OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 29 February 2024(1)

Case C-623/22

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,
Beroepsinstituut van Erkende Boekhouders en Fiscalisten,
VH,
ZS,
NI,
EX
v
Premier ministre/Eerste Minister,
joined parties:
Conseil des barreaux européens AISBL,
Conseil National des Barreaux de France

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

(Reference for a preliminary ruling – Council Directive 2011/16/EU – Administrative cooperation in the field of taxation – Council Directive (EU) 2018/822 – Potentially aggressive cross-border arrangements – Base erosion and profit shifting – Reporting obligation – Automatic exchange of information – Article 49 of the Charter of Fundamental Rights – Principle of legality of penalties – Clarity and precision of the reporting obligation – Article 7 of the Charter – Right to respect for private life – Existence of and justification for the interferences with private life – Intermediaries – Legal professional privilege – Scope of the waiver)

I. Introduction

1. Whereas tax evasion, fraud and abuse have been one of the greatest preoccupations of any government since the dawn of time, base erosion and profit shifting ('BEPS') strategies are a relatively new phenomenon. BEPS strategies are, in essence, aggressive international tax-planning strategies that exploit gaps and mismatches in tax rules in order to shift profits artificially to locations where they are subject to non-taxation or reduced taxation, which results in little or no tax being paid and significant revenue losses for governments. (2)

2. The growing impact of those strategies on the public treasury – which is due to a range of factors, including increased mobility, global value chains and digitalisation of the economy – and increased awareness of citizens – which view them as undermining the fairness and integrity of tax systems – led to discussions, both at the global level and within the European Union, on how governments should respond to that phenomenon.

3. One of the key instruments adopted by the European Union in that context is Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. (3) In essence, Directive 2018/822 introduces a mandatory disclosure regime for intermediaries and taxpayers, coupled with an automatic exchange of information between the Member States' tax authorities, regarding potentially 'aggressive' cross-border tax arrangements.(4)

4. In the present case, the Court is called upon to review the lawfulness of that regime. Indeed, the five questions referred by the Cour constitutionelle (Constitutional Court, Belgium) raise a variety of legal issues in that respect. Some of those questions concern specific aspects of Directive 2018/822, while others touch upon more general issues, among which, most notably, whether the interference with the private life of the individuals required to file the relevant information with the competent authorities infringes Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

II. Legal framework

A. European Union law

5. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (5) established a system for secure administrative cooperation between the Member States' national tax authorities and laid down the rules and procedures for exchanging information for tax purposes.

6. Directive 2011/16 was amended on a number of occasions, in particular, as indicated above, by Directive 2018/822.(6)

7. Recitals 2, 4, 6, 8, and 9of Directive 2018/822 read: (7)

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. …

… the 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 [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. …

…

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 of certain cross-border arrangements that could potentially be used for aggressive tax planning would constitute a step in the right direction. In order to develop a more comprehensive policy, it would also be necessary that as a second step, following the reporting, the tax authorities share information with their peers in other Member States. …

…

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 therefore be necessary to shift the reporting obligation to the taxpayer who benefits from the arrangement in such cases.

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".

…'

8. Article 3 of Directive 2011/16 includes the 'Definitions', inter alia, of 'cross-border arrangement' (point 18), 'hallmark' (point 20), 'intermediary' (point 21), 'associated enterprise' (point 23), 'marketable arrangement' (point 24) and 'bespoke arrangement' (point 25).

9. Article 8ab of Directive 2011/16 ('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:

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

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

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.

…

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.

…

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

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

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

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;

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

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

the value of the reportable cross-border arrangement;

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;

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.'

10. Article 25a of Directive 2011/16 ('Penalties') provides:

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

11. Annex IV of Directive 2011/16 is entitled 'Hallmarks'. Part I of Annex IV ('Main benefit test') reads:

'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 of Annex IV includes the 'Categories of hallmarks', in the following manner: A. Generic hallmarks linked to the main benefit test; B. Specific hallmarks linked to the main benefit test; C. Specific hallmarks related to cross-border transactions; D. Specific hallmarks concerning automatic exchange of information and beneficial ownership; and E. Specific hallmarks concerning transfer pricing.

B. National law

12. The Kingdom of Belgium has transposed Directive 2018/822 a law of 20 December 2019. (8)

III. Facts, national proceedings and the questions referred for a preliminary ruling

13. In 2020, the Belgian Association of Tax Lawyers ('BATL'), Ordre des barreaux francophones et germanophone ('OBFG'), Orde van Vlaamse Balies and Others ('OVBO'), Institut des conseillers fiscaux et des experts-comptables ('ICFC') (collectively, 'the applicants in the main proceedings') brought proceedings before the Cour constitutionelle (Constitutional Court), asking that court to suspend the law of 20 December 2019 and to set it aside, in whole or in part, on the ground that that law transposed a directive which was unlawful, in whole or in part. In their view, Directive 2018/822 infringes a number of provisions of the Charter and general principles of EU law.

14. The Cour constitutionelle (Constitutional Court), harbouring doubts as to the proper interpretation of certain provisions of the Charter and general principles of EU law, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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 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?

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 on Human Rights [('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 cross-border arrangements, are not sufficiently clear and precise?

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 cross-border arrangement is not fixed in a sufficiently clear and precise manner?

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], 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?

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 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?'

15. Written observations in the present proceedings have been submitted by the applicants in the main proceedings, the Conseil National des Barreaux de France, the Belgian, Czech, Spanish and Polish Governments, the Council of the European Union and the European Commission. Those parties, with the exception of the Czech Government, also presented oral argument at the hearing on 30 November 2023.

16. By letters of 20 October 2023, the Council and the Commission answered a question by the Court by providing information concerning the Member States that, in conformity with Article 8ab of Directive 2011/16, took measures to give certain intermediaries the right to a waiver in relation to filing information on a reportable cross-border arrangement, in order to preserve the legal professional privilege accorded to them under national law.

IV. Analysis

17. By its questions, the referring court asks the Court to review, in the light of various general principles and fundamental rights recognised in the EU legal order, the validity of Directive 2018/822, which amends Directive 2011/16 by introducing an obligation, for certain intermediaries and taxpayers, to report potentially aggressive cross-border tax-planning arrangements to the competent Member States' authorities ('the reporting obligation').

18. The five questions referred concern different aspects of the system introduced by Directive 2018/822. In that regard, I would like to emphasise, from the outset, that my assessment will be strictly confined to the aspects of Directive 2018/822 which the referring court considered, in its order for reference, to be potentially problematic. An approach of judicial restraint in the present case seems to me all the more appropriate given the broad formulation of certain questions, and the fact that the arguments put forward by the applicants in the main proceedings to contest the lawfulness of Directive 2018/822 are not always focused on the issues actually raised by the referring court.

A. First question: material scope of the reporting obligation and the principle of equality

19. By its first question, the referring court asks the Court whether Directive 2018/822 infringes the principles of equality and non-discrimination, guaranteed by Articles 20 and 21 of the Charter, in that it introduces a reporting obligation for cross-border arrangements that is not limited to corporate tax.

20. According to Article 2(1) and (2) of Directive 2011/16, its provisions – and thus also the reporting obligation provided for in Article 8ab – 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', and do not apply to 'value added tax and customs duties, or to excise duties covered by other Union legislation on administrative cooperation between Member States, … [nor] to compulsory social security contributions …'.

21. In that regard, I find it appropriate to point out, at the outset, that the principles of non-discrimination and of equal treatment represent, generally, two sides of the same coin. Indeed, the Court has consistently stated that the former is an expression of the latter. Nevertheless, under EU law, 'non-discrimination' is a rather specific concept: it concerns different treatment on the basis of certain specific prohibited grounds, such as those set out in Article 21 of the Charter (sex, race, colour, ethnic or social origin, genetic features, language, religion or other belief, political opinion, membership of a national minority, property, birth, disability, age or sexual orientation) or in Article 18 TFEU (nationality). (9) In the light of that, it seems to me that the doubts of the referring court concerning the scope of the reporting obligation introduced by Directive 2018/822 relate to a possible breach of the principle of equality, and not of the principle of non-discrimination.

22. According to settled case-law, the principle of equality, which is one of the fundamental principles of EU law, 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. (10) 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. (11)

23. As regards judicial review of whether EU legislation complies with the principle of equal treatment, the Court has held that the legislature has, in the exercise of the powers conferred on it, 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 (which is typically the case where the EU legislature adopts measures in the field of

taxation (12)). 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.(13)

24. It follows from the above that, in order to answer the question of the referring court, it is necessary to determine whether, having regard in particular to the object and purpose of the rules introduced by Directive 2018/822, by subjecting all taxes falling within the scope of Directive 2011/16 to the reporting obligation, the EU legislature has exceeded its margin of discretion by treating different situations in the same manner, without any objective justification.

25. According to recitals 1 to 5 of Directive 2018/822, that directive aims, in the first place, at enhancing transparency in the field of taxation, by allowing Member States' tax authorities to 'obtain comprehensive and relevant information about potentially aggressive tax arrangements … [in order to] 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'. The overarching aim of Directive 2018/822 is, as stated in recital 19 thereof, 'to improve the functioning of the internal market by discouraging the use of aggressive cross-border tax-planning arrangements'. (14)

26. Those aims are consistent with the overarching objective pursued by Directive 2011/16, which is, in essence, to develop administrative cooperation between the Member States' tax authorities, in order to overcome the negative effects which the creation of the internal market may have on the Member States' ability to assess taxes due properly. That difficulty may affect the operation of the national taxation systems, which may in turn incite tax fraud and tax evasion, thereby jeopardising the correct functioning of the internal market. (15)

27. Against that background, I fail to see any element suggesting any plausible reason for which *corporate tax* on the one hand, and *other taxes* falling within the scope of Directive 2011/16 on the other hand, should have been treated differently.

28. As pointed out by the Governments of the Member States that submitted observations in the present proceedings, as well as by the Council and the Commission, potentially aggressive cross-border tax arrangements may concern a variety of taxes. (16) The possibility that such arrangements exploit loopholes in the national taxation systems or conceal tax evasion or fraud exists regardless of the specific tax (or taxes) they are concerned with. Accordingly, the risks posed by one tax or another for the Member States' treasuries in the first place and, by way of a consequence, for the integrity of the internal market, appear comparable.

29. I, thus, do not find it unreasonable that the EU legislature has decided to enhance administrative cooperation on potentially aggressive cross-border tax arrangements with regard to a wide spectrum of taxes and to subject all the taxes covered by Directive 2011/16 to the newly introduced reporting obligation. It is equally reasonable that the taxes in respect of which administrative cooperation is governed by another set of rules (such as those indicated in Article 2(2) of Directive 2011/16) are excluded from the scope of the reporting obligation.

30. The broad scope *ratione tributi* of the reporting obligation thus appears consistent with the subject matter and purpose of the legal instrument which introduced it (Directive 2018/822) and, more generally, with the other EU rules which govern the field to which that act relates (administrative cooperation in the field of taxation). In fact, as the Polish Government points out, in so far as Directive 2018/822 is an instrument that amends Directive 2011/16, it is quite natural that the reporting obligation concerns all the taxes to which the other mechanisms of cooperation included in Directive 2011/16 are applicable. (17)

31. The contrary views expressed by the applicants in the main proceedings fail to convince me.

32. First, I must say that I find it hard to understand why the fact that some of the hallmarks set out in Annex IV of Directive 2011/16 are only applicable to corporate taxes would be of any relevance in order to establish a possible breach of the principle of equality. It seems to me that the EU legislature's desire to cover a diverse array of taxes may justify the inclusion in Annex IV of a variety of hallmarks, with some of those being more relevant for some taxes than others. Provided that at least *some* of the hallmarks may concern arrangements which concern taxes other than corporate tax, (18) and that information on those arrangements may be helpful to the competent authorities for the purpose of identifying loopholes, or combating tax evasion or fraud, I see no issue with the lawfulness of the directive.

33. Second, it may well be true that the major problems for the national tax systems are the result of tax arrangements which concern corporate tax. However, to the extent that – as said above – potentially aggressive cross-border tax arrangements with regard to taxes other than corporate tax do exist, the choice of the EU legislature to give a broad scope to the reporting obligation does not appear unreasonable.

34. In that context, I note that the applicants in the main proceedings have not provided any information to suggest that the problems raised by tax arrangements resulting from arrangements which concern taxes other than corporate tax are so minor that they should have been considered negligible by the EU legislature. (19) In any event, as the Commission emphasised, it is fair to assume that if the reporting obligation were to concern only one type of direct taxation (corporate tax), to the exclusion of other forms of direct taxation (for example, individual income tax) and of indirect taxation, some taxpayers could have turned some taxable profits of companies into other types of income not subject to the reporting obligation. That would undermine – as the Czech Government pointed out – the achievement of the objective pursued by the directive in question.

35. Third, although the Commission's Impact Assessment was particularly focused on the field of direct taxation (personal and corporate income tax), that document made it very clear that 'a reporting requirement may concern schemes that relate to any type of tax', and that 'any type of tax or duty may suffer from aggressive tax planning'. (20)

36. At any rate, the considerations developed by the Commission in its Impact Assessment do not detract from the fact that, ultimately, the EU legislature decided to give the reporting obligation a broad scope, as shown by the dual legal basis of Directive 2018/822: Articles 113 and 115 TFEU. The first provision enables the Council to adopt 'provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation'. The second provision empowers the Council to 'issue directives for the approximation of such [Member

States' laws] as directly affect the establishment or functioning of the internal market', including on fiscal matters. It cannot be disputed that such a dual legal basis permitted the EU legislature to adopt legislation which affects a broad range of taxes, such as those that are now concerned by the reporting obligation.

37. It follows from the foregoing considerations that the examination of the first question has not revealed any reason for taking the view that, by including taxes other than corporate tax, the EU legislature is in breach of the principle of equality.

B. Second and third questions

1. Preliminary remarks

38. By its second and third questions, which can be examined together, the referring court asks the Court whether (i) the concepts of 'arrangement' (as well as of 'cross-border', 'marketable' and 'bespoke' arrangement), 'intermediary', 'participant' and 'associated enterprise' referred to in Article 3 and/or Article 8ab of Directive 2011/16; (ii) the different hallmarks and the 'main benefit test' set out in Annex IV to Directive 2011/16; and (iii) the 30-day rule set out in Article 8ab(1) and (7) of Directive 2011/16, are *sufficiently clear and precise* to comply with the principles of legality of penalties and of respect for private life.

39. The assessment of the compatibility of Directive 2018/822 with those two principles raises different issues and, consequently, requires different types of analysis (see Subsections 2 and 3 below).

40. Before that, however, a preliminary observation is in order. It seems to me that, in their observations on the second and third questions, the applicants in the main proceedings conflate two sets of arguments: they contest, on the one hand, the *clarity and precision* of the provisions of Directive 2018/822 and, on the other, the *breadth* of those provisions.

41. Those complaints must nonetheless be distinguished. The second issue raises, in essence, a problem of proportionality: whether those concepts are too broad and, as a result, the directive goes too far, catching too many situations and/or creating too-far-reaching obligations. Therefore, in the present section of the Opinion (B), I will focus my analysis on whether the concepts at stake are sufficiently clear and precise to satisfy the requirements of legal certainty which are inherent in Article 49(1) and Article 7 of the Charter. The potential overreaching of the provisions of Directive 2018/822 will be examined when assessing the fourth and fifth questions referred (Sections C and D below).

2. Precision and clarity of Directive 2018/822 and the principle of legality of penalties

42. The principle of legality of penalties (*nulla poena sine lege certa*), enshrined in Article 49(1) of the Charter – which constitutes a specific expression of the general principle of legal certainty (21) – is, in principle, applicable only with regard to penalties that are of a criminal nature.

43. Article 25a of Directive 2011/16 (entitled 'Penalties') merely provides that (i) it is for Member States to lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to inter alia Article 8ab thereof, and (ii) those penalties should be 'effective, proportionate and dissuasive'. (22)

44. Accordingly, in so far as Directive 2011/16 does not require Member States to introduce criminal penalties for breaches of the reporting obligation, the applicability of Article 49(1) of the Charter is not so obvious. In principle, it is for the Member States to transpose the provisions set out in that directive in a manner which complies with the fundamental rights and principles enshrined in the Charter (including the principle of legality of penalties). (23)

45. That said, it cannot be excluded that – in the light of the subject matter and aim of the provisions introduced by Directive 2018/822, and the requirement that the penalties be 'effective' and 'dissuasive' – Member States might consider that failure to comply with the reporting obligation should necessarily be punished with penalties of such a severity that they will inevitably be of a criminal nature.(24) I understand that that may be the case of the Kingdom of Belgium. The referring court takes the view that, despite the penalties provided for under Belgian law being labelled 'administrative', those penalties should be considered 'criminal' from a substantive viewpoint. (25)

46. In such a case, the lack of clarity or precision of one or more concepts included in the provisions of Directive 2018/822 – especially since some of those provisions appear to leave little (or even no) room for manoeuvre for the Member States' transposition (26) – may actually result in that directive being unlawful for a breach of Article 49(1) of the Charter. I shall now explain the circumstances in which that breach could occur.

(a) The relevant case-law

47. According to consistent case-law, the principle of legality of penalties requires that EU legislation must give a clear definition of offences and the penalties which they attract. That requirement is satisfied where the individual concerned is in a position to ascertain from the wording of the relevant provisions and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will render him or her criminally liable.(27)

48. That said, the Court has also made clear that the principle of legality of penalties cannot be interpreted as precluding the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time. (28)

49. In the light 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. (29) 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 practice, those agreements and practice may provide further guidance to the interpreter. (30)

50. In the same vein, the Court has held that, since legislation must be of general application, its 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 the principle of legality, provided that the provision proves to be sufficiently clear in the large majority of cases. (31)

51. In addition, the Court has emphasised that the degree of foreseeability required depends to a considerable degree 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. They can therefore be expected to take special care in assessing the risks that such an activity entails. (32)

(b) Precision and clarity of the provisions introduced by Directive 2018/822

52. It is against those principles that I will now assess whether the provisions introduced by Directive 2018/822 may, due to a lack of precision and clarity of certain key concepts used therein, make it impossible for the individuals concerned to identify the acts and omissions which might trigger their liability, and thus lead to the imposition of criminal penalties upon them, in violation of the principle of legality of penalties whose core elements I have just outlined.

(1) The concept of 'arrangements'

53. The term 'arrangements' is employed in Article 8ab of Directive 2011/16 to identify the operations which, if cross-border (within the meaning of Article 3, point 18, thereof), are subject to the reporting obligation when (as stated by Article 3, point 19, thereof) they contain 'at least one of the hallmarks set out in Annex IV' to the same directive.

54. That term, and its equivalents in the other language versions of that directive, (33) is certainly general in nature and has a broad scope. However, that does not mean that, as claimed by the applicants in the main proceedings, those terms are vague or ambiguous.

55. First, although the concept of 'arrangements' is not expressly defined in Directive 2018/822, its preamble provides crucial indications. 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 … *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'. (34) 'Tax-planning structures' is, in turn, a term that is commonly used in the field of international taxation. (35) In addition, recital 19 of Directive 2018/822 refers essentially to the same idea, with a different expression: 'this Directive … targets *schemes* which are developed to potentially take advantage of market inefficiencies that originate in the interaction amongst disparate national tax rules'. (36)

56. Second, it seems to me that the ordinary meaning of the term 'arrangements' (mechanisms, plans, structures, schemes and so forth) is consistent with the EU legislature's intention to capture a variety of legal constructs – made up primarily of one or more (37) contracts, agreements, understandings and practices which give rise to commercial transactions – which form a coherent whole, and are capable of affecting the tax liability of (at least) one taxpayer.

57. Third I note that the use of the term 'arrangements', in the context of EU tax legislation, is not the product of Directive 2018/822. Indeed, other provisions in that field – predating that directive – have made use of such a term. (38) The applicants in the main proceedings did not argue that the use of that term has given rise to situations of uncertainty in relation to those provisions. Nor is any element in that regard present in the case file.

(2) The concepts of 'cross-border', 'marketable' and 'bespoke' arrangements

58. In the light of the above, it seems to me that, a fortiori, there should be no major issues concerning the interpretation of the concepts of 'cross-border', 'marketable' and 'bespoke' arrangements, which are all defined in Article 3 of Directive 2011/16.

59. First of all, as regards the term 'cross-border arrangement', it is defined in point 18 of Article 3 of Directive 2011/16 as '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'.

60. That definition appears, to my mind, to be quite clear: put simply, the arrangement must not be confined within one Member State, but should concern at least one other country (Member State or third country). That reading is consistent with the ordinary meaning of the word 'cross-border' (that is, involving at least two countries), which is of common use in EU internal market law.

61. That reading is also consistent with the scope and objective of the legislation in question. As explained in recital 10 of Directive 2018/822, since the reporting obligation is aimed at ensuring the proper functioning of the internal market, it is necessary 'to limit any common rules on reporting to cross-border situations, namely those involving either more than one Member State or a Member State and a third country'. The cross-border requirement follows also from the dual legal bases of Directives 2011/16 and 2018/822, which allow EU measures related to the establishment and functioning of the internal market. (39)

62. Next, the terms 'marketable arrangement' and 'bespoke arrangement' are defined, respectively, in points 24 and 25 of Article 3 of Directive 2011/16. Those two forms of arrangements are clearly meant to be alternative subgroups of 'cross-border arrangements': any such arrangement must be either one or the other. A 'marketable

arrangement' is 'a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised', whereas a 'bespoke arrangement' is 'any cross-border arrangement that is not a marketable arrangement'.

63. The only issue which may perhaps raise some interpretative questions is, I believe, the evaluation required to identify arrangements that are 'designed, marketed, ready for implementation or made available for implementation without a need to be *substantially customised*'. (40)

64. To my mind, the concept of 'marketable arrangements' refers to the practice of preparing formats or prototypes of tax arrangements: conceived and designed, by tax advisors or experts, without reference to the particular situation of one specific client, and thus meant to be marketed (that is, provided to clients against payment) as 'nearly' finished products. In other words, marketable arrangements are those which are prepared on the basis of a pre-existing model, which then undergoes only minor adaptations in order to be applicable to the specific situation of the relevant taxpayer, before being implemented.

65. Certainly, one could discuss what constitutes a *minor* adaptation. Minor adaptations naturally include 'filling in the blanks', adding or removing certain steps, or making slight changes to other steps. By contrast, a tax arrangement which is designed, entirely or for the most part, *ex novo*, in order to meet the specific wishes or needs of the client, is not a marketable arrangement but a bespoke arrangement.

66. However, a lengthy discussion on what is and what is not a minor adaptation seems to me a rather unproductive one: it clearly depends on the specific circumstances of each case. What truly matters is that the term 'substantial customisation' is one that, in most cases, will not raise any significant interpretative issues.

(3) The concept of 'participant'

67. The term 'participants' is employed in Article 3, point 18, of Directive 2011/16 in the definition of 'cross-border arrangement' for the purposes of that directive. Indeed, four of the five alternative conditions which have to be satisfied for an arrangement to be 'cross-border' are concerned with the status of 'the participants in the arrangement': their residence under conditions (a) and (b), and their activities in conditions (c) and (d). (41)

68. It is thus important, for the application of the system introduced by Directive 2018/822, to identify the participants. Indeed, save one exception, (42) the rule is that when all the participants in the arrangement are tax resident in one and the same Member State, there cannot be a cross-border arrangement and, as such, no reporting obligation arises.

69. There is, visibly, no explicit definition of the term 'participant' in Directive 2011/16. Nor can such a definition be extracted from the preamble of Directive 2018/822 or the documents which accompanied the Commission's proposal for a directive.(43)

70. That notwithstanding, it seems to me that that concept can be reasonably construed by looking at the ordinary meaning of the word (a person who takes part in something), and its function (to identify cross-border arrangements). The term 'participant' must necessarily refer to a natural or legal person which is, formally, a party to one of the various transactions composing the arrangement.

71. That term thus encompasses, first and foremost, the taxpayer(s) and the other entities (even if they are, for whatever reason, not taxable) *directly* concerned by the arrangements. By contrast, it normally does not encompass the intermediaries, unless they themselves take part, with a formal role, in one of the relevant legal mechanisms composing the arrangement.

(4) The concept of 'intermediary'

72. The term 'intermediary' identifies, under Article 8ab of Directive 2011/16, the main category of persons who, save exceptions, are required to file the relevant information with the competent authorities.

73. That term is expressly defined in Article 3, point 21, of Directive 2011/16 as 'any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement' (first paragraph). That provision adds that the concept of 'intermediary' also extends to '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'. However, any such person can 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' (second paragraph).

74. The applicants in the main proceedings emphasise the very comprehensive and also opened-ended nature of the definition. I can agree with them that the definition is couched in broad terms, and covers a diverse range of (natural and legal) persons. However, that does not imply that the provision is vague or ambiguous.

75. First, the categories of persons that may fall within that definition are, on the whole, relatively clear. As pointed out by the Commission, the term is meant to encompass the *main actors* which are involved, generally for *professional reasons*, in the tax-planning activities concerned by Directive 2018/822. In fact, in its Impact Assessment, the Commission stated that intermediaries include 'amongst others, consultants, lawyers, financial (investment) advisors, accountants, solicitors, financial institutions, insurance intermediaries, and company-formation agents'. Essentially, the term refers to professionals who 'advise clients on structuring their business, to reduce tax-related costs and they receive a premium fee as remuneration'. (44)

76. As the Belgian Government emphasises, in order to carry out the activities listed in Article 3, point 21, of Directive 2011/16, a person must be highly qualified in a specific field (tax law, corporate law, international finance, accounting and so forth), and active at international level. It is therefore hard to believe that one of those persons may be unaware that his or her activities in respect of some cross-border tax arrangement qualifies him or her as an 'intermediary' within the meaning of Directive 2011/16.

77. Second, Article 3, point 21, read in conjunction with the preamble and the other provisions of Directive 2011/16, indicates that the reporting obligation applies to (natural or legal) persons who (i) are not part of the

relevant taxpayers' internal staff; (45) (ii) are (or should be) aware of their involvement in,(46) and provide a meaningful (and *non de minimis*) contribution to, (47) the design, marketing, organisation and implementation of the arrangement; (iii) possess or control relevant information on the arrangement in question; (48) and (iv) are resident in or have other stable and structural links to one of the Member States. (49)

78. Third and last, I note that, once again, the term 'intermediary', and its equivalents, are of common use in the field of international taxation. (50)

79. Consequently, the definition provided by Directive 2011/16 is rather detailed and its meaning sufficiently clear. Although it cannot be excluded that, in some particular circumstances, a reasonable doubt may arise as to whether a given category of operators, or some specific person, falls within that definition, it seems to me that in the vast majority of cases the situation will be clear-cut. (51)

(5) The concept of 'associated enterprise'

80. The term 'associated enterprise' is employed in Directive 2011/16 in conjunction with 'advance pricing arrangements' (52) and 'cross-border transactions'. (53) Those last two constitute operations that are relevant in establishing the existence of reportable arrangements. In addition, pursuant to Article 8ab(14)(a), information concerning 'persons that are associated enterprises to the relevant taxpayer' is among the information that should be communicated to the authorities and then automatically exchanged within their network.

81. Notably, the concept of 'associated enterprise' is defined in Article 3, point 23, of Directive 2011/16, stating that, for the purposes of Article 8ab, 'associated enterprise' means a person who is related to another person in at least one of the following four 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.

82. In addition, Article 3, point 23, of Directive 2011/16 clarifies how the term should be understood (i) when more than one person participates in the management, control, capital or profits of the same person; (ii) when the same persons participate in the management, control, capital or profits of more than one person; (iii) when a person acts together with another person in respect of the voting rights or capital ownership of an entity; (iv) in the presence of indirect participation; and (v) when an individual, his or her spouse and his or her lineal ascendants or descendants are involved.

83. It seems to me that such a definition is not only rather detailed, but is also based on objective – and thus easily verifiable – criteria. It also essentially corresponds to the (more concise) explanation included in Article 3, point 15, of Directive 2011/16, according to which enterprises are considered associated enterprises where 'one enterprise participates directly or indirectly in the management, control or capital of another enterprise or the same persons participate directly or indirectly in the management, control or capital of the enterprises'.

84. Furthermore, I observe that the term 'associated enterprise' is also often used, both within the European Union and internationally, in the field of tax law. (54) That said, it may be true that – as OBFG points out – the fact that the various definitions of 'associated enterprises' included in the EU legislation do not entirely coincide may be the source of some misunderstanding. However, to the extent that each of those definitions, taken individually, lends itself to a straightforward application in respect of the cases governed by the relevant instrument, I do not think that the EU legislature's choice can be considered unlawful.

(6) The hallmarks

85. According to Article 3, point 19, of Directive 2011/16, a cross-border arrangement is 'reportable' if it 'contains at least one of the hallmarks set out in Annex IV'. In turn, point 20 of the same provision defines a 'hallmark' as 'a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance'.

86. The EU legislature's choice to resort to a list of hallmarks to identify the tax arrangements which must be reported is explained in recital 9 of Directive 2018/822, which reads as follows:

'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".' (55)

87. The list of hallmarks can be found in Part II of Annex IV to Directive 2011/16. Hallmarks are divided into different categories: 'Generic hallmarks linked to the main benefit test' (category A) and specific hallmarks, grouped according to whether they are 'linked to the main benefit test' (category B), 'related to cross-border transactions' (category C), concern 'automatic exchange of information and beneficial ownership' (category D) or concern 'transfer pricing' (category E). However, whereas certain hallmarks are by themselves sufficient to render the arrangement reportable, others are only relevant if the main benefit test, which I will explain further in the next section, is satisfied.

88. I do not share the doubts, expressed by the applicants in the main proceedings, concerning the clarity and precision of the hallmarks. It is true that both the number and the breadth of the hallmarks mean that they cover a heterogeneous group of arrangements. However, that fact, in and of itself, does not make the application of such an obligation unforeseeable for the individuals concerned. In fact, none of the hallmarks set out in Annex IV appears, in my view, manifestly imprecise or obscure.

89. A fortiori, the argument put forward at the hearing by some of the applicants in the main proceedings, that the definition of the hallmarks has not been adequately considered by the EU legislature, should be rejected. In particular, Section 7.7.2 of the Impact Assessment and Annex 7 thereto show how that activity was preceded by a

careful evaluation of the hallmarks used in similar disclosure regimes existing at that time (both within the European Union and elsewhere (56)) and of those considered in the OECD's reports.

90. As the Commission points out, the hallmarks describe very specific and concrete (fact-based) characteristics of the tax arrangements which, in most cases, should not be particularly difficult for tax professionals and, where necessary, taxpayers taking appropriate legal advice, to identify.

91. The fact that certain hallmarks employ terms which require some evaluation or forecast from the interpreter does not call the above into question. Indeed, none of the expressions included in the list of hallmarks that are criticised by the applicants in the main proceedings (57) seems to me to involve an assessment which cannot be reasonably expected by the persons involved.

92. In addition, to the extent that the applicants in the main proceedings complain about the legislative technique chosen by the EU legislature to identify reportable arrangements – that is, to resort to an exhaustive list of characteristics, instead of using an abstract definition – I would emphasise that such a choice falls squarely within the (ample) margin of manoeuvre that the EU legislature enjoys when adopting legislative acts which require the balancing of various public and private interests. (58) In the present case, I find the explanations of the legislature's choice, provided in recital 9 of Directive 2018/822, and in Section 5 of the Explanatory Memorandum (59), to be reasonable.

(7) The 'main benefit test'

93. The main benefit test has an important function in the context of the system introduced by Directive 2018/822. Indeed, certain hallmarks trigger the reporting obligation only if the main benefit test is satisfied. (60) Vice versa, the mere fact that the test is satisfied does not render an arrangement reportable, since at least one of the hallmarks must be present.

94. The main benefit test is set out in Part I of Annex IV to Directive 2011/16: it is 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'.

95. I do not perceive that test as lacking clarity or precision.

96. Admittedly, the main benefit test requires an evaluation which could be regarded as being partly subjective, since it relies on personal expectations. However, I do not read the provision in that way. In my view, what matters is not the subjective view of the taxpayer in question (and/or of any intermediary), but the expectation that a prudent and reasonably informed person would have to that effect.

97. Moreover, the main benefit test entails an evaluation of elements which are largely of an objective nature. The test is essentially meant to target arrangements which are put in place solely or mainly for tax reasons. It, thus, requires – according to the OECD's 2015 Final Report – comparison of 'the value of the expected tax advantage with any other benefits likely to be obtained from the transaction', which implies 'an *objective* assessment of the tax benefits'. (61)

98. It is true that the test requires a case-by-case assessment of the arrangements in question. Indeed, Annex IV states that 'all relevant facts and circumstances' must be considered, without any explanation of what those facts and circumstances may be. Nevertheless, it does not follow from that that the application of the test is uncertain, at least in the vast majority of cases. As I see it, the assessment of the relevant facts and circumstances involves, in particular, a twofold examination: of the characteristics of the arrangement, on the one hand, and of the object and purpose of the tax laws being applied, on the other hand.

99. First, are there non-tax-related reasons (for example, commercial, industrial and so forth) which may explain the decision to put the arrangement in question in place and, if so, are those reasons genuine, plausible and significant? Had the tax advantage not been there, would the taxpayer concerned have had an interest in making use of the arrangement? Is there some significant economic imbalance in the transactions which are part of the arrangements, for example, a lack of a reasonable relationship between the price paid and the products or services obtained in return?

100. Second, does the tax arrangement constitute a logical and straightforward application of the tax laws relied on, and one which is consistent with the object and purpose of those laws? Or is the tax arrangement rather 'taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability'? (62) Does the structure of the arrangement appear – in the light of its stated purpose, and of the national laws being applied – artificial or overly complex, and/or does it include steps which appear (if were not for their impact on tax liability) unnecessary?

101. These are questions that should not be difficult to address for tax professionals and taxpayers such as those making use of sophisticated tax arrangements.

102. Last but not least, I understand that a number of States, both within and outside the European Union, use or have used, in instruments which are, purpose-wise and content-wise, similar to Directive 2018/822, a 'main benefit test' which is comparable to that introduced by Directive 2018/822. (63)

103. Accordingly, given the diversity of the economic activities, the transactions and the national fiscal systems that may be involved, a case-by-case assessment of the arrangements under the main benefit test seems to me inevitable. That, however, does not call into question the relative clarity of the type of analysis to be carried out under that test by the persons required to apply it.

(8) The 30-day rule

104. The first subparagraph of Article 8ab(1) of Directive 2011/16 states that intermediaries are to file the information in question within 30 days, from the day the arrangement is 'made available for implementation', or is 'ready for implementation', or when 'the first step in the implementation [of the arrangement] has been made', whichever occurs first. The second subparagraph of Article 8ab(1) of Directive 2011/16 adds that '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'. (64)

Finally, Article 8ab(7) of Directive 2011/16 states that 'the relevant taxpayer … 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'.

105. Some of the applicants in the main proceedings argue that the triggering events are not identified by Article 8ab with the required level of precision. In particular, they claim that the exact meaning of the expressions 'made available' and 'ready' for implementation are unclear. For instance, OBFG questions whether a simple oral consultation of an expert by a taxpayer, or mere discussions, at a rather general level, would be sufficient to require the filing of the information in question.

106. I find those objections unconvincing.

107. At the outset, I must say that the term 'implementation' can hardly be considered as lacking clarity. Indeed, its everyday meaning (putting into effect, execution, application and so forth) indicates that the 30-day period for notification begins only when the tax arrangement in question goes from its conceptual stage to its operational stage. The operational stage involves, typically, the performance of one of the legal acts which are necessary to give effect to the arrangement in question.

108. It is important to note that the term 'implementation' appears in each of the three situations envisaged in the first subparagraph of Article 8ab(1), which all concern an ongoing, or at least imminent, execution of the tax arrangement in question. The reasons why in two of those situations (arrangement 'made available' or 'ready' for implementation) the clock may start ticking before the first step of implementation takes place is – if my understanding is correct – threefold.

109. First, the EU legislature has taken the view that, where feasible, an early filing of the information (that is, ideally, before the arrangements in question are actually implemented) should be preferred. That enables the tax administration to react at an early stage of the process, for example, by promptly amending the relevant legislation. (65) Second, the above provision enhances legal certainty by giving the intermediaries who might not be involved in the actual execution of the arrangements prepared by them (and, consequently, who may be unaware of the exact moment when implementation starts) a precise day from which the time limit starts to run. Third, the provision also excludes that the (real or alleged) unawareness of the timing of implementation of an arrangement may be used as a pretext by intermediaries who failed to comply with the reporting obligation.

110. The same logic (*dies a quo* that is easily predictable since it is not dependent on the conduct of other persons) is, in fact, followed by the additional rule set out in the second subparagraph of Article 8ab(1) for the persons that qualify as intermediaries because they agreed 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'. (66) Those intermediaries are required to file the information 'within 30 days beginning on the day after *they* provided, directly or by means of other persons, aid, assistance or advice'. (67)

111. In this context, I should like to add that, in my view, activities such as providing general advice, not linked to a specific and concrete tax arrangement for one or more specific clients, or the simple participation in discussions and exchange of views between intermediaries and taxpayers (or between different intermediaries), does not require the intermediary to file a report under Article 8ab of Directive 2011/16.

112. Admittedly, the relevant provisions are not crystal clear on this point. However, a number of reasons seem to me to rule out a duty to report arrangements which are not meant to be made operational. First, neither the preamble of Directive 2018/822 nor the provisions it introduced refer to a filing obligation which exists regardless of the implementation of the arrangements in question. In fact, recital 7 of Directive 2018/822 refers to filings to be submitted 'before' they are implemented. Second, verifying whether a given arrangement, examined in the abstract and irrespective of the participants and taxpayers concerned, is 'reportable' and 'cross-border' may not always give a reliable response. Third, it is evident that arrangements which are not executed (i) cannot lead to tax abuse, fraud or evasion, (ii) do not pose any threat to Member States' ability to collect taxes, and (iii) have no effect whatsoever on the internal market. Therefore, a wide-ranging obligation for intermediaries to report any aid, assistance or advice given in relation to transactions which are, at that stage, purely hypothetical and speculative would be unnecessary to achieve the objectives pursued by Directive 2018/822 and create a disproportionate burden for the professionals concerned.

113. Accordingly, I take the view that the 30-day rule laid down in Article 8ab(1) and (7) of Directive 2011/16 is sufficiently clear and precise.

(c) Interim conclusion

114. In the light of the above, I come to the conclusion that the criticism put forward by the applicants in the main proceedings with respect to the clarity and precision of certain concepts used in the provisions introduced by Directive 2018/822 is unfounded.

115. Admittedly, some of those concepts are broad and of a general nature, with the consequence that the provisions concerned must be given a wide scope or may encompass a variety of different situations.

116. That notwithstanding, none of the provisions examined appears to make it impossible or unreasonably difficult, for the individuals concerned, to ascertain when and within what time frame they may be subject to the reporting obligation introduced by Directive 2018/822. It seems to me that, at least in the vast majority of cases, the circumstances in which the reporting obligation is triggered are reasonably clear.

117. Indeed, Directive 2011/16 includes very detailed and fact-based definitions of some of the key concepts employed in Article 8ab thereof. Also, the meaning of other key concepts can be determined by making use of the traditional means of legal interpretation: that is, examining the ordinary meaning of the terms used in the text of the provision, in the light of their context and of the object and purpose of Directive 2011/16 and Directive 2018/822. In addition, several of those terms are of common use in the field of taxation, and are employed in national and international instruments.

118. It should not be overlooked, in this context, that aggressive tax arrangements are normally complex and costly instruments which are designed and managed by specialised professionals. One can (and by all means should) expect those professionals to know the applicable rules, be able to interpret them with the assistance of qualified legal counsel and stay informed of the progressive clarifications of those rules which stem from EU and national case-law.
119. In addition, although the room for manoeuvre enjoyed by Member States, when transposing Directive 2018/822, to integrate and clarify the rules was probably quite limited, (68) nothing prevents their authorities from providing formal or informal guidance to the professionals and taxpayers concerned. In fact, as far as I know, the tax authorities of a number of Member States have, in ent months, issued notices to that effect. (69)
120. Accordingly, having examined the issues raised in the request for a preliminary ruling, in the light of the arguments put forward by the applicants in the main proceedings, I am unconvinced by the claims that Directive 2018/822 infringes the principle of legality of penalties enshrined in Article 49(1) of the Charter.

3. Precision and clarity of Directive 2018/822 and respect for private life

121. The second aspect raised by the referring court with its second and third questions concerns, in essence, the compatibility of the reporting obligation with the principle of respect for private life enshrined in Article 7 of the Charter. The referring court's main concern underpinning part of the second and third questions is – according to the request for a preliminary ruling – that a possible lack of clarity and precision in the key concepts included in Directive 2018/822 could give rise to a far-reaching and hardly predictable interference with the intermediaries' and taxpayers' right to keep their communication confidential.
122. As I have just explained, when assessing the compatibility of Directive 2018/822 with Article 49(1) of the Charter, the meaning and scope of the terms which the applicants in the main proceedings take issue with are, in my view, reasonably clear. I do not find any additional element, in those parties' observations, which may suggest a different conclusion when the lawfulness of that directive is assessed, on the ground of an alleged lack of precision and clarity of its key concepts, against Article 7 of the Charter.
123. More fundamentally, it seems to me that Article 7 of the Charter does not impose any stricter obligation in terms of clarity or precision than Article 49 of the Charter, in the light of which I have already examined the precision and clarity of the key concepts. In any event, I shall come back to the issue of clarity and precision of the provisions introduced by Directive 2018/822 when assessing whether those provisions constitute an adequate 'legal basis' that could justify interference with the rights protected by Article 7 of the Charter.

C. Fifth question: interference with private life (necessity and proportionality of the reporting obligation)

124. In my view, it is more appropriate to examine the referring court's fifth question before examining its fourth question. Indeed, both questions concern the same problem (the lawfulness of the interference with private life, which the reporting obligation gives rise to), but the fifth question has a much broader scope and requires a more in-depth assessment of certain issues.
125. By its fifth question, the referring court asks the Court, in essence, whether the reporting obligation infringes the right to respect for the private life of the intermediaries and of the taxpayers concerned because the interference with that right would not be justified or proportionate, in the light of the objectives pursued by Directive 2018/822.
126. The referring court points out that the information that is to be communicated to the authorities contains the private data of companies and individuals. It also emphasises the broad scope of the reporting obligation, which extends to arrangements which may be lawful, non-abusive and whose main advantage may not be of a fiscal nature. In addition, the referring court also wonders whether the reporting obligation is consistent with the stated objective of ensuring the proper functioning of the internal market, in so far as the effect of the reporting obligation may be to discourage some cross-border activities.
127. In that connection, the applicants in the main proceedings argue that undertakings should be free to choose the least taxed route for their businesses, provided that it can be done without infringing the law. There would be no justification, in their view, for discouraging taxpayers from making use of cross-border tax arrangements, and professionals from engaging in activities concerned with international tax planning.
128. I do not find those arguments to be persuasive. Indeed, I am of the view that, whilst there is indeed interference with the private life of taxpayers and intermediaries, that interference may be justified as necessary and proportionate to attain certain objectives in the public interest recognised by the European Union.

1. Interference with private life

129. Article 7 of the Charter states that 'everyone has the right to respect for his or her private and family life, home and communications'. According to the Explanations relating to the Charter of Fundamental Rights, (70) the rights guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 ECHR. (71) Therefore, as also prescribed by Article 52(3) of the Charter and Article 6(3) TEU, Article 7 of the Charter will be interpreted in conformity with Article 8 ECHR.
130. In its case-law, the ECtHR has consistently embraced a broad definition of 'private life' which encompasses activities of a professional or business nature, finding that approach consistent with the essential object and purpose of Article 8 ECHR, which is to protect the individual against arbitrary interference by the public authorities. (72)
131. For its part, the Court has followed the same approach under Article 7 of the Charter, drawing inspiration from the Strasbourg case-law, (73) and building upon its pre-Charter case-law according to which the protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities is a general principle of EU law. (74) Inter alia, the Court has held that, in order to establish the existence of interference with the right enshrined in Article 7 of the Charter, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way. (75)

132. Against that backdrop, it is quite clear that the reporting obligation involves interference in the private sphere of intermediaries and taxpayers.
133. 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 consent by those persons and irrespective of the subsequent use of the data at issue, as interference in their private life and, therefore, as a limitation of the right guaranteed in Article 7 of the Charter. That is also the case where the communication to a public authority of nominative and financial data relating to legal persons incorporates the name of one or more natural persons. (76)
134. In the present case, the information to be communicated includes, pursuant to Article 8ab(14) of Directive 2011/16, data such as '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] and, where appropriate, the persons that are associated enterprises to the relevant taxpayer'. Those data constitute 'personal data', within the meaning of Article 8 of the Charter, when they concern natural persons. They may also be personal data when, despite the fact that they concern legal persons, the business name of those legal persons includes the name of natural persons. Such data fall, therefore, within the scope of the protection of private life guaranteed in Article 7 of the Charter. (77)
135. The key question is, accordingly, whether that interference can be justified.
136. As the Court has consistently held, the right enshrined in Article 7 of the Charter is not an absolute right, but must be considered in relation to its function in society. (78) Furthermore, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Under the second sentence of Article 52(1) of the Charter, subject to the principle of proportionality, limitations may be imposed on those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
137. These issues will be assessed in the following sections of this Opinion.

2. Legal basis and essence of the right

138. To begin with, as regards the requirement that any interference with the exercise of fundamental rights must be 'provided for by law', I recall that such a requirement implies not only that the measure providing for the interference must have a legal basis in domestic law, but also that that law must itself define the scope of the limitation on the exercise of the right concerned. (79) In defining the scope of the limitation it imposes, the law in question must avoid the risk of arbitrariness by providing rules that are sufficiently clear and predictable in their application. (80) However, as the Court has held, that requirement does not preclude the limitation in question from being formulated in terms which are sufficiently open, in order to allow for adaptation to different scenarios and to keep pace with changing circumstances. (81)
139. In the present case, it is clear that the interference with the right enshrined in Article 7 of the Charter lamented by the applicants in the main proceedings has a legal basis – as far as EU law is concerned – in Article 8ab of Directive 2011/16. I consider that legal basis to be adequate, in so far as the limitation on the exercise of the rights concerned is framed by rules whose application is, as explained in my assessment of the second and third questions referred, sufficiently clear and predictable. The predictability and clarity of the provisions is by no means called into question by the fact that they may have a rather broad scope. (82)
140. In addition, the requirement that any limitation of the rights and freedoms guaranteed by the Charter respect the essence of those rights and freedoms also appears, in my view, to be met. Put simply, Article 8ab of Directive 2011/16 requires certain taxpayers and certain professionals who are in a rather specific situation to communicate to the relevant tax authorities some relatively limited and mainly business-related information. Accordingly, I do not think that it is necessary in the present case to engage in any discussion on what may be considered the 'core' (and thus untouchable) part of the right to privacy in order to conclude that the reporting obligation does not impinge on that core part.
141. Lastly, the assessment of whether the EU measure in question complies with the principle of proportionality requires a fourfold examination of that measure: (i) does it pursue objectives of general interest recognised by the European Union? (ii) is it necessary to attain those objectives? (iii) does it go beyond what is necessary in order to attain those objectives? (iv) does it strike a fair balance between the various interests at stake?

3. The proportionality assessment (I): objectives pursued and suitability of the measure

142. In the first place, I am of the view that the provisions of Directive 2018/822 pursue objectives of general interest recognised by the European Union. As the Court has held (most recently in the judgment in *Orde van Vlaamse Balies*), combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute objectives of general interest recognised by the European Union for the purposes of Article 52(1) of the Charter, capable of warranting a limitation on the exercise of the rights guaranteed by Article 7 of the Charter. (83)
143. It should not be forgotten that – as stated in Article 2 TEU –equality of citizens and solidarity are two of the founding values of the European Union. Respect for those values is clearly undermined by fiscal and business practices that enable some taxpayers (most often, particularly wealthy ones) to avoid paying their fair share of taxes to the public treasury. Those practices fuel inequalities within society, and are thus fundamentally incompatible with the European Union's socio-economic model of 'social market economy', and with the pursuit of some of its main objectives such as, in particular, promoting social justice and the well-being of its peoples, and contributing to social progress. (84)
144. In the second place, I must say that the reporting obligation appears to have been genuinely conceived and designed to combat aggressive tax planning and prevent the risk of tax avoidance and evasion. That measure is, in my view, particularly suited to ensuring that public authorities obtain relevant information about potentially aggressive cross-border tax arrangements, enabling those authorities to react promptly to harmful practices, for example, by amending the regulatory framework. The reporting obligation, thus, makes an effective contribution to

the ultimate objective of strengthening the internal market by promoting fair taxation and combating certain negative spillover effects which may derive from increased mobility within the European Union.

145. In that regard – in order to respond to certain doubts expressed by the referring court – I would like to emphasise that the fact that some EU provisions may have the effect of discouraging certain cross-border activities does not mean that those provisions are inconsistent with the aim of strengthening the internal market. Indeed, the establishment of the internal market is not intended to promote the unhindered pursuit of trade for all products and all services, but to ensure that the EU market is not fragmented by divergent national rules. (85) Where public interests so require, the EU rules may legitimately discourage, restrict or altogether prohibit certain economic activities. (86)

146. That said, I must say that, despite the emphasis with which some of the applicants in the main proceedings described the possible impact of Directive 2018/822 on the cross-border activities carried out by both intermediaries and taxpayers, I have difficulty in seeing any significant undesirable effect. It seems to me that the activities which may well be discouraged are, in the first place, those concerned with arrangements which are unlawful (or at any rate lead to tax evasion, fraud or abuse). Obviously, neither the taxpayers nor the intermediaries would have an interest in reporting those operations to the tax authorities. Clearly, were that to happen, Directive 2018/822 would have a particularly positive effect on the internal market. In the second place, Directive 2018/822 could also have some dissuasive effect vis-à-vis the activities related to arrangements which operate at the fringes of the law and, more generally, those which exploit gaps and mismatches in tax rules so that businesses can pay little or no taxes for their revenues. It seems to me that there is also a clear public interest in discouraging such arrangements. (87) In the third place, I fail to understand why activities, carried out by intermediaries and taxpayers, which relate to arrangements which are not only lawful but are also not aggressive would be discouraged by the mere fact that a limited amount of information in that respect has to be reported to the authorities.

147. In addition, it is also important to point out that, in the observations submitted to the Court in the present proceedings, there is no detailed and concrete indication of alternative measures that would have made it possible to achieve the same level of protection of the objectives pursued by Directive 2018/822, whilst being less restrictive vis-à-vis the persons concerned.

148. In particular, I do not believe that introducing a minimum threshold for the arrangements to become reportable (for example, only those which procure a tax advantage above a given amount) – as some applicants in the main proceedings suggested – would have ensured the level of protection sought by the EU legislature. Indeed, any reportable arrangement, regardless of its monetary value, may be capable of revealing a significant loophole in the legislation which may, actually or potentially, be exploited by other, possibly more sizeable, arrangements.

149. Having explained that the provisions introduced by Directive 2018/822 are suitable to attain the objectives pursued by the EU legislature, it is necessary to determine, next, whether those provisions interfere with some individuals' private life beyond what is necessary to achieve the public objectives pursued.

4. The proportionality assessment (II): proportionality stricto sensu

150. I should recall at the outset that, as the Court has consistently held, legislation that limits the fundamental right to respect for private life must set out clear and precise rules governing its scope and application and impose minimum safeguards, so that the persons whose personal data have been transferred have sufficient guarantees against the risk of abuse of those data. It must, in particular, indicate in what circumstances and under which conditions a measure providing for the processing of such data may be adopted. (88)

151. In the present case, several considerations lead me to take the view that the EU legislature has limited the interference with the private life of intermediaries and taxpayers to what is strictly necessary.

152. First, the reporting obligation arises for only two categories of persons (intermediaries and taxpayers), (89) as a result of their deliberate choice and behaviour, the legal consequences of which they are (or should be) aware. The scope *ratione personae* of the measure is thus limited to the natural and legal persons that have a direct link to situations in respect of which the EU legislature seeks to enhance transparency. (90) There is, moreover, an exception for those persons (intermediaries) who enjoy legal professional privilege under national law. (91)

153. Second, the reporting obligation only arises in some specific situations: when the taxpayer has commissioned, or the intermediary has provided services in relation to, a cross-border tax arrangement which displays certain characteristics. Those are features – listed exhaustively in Annex IV to Directive 2011/16 – which the legislature considered as being typical of aggressive cross-border arrangements. It should be pointed out, in this context, that several of the hallmarks only concern legal persons, and some of them are only applicable to arrangements concerning a limited number of taxpayers.

154. The referring court and some of the applicants in the main proceedings, however, express doubts in relation to the material and personal scope of the reporting obligation, in so far as (i) it requires communication to the authorities of arrangements which may be lawful and/or not aggressive and/or not set up for tax reasons, and (ii) it burdens not only taxpayers but also intermediaries.

155. I do not share those doubts.

156. In fact, if the reporting obligation were to require communication of *unlawful* arrangements, Article 8ab of Directive 2011/16 would be invalid for being in breach of the right to avoid self-incrimination, which is a component of the right of defence, enshrined in Article 48(2) of the Charter. (92) Some of the applicants in the main proceedings made that point very clear at the hearing. I, thus, find it a bit puzzling that, at the same time, they criticise the directive for requiring intermediaries to file *lawful* information.

157. At any rate, the fact that the information to be reported may well concern lawful transactions is consistent with the objective pursued by the rules in question. Article 8ab of Directive 2011/16 is meant to enhance transparency by making some information concerning certain tax arrangements available to the tax authorities; it does not imply any (positive or negative) evaluation of the lawfulness of those arrangements, nor of the taxpayers' or intermediaries' compliance with, for example, the relevant tax and financial rules.(93)

158. The Court has consistently ruled that the mere pursuit by a taxpayer of the most favourable tax regime, by availing itself of the internal market freedoms, cannot set up a general presumption of fraud or abuse, or deprive that taxpayer of its rights or advantages arising from EU law. (94) Thus, there is no question that, as argued by the applicants in the main proceedings, taxpayers can legitimately choose the 'least taxed route' for their businesses, provided they remain within the confines of what is lawful under the relevant EU and national laws.
159. However, that does not prevent Member States from taking the view that their national legislation, especially because of its interaction with the national legislation of the other Member States and with the EU rules on free movement, may have loopholes that require regulatory intervention. In particular, those are the situations that, although lawful, may lead to the under-taxation of certain taxpayers, or those that make it easy for taxpayers to engage in tax evasion, fraud or abuse.
160. It should also be borne in mind that Directive 2018/822 was adopted as a follow-up to the OECD's works on BEPS strategies, which are generally considered to involve both lawful and unlawful practices. Although it may be an exaggeration to say, as Denis Healey (95) did, that 'the difference between [lawful] tax avoidance and [unlawful] tax evasion is the thickness of a prison wall', it is nonetheless hardly disputable that, at times, there is only a fine line between the two.
161. Therefore, in order to attain the objectives pursued, it is crucial (and inevitable) that the reporting obligation target arrangements that have certain characteristics, without those elements having necessarily to suggest the unlawful or abusive character of the arrangement.
162. After all, the entire system of taxation, both within and outside the European Union, is based on reporting and disclosure obligations placed upon taxpayers concerning information on activities which are, in principle, presumed lawful. Taxation is obviously not the only field in which individuals and companies are required to provide to the public administration certain information concerning their private or professional activities, in order to enable the authorities to, for instance, record and store such information in ad hoc registers,(96) verify *ex ante* or *ex post* that the activity is exercised in compliance with the law, (97) or react promptly were some accident to occur. (98)
163. For the same reasons, I do not perceive as being problematic the fact that the reporting obligation may also extend to arrangements that may be neither 'aggressive' nor motivated by the prospect of obtaining some tax advantage. (99)
164. The EU legislature has taken the view that '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'. It has, thus, considered it to 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'. (100)
165. The applicants in the main proceedings have not contested those considerations, which, in any event, do not appear unreasonable to me. Accordingly, it is necessary, in my view, that the material scope of the reporting obligation be to some extent over-inclusive to be truly effective.
166. Nor am I convinced by the argument – put forward by some of the applicants in the main proceedings – that it would have been sufficient to require the *taxpayers* to file the required information. In that regard, I refer to the Opinion of Advocate General Rantos in *Orde van Vlaamse Balies and Belgian Association of Tax Lawyers*, where he emphasised the '[intermediaries'] central role in the design of aggressive tax-planning arrangements' and, in the light of that, he agreed with the EU legislature in that 'the reporting system would have been much less effective if it was for the taxpayer him- or herself to declare to the tax authorities his or her own decision to enter into an "aggressive arrangement"'. (101)
167. That is so because the intermediaries are usually those who are the most knowledgeable of the arrangements to be reported and, as such, they are ideally placed to file the relevant information correctly and in full. In addition, intermediaries are normally members of regulated professions, whose activities are governed by various sets of national rules (including on deontology) and, at times, by self-regulation, and are often carried out in accordance with international standards. As such, their compliance with the law (including disclosure obligations) can be more easily monitored and, where a breach is detected, effective penalties can be imposed.
168. Third, the quantity and quality of the information to be provided to the authorities also appear to be necessary to attain the objectives pursued. The list of information set out in Article 8ab(14) of Directive 2011/16 (102) is relatively limited in terms of amount, includes only basic personal data and consists mainly of business-related information. There is also no item among those listed that appears to be manifestly unrelated to the object and purpose of the reporting obligation. Given the above, the information to be communicated to the authorities does not enable them to draw any specific conclusions as to the private life of the natural persons concerned (taxpayers and intermediaries). (103)
169. Fourth, there are clear limits as to which authorities can access the information disclosed by the intermediaries and taxpayers concerned and exchanged within the authorities' network: (104) those specifically designated as 'competent' by each Member State. (105) For its part, the Commission is allowed access to only part of the information exchanged,(106) and mainly for monitoring the proper functioning of the system established by Directive 2018/822 and for statistical purposes. (107) I understand that the information provided is to be treated confidentially and, in principle, cannot be disclosed to third parties. (108)
170. Fifth, there is also an indication, even if a somewhat general one, of how the information can be used by the competent authorities, in recital 2 of Directive 2018/822: '[to] 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'.
171. Sixth, a number of safeguards are in place against unlawful access (109) and, more importantly, unlawful use of the personal data. In particular, Article 25 of Directive 2011/16 provides that the rules laid down in the General Data Protection Regulation (110) and in the Data Protection Framework for the EU institutions (111) remain, in

principle, applicable to the exchange of information and the processing of personal data made pursuant to the provisions of Directive 2011/16. I am, therefore, unconvinced by BATL's and OBFG's arguments concerning an alleged lack of rules governing storage or use of the data, and of safeguards against abuses thereof.

172. On the basis of the above, I take the view that the reporting obligation does not go beyond what is necessary to attain the objectives pursued by the EU legislature.

5. The proportionality assessment (III): balance of interests

173. Lastly, I am of the view that the provisions introduced by Directive 2018/822 strike a fair balance between the interests at stake.

174. The public interest pursued by those provisions is, as stated in points 142 and 143 above, of the greatest importance for the European Union. That is all the more so in today's globalised world where, according to recent studies, the gap between rich and poor has widened significantly in the last few years. (112)

175. In that context, the interference produced by the reporting obligation in the intermediaries' and taxpayers' private life appears rather limited, for the reasons explained above. Moreover, the overall number of situations in which that interference takes place is also reduced. For example, the Belgian Government stated that, in the past few years, it received fewer than 1 000 notifications under Article 8ab of Directive 2011/16, whilst receiving millions of ordinary tax declarations every year.

176. It may also be worth emphasising that the EU legislature has sought to minimise, as far as possible, the inconvenience for those required to file the information in question. (113) For instance, the description of the reportable arrangement – which, I assume, constitutes the key part of the filing – must be done in summary form, and its components and the relevant business activities only explained 'in abstract terms'. (114) Thus, OBFG's contention that the reporting obligation would require intermediaries to disclose their advice to the authorities should be rejected.

177. Furthermore, the EU legislature has also sought to avoid unnecessary multiplication of work for taxpayers and intermediaries, in particular by allowing derogations from the reporting obligation where the same arrangement is reportable by various persons or in various Member States, (115) or a report may be similar to one submitted previously. (116)

178. Last but not least, it should be pointed out that there is no requirement for intermediaries to 'hunt' for the information that, although reportable, they may not have. As stated by Article 8ab(1) of Directive 2011/16, they are only obliged to file information 'that is within their knowledge, possession or control'. Consequently, I cannot agree with BATL's argument according to which the reporting obligation would require intermediaries to engage in a time-consuming and costly activity to seek and communicate the relevant information.

179. Nor do I agree with OBFG that the reporting obligation is disproportionate because *some* of the data to be reported could be extracted, by the tax authorities, from the data provided by the taxpayers and/or exchanged between the authorities in conformity with the provisions of other legal instruments. (117)

180. In the Impact Assessment (Section 2 and Annex 5) and in the Explanatory Memorandum (Section 1), it is explained why the information collected by the authorities under the other 'DAC' and 'ATAD' instruments (118) is not clear and comprehensive. Far from explaining in detail why Directive 2018/822 would create an unnecessary duplication of work for taxpayers or intermediaries, OBFG's submission confines itself to referring only to certain pieces of information among those listed in Article 8ab(14) of Directive 2011/16, which are provided to the authorities only in some of the situations laid down in Annex IV, and only for certain taxes. Moreover, OBFG itself recognises that some of its allegations concerning the authorities that already have access to certain reportable information are only 'probable'.

181. It is my firm belief that the principles of good administration and proportionality limit the public administration's ability to request that natural and legal persons provide information that, for example, is irrelevant or unnecessary for the administration, is already in the possession of the administration or may create an intolerable workload and excessive costs to be collected, organised and communicated by the persons concerned. (119) However, that is clearly not the case of Article 8ab of Directive 2011/16: not only would the tax authorities be unable to 'connect the dots' between the various pieces of information collected under different legal instruments but, as indicated, significant pieces of information would be missing, thus making those authorities unable to see the complete picture in respect of the arrangements in question.

182. In the light of the above, I come to the conclusion that Article 8ab of Directive 2011/16 does not infringe Article 7 of the Charter by creating an impermissible interference with the right to private life of intermediaries and taxpayers.

D. Fourth question: respect for private life (scope of the waiver)

183. Lastly, by its fourth question, the referring court asks the Court, in essence, to examine the validity of Article 8ab(5) of Directive 2011/16 in the light of Article 7 of the Charter, in so far as the former provision requires intermediaries who have the right to a waiver, on account of the obligation of professional secrecy under national law, to notify any other intermediary, who is not his or her client, of that intermediary's reporting obligations under Directive 2011/16.

184. That question is largely similar to that referred in the case which led to the judgment in *Orde van Vlaamse Balies*, in which the Court found that Article 8ab(5) of Directive 2011/16 infringed Article 7 of the Charter and was therefore invalid, in so far as the obligation for *lawyers* benefiting from a waiver to notify other intermediaries resulted in the disclosure of the identity of the lawyer-intermediary and of his or her having been consulted by the client.

185. However, the formulation of the question referred in the present case is slightly different from that posed in the previous case. Indeed, the expression 'a lawyer acting as an intermediary' has been replaced by the expression 'an intermediary bound by legal professional privilege subject to criminal sanctions under the national law of that Member State'.

186. Accordingly, in the present case the referring court intends to inquire: (i) as to whether the right of a waiver on account of professional secrecy, set out in Article 8ab(5) of Directive 2011/16, is restricted to lawyers or can be granted to other categories of professionals, if those categories enjoy such protection under national law; and (ii) if the latter, as to whether Article 8ab(5) of Directive 2011/16 is invalid, for a breach of Article 7 of the Charter, in so far as it requires those professionals to notify other intermediaries of their reporting obligation, thereby disclosing their identity and their having been consulted.

187. I shall examine these two issues in turn.

1. Personal scope of the right to a waiver

188. The first issue that arises is whether, under Article 8ab(5) of Directive 2011/16, Member States can grant a waiver only to lawyers or also to other categories of professionals who are subject to a form of professional secrecy under national law.

189. The interpretative doubt stems, first and foremost, from the fact that a textual and comparative analysis of Article 8ab(5) of Directive 2011/16 offers no clear-cut answer to that question.

190. On the one hand, the majority of the language versions of that provision include terms which are generic, and thus do not cover only the confidentiality rights accorded to lawyers. (120) In addition, a broad reading of the scope of the right to a waiver could be considered consistent with the fact that (i) such scope is determined through a *renvoi* to the laws of the Member States and (ii) the second subparagraph of that provision refers to the generic term, in plural, 'professions'.

191. On the other hand, however, a significant number of language versions (Greek, English, Maltese, Romanian and Finnish) include a term that is specific for lawyers. In addition, whereas an interpretation of the term as restricted to lawyers would be compatible with all language versions, the opposite would not be true. Furthermore, Article 8ab(14) (in the Greek, English, Maltese, Romanian and Finnish versions) includes a reference to professional secrecy, and not to legal professional privilege, which may be taken to indicate that the term used in paragraph 5 of the same provision has a very specific connotation and, as a consequence, narrower scope.

192. Unfortunately, a contextual and historical interpretation of Article 8ab of Directive 2011/16 and an examination of the the Member States' subsequent practice also do not provide unequivocal guidance.

193. First, an examination of Directives 2011/16 and 2018/822 in their entirety offers little clue as to the scope *ratione personae* of the waiver. As regards Directive 2011/16, the only reference to the legal professional privilege is in Article 8ab(5) itself. In addition, the preamble of Directive 2018/822 sheds no further light on the concept, since the term 'legal professional privilege' is only referred to in recital 8 thereof, which, however, contains no useful information for its interpretation.

194. Second, the *travaux preparatoires* referred to by the parties do not offer a clear direction either. However, some passages of the Impact Assessment appear to indicate that, for the Commission, the concept of 'legal professional privilege' included in its proposal for a directive concerned only that recognised in relation to lawyers. (121) In that regard, the Commission adds that the text of the proposal which its services worked on and proposed to the College of Commissioners for adoption was drafted in English (which includes the technical term 'legal professional privilege').

195. In that connection, it can hardly be disputed that the term 'legal professional privilege' relates specifically to the activities of lawyers, attaching a privilege of confidentiality to lawyer–client communications. That specificity is confirmed, inter alia, by the case-law of the EU Courts, (122) and of the ECtHR. (123) To the best of my knowledge, that is also true at global level. (124) For example, in a number of jurisdictions the issue arose as to whether tax accountants could claim legal professional privilege when advising clients on legal issues but, at least in the cases I am aware of, that claim was consistently rejected. (125)

196. That restrictive approach to the concept of 'legal professional privilege' appears consistent with the historical foundations of that principle. As Advocate General Poiares Maduro wrote, 'it is possible to find traces of it "in all democracies" and in all eras … From that point of view, if *lawyers*' secrecy merits recognition in the Community legal order, that is quite simply because it has its roots in the very foundations of European society'. (126) Legal scholarship appears to confirm those considerations. (127)

197. However, as explained, the term 'legal professional privilege' and its close equivalents are only employed in some language versions of Directive 2011/16. Thus, that element, albeit important, cannot be considered to be determinative.

198. Third, the detailed information provided by the Council and the Commission in reply to a question from the Court concerning the manner in which the Member States transposed, at national level, Article 8ab(5) of Directive 2011/16 does not give us a clear indication. Indeed, numerous Member States did limit the possibility for lawyers to obtain a waiver. However, a number of other Member States did not define, in the implementing national law, the precise professions which may benefit from a waiver, since the relevant provisions provide for a simple *renvoi* to the rules on professional secrecy that are included in sectorial legislation. That, I understand, makes it possible for other categories of professionals to obtain a waiver, where national legislation so provides.

199. In the light of the above, I have to conclude that a textual, comparative, contextual and historical interpretation of Article 8ab of Directive 2011/16, as well as an examination of its transposition at national level, does not make it possible to identify, with reasonable certainty, the meaning of the term 'legal professional privilege' (and the corresponding terms included in the other language versions of the directive). Hence, in this situation of a relative lack of clarity, it seems to me that, to determine the proper interpretation of that term, one must turn to the object and purpose of Directive 2018/822.

200. As stated in point 25 above, the aim of Directive 2018/822 is to enhance transparency in the field of taxation, by allowing Member States' tax authorities to obtain comprehensive information about potentially aggressive tax arrangements, in order to enable those authorities to react promptly to harmful tax practices, for instance by enacting legislation to close loopholes in the regulatory framework. To that end, Directive 2018/822 introduces a

mandatory disclosure regime, coupled with an automatic exchange of information between the Member States' authorities.

201. Against that backdrop, it seems to me that six distinct reasons favour an interpretation of the term 'legal professional privilege' that is, in principle, restricted to the confidentiality protection that is typically recognised to in relation to lawyers.

202. First, the mandatory disclosure regime established by Directive 2018/822 is, as explained in points 166 and 167 above, fundamentally based on the reporting obligation placed on the intermediaries. As noted by Advocate General Rantos, the reporting obligation on the intermediaries 'constitutes the cornerstone of that system and any limitation on its functioning would risk undermining the very core of the objectives of Directive 2011/16'. (128) In fact, it is clear that the reporting obligation placed on the taxpayers themselves is, within the scheme of Directive 2018/822, only a 'second best'. (129)

203. I agree. Giving the Member States the possibility to grant waivers to various categories of intermediaries could, therefore, significantly affect the effectiveness of the system set up by Directive 2018/822. In fact, it would suffice to grant a waiver to one or a few specific categories of professionals (such as auditors, accountants and/or tax consultants) to have a rather substantial part of the natural and legal persons falling within the definition of 'intermediaries' being exonerated from the reporting obligation.

204. This problem seems compounded by the fact that Directive 2018/822 did not include any real criteria, specifications or limits for the categories of professionals to which Member States could grant a waiver. (130) The *renvoi* to the national legislation in that regard is complete and unqualified, which would result in Member States enjoying near-unfettered discretion on that point.

205. Second, allowing Member States complete freedom as to the categories of professionals who may benefit from a waiver would likely introduce an element of distortion in the internal market. Indeed, the 'variable geometry' in the application of Article 8ab(5) of Directive 2011/16 could encourage some professionals in this field to establish themselves in one of the Member States whose national legislation grants them immunity from the reporting obligation (and thus at no risk of penalties). This could also lead, were some Member States to be particular liberal on this matter, to the creation of some 'safe harbours' within the European Union for professionals specialising in aggressive tax arrangements.

206. Third, a wide scope of the waiver would introduce a difference between, on the one hand, the EU system and, on the other hand, (i) the system envisaged in the related OECD acts, which provided a source of inspiration for Directive 2018/822,(131) given that those acts include exceptions to rules on disclosures only where necessary to protect the confidentiality of lawyer–client communications; (132) and (ii) the three mandatory systems of disclosure that existed at Member State level when Directive 2018/822 was proposed by the Commission and then negotiated at the level of the Council (namely, in Ireland, Portugal and the United Kingdom).

207. Indeed, according to Annex 7 to the Impact Assessment, which described the main features of the Irish, Portuguese and United Kingdom systems, all three systems included an exception to reporting obligations that was limited to lawyers. In this context, it is also interesting to note that both the Belgian Government and the Council stated at the hearing that the system of disclosure in place in the United Kingdom at the time constituted one the main models of reference during the negotiations which led to the adoption of Directive 2018/822.

208. Fourth, at the hearing, the Council stated that, in the legislative process, the view was taken that some leeway had to be given to the Member States with regard to the scope of the waiver, in order to enable them to comply with the Charter and with the case-law of the ECtHR. However, I note that neither the Charter nor the case-law of the ECtHR requires the protection of legal professional privilege to be extended to professions other than lawyers. Thus, although the Council did not take a formal position on the interpretation to be given to Article 8ab(5) of Directive 2018/822, its observations support the view that the EU legislature intended to endorse the restrictive approach proposed by the Commission with regard to the scope of the waiver.

209. Fifth, a restrictive reading of the term 'legal professional privilege' appears more in line with the well-established interpretative principle according to which exceptions to EU rules of general application must be interpreted strictly. (133) That seems to me all the more appropriate, in the present case, since the derogation at issue affects – as indicated in points 166, 167 and 202 above – a central aspect of the system introduced by Directive 2018/822: the obligation for intermediaries. As such, a broad interpretation thereof would have the potential to affect significantly the ability of that system to achieve the objectives pursued by the EU legislature. (134)

210. A broad and flexible reading of the scope *ratione personae* of the waiver appears to go against the clear indication of the European Parliament, which, as stated in recital 4 of Directive 2018/822, 'has called for tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance and evasion'.

211. Sixth and final, a restrictive reading of the term 'legal professional privilege' appears to be indirectly supported by the judgment of the Court in *Orde van Vlaamse Balies*.

212. In that judgment, the Court started its analysis by interpreting Article 7 of the Charter in the light of the case-law of the ECtHR concerning Article 8(1) ECHR, a provision which 'protects the confidentiality of all correspondence between individuals and affords *strengthened protection to exchanges between lawyers and their clients*'. Like the ECHR provision, Article 7 of the Charter also – the Court ruled – 'covers not only the activity of defence but also legal advice [and] guarantees the secrecy of that legal consultation, both with regard to its content and [with regard] to its existence'. Therefore, the Court found that 'other than in exceptional situations, [clients] must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her'. (135)

213. Having said that, the Court went on to emphasise that the 'specific protection' which Article 7 of the Charter affords to lawyers' legal professional privilege 'is justified by the fact that *lawyers are assigned a fundamental role in a democratic society*, that of defending litigants … 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 …'. (136)

214. In my view, the reasons which led the Court to afford extensive protection, within the system set up by Directive 2018/822, to legal professional privilege do not apply to the activities of professionals (such as accountants, auditors and tax advisors) who do not participate in the administration of justice and, as such, whose communications with their clients do not benefit, under Article 7 of the Charter and Article 8 ECHR, from any *strengthened* protection with regard to their confidentiality.

215. It follows from the above that, in my view, the term 'legal professional privilege', within the meaning of Article 8ab(5) of Directive 2011/16, should receive a restrictive interpretation, being concerned only with lawyers.

216. Admittedly, an objection could be made to the effect that such an interpretation may not be fully reflected in certain terms used in that provision ('professions'), and in line with the fact that, to determine the exact scope of the protection, the provision operates a *renvoi* to the Member States' national laws.

217. However, those objections are unpersuasive.

218. As pointed out by the Commission at the hearing, in some national systems, there are different professionals which fit the definition of 'lawyer' and whose communications with clients are, under national law, protected by confidentiality. (137) One obvious example is the Irish legal system, where one finds solicitors and barristers. In addition, certain countries extend the confidentiality protection to the activities of in-house counsel, as a matter of principle or where admitted to the bar. Last but not least, the object of the protection (type of communications), the extent of the protection (for example, possible limits to the confidentiality, or exceptions for certain fields of law) may also vary from Member State to Member State. (138)

219. Additionally, some national systems provide for specific situations in which, exceptionally, non-lawyers (such as, for example, university professors or tax accountants) are treated in the same way as lawyers and are, thus, permitted to provide legal advice to clients and represent them in court. In those (limited) circumstances, it seems to me that those professionals may also be entitled to benefit from a waiver under Article 8ab(5) of Directive 2011/16.

220. These considerations may therefore explain the wording of that provision.

221. In the light of the above, I take the view that, under Article 8ab(5) of Directive 2018/822, Member States may give intermediaries the right to a waiver in relation to filing information on reportable cross-border arrangements only where the reporting obligation would be in breach of the legal professional privilege which, under the national law of that Member State, is recognised in relation to lawyers and other professionals which are, in exceptional circumstances, treated in the same way as lawyers.

2. Lawfulness of the requirement to notify other intermediaries

222. If the Court were to agree with my assessment above, there would be no need to deal with the second issue raised by the referring court's fourth question. By contrast, if the Court were to disagree with me in that respect, and consider that Member States may grant waivers to professionals others than lawyers, even in circumstances going beyond those explained above, then it would also have to address that issue.

223. Unlike the referring court's fifth question, its fourth question concerns one specific aspect of the system introduced by Directive 2018/822: the obligation, by intermediaries (other than lawyers) which benefit from a waiver, to notify other intermediaries of a reporting obligation potentially (139) incumbent upon them under Article 8ab of Directive 2011/16. The question raised is thus whether that specific aspect of the system introduced by Directive 2018/822 creates unjustifiable interference with the intermediaries' right, under Article 7 of the Charter, to keep confidential their identity and the fact that they have been consulted by the client.

224. In my view, the answer to that question should be in the negative.

225. As stated in points 132 to 134 above, I have no doubt that the rules introduced by Directive 2018/822 give rise to interference with the intermediaries' rights protected by Article 7 of the Charter and, in particular, with the right of keeping their professional communications confidential. (140) However, I am also of the view that that interference is justified by the objectives of general interest pursued by the legislation in question.

226. I come to the same conclusion concerning the specific aspect concerned by the fourth question referred. As explained in points 211 to 213 above, the *strengthened* protection which the Court recognised in relation to the legal professional privilege in *Orde van Vlaamse Balies* stems from the specific function that lawyers exercise in advising and representing clients. However, professionals such as accountants, auditors and tax advisors do not exercise such a function. Some of the applicants in the main proceedings agreed in that respect.

227. Therefore, I am unconvinced by the ICFC's contention that, pursuant to Article 7 of the Charter, such professionals should be entitled to the same level of confidentiality protection that is recognised in relation to lawyers. My views find additional support in the EU, ECtHR and extra-EU case-law referred to in point 195 above.

228. That is not to say, obviously, that those professionals do not perform activities which are – generally speaking – also in the public interest, or that their dealings with clients should not, in principle, remain confidential. It only means that their functions are of a different nature from those of lawyers, and that their communications with clients do not require the *particularly* high level of confidentiality that is generally recognised in relation to lawyer–client communications. (141)

229. In particular, given the complexity of tax legislation and the significant filing burdens placed on undertakings by such legislation, the fact that a taxpayer has consulted an accountant, auditor or tax advisor is hardly surprising, let alone suspicious. In my experience, that type of consultation is generally regarded as being part and parcel of running a business. Therefore, the fact that one intermediary has, in some very specific circumstances, to disclose, to some other intermediary, his or her involvement in the tax-planning activities of a given taxpayer does not appear to me, for the reasons explained, to give rise to unacceptable interference with the intermediaries' right flowing from Article 7 of the Charter, including the right to keep professional communications confidential.

230. Accordingly, I take the view that the EU legislature has not made a manifest error when attempting to strike a balance between the right of intermediaries (other than lawyers) to confidentiality of their communications and the general interest of combating aggressive tax planning and preventing the risk of tax avoidance and evasion.

231. Consequently, the examination of the fourth question referred also did not reveal, in my view, any aspect of the system introduced by Directive 2018/822 that may call into question the lawfulness of that instrument.

V. Conclusion

232. In conclusion, I propose that the Court answer the questions referred for a preliminary ruling by the *Cour constitutionnelle* (Constitutional Court, Belgium) to the effect that the examination of those questions has not disclosed any issues affecting the validity of Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

Original language: English.

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2 See, for example the preamble to Organisation for Economic Co-operation and Development (OECD), Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

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3 OJ 2018 L 139, p. 1.

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4 Meant as tax-planning activities that '[exploit] loopholes in tax laws – that is, abiding by the letter of the law but violating its spirit – to minimise or avoid tax liability' (see European Parliamentary Research Service, 'Measures tackling aggressive tax planning in the national recovery and resilience plans', 2023, p. 2.)

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5 The directive is also known as 'DAC6'. 'DAC' stands for 'Directive on Administrative Cooperation' (OJ 2011 L 64, p. 1).

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6 In this Opinion, I shall refer to the provisions of Directive 2011/16 as amended (including by Directive 2018/822) and currently in force.

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7 Footnotes present in the original text are omitted.

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8 Moniteur Belge of 30 December 2019, p. 119025.

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9 See, with further references, my Opinion in *Fastweb and Others (Time frame for billing)* (C-468/20, EU:C:2022:996, point 80).

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10 See, inter alia, 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).

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11 See, for example, 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).

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12 See, to that effect, judgment of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 54 and the case-law cited).

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13 See, inter alia, judgment of 10 February 2022, *OE (Habitual residence of a spouse – Nationality criterion)* (C 522/20, EU:C:2022:87, paragraph 21). More generally on this topic, see my Opinion in *ECB* v *Crédit lyonnais* (C-389/21 P, EU:C:2022:844, points 41 to 74).

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14 See also recital 6 of Directive 2018/822: '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*'. Emphasis added.

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15 See recitals 1 and 2 of Directive 2011/16. See also recital 2 of Directive 2018/822.

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16 That is also confirmed by the OECD/G20, Base Erosion and Profit Shifting Project, Mandatory Disclosure Rules, 'ACTION 12: 2015 Final Report' ('OECD's 2015 Final Report'), according to which the mandatory disclosure regimes, similar to that introduced by the EU legislature in 2018, existing at that time had 'a broad scope and can capture the largest possible set of taxpayers, *tax types* and transactions' (paragraph 26, emphasis added).

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17 The fact that 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) ('ATAD') has a narrower material scope, being limited to corporate tax – an element which some of the applicants in the main proceedings emphasised – is immaterial in this context. As recital 14 of Directive 2018/822 makes clear, those two directives are complementary but distinct instruments. Nothing required the EU legislature to envisage an identical material scope of the two directives.

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18 Such as, for example, hallmarks C.1 and D.

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19 In that connection, BATL questions the proportionality and necessity of introducing a wide-ranging reporting obligation, given that the documents accompanying the proposal for a directive did not contain any reference to

macroeconomic studies evaluating and/or quantifying the alleged positive effect that the reporting obligation would have on national budgets in relation to the various taxes concerned. However, that argument misses the point: the immediate effect sought by Directive 2018/822 is to increase *transparency*. It will be for the Member States to decide, having reviewed the information collected through the system set up by Directive 2018/822, whether and how to amend their national fiscal systems in order to increase tax revenue. In any event, as long as the choice of the EU legislature appears prima facie reasonable, it would have been for BATL, in the present proceedings, to adduce elements corroborating the view that, given the low level of significance of the problems posed by arrangements which concern taxes others than corporate tax, the reporting obligation, as conceived, constitutes a disproportionate burden for the persons concerned, or exceeds what is necessary to achieve the objectives of Directive 2018/822.

20 Commission Staff Working Document Impact Assessment, SWD(2017) 236 final ('the Impact Assessment'), Section 7.2.

21 See, inter alia, judgment of 20 December 2017, *Vaditrans* (C-102/16, EU:C:2017:1012, paragraph 50).

22 See also recital 15 of Directive 2018/822.

23 See, to that effect, judgment of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596, paragraphs 83 to 88).

24 In that regard, I hardly need to recall that the Court has, in its case-law, drawn inspiration from the case-law of the European Court of Human Rights ('the ECtHR') concerning 'the Engel criteria'. See ECtHR, judgment of 8 June 1976, *Engel and Others v. the Netherlands* (CE:ECHR:1976:0608JUD000510071), and judgment of the Court of Justice of 5 June 2012, *Bonda* (C-489/10, EU:C:2012:319, paragraph 37).

25 On this matter, see, with further references to the case-law, my Opinion in *Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos* (C-683/21, EU:C:2023:376, point 74).

26 See also recital 10 of Directive 2018/822: '… due to the potential impact on the functioning of the internal market, one can justify the need for enacting a common set of rules, rather than leaving the matter to be dealt with at the national level'.

27 See, for example, judgment of 5 May 2022, *BV* (C-570/20, EU:C:2022:348, paragraph 38 and the case-law cited).

28 Ibid., paragraph 41 and the case-law cited.

29 To that effect, ibid., paragraph 42.

30 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 61 and 69 to 71)

31 Judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 164 and the case-law cited).

32 Judgment of 5 May 2022, *BV* (C-570/20, EU:C:2022:348, paragraph 43 and the case-law cited).

33 Such as, for instance, 'dispositifs' in French, 'järjestelyjä' in Finnish, 'meccanismi' in Italian', 'ρυθμισεις' in Greek, 'Gestaltungen' in German, 'modalitate' in Romanian and 'constructies' in Dutch.

34 Emphasis added.

35 Numerous documents from, for example, the OECD and the International Ethics Standards Board for Accountants ('IESBA') use that term.

36 Emphasis added.

37 See Article 3, point 18, second paragraph, of Directive 2011/16: 'an arrangement shall also include a series of arrangements. An arrangement may comprise more than one step or part'. This part of the definition has been criticised by some of the applicants in the main proceedings as being unclear. However, in my view its meaning and purpose are evident. Some arrangements are made up of different components and involve different steps, which all form part of an overall plan (see, for example, hallmarks B.3 and D.2). Those components and steps, even though they could be reportable when taken individually, do not need to be reported separately but only once, that is to say, when the overall plan is reported.

38 See, for example, Article 6 of the ATAD Directive, and Article 1(2) and (3) of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8), as amended in 2015.

39 See above, point 36 of this Opinion.

40 Emphasis added.

41 See above, point 59 of this Opinion.

42 That is, when the arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership (Article 3, point 18(e), of Directive 2011/16). This last condition seems to me to constitute an anti-circumvention or 'safety net' clause. At first sight, its clarity may appear dubious in so far as it appears to require intermediaries and taxpayers to assess the potential impact that a failure to report a given arrangement may have on the proper functioning of the system set up by Directive 2018/822 or on the authorities' capacity to identify beneficial ownership. One could argue that those are evaluations that are not for the intermediaries and taxpayers to make. However, Article 3, point 18(e), of Directive 2011/16 should be read in conjunction with Section D of Annex IV ('Specific hallmarks concerning automatic exchange of information and beneficial ownership'). In my view, the latter clarifies the scope and meaning of Article 3, point 18(e), of Directive 2011/16.

43 Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (COM/2017/0335 final).

44 See the Impact Assessment, Section 3.1.2.

45 That follows expressly from recital 6 of Directive 2018/822.

46 That follows, a fortiori, from Article 3, point 21, second paragraph, of Directive 2011/16.

47 That follows, necessarily, from Article 3, point 21, first and second paragraphs, of Directive 2011/16.

48 See, in that regard, Article 8ab, paragraph 1, of Directive 2011/16.

49 See, in that regard, Article 3, point 21, third paragraph, of Directive 2011/16.

50 See, for example, OECD, *Study into the Role of Tax Intermediaries*, 2008. A number of countries use alternative terms to identify a similar category of individuals, such as 'promoter' (for example, Canada, South Africa and the United Kingdom), and 'advisor' or 'material advisor' (for example, Canada and the United States).

51 For example, in the light of the principles explained above, I would say – in response to an argument made by OBFG – that operators such as a bank opening an account or a notary certifying the authenticity of a contract are, normally, not 'intermediaries' under Directive 2011/16.

52 Article 3, point 15, and hallmarks under category C in Annex IV.

53 Article 3, point 16, and hallmarks under category E in Annex IV.

54 See, by way of an example, Article 2, point (4), of the ATAD Directive, Article 4 of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC) (OJ 1990 L 225, p. 10), as amended and currently in force, and Article 9 of the OECD Model Tax Convention on Income and on Capital.

55 Emphasis added.

56 At the time the Commission prepared its Impact Assessment (see Section 2.2.3 thereof), a similar mandatory regime of disclosure existed in Ireland, Portugal and the United Kingdom, as well as in Canada, India, Israel, South Africa and the United States.

57 OBFG criticises, in particular, the references of certain hallmarks to 'standardised documentation and/or structure [which need not] be *substantially* customised' (A, 3); 'arrangement … where there is a *material* difference in the amount being treated as payable' (C, 4); 'no *reliable* comparable', 'assumptions [that] are highly *uncertain*', and '[the difficulty] to *predict* the level of ultimate success' (E, 2(a) and (b)). Emphasis added.

58 See, inter alia, the case-law referred to in point 23 above.

59 Annexed to its Proposal for a Council Directive (see above, footnote 43).

60 See above, point 11 of this Opinion.

61 Paragraph 81.

62 Here I am using an expression employed by the Commission in its Recommendation of 6 December 2012 on aggressive tax planning, C(2012) 8806 final, recital 2.

63 See, for example, the 'principal purpose test' used in the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (in particular, Article 7 thereof). That

convention has 101 signatories and parties (as of 23 September 2023).

64 Concerning 'the intermediaries referred to in the second paragraph of point 21 of Article 3' see above, point 73 of this Opinion.

65 See recital 7 of Directive 2018/822.

66 As defined in Article 3, point 21, second paragraph, of Directive 2011/16.

67 Emphasis added.

68 See above, point 46 of this Opinion.

69 Obviously, the tax authorities' guidance does not provide the 'authentic' interpretation of the law. However, where appropriate, that guidance can be relied upon by intermediaries and taxpayers against the authorities to oppose the imposition of penalties (for example, to invoke estoppel, legitimate expectations or to prove absence of intent, knowledge or negligence in respect of a possible breach of the reporting obligation).

70 OJ 2007 C 303, p. 17.

71 Paragraph 1 of Article 8 ECHR is almost identical to Article 7 of the Charter. Paragraph 2 of Article 8 ECHR provides: 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

72 See, inter alia, ECtHR, 16 December 1992, *Niemietz v. Germany* (CE:ECHR:1992:1216JUD001371088, §§ 29 and 31).

73 See, for example, judgment of 22 October 2002, *Roquette Frères* (C-94/00, EU:C:2002:603, paragraph 29).

74 See, in particular, judgment of 21 September 1989, *Hoechst* v *Commission* (46/87 and 227/88, EU:C:1989:337, paragraph 19).

75 See, for example, judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 33 and the case-law cited).

76 See, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)* (C-78/18, EU:C:2020:476, paragraphs 124 and 125).

77 Similarly, ibid., paragraph 128.

78 See, inter alia, judgment of 16 July 2020, *Facebook Ireland and Schrems* (C-311/18, EU:C:2020:559, paragraph 172 and the case-law cited).

79 Ibid., paragraph 175.

80 In more detail, and with further references to the case-law of the Court and of the ECtHR, Opinion of Advocate General Saugmandsgaard Øe in *Facebook Ireland and Schrems* (C-311/18, EU:C:2019:1145, points 263 and 265).

81 See judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963, paragraph 35) ('the judgment in *Orde van Vlaamse Balies*').

82 See, to that effect, ECtHR, judgment of 14 March 2013, *Bernh Larsen Holding AS and Others v. Norway* (CE:ECHR:2013:0314JUD002411708, §§ 123 to 134), with reference to Article 8 ECHR.

83 Paragraph 44 of the judgment.

84 See especially Article 3 TEU.

85 See, similarly, Opinion of Advocate General Tesauro in *Hünermund and Others* (C-292/92, EU:C:1993:863, points 1 and 27), and Opinion of Advocate General Geelhoed in *Arnold André* (C-434/02, EU:C:2004:487, point 80).

86 See, to that effect, judgments of 14 December 2004, *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 34), and of 3 December 2019, *Czech Republic* v *Parliament and Council* (C-482/17, EU:C:2019:1035, paragraphs 48, 60 and 61).

87 I hardly need to point out that Directive 2018/822 does not lay down any substantive rule in that regard, let alone a prohibition of those arrangements.

88 See, to that effect, Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, (EU:C:2017:592, paragraphs 140 and 141 and the case-law cited).

89 Cf. judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 56).

90 Cf. ibid, paragraph 58.

91 See below my assessment of the fourth question referred.

92 See, inter alia, judgment of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraphs 45 and 47 and the case-law cited).

93 See also Article 8ab(15) of Directive 2011/16: 'The fact that a tax administration does not react to a reportable cross-border arrangement shall not imply any acceptance of the validity or tax treatment of that arrangement.'

94 See, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraphs 36 and 37), and of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 109).

95 Former Chancellor of the Exchequer of the United Kingdom of Great Britain and Northern Ireland (1974 to 1979).

96 For example, individuals may be required to send information concerning their vital events for civil registration.

97 For example, natural and legal persons may need to send very detailed information to the relevant authorities in order to obtain authorisation to open a doctor's surgery or dental practice, supply food to the public or practise as a qualified lawyer.

98 See, for example, the detailed rules concerning the information to be produced before the transport of radioactive material takes place (Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel, (OJ 2006 L 337, p. 21)).

99 Indeed, some of the hallmarks trigger the reporting obligation regardless of whether the main benefit test is fulfilled (see Annex IV, Part I, of Directive 2011/16).

100 Recital 9 of Directive 2018/822.

101 C-694/20, EU:C:2022:259, point 20. See also Sections 3.1.2, 7.1 and 9.1 of the Impact Assessment and Section 1 of the Explanatory Memorandum.

102 See above, point 9 of this Opinion.

103 Cf. judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 27).

104 The 'CCN network', which is the common platform based on the common communication network, was developed by the European Union for all transmissions by electronic means between competent authorities in the area of customs and taxation. See Article 3, point 13, and Article 21(1) of Directive 2011/16, as well as recital 12 of Directive 2018/822.

105 See Article 3, point 1, Article 4, and Article 8ab(1) and (6) of Directive 2011/16.

106 Notably, it does not have access to the personal data of taxpayers and intermediaries or to the description of the reportable arrangements.

107 See Article 8ab(17) and Article 21(5) and (7) of Directive 2011/16, as well as recital 6 of Directive 2018/822.

108 This follows, a fortiori, from Article 23 (especially paragraph 3 thereof) and Article 23a of Directive 2011/16. See, however, the exception provided for in Article 24 of that directive.

109 See, especially, Article 21(2), third subparagraph, and (7) of Directive 2011/16.

110 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 2016 L 119, p. 1).

111 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39).

112 See, for example, United Nations, Department of Economic and Social Affairs, 'World Social Report 2020 – Inequality in a Rapidly Changing World'.

113 See, inter alia, recital 13 of Directive 2018/822.

114 See paragraph 14, letter (c), of Article 8ab of Directive 2011/16.

115 See Article 8ab(3), (4), (9) and (10) of Directive 2011/16.

116 See Article 8ab(2) of Directive 2011/16.

117 OBFG refers, in particular, to Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ 2015 L 332, p. 1) ('DAC 3'), and to Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ 2016 L 342, p. 1) ('DAC 5').

118 See footnotes 17 and 118 above.

119 See, by analogy and with further references to the case-law, Opinion of Advocate General Wahl in *Buzzi Unicem* v *Commission* (C-267/14 P, EU:C:2015:696, points 97 to 117).

120 Such as, for example, 'secreto profesional' (in Spanish), 'zákonné profesní mlčenlivosti' (in Czech), 'Verschwiegenheitspflicht' (in German), 'secret professionnel' (in French), 'profesionalne tajne' (in Croatian), 'segreto professionale' (in Italian), 'verschoningsrecht' (in Dutch), 'profesinė paslaptis' (in Lithuanian) and 'yrkesmässiga privilegierna' (in Swedish).

121 See Section 7.1.3. of the Impact Assessment and points 3.3. and 3.4. of Annex 2 thereof.

122 See, inter alia, judgment of 18 May 1982, *AM & S Europe* v *Commission* (155/79, EU:C:1982:157, paragraphs 18 to 28).

123 See, inter alia, ECtHR, judgment of 4 February 2020, *Kruglov and Others v. Russia* (CE:ECHR:2020:0204JUD001126404, §137).

124 For instance, the rationale of the legal professional privilege (in US law, the 'client–attorney privilege') is, according to the US Supreme Court, 'to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice"' (see, inter alia, Opinion of 25 June 1998, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), p. 403).

125 See, inter alia, Federal Court of Appeal (Canada), judgment of 24 June 2003, *Tower v. MNR* (2003), 310 N.R. 280 (FCA); Supreme Court (United Kingdom) judgment of *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another* (2013) UKSC 1; Court of Appeal (Hong Kong), judgment of 29 June 2015, *Super Worth International Ltd & Ors v Commissioner of the ICAC & another* (CACV 168/2015); and Federal Court (Australia), judgment of 25 March 2022, *Commissioner of Taxation v PricewaterhouseCoopers & Ors* (2022) FCA 278.

126 Opinion of Advocate General Poiares Maduro in *Ordre des barreaux francophones et germanophone and Others* (C-305/05, EU:C:2006:788, point 36) (emphasis added).

127 See, inter alia, Union International des Avocats, 'International Report on Professional Secrecy and Legal Privilege', November 2019, p. 7; and Kameoka, E., *Legal Professional Privilege in EU Competition Investigations*, Edward Elgar, 2023, pp. 29 to 33.

128 Opinion in *Orde van Vlaamse Balies and Belgian Association of Tax Lawyers* (C-694/20, EU:C:2022:259, point 21).

129 Ibid. point 20. See also recitals 6 and 8 of Directive 2018/822.

130 The second subparagraph of Article 8ab(5) of Directive 2011/16 merely states that 'intermediaries may only be entitled to a waiver … to the extent that they operate within the limits of the relevant national laws that define their professions'.

131 See recitals 4 and 13 of Directive 2018/822.

132 See, in particular, Rule 2.4 of OECD, Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, p. 20: 'an Intermediary shall not be required to disclose any information … where

that information is protected from disclosure under professional secrecy rules stipulated in domestic law, but 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 …'. See also, OECD, Commentary on Article 26: Concerning the Exchange of Information (point 19.4), Model Tax Convention on Income and on Capital, 2017.

133 See, among many, judgment of 27 April 2023, *Fluvius Antwerpen* (C-677/21, EU:C:2023:348, paragraph 54 and the case-law cited).

134 See, by analogy, judgment of 7 September 2023, *Charles Taylor Adjusting* (C-590/21, EU:C:2023:633, paragraph 32).

135 Judgment in *Orde van Vlaamse Balies*, paragraph 27 (emphasis added).

136 Ibid., paragraph 28 (emphasis added).

137 For a good overview, see the types of legal professions listed, by Member State, in the European e-Justice Portal (e-justice.europa.eu).

138 For a summary of the different regimes in Europe, see the Council of Bars and Law Societies of Europe (CCBE), 'Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions', John Fish, 2004.

139 That is, unless those intermediaries, too, may, by virtue of national law, benefit from a waiver in accordance with Article 8ab of Directive 2011/16.

140 As follows from the judgment in *Orde van Vlaamse Balies*, paragraph 27, Article 7 of the Charter must be interpreted as 'protect[ing] the confidentiality of all correspondence between individuals'.

141 See, also, above, points 212, 214 and 226 of this Opinion.