Provisional text

JUDGMENT OF THE COURT (Second Chamber)

29 July 2024 (*)

(Reference for a preliminary ruling – Administrative cooperation in the field of taxation – Mandatory automatic exchange of information in relation to reportable cross-border arrangements – Directive 2011/16/EU, as amended by Directive (EU) 2018/822 – Article 8ab(1) – Reporting obligation – 8ab(5) – Subsidiary obligation to notify – Legal professional privilege – Validity – Articles 7, 20 and 21, and Article 49(1) of the Charter of Fundamental Rights of the European Union – Right to respect for private life – Principles of equal treatment and non-discrimination – Principle of legality in criminal proceedings – Principle of legal certainty)

In Case C-623/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Constitutional Court, Belgium), made by decision of 15 September 2022, received at the Court on 29 September 2022, in the proceedings

Belgian Association of Tax Lawyers,

SR,

FK,

Ordre des barreaux francophones et germanophone,

Orde van Vlaamse Balies,

CQ,

Instituut van de Accountants en de Belastingconsulenten,

VH,

ZS,

NI,

EX

v

Premier ministre/Eerste Minister,

intervening parties:

Conseil des barreaux européens AISBL,

Conseil national des barreaux de France,

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: N. Emiliou,

Registrar: N. Mundhenke, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2023,

after considering the observations submitted on behalf of:

– the Belgian Association of Tax Lawyers, SR and FK, by P. Malherbe, avocat, and P. Verhaeghe, advocaat,

– the Ordre des barreaux francophones et germanophone, by J. Noël and S. Scarnà, avocats,

– the Orde van Vlaamse Balies and CQ, by P. Wouters, advocaat,

– the Instituut van de Accountants en de Belastingconsulenten, VH, ZS, NI and EX, by F. Judo, advocaat,

– the Conseil national des barreaux de France, by J.-P. Hordies and J. Tacquet, avocats,

– the Belgian Government, by S. Baeyens, P. Cottin and C. Pochet, acting as Agents, and by S. Hamerijck, expert,

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

– the Spanish Government, by A. Ballesteros Panizo and I. Herranz Elizalde, acting as Agents,

– the Polish Government, by B. Majczyna and A. Kramarczyk–Szaładzińska, acting as Agents,

– the Council of the European Union, by I. Gurov, K. Pavlaki and K. Pleśniak, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 29 February 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the assessment of the validity of Article 8ab(1), (5), (6) and (7) of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive (EU) 2018/822 of 25 May 2018 (OJ 2018 L 139, p. 1), in the light of the fundamental rights, in particular Articles 7, 20 and 21, and Article 49(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’), and the general principle of legal certainty.

2 The request has been made in the context of a number of proceedings between, inter alia, on the one hand, the de facto association, the Belgian Association of Tax Lawyers and others (‘the BATL’), the Ordre des barreaux francophones et germanophone (French- and German-speaking Bar Association; ‘the OBFG’), the Orde van Vlaamse Balies (Association of Flemish Bars) and others (‘the OVB’) and the Instituut van de Accountants en de Belastingconsulenten (Institute of Accountants and Tax Consultants) and others (‘the ITAA’) and, on the other, Premier ministre/Eerste Minister (Prime Minister, Belgium) concerning the validity of certain provisions of the Law of 20 December 2019 transposing Directive [2018/822] (*Moniteur belge* of 30 December 2019, p. 119025).

Legal context

European Union law

Directive 98/5/EC

3 Article 1(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36), as amended by Council Directive 2013/25/EU of 13 May 2013 (OJ 2013 L 158, p. 368), ('Directive 98/5') provides:

'For the purposes of this Directive:

(a) "lawyer" means any person who is a national of a Member State and who is authorised to pursue his professional activities under one of the following professional titles:

Belgium	Avocat/Advocaat/Rechtsanwalt
Bulgaria	Адвокат
Czech Republic	Advokát
Denmark	Advokat
Germany	Rechtsanwalt
Estonia	Vandeadvokaat
Greece	Δικηγόρος
Spain	Abogado/Advocat/Avogado/Abokatu
France	Avocat
Croatia	Odvjetnik/Odvjetnica
Ireland	Barrister/Solicitor
Italy	Avvocato
Cyprus	Δικηγόρος
Latvia	Zvērināts advokāts
Lithuania	Advokatas
Luxembourg	Avocat
Hungary	Ügyvéd
Malta	Avukat/Prokuratur Legali
Netherlands	Advocaat
Austria	Rechtsanwalt
Poland	Adwokat/Radca prawny
Portugal	Advogado
Romania	Avocat
Slovenia	Odvetnik/Odvetnica

Slovakia Advokát/Komerčný právnik

Finland Asianajaja/Advokat

Sweden Advokat

United Kingdom Advocate/Barrister/Solicitor.'

Directive 2011/16

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

5 That directive has been amended on a number of occasions and, in particular, by Directive 2018/822 ('amended Directive 2011/16'), which introduced a reporting obligation in respect of any potentially aggressive tax-planning cross-border tax arrangements ('the reporting obligation' or 'the reporting') to the competent authorities.

6 Article 2 of amended Directive 2011/16, entitled 'Scope', provides in paragraphs 1 and 2:

'1. This Directive shall apply to all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities.

2. Notwithstanding paragraph 1, this Directive shall not apply to value added tax [(VAT)] and customs duties, or to excise duties covered by other Union legislation on administrative cooperation between Member States. This Directive shall also not apply to compulsory social security contributions payable to the Member State or a subdivision of the Member State or to social security institutions established under public law.'

7 Article 3 of that directive, entitled 'Definitions', provides:

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

(1) "competent authority" of a Member State means the authority which has been designated as such by that Member State. When acting pursuant to this Directive, the central liaison office, a liaison department or a competent official shall also be deemed to be competent authorities by delegation according to Article 4;

…

(18) "cross-border 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:

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

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

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

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

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

For the purposes of points 18 to 25 of this Article, Article 8ab and Annex IV, an arrangement shall also include a series of arrangements. An arrangement may comprise more than one step or part.

(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.

(23) for the purposes of Article 8ab, "associated enterprise" means a person who is related to another person in at least one of the following ways:

(a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;

(b) a person participates in the control of another person through a holding that exceeds 25% of the voting rights;

(c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25% of the capital;

(d) a person is entitled to 25% or more of the profits of another person.

If more than one person participates, as referred to in points (a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.

If the same persons participate, as referred to in points (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated

enterprises.

For the purposes of this point, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

In indirect participations, the fulfilment of requirements under point (c) shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50% of the voting rights shall be deemed to hold 100%.

An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person.

(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.'

8 Article 8ab of amended Directive 2011/16, entitled 'Scope and conditions of mandatory automatic exchange of information on reportable cross-border arrangements', states:

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

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

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

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

whichever occurs first.

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

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

…

5. Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under paragraph 6.

Intermediaries may only be entitled to a waiver under the first subparagraph to the extent that they operate within the limits of the relevant national laws that define their professions.

6. Each Member State shall take the necessary measures to require that, where there is no intermediary or the intermediary notifies the relevant taxpayer or another intermediary of the

application of a waiver under paragraph 5, the obligation to file information on a reportable cross-border arrangement lie with the other notified intermediary, or, if there is no such intermediary, with the relevant taxpayer.

7. The relevant taxpayer with whom the reporting obligation lies shall file the information within 30 days, beginning on the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or is ready for implementation by the relevant taxpayer, or when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first.

Where the relevant taxpayer has an obligation to file information on the reportable cross-border arrangement with the competent authorities of more than one Member State, such information shall be filed only with the competent authorities of the Member State that features first in the list below:

(a) the Member State where the relevant taxpayer is resident for tax purposes;

(b) the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement;

(c) the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;

(d) the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State.

8. Where, pursuant to paragraph 7, there is a multiple reporting obligation, the relevant taxpayer shall be exempt from filing the information if it has proof, in accordance with national law, that the same information has been filed in another Member State.

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.

…

12. Each Member State shall take the necessary measures to require intermediaries and relevant taxpayers to file information on reportable cross-border arrangements the first step of which was implemented between 25 June 2018 and 30 June 2020. Intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 31 August 2020.

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

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

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

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

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

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

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

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

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

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

…'

9 Article 25a of amended Directive 2011/16, entitled 'Penalties' is worded as follows:

'Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.'

10 Annex IV to amended Directive 2011/16 ('Annex IV'), entitled 'Hallmarks', provides for a main benefit test and lists categories of hallmarks in the following terms:

'Part I. Main benefit test

Generic hallmarks under category A and specific hallmarks under category B and under points (b)(i), (c) and (d) of paragraph 1 of category C may only be taken into account where they fulfil the "main benefit test".

That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

In the context of hallmark under paragraph 1 of category C, the presence of conditions set out in points (b)(i), (c) or (d) of paragraph 1 of category C cannot alone be a reason for concluding that an arrangement satisfies the main benefit test.

Part II. Categories of hallmarks

A. Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.

2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:

(a) the amount of the tax advantage derived from the arrangement; or

(b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the

intended tax advantage derived from the arrangement was not partially or fully achieved.

3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.

2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.

3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

C. Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:

(a) the recipient is not resident for tax purposes in any tax jurisdiction;

(b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:

(i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or

(ii) is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the [Organisation for Economic Cooperation and Development (OECD)] as being non-cooperative;

(c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;

(d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes;

2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.

3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

4. There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

D. Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following:

(a) the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;

(b) the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;

(c) the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;

(d) the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information;

(e) the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;

(f) arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:

(a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and

(b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and

(c) where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849 [of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73)], are made unidentifiable.

E. Specific hallmarks concerning transfer pricing

1. An arrangement which involves the use of unilateral safe harbour rules.

2. An arrangement involving the transfer of hard-to-value intangibles. The term “hard-to-value intangibles” covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:

(a) no reliable comparables exist; and

(b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.

3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year

period after the transfer, of the transferor or transferors, are less than 50% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.'

Directive(EU)2016/1164

11 Recital 11 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 2016 L 193, p. 1) states:

'General anti-abuse rules (GAARs) feature in tax systems to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions. GAARs have therefore a function aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules. Within the [European] Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs. …'

12 Article 6 of Directive 2016/1164, entitled 'General anti-abuse rule', provides:

'1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.'

Directive 2018/822

13 Recitals 2, 4, 6 to 9, 14 and 18 of Directive 2018/822 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. Such structures commonly consist of arrangements which are developed across various jurisdictions and move taxable profits towards more beneficial tax regimes or have the effect of reducing the taxpayer's overall tax bill. As a result, Member States often experience considerable reductions in their tax revenues, which hinder them from applying growth-friendly tax policies. 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. However, the fact that tax authorities do not react to a reported arrangement should not imply acceptance of the validity or tax treatment of that arrangement.

…

(4) Recognising how a transparent framework for developing business activity could contribute to clamping down on tax avoidance and evasion in the internal market, the [European] Commission has been called on to embark on initiatives on the mandatory disclosure of information on potentially aggressive tax-planning arrangements along the lines of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS) Project. In this context, the European Parliament has called for tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance and evasion. It is also important to note that in the G7 Bari Declaration of 13 May 2017 on fighting tax crimes and other illicit financial flows, the OECD was asked to start discussing possible ways to address arrangements designed to circumvent reporting under the

[Common Reporting Standard (CRS)] or aimed at providing beneficial owners with the shelter of non-transparent structures, considering also model mandatory disclosure rules inspired by the approach taken for avoidance arrangements outlined within the BEPS Action 12 Report.

…

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

(7) It is acknowledged that the reporting of potentially aggressive cross-border tax-planning arrangements would stand a better chance of achieving its envisaged deterrent effect where the relevant information reached the tax authorities at an early stage, in other words before such arrangements are actually implemented. To facilitate the work of Member States' administrations, the subsequent automatic exchange of information on such arrangements could take place every quarter.

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

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

…

(14) While direct taxation remains within the competence of Member States, it is appropriate to refer to a corporate tax rate of zero or almost zero, solely for the purpose of clearly defining the scope of the hallmark that covers arrangements … which should be reportable … Moreover, it is appropriate to recall 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 [Directive 2016/1164].

…

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

Belgian law

14 The Law of 20 December 2019 transposing Directive 2018/822 amended the code des impôts sur les revenus (Income Tax Code) 1992, the code des droits d'enregistrement, d'hypothèque et de greffe (Code on Registration, Mortgage and Court Fees), the code des droits de succession (Inheritance Tax

Code) and the code des droits et taxes divers (Code on Miscellaneous Duties and Taxes) ('the Law of 20 December 2019').

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

15 By applications lodged on 30 June, and 1 and 2 July 2020, the applicants in the main proceedings asked the Cour constitutionnelle (Constitutional Court, Belgium), the referring court, to annul the Law of 20 December 2019 in whole or in part. The cases concerned were joined by the referring court for the purposes of the proceedings.

16 The referring court notes that some of the applicants in the main proceedings dispute the scope of the Law of 20 December 2019 in so far as it also applies to taxes other than corporation tax. Since that application without distinction has its origin in the provisions of Directive 2018/822, the referring court considers it necessary to refer a first question concerning the validity of that directive in the light of the principles of equal treatment and non-discrimination, and of Articles 20 and 21 of the Charter.

17 The referring court states, moreover, that some of the applicants in the main proceedings claim that the concepts of 'arrangement', 'intermediary', 'participant' and 'associated enterprise', and the description 'cross-border', the various 'hallmarks' and the 'main benefit test' are not sufficiently precise. Since those different concepts, and the concepts of 'marketable arrangement' and 'bespoke arrangement', reproduce those contained in Directive 2018/822, and since the failure to comply with the reporting obligation laid down in that directive is enforceable by means of administrative fines provided for under national law, the referring court considers it necessary to refer a second question for a preliminary ruling about those concepts concerning the validity of Directive 2018/822 in the light of the principle of legal certainty, the principle of legality in criminal matters laid down in Article 49(1) of the Charter and the right to respect for private life guaranteed in Article 7 of the Charter.

18 Since some applicants in the main proceedings have argued that the provisions of the Law of 20 December 2019 do not make it possible to determine with the requisite degree of precision the date from which the reporting period provided for in that law begins to run and since those provisions reproduce in that regard those of Directive 2018/822, the referring court considers it necessary to refer a third question on the validity of that directive relating to that aspect, which is also addressed in the light of Article 7 and Article 49(1) of the Charter.

19 Also called upon to rule on the complaints put forward by some of the applicants in the main proceedings concerning the obligation, for an intermediary relying on legal professional privilege, to inform the other intermediaries of their reporting obligation, the referring court considers that it is appropriate, before ruling on the substance of the case, to refer a fourth question to the Court of Justice for a preliminary ruling concerning the validity of the provision of Directive 2018/822 laying down that obligation, similar to the question referred in Case C-694/20, which, in the meantime, gave rise to the judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963), but concerning all intermediaries who are bound by legal professional privilege and solely with regard to the right to respect for private life.

20 Finally, as regards the reporting obligation in respect of cross-border arrangements laid down in Directive 2018/822 and also challenged by some of the applicants in the main proceedings, the referring court notes that the scope of that obligation is broad and that it may relate to arrangements that are lawful, genuine and non-abusive, the main advantage of which is not fiscal in nature. Therefore, the question arises as to whether, in view of that broad scope and the information to be filed, that reporting obligation is reasonably justified and proportionate in the light of the objectives pursued and whether it is relevant in the light of the objective of ensuring the proper functioning of the internal market, since, in particular, the condition that the arrangement must be cross-border could be such as to hinder the exercise of the freedoms of movement. In that regard, the referring court considers it necessary to refer a fifth question for a preliminary ruling concerning the validity of that directive and the reporting obligation thus imposed, in the light of the right to respect for private life enshrined in Article 7 of the Charter.

21 It is in those circumstances that the Cour constitutionnelle (Constitutional Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does [Directive 2018/822] infringe Article 6(3) [TEU] and Articles 20 and 21 of the [Charter] and, more specifically, the principles of equality and non-discrimination as guaranteed by those provisions, in that [Directive 2018/822] does not limit the reporting obligation in respect of [reportable] cross-border arrangements to corporation tax, but makes it applicable to all taxes falling within the scope of [Directive 2011/16,] which include under Belgian law not only corporation tax, but also direct taxes other than corporation tax and indirect taxes, such as registration fees?

(2) Does [Directive 2018/822] infringe the principle of legality in criminal matters as guaranteed by Article 49(1) of the [Charter] and by Article 7(1) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’)], the general principle of legal certainty and the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the concepts of ‘arrangement’ (and therefore the concepts of ‘cross-border arrangement’, ‘marketable arrangement’ and ‘bespoke arrangement’), ‘intermediary’, ‘participant’, ‘associated enterprise’, the terms ‘cross-border’, the different ‘hallmarks’ and the ‘main benefit test’ that [Directive 2018/822] uses to determine the scope of the reporting obligation in respect of [reportable] cross-border arrangements, are not sufficiently clear and precise?

(3) Does [Directive 2018/822], in particular in so far as it inserts Article 8ab(1) and (7) into [Directive 2011/16], infringe the principle of legality in criminal matters as guaranteed by Article 49(1) of the [Charter] and by Article 7(1) of the [ECHR], and infringe the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the starting point of the 30-day period during which the intermediary or relevant taxpayer must fulfil its reporting obligation in respect of a [reportable] cross-border arrangement is not fixed in a sufficiently clear and precise manner?

(4) Does Article 1(2) of [Directive 2018/822] infringe the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the new Article 8ab(5) which it inserted in [Directive 2011/16], [and which] provides that, where a Member State takes 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 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 an intermediary bound by legal professional privilege subject to criminal sanctions under the national law of that Member State to share with another intermediary, not being his client, information which he obtains in the course of the essential activities of his profession?

(5) Does [Directive 2018/822] infringe the right to respect for private life as guaranteed by Article 7 of the [Charter] and by Article 8 of the [ECHR], in that the reporting obligation in respect of [reportable] cross-border arrangements interferes with the right to respect for the private life of intermediaries and relevant taxpayers which is not reasonably justified or proportionate in the light of the objectives pursued and which is not relevant to the objective of ensuring the proper functioning of the internal market?’

Consideration of the questions referred

The first question referred

22 By its first question, the referring court, in essence, asks the Court of Justice to examine the validity of amended Directive 2011/16 in the light of the principles of equal treatment and non-discrimination, and of Articles 20 and 21 of the Charter, in so far as that directive does not limit the reporting obligation

laid down in Article 8ab(1), (6) and (7) to corporation tax, but makes it applicable to all taxes falling within its scope.

23 As regards the principle of non-discrimination laid down in Article 21 of the Charter, it should be noted at the outset that it is not apparent how the application without distinction of the reporting obligation at issue with regard to the various tax types concerned could reveal the existence of a difference in treatment based on a specific factor such as those listed in that provision.

24 That being so, it must be borne in mind that the prohibition on discrimination is merely a specific expression of the general principle of equality which is one of the fundamental principles of EU law, and that that principle, which is also reflected in Article 20 of the Charter, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 85 and the case-law cited).

25 The comparability of different situations must be assessed with regard to all the elements which characterise them. These elements must, in particular, be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (judgment of 10 February 2022, *OE (Habitual residence of a spouse – Nationality criterion)*, C-522/20, EU:C:2022:87, paragraph 20 and the case-law cited).

26 Moreover, the Court has also held, as regards judicial review of whether the EU legislature has observed the principle of equal treatment, that that legislature has, in the exercise of the powers conferred on it, a broad discretion where it intervenes in a field involving political, economic and social choices and where it is called on to undertake complex assessments and evaluations. Thus, only if a measure adopted in this field is manifestly inappropriate in relation to the objectives which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected (judgment of 10 February 2022, *OE (Habitual residence of a spouse – Nationality criterion)*, C-522/20, EU:C:2022:87, paragraph 21 and the case-law cited).

27 In the present case, it follows from Article 2(1) and (2) of amended Directive 2011/16 that, in essence, the reporting obligation laid down in Article 8ab(1), (6) and (7) of that directive applies to all taxes of any kind levied by a Member State and its territorial or administrative subdivisions, but not to value added tax (VAT) and customs duties nor to excise duties covered by other EU legislation on administrative cooperation between Member States.

28 It should be borne in mind that that obligation forms part of the establishment of international tax cooperation to fight aggressive tax planning, which takes the form of an exchange of information between Member States. That obligation is intended to contribute to combating that aggressive tax planning and preventing the risk of tax avoidance and evasion (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraphs 43 and 44 and the case-law cited).

29 It follows that the reference criterion against which, in the present case, the existence of a possible infringement of the principle of equal treatment must be assessed, in so far as amended Directive 2011/16 does not limit the reporting obligation in respect of cross-border arrangements solely to corporate taxes, but makes it applicable to all taxes other than VAT, customs duties and excise duties, is that of the risk of aggressive tax planning and of tax avoidance and evasion.

30 Yet there is nothing in the documents before the Court to support the conclusion that aggressive tax-planning practices may be implemented only in the field of corporation tax, to the exclusion of other direct taxation such as, for example, income tax applicable to natural persons and the field of indirect taxation which, unlike VAT, customs duties and excise duties, which are excluded from the scope of amended Directive 2011/16, are not, like those three types of indirect taxes, subject to specific EU legislation in the context of which the objective of combating such practices may, in some circumstances, be more specifically guaranteed.

31 In that regard, as the Advocate General observed in point 35 of his Opinion, although the Commission's Impact Assessment of 21 June 2017 (SWD(2017) 236 final), accompanying the proposal to amend Directive 2011/16 ('the Impact Assessment'), attaches more importance to direct taxes, it nevertheless states that any type of tax or duty is susceptible to aggressive tax planning. The fact that that study envisages that the fight against aggressive tax planning in the field of VAT could be better achieved under Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which is reflected in the fact that the latter tax falls outside the scope *ratione materiae* of amended Directive 2011/16, does not mean that the fight against aggressive tax planning could not, in the case of other indirect taxes, usefully have recourse to the reporting obligation.

32 Furthermore, as the Advocate General observed in point 28 of his Opinion, the OECD/G20 Base Erosion and Profit Shifting Project, which, as is apparent from recital 4 of Directive 2018/822, influenced the EU legislature, also attests to the fact that a reporting system such as that established by that directive was capable of capturing the largest possible set of tax types.

33 In those circumstances, it appears that the different tax types subject to the reporting obligation laid down by amended Directive 2011/16 fall within comparable situations in the light of the objectives pursued by that directive in the field of combating aggressive tax planning and tax avoidance and evasion in the internal market and that being subject to that obligation, in an area in which the EU legislature has a broad discretion in the exercise of the powers conferred on it, is not manifestly inappropriate in the light of those objectives.

34 In view of the foregoing considerations, it must be concluded that the examination of the aspect to which the first question relates has disclosed no factor of such a kind as to affect the validity of amended Directive 2011/16, in the light of the principles of equal treatment and non-discrimination, and of Articles 20 and 21 of the Charter.

The second and third questions referred

35 By the second and third questions, which it is appropriate to examine together, the referring court asks the Court to examine the validity of amended Directive 2011/16, in the light of the principle of legal certainty, the principle of legality in criminal matters enshrined in Article 49(1) of the Charter and the right to respect for private life guaranteed in Article 7 of the Charter, in so far as the concept of 'arrangement', and therefore those of 'cross-border arrangement', 'marketable arrangement' and 'bespoke arrangement', 'intermediary', 'participant', 'associated enterprise', the description 'cross-border', the various 'hallmarks', the 'main benefit test' and, lastly, the starting point of the 30-day period prescribed for fulfilling the reporting obligation, which that directive uses and lays down in order to determine the scope and reach of that obligation, are not sufficiently clear and precise.

36 The principle of legal certainty requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences. That principle requires, inter alia, that legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 223 and the case-law cited).

37 However, those requirements cannot be interpreted as precluding the EU legislature from having recourse, in a norm that it adopts, to an abstract legal notion, nor as requiring that such an abstract norm refer to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 224 and the case-law cited).

38 As regards the principle of legality in criminal matters, it should be noted that, although amended Directive 2011/16 does not itself lay down any penalty for infringement of the reporting obligation, Article 25a of that directive provides, in that respect, that the Member States must determine effective, proportionate and dissuasive penalties, that is to say, penalties that may be criminal in nature, and the referring court states, moreover, that that is the case as regards the penalties provided for in Belgian

law. To that extent, any lack of clarity or precision in the concepts and time limits to which the second and third questions relate, concepts and time limits which determine the conduct with which the individuals concerned must comply if they are to avoid those penalties being imposed, is liable to undermine the principle of legality in criminal matters.

39 That principle, laid down in Article 49(1) of the Charter, and which constitutes a specific expression of the general principle of legal certainty, implies, inter alia, that legislation must clearly define offences and the penalties which they attract (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 47 and the case-law cited).

40 Legality in criminal matters is respected where the individual concerned is in a position, on the basis of the wording of the relevant provision and, if necessary, with the help of the interpretation made by the courts, to know which acts or omissions will make him or her criminally liable (judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 56 and the case-law cited).

41 It should also be borne in mind that the principle that offences and penalties must be defined by law forms part of the constitutional traditions common to the Member States and has been enshrined in various international treaties, in particular in Article 7(1) of the ECHR. It may be seen from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) that, in accordance with Article 52(3) of the Charter, the right guaranteed in Article 49 has the same meaning and scope as the right guaranteed by the ECHR (judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 53 and 54).

42 In that regard, it is clear from the case-law of the European Court of Human Rights ('the ECtHR') on Article 7 of the ECHR that, because of the necessarily general nature of legislative acts, their wording cannot be absolutely precise. It follows that, while the use of the legislative technique of referring to general categories, rather than to exhaustive lists, often leaves grey areas at the fringes of a definition, those doubts in relation to borderline cases are not sufficient, in themselves, to make a provision incompatible with Article 7 of that convention, provided that that provision proves to be sufficiently clear in the large majority of cases (see, to that effect, inter alia, ECtHR, 15 November 1996, *Cantoni v. France*, CE:ECHR:1996:1115JUD001786291, §§ 31 and 32).

43 Similarly, it is apparent from the case-law of the Court that the principle *nulla poena sine lege certa* cannot be interpreted as prohibiting the gradual clarification of rules of criminal liability by means of interpretations in the case-law, provided that those interpretations are reasonably foreseeable (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 167 and the case-law cited).

44 In view of the above, the fact that legislation refers to broad concepts which must be clarified gradually does not, in principle, preclude that legislation from being regarded as laying down clear and precise rules allowing individuals to predict which acts and omissions are liable to be subject to penalties of a criminal nature (see, to that effect, judgment of 5 May 2022, *BV*, C-570/20, EU:C:2022:348, paragraph 42). In that regard, what matters is whether any ambiguity or vagueness in those concepts may be dispelled by using the ordinary methods of interpretation of the law. In addition, when those concepts correspond to those employed in relevant international agreements and practices, those agreements and practices may provide further guidance to the court responsible for that interpretation (see, to that effect, judgment of 25 November 2021, *État luxembourgeois (Information on a group of taxpayers)*, C-437/19, EU:C:2021:953, paragraphs 69 to 71).

45 Lastly, the Court has emphasised that the degree of foreseeability required depends to a considerable extent on the content of the text in question, the field it covers and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances of the case at issue, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. Such persons can therefore be expected to take special care in evaluating the risk that such an activity entails (judgment of 5 May 2022, *BV*, C-570/20, EU:C:2022:348, paragraph 43 and the case-law cited).

46 It is in the light of the foregoing considerations that the concepts referred to in the second question must be examined.

47 In the first place, as regards the concept of 'arrangement', it is not specifically defined in Article 3 of amended Directive 2011/16, entitled 'Definitions'. That concept is used in that directive either alone or with other words to form the terms 'cross-border arrangement', 'reportable cross-border arrangement', 'marketable arrangement' and 'bespoke arrangement'. The term 'arrangement' is also used in Annex IV in expressions such as an arrangement 'that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax', an arrangement 'which includes circular transactions …' or, in the part of the sentence 'where the intermediary is entitled to receive a fee … for the arrangement and that fee is fixed by reference to … the amount of the tax advantage derived from the arrangement'. Finally, point 18 of Article 3 of that directive states that the term 'arrangement' also means a series of arrangements and that an arrangement may comprise more than one step or part.

48 Moreover, recital 2 of Directive 2018/822 states that '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' and states that 'such structures commonly consist of arrangements which are developed across various jurisdictions and move taxable profits towards more beneficial tax regimes or have the effect of reducing the taxpayer's overall tax bill.'

49 It follows from the foregoing that the term 'arrangement' must be understood in its usual sense of mechanism, operation, structure or set-up, the purpose of which, in the context of amended Directive 2011/16, is to carry out tax planning. In view of the wide variety and the sophistication of possible tax-planning structures, highlighted by recital 2 of Directive 2018/822, it cannot be ruled out, as stated, in essence, in point 18 *in fine* of Article 3 of amended Directive 2011/16, that an arrangement may itself consist of a number of arrangements. That may be the case for an arrangement that involves the coordinated implementation, especially in different Member States or according to a staggered timetable, of separate legal and tax mechanisms that are not only steps or parts of that arrangement but which already pursue, individually and separately from each other, tax planning and which, taken together, seek to carry out overall tax planning.

50 It should be added that taking account of tax-planning practices through the generic concept of 'arrangement' is a well-established way of proceeding, as reflected, inter alia, by the OECD's Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (2018) ('the OECD Model Rules'), drawn up on the basis of the best practices recommended by the BEPS Action 12 Report, and referred to by the EU legislature in recital 4 *in fine* of Directive 2018/822. In paragraph 23 of the Commentary contained in the OECD Model Rules, it is stated that the term 'arrangement' is used as part of the definition of a 'CRS Avoidance Arrangement' and that that definition is intended to be sufficiently broad and robust to capture any agreement, scheme, plan or understanding and all the steps and transactions that form part of or give effect to that arrangement.

51 The OBFG submits that, since the reporting obligation refers to each 'reportable arrangement', the fact that such an arrangement may consist of a series of arrangements may give rise to uncertainty as to the breadth of the specific reporting obligations to be complied with.

52 In that regard, it is apparent from Article 8ab of amended Directive 2011/16 that the obligation in question refers, in principle, to any 'reportable cross-border arrangement', that is to say, in accordance with point 19 of Article 3 of that directive, any cross-border arrangement containing at least one of the hallmarks set out in Annex IV that present an indication of a potential risk of tax avoidance, in accordance with point 20 of Article 3 of that directive. In that context, it is only if and to the extent that an arrangement is itself composed of mechanisms that do not constitute only steps or parts of that arrangement, but which already pursue, individually and separately from each other, tax planning and which already constitute 'reportable cross-border arrangements', that is to say, arrangements which, each individually and in isolation, entail a 'potential risk of tax avoidance', that that reporting obligation applies to each of those arrangements, in addition to applying, at the appropriate time, to the overall arrangement which they comprise. On the other hand, where a 'reportable arrangement' is

composed of mechanisms that do not have those characteristics, the same obligation exists only in respect of that arrangement and comes into being only on the date on which that arrangement satisfies one of the temporal conditions laid down in Article 8ab(1) of amended Directive 2011/16.

53 Having regard to the foregoing considerations and in view of the case-law referred to in paragraphs 36 to 45 above, it must be held that the concept of 'arrangement' appears to be sufficiently clear and precise in the light of the requirements stemming from the principles of legal certainty and legality in criminal matters.

54 In the second place, the concepts of 'cross-border arrangement', 'marketable arrangement' and 'bespoke arrangement' are defined, respectively, in points 18, 24 and 25 of Article 3 of amended Directive 2011/16.

55 The classification as a 'cross-border arrangement' is essentially determined, in point 18 of Article 3 of amended Directive 2011/16, in the light of the residence for tax purposes of the participant or participants in such an arrangement, the location of the activity of the participant or participants or the consequences which that arrangement may have on the automatic exchange of information or on the identification of the actual beneficiaries of that arrangement.

56 As regards, first, the concepts of 'residence for tax purposes' and 'location of the activity', it must be stated that they do not raise any particular difficulty in comprehension.

57 Second, as regards the concept of 'participant in the arrangement', although not specifically defined in amended Directive 2011/16, it is nevertheless easily understood as covering the 'relevant taxpayer', referred to in point 22 of Article 3 of that directive, and as not covering, a priori, an 'intermediary', within the meaning of point 21 of Article 3 of that directive, without prejudice, however, to the possibility that that intermediary, in addition to carrying out the transactions referred to in point 21, might actively take part in the arrangement as the relevant taxpayer.

58 Third, as regards the assessment of the 'impact on the automatic exchange of information or the identification of beneficial ownership', which an arrangement may have, this is sufficiently explained by Annex IV, in so far as that annex refers, in category D, to specific hallmarks concerning the automatic exchange of information and beneficial ownership. Category D contains, in paragraphs 1 and 2, lists of various organisational and operational mechanisms by which an arrangement is liable to have the effect of undermining the reporting obligation or of concealing, by recourse to non-transparent ownership channels, the identity of the beneficial ownership of those organisational or operating mechanisms.

59 It follows from the foregoing considerations that the concept of a 'cross-border arrangement', in its various aspects, appears, on examination of the provisions of amended Directive 2011/16 and having regard to the case-law referred to in paragraphs 36 to 45 above, to be sufficiently clear and precise in the light of the requirements stemming from the principles of legal certainty and legality in criminal matters.

60 The same applies to the mutually exclusive concepts of 'marketable arrangement' and 'bespoke arrangement', the first being a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised, while the second is defined as being any cross-border arrangement that is not a marketable arrangement. As regards, in particular, the expression 'substantially', it should be noted that this is clarified by hallmark A.3 of Annex IV, from which it follows, in essence, that an arrangement which does not need to be substantially customised for implementation is an arrangement the documentation and/or structure of which are largely standardised and which may be made available to a number of taxpayers.

61 In the third place, the concept of 'intermediary' is defined in point 21 of Article 3 of amended Directive 2011/16 as designating, according to the first subparagraph of that provision, 'any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement' but also, according to the second subparagraph of that provision, '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.'

62 That provision adds that, in order to be an intermediary, a person must satisfy at least one of the following four additional conditions relating to the existence of a connection with the territory of the Member States, namely to be resident in a Member State for tax purposes, to have a permanent establishment in a Member State through which the services with respect to the arrangement are provided, to be incorporated in, or governed by the laws of, a Member State, or to be registered with a professional association related to legal, taxation or consultancy services in a Member State.

63 It is apparent from the request for a preliminary ruling that the referring court's doubts relate above all to the concept of 'intermediary' in so far as it covers, in the second subparagraph of point 21 of Article 3 of amended Directive 2011/16, persons who are, in essence, only auxiliary intermediaries or, according to the terms of the OECD Model Rules, 'service providers', in that they undertake only to provide 'aid, assistance or advice' ('auxiliary intermediaries'), as opposed to the persons referred to in the first subparagraph of point 21 Article 3 of that directive, who design, market, organise or make available for implementation or manage the implementation of, the cross-border arrangement ('the main intermediaries') and whom those model rules designate as 'promoters' of the arrangement.

64 In that context, it must be noted that the second subparagraph of point 21 of Article 3 of amended Directive 2011/16, by its content recalled in paragraph 61 above, uses a form of words that does not appear, in view of the case-law cited in paragraphs 36 to 45 above, to be lacking in the precision necessary to enable the operators concerned to identify themselves as falling, or not falling, within the category of persons subject to the reporting obligation. In particular, that is the case with the concept of a person who has 'undertaken to provide, directly or by means of other persons, aid, assistance or advice', which is vital for enabling that identification.

65 In the fourth place, the concept of 'associated enterprise' is defined in point 23 of Article 3 of amended Directive 2011/16, which provides that, for the purposes of Article 8ab of that directive, such an enterprise is a person who is related to another person in one of the different ways which point 23 of Article 3 sets out, where, in accordance with certain methods and under certain conditions, the first person participates in the management, control, capital or profits of that other person. That provision also provides, inter alia, that, in the event of a joint participation by more than one person in the management, control, capital or profits of one or more other persons, the persons thus participating are to be regarded as associated enterprises. It also sets out the detailed rules for taking indirect holdings into consideration and states that the spouse, lineal ascendants and descendants of an individual are treated as forming, with him or her, a single person.

66 In the light of the case-law referred to in paragraphs 36 to 45 above, such a provision, although worded in broad terms, clearly satisfies the requirements of clarity and precision arising from the principles of legal certainty and legality in criminal matters. In that regard, it should be noted that the comments made by the OBFG in its observations on that definition do not relate so much to a possible lack of clarity of that provision, but to its breadth.

67 In the fifth place, as regards the hallmarks set out in Annex IV, recital 9 of Directive 2018/822 states, in essence, that, in view of the fact that aggressive tax planning is becoming increasingly more complex and is constantly adapting to the defensive countermeasures taken by the tax authorities, it is more effective to endeavour to capture potentially aggressive tax-planning arrangements by establishing a list of features and elements that are 'hallmarks' of those arrangements than to define the concept of aggressive tax planning.

68 Point 20 of Article 3 of amended Directive 2011/16 defines hallmark as being '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'.

69 The hallmarks defined in that annex are divided into different categories, namely ‘generic hallmarks linked to the main benefit test’ included in Category A, ‘specific’ hallmarks, the first linked to the ‘main benefit test’ included in Category B, the second linked to ‘cross-border transactions’ included in Category C, the third concerning ‘automatic exchange of information and beneficial owners’ included in category D, and the fourth concerning ‘transfer pricing’ included in category E.

70 While the presence of certain hallmarks in a cross-border arrangement is sufficient to establish that that arrangement presents a potential risk of tax avoidance, others, those in categories A and B, and in paragraph 1(b)(i), (c) and (d) of category C, can only be taken into account where they satisfy the ‘main benefit test’ set out in Part I of Annex IV. That test is satisfied where it ‘can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.’

71 It must be pointed out that the hallmarks thus defined in Annex IV relate to specific and concrete characteristics of tax arrangements which the intermediaries, within the meaning of amended Directive 2011/16, who are as a general rule tax specialists, or even, in the absence of an intermediary, the taxpayers who themselves design cross-border tax-planning arrangements, are able to identify without undue difficulty.

72 In addition, the definitions of hallmarks contained in Annex IV can be linked to the detailed analyses contained in the BEPS Action 12 Report and in the Impact Assessment.

73 Moreover, as the Advocate General observed in point 88 of his Opinion, although it is true that the variety and scope of the hallmarks mean that they cover a heterogeneous set of arrangements, that fact is not such as to make the application of the reporting obligation unforeseeable for the persons subject to that obligation.

74 As regards the OBFG’s claim that the main benefit test is a subjective test, it should be noted that that test refers to the benefit which, ‘having regard to all relevant facts and circumstances, a person may reasonably expect to derive from [that] arrangement’. It does not appear particularly difficult for an intermediary and, in the absence of an intermediary bound by the reporting obligation, for the relevant taxpayer to decide whether the main benefit or one of the main benefits that can reasonably be expected of the arrangement they design and/or use is fiscal in nature. In that regard, the BEPS Action 12 Report states that the main benefit test compares the value of the expected tax advantage with any other benefits likely to be obtained from the transaction and has the advantage of requiring an objective assessment of the tax benefits.

75 In view of the foregoing considerations and in the light of the case-law referred to in paragraphs 36 to 45 above, it must be held that the hallmarks defined in Annex IV appear to be sufficiently clear and precise in the light of the requirements stemming from the principles of legal certainty and legality in criminal matters.

76 In the sixth place, the first subparagraph of Article 8ab(1) of amended Directive 2011/16 sets the starting point of the 30-day period for intermediaries to fulfil the reporting obligation as the day after the reportable cross-border arrangement is made available for implementation, or the day after that arrangement is ready for implementation, or when the first step in the implementation of that arrangement has been made, whichever occurs first.

77 In addition, the second subparagraph of Article 8ab(1) of that directive provides that ‘notwithstanding the first subparagraph, intermediaries referred to in the second subparagraph of point 21 of Article 3 shall also be required to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.’

78 Finally, where the reporting obligation is imposed on the relevant taxpayer, in the absence of an intermediary subject to that obligation, Article 8ab(7) of that directive provides, in essence and in terms similar to those used in relation to the main intermediaries, that the 30-day period begins on the day after the arrangement is made available to that taxpayer for the purposes of implementation, or is ready to be implemented by that taxpayer, or when the first step of its implementation has been made in relation to that taxpayer, whichever occurs first.

79 The rationale of amended Directive 2011/16 and that of the reporting obligation which it imposes mean that the point at which that obligation arises must be determined. The implementation of the reportable arrangement, or the provision of aid, assistance or advice, as is apparent from the provisions referred to in paragraphs 76 to 78 above, are the events chosen by the EU legislature in that respect.

80 First, the concept of 'implementation of the … cross-border arrangement' refers, as the Advocate General observes in point 107 of his Opinion and as is suggested by everyday language, to the transition of that arrangement from its conceptual stage to its operational stage. That concept cannot be regarded as being imprecise or lacking in clarity for the intermediary or intermediaries referred to in the first subparagraph of point 21 of Article 3 of amended Directive 2011/16, or, in the absence of an intermediary, for the relevant taxpayer. Those intermediaries and, in the absence of an intermediary, the relevant taxpayer, know the arrangement in question and are therefore in a position to determine precisely the moment when such a transition takes place.

81 Second, as regards the reference to the provision of aid, assistance or advice, applicable to the intermediaries mentioned in the second subparagraph of Article 8ab(1) of amended Directive 2011/16, who are those referred to in the second subparagraph of point 21 of Article 3 of that directive, it should be noted that the provision of that aid, assistance or advice may be spread over a period of time.

82 However, the second subparagraph of Article 8ab(1) does not specify whether the starting point of the reporting period available to those intermediaries is the day after the first day or the last day of the period in which the aid, assistance or advice is provided.

83 Furthermore, it must be pointed out that the reporting obligation imposed on those intermediaries, referred to in the second subparagraph of point 21 of Article 3 of that directive, can logically exist only from the moment the person concerned knows or could reasonably be expected to know that he or she has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing or organising a reportable cross-border arrangement and is, therefore, an 'intermediary' subject to the reporting obligation. That moment may, where appropriate and on the basis of the information available to that person on the precise nature of the arrangement in question, arise only after the beginning of the provision, by that person, of aid, assistance or advice. It is, in particular, in view of that circumstance that the second subparagraph of point 21 of Article 3 of that directive stipulates that that person is to have the right to provide evidence that he or she did not know and could not reasonably be expected to know that he or she was involved in a reportable cross-border arrangement.

84 Lastly, it must be held, as the Advocate General observes in point 109 of his Opinion and as is apparent from recital 7 of Directive 2018/822, that the early filing of information with the tax administration, that is to say, before the arrangement is implemented, should be preferred. Nevertheless, and as the Advocate General observes, in essence, in point 112 of his Opinion, it is necessary, as far as possible, to limit the risk that reporting obligations must be performed in respect of arrangements the implementation of which remains uncertain, which could arise particularly in the case of auxiliary intermediaries who, being less directly involved than the main intermediaries, are consequently less likely to be specifically instructed on the progress of the arrangement concerned.

85 In those circumstances, it must be inferred both from the use, in the second subparagraph of Article 8ab(1) of amended Directive 2011/16, of the past tense ('provided') and from the rule applied to the main intermediaries, according to which the reporting period does not run from the beginning of their involvement in the design of the arrangement, but only at the stage of its implementation, that the auxiliary intermediaries' reporting period cannot begin to run until the day after the date on which they completed their provision of aid, assistance or advice and, at the latest, on the day defined by the first subparagraph of Article 8ab(1), in so far as they are aware of it. It should be added that those considerations are without prejudice to the right of those intermediaries to release themselves from their reporting obligation, if they so wish, even before the 30-day period allowed for that purpose starts to run, including, therefore, from the beginning of their provision of aid, assistance or advice.

86 In view of the foregoing considerations and in the light of the case-law referred to in paragraphs 36 to 45 above, it must be held that the starting point of the reporting period is, for the various categories of intermediaries referred to in amended Directive 2011/16, and for the relevant taxpayer where the

reporting obligation lies with him or her, determined in a sufficiently clear and precise manner in the light of the requirements stemming from the principles of legal certainty and legality in criminal matters.

87 In those circumstances, it must be concluded that the examination of the second and third questions does not call into question the validity of amended Directive 2011/16, in the light of the principles of legal certainty and legality in criminal matters.

88 As regards compliance with Article 7 of the Charter, the second and third questions concern, in essence, whether, irrespective of the issue of compliance with legal professional privilege, the concepts and time limits referred to in those questions are sufficiently precise for the interference with the private life of the intermediary and the relevant taxpayer entailed by the reporting obligation to be defined itself in a sufficiently precise manner in view of the information which that declaration must contain.

89 Since, as the Advocate General observes in point 123 of his Opinion, Article 7 of the Charter does not impose any obligation that is stricter than Article 49 of the Charter in terms of the requirement for clarity or precision of the concepts used and the time limits laid down, it must be held that the interference with the private life of the intermediary and relevant taxpayer entailed by the reporting obligation is itself defined in a sufficiently precise manner in view of the information that that reporting must contain. That consideration is, however, without prejudice to the examination of whether that interference goes beyond what is necessary to safeguard the public interest objectives pursued by amended Directive 2011/16, which is the subject of the fifth question referred for a preliminary ruling.

90 In view of all the foregoing considerations, it must be concluded that the examination of the aspects to which the second and third questions referred relate has disclosed no factor of such a kind as to affect the validity of amended Directive 2011/16, in the light of the principle of legal certainty, the principle of legality in criminal matters enshrined in Article 49(1) of the Charter and the right to respect for private life guaranteed in Article 7 of the Charter.

The fourth question referred

91 The fourth question concerns the obligation to notify laid down in Article 8ab(5) of amended Directive 2011/16, and is similar to that raised, in respect of lawyers, in the case that gave rise to the judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963). That question concerns, in the present case, intermediaries who are not lawyers and who are bound by legal professional privilege under national law.

Preliminary considerations on the scope of Article 8ab(5) of amended Directive 2011/16

92 Before examining that question, it is necessary to rule on the Commission's observations, reiterated at the hearing, to the effect that the power of the Member States, provided for in Article 8ab(5) of amended Directive 2011/16, to substitute the obligation to notify for the reporting obligation, was established not in respect of all professionals subject to an obligation of legal professional privilege under national law, but only with regard to those who are comparable to lawyers in that they are entitled, under national law, to represent parties in legal proceedings. The Commission added that the EU legislature intended, in view of the variety of national legal systems, to leave the determination of those professionals to the discretion of each Member State.

93 In its written observations and at the hearing, the Council of the European Union also submitted that it is not justified, as regards legal professional privilege, to afford intermediaries who are not lawyers the same protection as lawyers. In that regard, it argued, inter alia, in essence, that the power to substitute obligations provided for in Article 8ab(5) of amended Directive 2011/16, was conferred on the Member States only in order to enable them to comply with the requirements stemming from the Charter and the case-law of the ECtHR and the Court of Justice.

94 According to the Court's settled case-law, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms

part (judgment of 20 October 2022, *Staatssecretaris van Justitie en Veiligheid (Removal of a victim of trafficking in human beings)*, C-66/21, EU:C:2022:809, paragraph 55 and the case-law cited).

95 As regards the wording of Article 8ab(5) of amended Directive 2011/16, it should be noted that the language versions of that provision diverge. The English language version uses the expression 'legal professional privilege', which must be regarded as referring, in the context of EU law and as the Commission asserts, to the professional secrecy of lawyers and other professionals who could be regarded in the same way as lawyers, in that they are authorised, under the applicable national law, to ensure legal representation of a client before the national courts. Two language versions, namely Maltese and Romanian, contain a literal translation of that English expression (respectively, '*privileġġ professjonali legali*' and '*privilegiu profesional legal*'). The Greek language version expressly refers to the 'professional secrecy of lawyers under national law' ('*το δικηγορικό απόρρητο βάσει της εθνικής νομοθεσίας*'). By contrast, the other eighteen language versions contain expressions referring, in essence, to professional secrecy applicable under national law, without reference to the professional secrecy of lawyers. Those other language versions may therefore relate to professions (such as tax adviser, notary, auditor, accountant, banker) which are bound by legal professional privilege under the national law but, a priori, are not entitled to provide legal representation in court proceedings under that law.

96 As regards recital 8 of Directive 2018/822, relating to the insertion of Article 8ab(5) in Directive 2011/16, it contains, in twenty-two language versions, the same terminological differences and the following additional features. The Greek language version of that recital refers to professional secrecy in general ('*το επαγγελματικό απόρρητο*'), without further mentioning the professional secrecy of lawyers, as the Greek language version of Article 8ab(5) does. Conversely, the Danish version of that recital makes reference to the lawyer, by providing that the reporting obligation may not be imposed in the case of the 'confidentiality of correspondence between lawyer and client, or an equivalent legal obligation provided for by law' ('*på Grund af fortroligheden af korresponddmellem advokat og klient, eller en tilsvarende lovbaseret tavshedspligt*'), whereas the Danish version of Article 8ab(5) does not mention lawyers.

97 It follows from the foregoing that a literal interpretation of Article 8ab(5) of amended Directive 2011/16 does not make it possible to determine clearly and unequivocally the scope, as regards the professions that may be concerned, of the power conferred on Member States by amended Directive 2011/16 to substitute the obligation to notify for the reporting obligation.

98 As regards the context and objectives pursued by amended Directive 2011/16, it should be noted, in the first place, that, as is apparent from recital 2 of Directive 2018/822, that directive is intended to enable Member States effectively to protect their national tax bases from the erosion which they suffer as a result of the establishment by taxpayers of particularly sophisticated tax-planning structures. It is also apparent from that recital that, in order to allow such effective protection, it is important that Member States obtain comprehensive and relevant information about potentially aggressive tax arrangements in order to be able 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. Furthermore, as is apparent from recitals 4 and 8 of that directive, its objective is also to ensure the proper functioning of the internal market by combating tax avoidance and evasion in that market. In order to achieve each of those objectives, the mandatory disclosure of information on potentially aggressive tax-planning arrangements by means of reporting of information imposed on intermediaries was considered essential by the EU legislature, as is apparent from recitals 6 to 8 of that directive.

99 As the Advocate General observed, in essence, in points 202 to 204 of his Opinion, to interpret Article 8ab of amended Directive 2011/16 as allowing Member States to grant a waiver to all intermediaries, such as tax advisers, notaries, auditors, accountants or bankers, from the obligation to make such a report, provided that they are subject to legal professional privilege under the applicable national law, would potentially have the effect of opening the way to calling into question the very effectiveness of the reporting mechanism thus established by the EU legislature.

100 In the second place, it should be noted, as the Commission observes and as the Advocate General stated in point 206 of his Opinion, that amended Directive 2011/16, and, more specifically, the

reporting obligation and the obligation to notify which it lays down in Article 8ab thereof are closely influenced by OECD documents and, in particular, Rule 2.4 of the OECD Model Rules.

101 That rule, entitled 'No obligation for the Intermediary to disclose', thus provides that the reporting waiver, based on professional secrecy rules laid down by domestic law, applies 'only to the extent the disclosure would reveal confidential information held by an attorney, solicitor or other admitted legal representative with respect to a Client, as defined in the Commentary to Article 26 of the OECD Model Tax Convention'.

102 Point 80 of Part III of the OECD Model Rules, entitled 'Commentary', states, to the same effect, that 'mandatory disclosure rules do not require an attorney, solicitor or other admitted legal representative to disclose any information that is protected by legal professional privilege or equivalent professional secrecy obligations'.

103 The Commentary on Article 26 of the Model Tax Convention on Income and on Capital, adopted by the OECD, also refers, in paragraph 19.4 thereof, to the protection afforded to confidential communications between a client and an 'attorney, solicitor or other admitted legal representative'.

104 It follows from the foregoing that the work which inspired the wording of amended Directive 2011/16, as regards the reporting obligation and the obligation to notify, sought, in essence, to protect professional secrecy only for lawyers and other professionals who, like lawyers, are legally authorised to ensure legal representation.

105 In the third place, it must be held that the reference made in Article 8ab(5) of amended Directive 2011/16 to the legal professional privilege applicable 'under the national law' is explained by the fact that, although enhanced protection of exchanges between a lawyer and his or her client is already guaranteed at EU level on the basis of Articles 7 and 47 of the Charter, the detailed rules governing that protection and, above all, the conditions and limits within which other professionals bound by legal professional privilege may, where appropriate, rely on comparable protection, are governed by national laws. In that regard, it is apparent from the documents before the Court that certain Member States extend the capacity to ensure legal representation to professions other than lawyers.

106 While it is therefore justified, as provided for in Article 8ab(5) of amended Directive 2011/16, for the Member States to have, in that context, a measure of discretion in the exercise of their power to substitute the obligation to notify for the reporting obligation, in order to allow them to take account of professions, other than lawyers, which they authorise to ensure legal representation, the fact remains that that discretion is not intended to allow those Member States to extend the benefit of that substitution of obligations to professions which do not ensure such representation.

107 It should also be added that a different interpretation of Article 8ab(5) of amended Directive 2011/16, and of the power of the Member States to substitute the obligation to notify for the reporting obligation would risk creating distortions between Member States, since a broad exercise of that power by some of them in relation to professions bound by legal professional privilege but not ensuring legal representation, could lead to the relocation of potentially aggressive tax-planning activities in their territory, thereby undermining the effectiveness and the uniformity, at EU level, of the fight against tax avoidance and evasion in the internal market.

108 In view of the foregoing considerations, it must be held that the power of the Member States to substitute the obligation to notify for the reporting obligation was given by Article 8ab(5) of amended Directive 2011/16 only in respect of professionals who, like lawyers, are authorised under national law to ensure legal representation.

109 The question remains, however, whether, as the Court has already held with regard to the relationship between a lawyer and his or her client, in its judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963, paragraphs 19 *in fine* and 27), the very existence of the relationship between a professional who is not a lawyer authorised to ensure legal representation and his or her client should remain secret vis-à-vis third parties, with the result that the imposition on such a professional of the subsidiary obligation to notify is not even conceivable, in that it would lead to the

existence of the relationship between that professional and his or her client being revealed to third parties.

110 It is that last question which must, in essence, be determined in the examination of the fourth question referred for a preliminary ruling.

Consideration of the question

111 By the fourth question, the referring court asks the Court, in essence, to examine the validity of Article 8ab(5) of amended Directive 2011/16 in the light of Article 7 of the Charter, in so far as the effect of the application of Article 8ab(5) by the Member States is to require an intermediary who is not a lawyer but is authorised to ensure legal representation, where that intermediary is exempt from the reporting obligation laid down in Article 8ab(1) of that directive on account of legal professional privilege which he or she is bound by, to notify without delay any other intermediary who is not his or her client of that other intermediary's reporting obligations under Article 8ab(6) of that directive.

112 In that regard, it should be noted at the outset 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 ECHR (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 25).

113 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 of Justice must therefore 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 ECtHR, as the minimum threshold of protection (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 26).

114 As the Court has already stated, it is apparent from the case-law of the ECtHR that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients (see, to that effect, ECtHR, 6 December 2012, *Michaud v. France*, CE:ECHR:2012:1206JUD001232311, §§ 117 and 118). Like that provision, the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence. As the ECtHR has pointed out, individuals who consult a lawyer can reasonably expect that their communication is private and confidential (ECtHR, 9 April 2019, *Altay v. Turkey (No 2)*, CE:ECHR:2019:0409JUD001123609, § 49). Therefore, other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 27).

115 As the Court has also held, the specific protection which Article 7 of the Charter and Article 8(1) ECHR afford to lawyers' legal professional privilege, which primarily takes the form of obligations on them, is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants (ECtHR, 6 December 2012, *Michaud v. France*, CE:ECHR:2012:1206JUD001232311, §§ 118 and 119). That fundamental task entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 28).

116 It is apparent from the case-law referred to in paragraphs 114 and 115 above that the confidentiality of the relationship between a lawyer and his or her client enjoys very specific protection, which relates to the special position occupied by a lawyer in the judicial organisation of the Member States and to the fundamental task entrusted to him or her and which is recognised by all the Member States. It was in the light of those considerations that the Court, in the judgment of 8 December 2022, *Orde van*

Vlaamse Balies and Others (C-694/20, EU:C:2022:963), held that the obligation to notify, when it is imposed on the lawyer, infringes Article 7 of the Charter.

117 In that regard, it should finally be noted that the requirement as to the position and status of an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart to that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest. Such a conception reflects the legal traditions common to the Member States and is also to be found in the legal order of the European Union, as is apparent from the provisions of Article 19 of the Statute of the Court of Justice of the European Union (judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others*, C-550/07 P, EU:C:2010:512, paragraph 42 and the case-law cited).

118 In the light of those considerations, and of the unique position which they accord to the profession of lawyer within society and for the purposes of the proper administration of justice, it must be held that the solution thus adopted in the judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963) as regards lawyers can extend only to persons pursuing their professional activities under one of the professional titles referred to in Article 1(2)(a) of Directive 98/5.

119 Therefore, as regards the other professionals who, although authorised, as the case may be, by the Member States to ensure legal representation, do not meet the abovementioned characteristics, such as, for example, university professors in certain Member States, there is nothing to support the conclusion that Article 8ab(5) of amended Directive 2011/16 is invalid in the light of Article 7 of the Charter, in so far as the obligation to notify, where it is substituted by the Member State for the reporting obligation, has the consequence that the existence of the consultation link between the notifying intermediary and his or her client is brought to the attention of the notified intermediary and, ultimately, the tax administration.

120 In those circumstances, the answer to the fourth question is that the invalidity of Article 8ab(5) of amended Directive 2011/16, in the light of Article 7 of the Charter, declared by the Court in the judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963), applies only to persons who pursue their professional activities under one of the professional titles referred to in Article 1(2)(a) of Directive 98/5.

The fifth question referred

121 By that question, the referring court is essentially asking the Court of Justice to examine the validity of Article 8ab(1), (6) and (7) of amended Directive 2011/16 in the light of the right to respect for private life guaranteed in Article 7 of the Charter, in so far as those provisions have the effect of requiring intermediaries who do not benefit from the waiver referred to in Article 8ab(5) of that directive and, in the absence of an intermediary subject to the reporting obligation, the relevant taxpayer, to undertake the reporting provided for in Article 8ab(1) of that directive.

122 In that regard, the referring court observes, in particular, that the reporting obligation may concern cross-border arrangements that are lawful, genuine, non-abusive and the main advantage of which is not fiscal in nature.

123 Thus, the fifth question relates to a possible breach, by that obligation, of the right to protection of private life arising, in essence, from the fact that the reporting obligation in respect of an arrangement that does indeed pursue a tax advantage, but in a lawful and non-abusive manner, would limit the taxpayer's freedom to choose, and the intermediary's freedom to design and advise that taxpayer on, the least taxed route.

124 In that regard, as has been recalled in paragraphs 112 and 113 above, Article 7 of the Charter corresponds to Article 8(1) of the ECHR and, in accordance with Article 52(3) of the Charter, the Court takes account, in the interpretation of the rights guaranteed by Article 7, of the corresponding rights guaranteed by Article 8(1), as interpreted by the ECtHR.

125 In that context, the Court has held that provisions imposing or allowing the communication of personal data such as the name, place of residence or financial resources of natural persons to a public authority must be characterised, in the absence of the consent of those natural persons and irrespective of the subsequent use of the data at issue, as an interference in their private life and therefore as a limitation on the right guaranteed in Article 7 of the Charter, without prejudice to the potential justification of such provisions (judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 124).

126 Furthermore, it is apparent from the case-law of the ECtHR that the concept of private life is a broad concept which includes the concept of personal autonomy. More specifically, the ECtHR has held that 'Article 8 [of the ECHR] protects the right to personal development, whether in terms of personality or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees.' It stated that that provision 'encompasses the right for each individual to approach others in order to establish and develop relationships with them and with the outside world, that is, the right to a "private social life", and [that provision] may include professional activities or activities taking place in a public context' (ECtHR, 18 January 2018, *FNASS and Others v. France*, CE:ECHR:2018:0118JUD004815111, § 153 and the case-law cited). It thus held, in particular, that there was no reason of principle to regard the concept of 'private life' as excluding professional or commercial activities and that interpreting that concept as including such activities is consonant with the essential object and purpose of Article 8 of the ECHR, namely to protect the individual against arbitrary interference by the public authorities (see, to that effect, ECtHR, 16 December 1992, *Niemietz v. Germany* CE:ECHR:1992:1216JUD001371088, §§ 29 and 31).

127 It follows from the foregoing that the concept of private life is a broad concept that includes the concept of personal autonomy, which covers, at the very least, the freedom of any person to organise his or her life and activities, both personal and professional or commercial. However, the Court also noted that regard must be had to the case-law of the ECtHR, from which it is apparent that the right of interference permitted by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities were involved than would otherwise be the case (see, to that effect, judgment of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 29).

128 In the present case, it should be pointed out that the freedom of economic operators to organise their activities in such a way as to limit their tax burden is reflected, inter alia, in recital 11 of Directive 2016/1164, which states, in essence, that GAARs should be applied within the European Union to arrangements that are not genuine; otherwise, the taxpayer must have the right to choose the most tax efficient structure for his or her business activities. Furthermore, the purpose of the reporting at issue is, in particular and as is apparent from recital 2 of Directive 2018/822, to enable tax administrations and national legislatures to react promptly to differences between national laws or regulatory loopholes, which often give rise to the creation of cross-border tax arrangements aimed at reducing the tax burden on taxpayers.

129 For its part, the reporting obligation at issue entails revealing to the tax administration, together with the data identifying the persons concerned, information on the cross-border arrangement at issue. That information, which may be inferred from Article 8ab(14) of amended Directive 2011/16 contains, inter alia, a summary of the content of that provision and information on the national provisions on which that arrangement is based. In so doing, that obligation constitutes, as such, an interference with the right to respect for private life and communications, which results in revealing to the administration the result of tax design and engineering work, carried out in the context of personal, professional or business activities, by the taxpayer him or herself or, in most cases, by one or more intermediaries within the meaning of point 21 of Article 3 of that directive.

130 Thus, that obligation, in so far as it provides the tax administrations with the means to remedy promptly the regulatory disparities and loopholes on which the cross-border arrangements are based, is such as to reduce the interest for taxpayers in having recourse to tax arrangements the effective duration of which is likely to be correspondingly shortened.

131 That obligation is therefore liable to deter both those taxpayers and their advisers from designing and implementing cross-border, tax-planning mechanisms which, while lawful, are based on disparities

between the various applicable national rules.

132 It follows that the reporting obligation, in so far as it covers, inter alia, such arrangements, entails a limitation of the freedom of taxpayers and intermediaries to organise their personal, professional and business activities and therefore constitutes an interference with the right to respect for private life guaranteed in Article 7 of the Charter.

133 The question therefore arises as to whether that interference may be justified.

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

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

136 In that regard, it must be pointed out that Article 8ab(1) of amended Directive 2011/16 expressly provides that the Member States are to take the necessary measures to require intermediaries to file ‘information that is within their knowledge, possession or control on reportable cross-border arrangements’ with the competent authorities. In the absence of an intermediary bound by the reporting obligation, that obligation is incumbent on the relevant taxpayer, in accordance with Article 8ab(6) of that directive. In addition, the concept of ‘reportable cross-border arrangement’ is defined in point 19 of Article 3 of that directive in line with the hallmarks set out in Annex IV. The content of that obligation may be inferred from Article 8ab(14) of amended Directive 2011/16.

137 In those circumstances, it must be held that the requirement that the limitation on the exercise of fundamental rights must be provided for by law is satisfied.

138 In the second place, as regards the requirement relating to respect for the essence of the right to respect for private life, guaranteed in Article 7 of the Charter, it should be noted that an obligation such as that at issue in the main proceedings, which relates solely to the communication of data revealing the design and implementation of a potentially aggressive tax arrangement without even directly affecting the possibility of such design or such implementation, cannot be regarded as undermining the essence of the right to respect for the private life of the persons concerned.

139 In the third place, as regards the principle of proportionality, it is necessary to ascertain, first of all, whether the reporting obligation laid down in Article 8ab(1), (6) and (7) of amended Directive 2011/16 meets an objective of general interest recognised by the European Union. If so, it must then be ensured, first, that that obligation is appropriate for attaining that objective, second, that the interference with the fundamental right to respect for private life which may result from that obligation is limited to what is strictly necessary, in the sense that the objective pursued could not reasonably be achieved in an equally effective manner by other means less prejudicial to that right, and, third, provided that this is indeed the case, that the interference is not disproportionate and does not impose a burden that outweighs that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference (see, to that effect, judgment of 22 November 2022, *Luxembourg Business Registers*, C-37/20 and C-601/20, EU:C:2022:912, paragraphs 64 and 66).

140 As regards the requirement that the limitation of the fundamental right must meet an objective of general interest, it should be pointed out that the amendment made to Directive 2011/16 by Directive 2018/822 falls within the scope of international tax cooperation to combat aggressive tax planning, manifested by the exchange of information between Member States. In that regard, it is apparent in particular from recitals 2, 4, 8 and 9 of Directive 2018/822 that the reporting obligation and the obligation to notify established by Article 8ab of amended Directive 2011/16 are intended to contribute to the fight against aggressive tax planning and the prevention of the risk of tax avoidance and evasion.

141 Combating aggressive tax planning and preventing the risks of tax avoidance and evasion constitute objectives of general interest recognised by the European Union for the purposes of Article 52(1) of the Charter, capable of enabling a limitation to be placed on the exercise of the rights guaranteed by Article 7 of the Charter (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 44 and the case-law cited).

142 As regards the question whether the reporting obligation laid down in Article 8ab(1), (6) and (7) of amended Directive 2011/16 is suitable for the attainment of those objectives, it should be noted that, as the EU legislature stated, inter alia, in recitals 2, 6 and 7 of Directive 2018/822, filing with the national tax administrations detailed information on cross-border tax arrangements, in particular the information referred to in Article 8ab(14) of that directive, at the early stage provided for in Article 8ab(1) of that directive, is particularly likely to enable the Member States to react promptly against harmful tax practices, even if they are lawful, and to remedy legislative or regulatory disparities and loopholes that may facilitate the development of such practices.

143 As regards the requirement that the interference with the fundamental right to respect for private life which is liable to result from that reporting obligation must be limited to what is strictly necessary, in the sense that the objective pursued cannot reasonably be achieved just as effectively by other means less restrictive of that right, it should be noted that that obligation is a particularly effective means of combating aggressive tax planning and preventing the risks of tax avoidance and evasion. By requiring intermediaries and, otherwise, the relevant taxpayer to transmit to the tax administration, at a very early stage, information on the cross-border arrangements containing one of the hallmarks set out in Annex IV, the EU legislature allows the Member States to react with precision and speed, if necessary in a coordinated manner, to aggressive tax-planning mechanisms, which the examination and monitoring of tax behaviour a posteriori does not allow quite as much.

144 Furthermore, the information to be filed as part of the reporting, as set out in Article 8ab(14) of amended Directive 2011/16, relates to the identification of the intermediaries and relevant taxpayers and, where appropriate, the enterprises associated with those taxpayers, and to the hallmarks set out in Annex IV. It must also include a summary of the cross-border arrangement concerned and, as appropriate, a description in abstract terms of the relevant business activities and arrangements, without disclosing a commercial or other secret. It must indicate the date of implementation of the cross-border arrangement concerned, the national provisions on which it is based and the value of that arrangement. It must identify the Member State or States concerned or likely to be concerned by the arrangement and any other person who may be concerned by the arrangement in a Member State.

145 That information does not appear to go beyond what is strictly necessary to enable the Member States to have a sufficient understanding of the cross-border arrangements concerned and to be able to act promptly, either solely on the basis of the information communicated or by contacting the intermediaries or relevant taxpayers for the purpose of obtaining additional information.

146 Furthermore, it must be pointed out that it follows from Article 8ab(1) of amended Directive 2011/16 that the reporting obligation concerns, for the intermediary and, failing that, for the relevant taxpayer, only information that is within his or her knowledge, possession or control. Accordingly, that obligation does not entail, for the obligor, an obligation to investigate and seek information beyond the scope of the information which he or she already controls.

147 Finally, it should be noted that the information which the tax authorities of the Member States gain from the reporting obligation differs, both in terms of the nature of the data communicated on that occasion and the rules governing that communication, from the information which Directive 2011/16 and its five amendments, made prior to Directive 2018/822, have already arranged to be shared

between the Member States. Unlike the mechanisms for the automatic exchange of information provided for in those earlier versions of Directive 2011/16, the version of that directive resulting from Directive 2018/822 provides Member States with information that is both early and targeted at specific tax arrangements involving a potential risk of tax avoidance, the designers of those arrangements and their beneficiaries, which is likely to increase significantly the effectiveness of combating aggressive tax planning and preventing the risks of tax avoidance and evasion.

148 As regards the question whether the interference with the right to protection of private life entailed by the reporting obligation is not disproportionate and does not outweigh the public interest objective pursued, it should be noted that, while that interference is certainly not negligible, combating aggressive tax planning and preventing the risks of tax avoidance and evasion are important objectives, the pursuit of which depends not only on the protection of the tax base, and therefore the tax revenue of the Member States, and the establishment of a fair tax environment in the internal market, as highlighted in recitals 2 and 6 of Directive 2018/822, but also on the safeguarding of the balanced allocation of the Member States' powers of taxation and the effective collection of tax, which the Court has found to be legitimate objectives (see, to that effect, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraphs 56 and 67 and the case-law cited). In those circumstances, the fact that the reporting obligation may, as the case may be, apply to legal cross-border arrangements, for the purposes and under the conditions recalled in paragraphs 139 to 147 above, does not permit the inference that that obligation is disproportionate, whether with regard to the taxpayer who benefits from the arrangement at issue or the intermediary who designed it.

149 It follows from the foregoing considerations that the limitation on the right to protection of private life, understood as the right of everyone to organise his or her private life, contained in the reporting obligation laid down in Article 8ab(1), (6) and (7) of amended Directive 2011/16, is justified.

150 In view of all the foregoing considerations, it must be concluded that the examination of the aspects to which the fifth question relates has disclosed no factor of such a kind as to affect the validity of amended Directive 2011/16 in the light of the right to respect for private life guaranteed in Article 7 of the Charter.

Costs

151 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. **The examination of the aspect to which the first question referred relates has disclosed no factor of such a kind as to affect the validity 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, in the light of the principles of equal treatment and non-discrimination, and of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union.**

2. **The examination of the aspects to which the second and third questions referred relate has disclosed no factor of such a kind as to affect the validity of Directive 2011/16, as amended by Directive 2018/822, in the light of the principle of legal certainty, the principle of legality in criminal matters enshrined in Article 49(1) of the Charter of Fundamental Rights and the right to respect for private life guaranteed in Article 7 of that Charter.**

3. **The invalidity of Article 8ab(5) of Directive 2011/16, as amended by Directive 2018/822, in the light of Article 7 of the Charter of Fundamental Rights, declared by the Court in the judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963), applies only to persons who pursue their professional activities under one of the professional titles referred to in Article 1(2)(a) of Directive 98/5/EC of the European**

Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

4. **The examination of the aspects to which the fifth question referred relates has disclosed no factor of such a kind as to affect the validity of Directive 2011/16, as amended by Directive 2018/822, in the light of the right to respect for private life guaranteed in Article 7 of the Charter of Fundamental Rights.**

[Signatures]

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* Language of the case: French