

Case C-432/23**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

12 July 2023

Referring court:

Cour administrative (Luxembourg)

Date of the decision to refer:

11 July 2023

Appellants:

F, société en commandite simple

Ordre des avocats du barreau de Luxembourg

Respondent:

État luxembourgeois

1. Subject matter and facts of the dispute:

- 1 On 28 June 2022, the Director of the Direct Taxation Administration (Luxembourg) sent F, which is a limited partnership ('F'), a decision which was essentially worded as follows:

... the competent authority of the Spanish tax administration has sent us a request for information pursuant to ... Council Directive 2011/16/EU of 15 February 2011 ...

The legal person to which the request relates is the Spanish company K ...

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

- Please provide all available documentation for the period in question (engagement letter, contracts with the client, reports, memoranda,

communications, invoices etc.) relating to services provided by [your company] F to the Spanish company K in connection with:

- o the acquisition in 2015 of 80% of the shares in N by the investment group O (invoice No ...);
 - o the acquisition of another Spanish undertaking by the group in 2018 (invoice No ...);
- Please provide a detailed description of the manner in which the abovementioned operations were conducted, from the time when the services of F were engaged until their completion, as well as an explanation of its involvement in those processes and the identity of its interlocutors (vendors, buyers and third parties) and invoices;

...?

- 2 By email of 8 July 2022, F informed the Direct Taxation Administration that it had acted as lawyer/legal counsel for the group to which K belongs and is therefore prevented by law from communicating information concerning its client in so far as it is covered by its legal professional privilege.
- 3 In a letter sent by registered post on 8 August 2022, F reaffirmed its position, stating that its legal mandate in the case to which the decision relates did not cover tax matters but concerned only company law.
- 4 By letter sent by registered post on 19 August 2022, the Director of the Direct Taxation Administration notified F that its response was not satisfactory and reminded it of the Commentary on Article 26 of the OECD Model Tax Convention:

‘A requested State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. However, the scope of protection afforded to such confidential communications should be narrowly defined. Such protection does not attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law. Also, information on the identity of a person such as a director or beneficial owner of a company is typically not protected as a confidential communication. Whilst the scope of protection afforded to confidential communications might differ among States, it should not be overly broad so as to hamper effective exchange of information. Communications between attorneys, solicitors or other admitted legal representatives and their clients are only confidential if, and to the extent that, such representatives act in their capacity as attorneys, solicitors or other admitted legal representatives and not in a different capacity, such as nominee shareholders, trustees, settlors, company directors or under a power of

attorney to represent a company in its business affairs' (Update to Article 26 of the OECD Model Tax Convention and its Commentary, approved by the OECD Council on 17 July 2012, paragraph 19.3).

- 5 By decision of 16 September 2022, the Director of the Direct Taxation Administration imposed a fine on F for failing to comply with the decision of 19 August 2022.
- 6 F brought an action in which the Ordre des avocats du barreau de Luxembourg intervened. By judgment of 23 February 2023, the Tribunal administratif (Administrative Court) dismissed the action and the application to intervene.
- 7 By applications lodged on 10 and 13 March 2023, F and the Ordre des avocats du barreau de Luxembourg appealed against that judgment before the Cour administrative (Higher Administrative Court).
- 8 The Cour administrative has admitted the two appeals in the actions brought against the decision of 19 August 2022 and, in examining them, is referring the questions set out below to the Court of Justice for a preliminary ruling.

2. The provisions at issue:

A. EU law

Charter of Fundamental Rights of the European Union

- 9 Article 7 provides:

‘Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications’.

- 10 Article 52 provides:

‘Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made 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.

...’.

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

11 Article 17 provides:

‘Limits

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

...

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

12 Article 18 provides:

‘Obligations

1. If information is requested by a Member State in accordance with this Directive, the requested Member State shall use its measures aimed at gathering information to obtain the requested information, even though that Member State may not need such information for its own tax purposes. That obligation is without prejudice to paragraphs 2, 3 and 4 of Article 17, the invocation of which shall in no case be construed as permitting a requested Member State to decline to supply information solely because it has no domestic interest in such information.

...’

C. Luxembourg legislation

General Tax Law of 22 May 1931, ‘Abgabenordnung (AO)’

13 Paragraph 177 provides in essence:

‘(1) The following may also refuse to communicate information:

1. defence counsel and lawyers who have acted in criminal cases,
2. doctors in respect of information entrusted to them in the exercise of their profession,
3. lawyers in respect of information entrusted to them in the exercise of their profession,

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

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

3. Assessment by the Cour administrative:

- 14 The decision of 19 August 2022 complies with the Luxembourg legislation on the international exchange of information on request in tax matters, in particular Paragraph 177 of the AO, which governs the legal professional privilege of lawyers in tax matters.
- 15 Paragraph 177 of the AO does not prevent the Direct Taxation Administration from demanding from a lawyer information concerning another taxpayer in a domestic or an international context. A decision requesting relevant information of any kind does not become unlawful in so far as it is addressed to a lawyer.
- 16 On the other hand, the legal professional privilege of lawyers invoked in accordance with the criteria laid down in Paragraph 177 of the AO must be considered a valid reason for the lawyer not to comply with the information order and prevents a fine being imposed on him or her.
- 17 The appellants are nevertheless challenging the decision of 19 August 2022. They rely on Article 17(4) of Directive 2011/16 and claim, in essence, that the orders requiring F to provide all available documentation relating to services provided to its client constitute an unjustified interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter. According to the appellants, such interference cannot be justified by the objective pursued by Directive 2011/16 of enhancing the correct assessment of taxes in cross-border situations and of fighting fraud on the ground that the order requiring F to provide the requested information cannot be considered strictly necessary for achieving the objectives of that directive.
- 18 The appellants rely on the judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963. In their view, even though the analysis contained in that judgment concerns potentially aggressive tax-planning cross-border arrangements, the Court of Justice interprets the scope of Article 7 of the Charter more broadly in relation to the legal professional privilege of lawyers. Consequently, the principles set out therein affect the validity of the provisions of Directive 2011/16 concerning the exchange of information on request and the domestic transposing provisions, as well as the validity of the decision taken in this case. However, despite the broad formulation of those principles, the Court of Justice has not yet had an opportunity to apply them to their full extent in relation to the system of exchange of information on request.

- 19 In challenging the validity of the decision of 19 August 2022 in the light of Article 7 of the Charter in particular, the applicants thus call into question, as such, the obligation imposed on F, pursuant to provisions of EU law and national law, to provide the information requested therein.
- 20 In order to enable it to give a ruling in the present action from this perspective, the Cour administrative would like the Court of Justice to give a number of clarifications on the following points:
- 21 First, the Court of Justice stated that Article 7 of the Charter ‘protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients’ (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 27), such protection covering not only the activity of defence but also legal advice, both with regard to its content and to its existence.
- 22 In the present case, F asserts that it advised its Spanish client solely in the field of company law, more specifically on setting up an acquisition and financing structure involving various Luxembourg companies. Even though it seems logical *a priori* to accept that, because legal advice provided by a lawyer with a view to establishing tax-planning cross-border arrangements is covered by the strengthened protection afforded by Article 7 of the Charter, the same conclusion can be drawn for advice on setting up corporate investment structures, the Cour administrative nevertheless considers that clarification on this point is needed in view of the diversity of these fields of action (first question referred).
- 23 Second, the Court of Justice held that the obligation imposed on the lawyer by Directive 2011/16 to reveal his or her identity, his or her assessment of the content of the cross-border arrangement and the fact that he or she was consulted, as well as the disclosure of that information to the tax authorities, entail an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraphs 27 to 30).
- 24 In the present case, the decision of 19 August 2022 requires F to provide the Director, broadly speaking, with all documents relating to its relations with its client, a detailed description of the abovementioned operations and an explanation of its involvement in those processes and the identity of its interlocutors. In view of the general nature of the information requested, it seems logical to conclude that the decision of 19 August 2022, as an individual act by which the competent authority of a Member State discharges its obligations under Directive 2011/16 in a specific case, also entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter. However, given the difference between the respective systems of exchange of information at issue and the corresponding acts, the Cour administrative considers that confirmation of this analysis by the Court of Justice is needed (second question referred).

- 25 Third, in the event that the protection afforded by Article 7 of the Charter was applicable in the present case and the existence of an interference was established, the Court administrative notes that the Court of Justice observed that ‘the rights enshrined in Article 7 of the Charter are not absolute rights, but must be considered in relation to their function in society. Indeed, as can be seen from Article 52(1) of the Charter, that provision allows limitations to be placed on the exercise of those rights, provided that those limitations are provided for by law, that they respect the essence of those rights and that, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others’ (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 34). ‘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 enabling a limitation to be placed on the exercise of the rights guaranteed by Article 7 of the Charter’ (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 44).
- 26 It may therefore be concluded that the legal professional privilege of the lawyer, which covers relations between lawyers and their clients, does not enjoy absolute protection precluding any order to provide information in response to an exchange of information request from another Member State, but that such an order continues to be permitted within limits consistent with the abovementioned conditions.
- 27 As regards the condition that the limitations must be provided for by law, the Court of Justice examined the provisions of Article 8ab(5) of Directive 2011/16, which concern the mechanism for notification and automatic exchange of cross-border arrangements and concluded that, by expressly laying down the obligation, for a lawyer-intermediary who is exempt from the obligation to file information on account of the legal professional privilege by which he or she is bound, to notify other intermediaries of their reporting obligations under paragraph 6 of that Article 8ab, that paragraph fulfils the principle of legality.
- 28 However, Directive 2011/16 does not include any provision, with regard to the exchange of information on request, which establishes a particular system entailing specific limitations on the obligation to provide information incumbent on a lawyer, as a third party holding information, but simply states in Article 17(4) that a professional secret may justify a refusal to comply with an exchange of information request.
- 29 Consequently, the question of the compliance of Directive 2011/16 with Articles 7 and 52(1) of the Charter arises in so far as it does not include, beyond Article 17(4), any provision establishing a specific, harmonised arrangement putting into effect the duty of cooperation of the lawyer, as a third party holding information, in the exchange of information on request (third question referred).

- 30 Fourth, in the event that the Court of Justice were to find that Directive 2011/16 does comply, despite the absence of specific provisions relating to the legal professional privilege of lawyers, in particular by ruling that the directive can legitimately leave it to Member States to regulate this question in domestic law in compliance with the limits laid down by Article 7 of the Charter, the question arises whether the system of cooperation by lawyers in the exchange of information on request established by Directive 2011/16, which takes into account the effect of their legal professional privilege, may be determined by the provisions of domestic law of each Member State governing domestic situations in accordance with the reference made by Article 18(1) of the directive. If so, Paragraph 177 of the AO should be applied as a provision of domestic law regulating the duty of cooperation of lawyers as third parties (fourth question referred).
- 31 Fifth, it is true that Paragraph 177 of the AO is confined solely to advice given in tax matters. However, that limitation on the lawyer's obligation to communicate applies only at the level of compliance with the information order, but not at the level of the issue of the information order itself. Paragraph 177 of the AO does not include any particular limitation on the lawyer's obligation in respect of the extent or the nature of the information which he or she may be required to provide, making the Director of the Direct Taxation Administration subject, as from the adoption of his information order, to restrictions in specifying the information which a lawyer might be required to provide to him.
- 32 'As regards respect for the essence of the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter, it should be noted that the obligation to notify, established by Article 8ab(5) of amended Directive 2011/16, entails only to a limited extent the lifting, vis-à-vis a third-party intermediary and the tax authorities, of the confidentiality of the communications between the lawyer-intermediary and his or her client' (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 39). The Cour administrative infers from this that a lawyer's obligation to provide information, which would entail the lifting of the confidentiality of those communications, would have to be regarded as an interference with the very essence of the right to respect for communications between lawyers and their clients.
- 33 In the present case, the decision of 19 August 2022 orders F to provide the Director of the Direct Taxation Administration, broadly speaking, with all documents relating to its relations with its client, a detailed description of the abovementioned operations and an explanation of its involvement in those processes and the identity of its interlocutors. In view of the general nature of the information requested concerning its entire file, including details of the content of all communications between F and its Spanish client, it can legitimately be presumed that the obligation to provide all that information affects the essence of the right to respect for communications between lawyers and their clients and is likely to be contrary to Article 7 of the Charter. The decision at issue is, however,

consistent with Paragraph 177 of the AO and its addressee may refuse to comply with it only if it advised its client solely outside the field of taxation, unless an affirmative or negative response to questions in tax matters would put its client at risk of criminal prosecution.

- 34 Consequently, it cannot be ruled out that the Court of Justice will also hold that Paragraph 177 of the AO does not comply with Article 7 of the Charter and that it must be concluded that the decision does not comply with EU law in this regard.
- 35 This conclusion would not, however, automatically entail the annulment of that decision in its entirety in so far as it is not indivisible but is in fact a decision that can be divided into each of the items of information concerned. Where only some severable parts of a decision are unlawful, in this case the parts of the decision of 19 August 2022 which should be considered to affect the essence of the right to respect for communications between lawyers and their clients, the Luxembourg administrative courts may limit the annulment of the decision to those parts alone. In other words, in the present case, the Luxembourg administrative courts could allow to remain the lawyer's obligation to prove information which would not be considered to affect the essence of the right to respect for communications between lawyers and their clients.
- 36 Consequently, even if the Court of Justice recognised in principle the possibility of ordering a lawyer to provide information in the context of an exchange of information on request and even if Paragraph 177 of the AO was accepted in principle as a valid domestic legal basis for such an order, in accordance with the reference made by Article 18(1) of Directive 2011/16, the Court administrative should not confine itself to examining the interference with the essence of the confidentiality of the communications between lawyers and their clients, but should determine, moreover, whether other principles set out by the Court of Justice in its judgment of 8 December 2022, where relevant, are such as to limit further the information which may legitimately be requested from a lawyer in the context of an exchange of information on request based on Directive 2011/16.
- 37 In its judgment of 8 December 2022, the Court of Justice applied the principle of proportionality to the lawyer's obligation to notify, stating that 'that principle requires that the limitations which may, in particular, be imposed by acts of EU law on rights and freedoms enshrined in the Charter do not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous. In addition, an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure, by properly balancing the objective of general interest against the rights at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued' (judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 41).

- 38 The Court of Justice examined the question whether in that case the obligation imposed on lawyers was appropriate and necessary for the achievement of the objectives of Directive 2011/16 in relation to the obligation to notify laid down in Article 8ab(5) of that directive, reviewing whether it was strictly necessary in the light of the obligations incumbent on all other intermediaries or, as the case may be, the relevant taxpayer. In so far as, in the view of the Court of Justice, those obligations on other intermediaries and the relevant taxpayer ensured the effective notification of the arrangement in question to the competent tax authorities, it concluded that the obligation to notify incumbent on lawyers was not necessary.
- 39 If these requirements relating to appropriateness and necessity for the achievement of the objective of Directive 2011/16 must be applied to a lawyer's obligation to provide information in the context of the exchange of information on request, they could be understood as requiring an enhanced check of the foreseeable relevance of the information requested from the lawyer so as to ensure that he or she is asked to provide only information which can actually be used for taxation purposes in the requesting State. The requirement of the necessity of the lawyer's obligation to cooperate could also entail an enhanced check that the requesting Member State has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of those objectives, in accordance with Article 17(1) of Directive 2011/16. The same requirement could further prompt a specific check whether the lawyer in question is actually the only possible source of the requested information.
- 40 Similarly, the proper balancing of the objective of general interest against the rights at issue in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued could make it necessary to lay down additional conditions for the validity of an information order made against a lawyer in an exchange of information on request, which could relate to a specific fiscal purpose such as the detection of aggressive or abusive structures or the significance of the financial implications of the ongoing check in the requesting State.
- 41 The Cour administrative considers that, in examining the validity of an order requiring a lawyer to provide certain information in a procedure for exchange of information on request with another Member State pursuant to Directive 2011/16, the principles set out in the judgment of the Court of Justice of 8 December 2022 are such as to call into question the validity of provisions of Directive 2011/16, Paragraph 177 of the AO and the decision of 19 August 2022 (fifth and sixth questions).

4. Questions referred for a preliminary ruling:

- 42 Pursuant to Article 267 TFEU, the Cour administrative requests the Court of Justice to give a preliminary ruling on the following questions:

‘1. Does legal advice provided by a lawyer on matters of company law – in this case on setting up a corporate investment structure – fall within the scope of the strengthened protection of exchanges between lawyers and their clients afforded by Article 7 of the Charter?’

2. If the first question is answered in the affirmative, does a decision by the competent authority of a requested Member State adopted in response to a request from another Member State in the context of an exchange of information on request on the basis of Directive 2011/16, ordering a lawyer to provide it, broadly speaking, with all available documentation relating to its relations with its client, a detailed description of the operations on which it advised and an explanation of its involvement in those processes and the identity of its interlocutors, constitute an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter?

3. If the second question is answered in the affirmative, does Directive 2011/16 comply with Articles 7 and 52(1) of the Charter in so far as it does not include, beyond Article 17(4), any provision which formally permits interference with the confidentiality of exchanges between lawyers and their clients in the context of the system of exchange of information on request and which itself defines the scope of the limitation on the exercise of the right in question?

4. If the third question is answered in the affirmative, can the arrangements relating to the duty of cooperation of lawyers (or of a law firm) as third parties holding information in the context of the application of the mechanism for the exchange of information on request established by Directive 2011/16, in particular specific limitations to take into account the effect of their legal professional privilege, be governed by the provisions of domestic law of each Member State regulating the duty of cooperation of lawyers, as third parties, in a tax investigation in the context of the application of domestic tax legislation in accordance with the reference made by Article 18(1) of that directive?

5. If the fourth question is answered in the affirmative, in order to comply with Article 7 of the Charter, must a national legal provision establishing the arrangements relating to the duty of cooperation of lawyers as third parties holding information, like that applicable in the present case, include specific provisions which:

- ensure respect for the essence of the confidentiality of the communications between lawyers and their clients; and
- introduce specific conditions to ensure that the lawyer’s obligation to cooperate is reduced to what is appropriate and necessary for the achievement of the objective of Directive 2011/16?

6. If the fifth question is answered in the affirmative, must the specific conditions to ensure that cooperation by lawyers with the tax investigation is reduced to what is appropriate and necessary for the achievement of the objective

of Directive 2011/16 include the obligation for the competent authority of the requested Member State:

- to carry out an enhanced check of whether the requesting Member State has, beforehand, actually exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of those objectives, in accordance with Article 17(1) of Directive 2011/16; and/or
- to have, beforehand, unsuccessfully contacted other potential information holders in order to be able, as a last resort, to contact a lawyer in his or her capacity as a potential information holder; and/or
- properly to balance, in each individual case, the objective of general interest against the rights at issue in such a manner that a decision ordering that information be provided could validly be issued in respect of a lawyer only if additional conditions are met, such as the requirement that the financial implications of the ongoing check in the requesting State reach or are likely to reach a certain significance or are likely to fall within the scope of criminal law?’