known to the latter. [45]

96. Secondly, the contested provision, in my view, makes it possible to ensure the effectiveness of the system for reporting cross-border arrangements to the tax authorities. Notwithstanding the fact that, irrespective of any notification by the lawyer-intermediary, third-party intermediaries remain subject to an obligation to report information to the tax authorities under Article 8ab(1) of Directive 2011/16, the obligation to notify laid down in the contested provision makes it possible to ensure that the tax authorities obtain the information necessary to assess the cross-border arrangement. In other words, that mechanism makes it possible, first, to 'alert' the other intermediaries to their duty to comply with their reporting obligation and, secondly, to ensure that those cross-border arrangements which might not be reported are actually reported.

[42] Judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 72 and the case-law cited).

[43] I also note that recital 14 of Directive 2018/822 specifies that 'aggressive cross-border tax-planning arrangements, the main purpose or one of the main purposes of which is to obtain a tax advantage that defeats the object or purpose of the applicable tax law, are subject to the general anti-abuse rule as set out in Article 6 of Council Directive (EU) 2016/1164 [of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2006 L 193, p. 1)]'.

[44] See points 73 and 74 of this Opinion.

[45] See point 75 of this Opinion.

97. I am, however, of the opinion that, in order to be able to assess fully the compatibility of the contested provision with Article 7 of the Charter, account must also be taken of the subsidiary obligation on the third-party intermediary to provide the tax authorities with the name of the lawyer-intermediary.

3. Does the disclosure of the name of the lawyer-intermediary, which is protected by legal professional privilege, to the tax authorities in the context of the reporting obligation which is incumbent on intermediaries and the taxpayer constitute an infringement of Article 7 of the Charter?

98. It should be noted that the doubts expressed by the referring court as to the compatibility of Directive 2011/16 with the Charter concern only the contested provision and not the procedure for notifying (at a later stage) the tax authorities of information concerning the cross-border arrangement. I consider, nevertheless, that, from the perspective of Article 7 of the Charter, the question of the disclosure of the name of a lawyer-intermediary who relies on legal professional privilege is equally relevant.

99. I would point out that the ECtHR has held that to require lawyers to report to the administrative authorities information concerning another person which came into their possession through exchanges with that person constitutes an interference with their right to respect for their private life. [46]

100. In the present case, even if the lawyer is exempted from notifying the tax authorities, the existence of communication with his or her taxpayer client (and therefore the name of the lawyer) will be disclosed to the tax authorities either by the taxpayer him- or herself or by a third-party intermediary.

101. I recall that, as a result of their own reporting obligations under Article 8ab(1) of Directive 2011/16, the notified third-party intermediaries, who have thus been informed of the lawyer's involvement and are not themselves bound by legal professional privilege, will notify the tax administration not only of the existence of a cross-border arrangement and the relevant taxpayer, but also of the involvement of the lawyer-intermediary. In that regard, it follows from the second subparagraph of Article 8ab(9) and Article 8ab(14) of that directive that the identification of intermediaries is one of the items of information to be provided to fulfil the reporting obligation.

102. I therefore consider that the contested provision undermines the enhanced protection of exchanges between lawyers and their clients guaranteed by Article 8 ECHR. It is therefore necessary to examine whether the obligation at issue is indeed provided for by law, pursues an objective of general interest recognised by the European Union, is necessary in order to attain that objective and complies with the principle of proportionality.

103. As regards the first two criteria to be taken into consideration, I refer to the foregoing analysis on the contested provision which applies *mutatis mutandis* to the second subparagraph of Article 8ab(9) and Article 8ab(14) of Directive 2011/16. [47]

[46] The judgment in *Michaud*, § 91.

[47] See points 86 to 91 of this Opinion.

104. The following analysis therefore concerns only whether the communication of the lawyer's name to the tax authorities by a third-party intermediary or the taxpayer is necessary in order to attain the objective of combating aggressive tax planning and complies with the principle of proportionality.

105. It should be noted that, in the light of the information received, the tax authorities have all the information necessary to assess the cross-border arrangements in question. Thus, obtaining the lawyer's name does not provide them with any material information about the arrangement in question.

106. Moreover, by virtue of their powers of investigation and review, the tax authorities may request any further information (and information additional to that already received in the declaration) whether from the taxpayer him- or herself or from intermediaries who are not subject to legal professional privilege.

107. They do not need to know the identity of the lawyer-intermediary since, as Directive 2011/16 itself states, legal professional privilege exempts him or her from any reporting obligation with regard to the cross-border arrangement. In other words, any request for information from the tax administration to the lawyer-intermediary would conflict with legal professional privilege (unless the client instructs the lawyer to respond) and could be addressed effectively only to the taxpayer or, possibly, other intermediaries who are not subject to legal professional privilege.

108. At the hearing, some of the Member States and the Commission argued that the notification of the lawyer's name to the tax authorities is justified by the need to ensure effective supervision of the intermediaries involved in cross-border arrangements. As far as lawyers are concerned, the purpose of that measure is therefore to verify whether a lawyer has fulfilled his or her obligations under Directive 2018/822 and whether legal professional privilege has been rightly invoked.

109. Although Directive 2018/822 aims to ensure that, because of their central role in the organisation of cross-border arrangements, intermediaries are required to file the necessary information with the tax authorities, the fact remains that its main objective is to combat aggressive tax-planning practices.

110. That objective is based on the possibility that is now available to the tax authorities of obtaining the information which is necessary to enable them to assess cross-border arrangements, of exchanging those data between Member States and of adapting their tax laws accordingly. That objective, which is fulfilled as soon as that information is obtained, irrespective of whether it was transmitted by an intermediary or a taxpayer, does not require the name of the lawyer involved to be known where he or she invokes legal professional privilege or for it to be checked whether he or she has rightly relied on his or her legal professional privilege.

111. It should be noted that Directive 2018/822 also seeks to protect the legal professional privilege of lawyers and the general principles set out in the Charter.[48] By making third-party intermediaries and the taxpayer subject to the obligation to provide the name of the lawyer, that measure would run counter to that objective.

[48] See recital 18 of Directive 2018/822.

112. It would therefore be paradoxical to recognise the lawyer's legal professional privilege and to grant him or her a reporting waiver on that basis to then infringe that right by providing that, as an indirect consequence of the reporting obligation which is incumbent on the third-party intermediary (and the taxpayer), his or her name will be communicated to the tax authorities. Moreover, it is not expressly stated in any provision of Directive 2018/822 that it seeks to verify whether the lawyer was entitled to legal professional privilege.

113. I therefore take the view that, while it cannot be ruled out that, under national law (and the rules of professional conduct applicable to lawyers), a Member State may carry out such a check – for example where a lawyer is suspected of having participated in a fraudulent activity – this has no legal basis in Directive 2018/822.

114. Therefore, I consider that, for the purposes of applying Article 8ab(9) of Directive 2011/16, the third-party intermediary and the taxpayer must be able to fulfil their reporting obligations by means of an abstract scheme which does not have to indicate the identity of the lawyer. [49]

115. Such a solution would, moreover, comply with the principle of proportionality by limiting itself to what is strictly necessary in order to attain the objectives pursued by Directive 2018/822.

116. The use of an abstract scheme which does not include the lawyer's name would make it possible to attain the objective of combating aggressive tax planning while at the same time ensuring respect for legal professional privilege and private life, guaranteed under Article 7 of the Charter. Furthermore, the proposed solution would, in my view, make it possible to ensure the effectiveness of the system for reporting cross-border arrangements to the tax authorities, without depriving those authorities of receiving all the necessary information on the tax arrangements in question (the name of the lawyer does not form part of that information for the reasons set out in points 105 to 107 of this Opinion).

117. In the light of the foregoing, I consider, first, that the identification of a lawyer as one of the items of information to be provided to fulfil the reporting obligation set out in the second subparagraph of Article 8ab(9) and Article 8ab(14) of Directive 2011/16 constitutes an infringement of Article 7 of the Charter where that lawyer has a reporting waiver on the basis of legal professional privilege. Secondly, I consider that the infringement of the protection of private life resulting from the contested provision does not, in the light of the objectives pursued, involve a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed, provided that the name of the lawyer-intermediary is not disclosed to the tax authorities.

V. Conclusion

118. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Grondwettelijk Hof (Constitutional Court, Belgium) as follows:

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, by requiring a lawyer who is acting as an intermediary and who, relying on his or her legal professional privilege, has a reporting waiver, to notify,

[49] For example, the anonymisation of the lawyer's name could be accepted as an appropriate solution.

without delay, another intermediary of his or her reporting obligations under paragraph 6 of that article, does not infringe the right to respect for private life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, provided that the name of that lawyer is not disclosed to the tax authorities in the context of the fulfilment of the reporting obligation laid down in the second subparagraph of Article 8ab(9) and Article 8ab(14) of that directive.