

Case C-694/20

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:

21 December 2020

Referring court:

Grondwettelijk Hof (Belgium)

Date of the decision to refer:

17 December 2020

Applicants:

Orde van Vlaamse Balies

IG

Belgian Association of Tax Lawyers

CD

JU

Defendant:

Vlaamse Regering

Subject of the action in the main proceedings

The action in the main proceedings concerns claims for the suspension and annulment, in whole or in part, of the Flemish decree van 26 juni 2020 tot wijziging van het decreet van 21 juni 2013 betreffende de administratieve samenwerking op het gebied van de belastingen, wat betreft de verplichte automatische uitwisseling van inlichtingen op belastinggebied met betrekking tot meldingsplichtige grensoverschrijdende constructies (Decree of 26 June 2020 amending the Decree of 21 June 2013 on administrative cooperation in the field of taxation as regards the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements; ‘the Decree of 26 June 2020’). Those claims were brought by the Orde van Vlaamse Balies

(Flemish Bar Council), the de facto association, ‘Belgian Association of Tax Lawyers’ and others.

Subject and legal basis of the request for a preliminary ruling

The request for a preliminary ruling concerns the compatibility of Article 1(2) of Directive (EU) 2018/822 with Article 7 (right to respect for private life) and Article 47 (right to a fair trial) of the Charter of Fundamental Rights of the European Union, in so far as it requires a lawyer-intermediary who wishes to invoke professional secrecy, to notify the other intermediaries involved of their reporting obligations.

The request is made pursuant to Article 267 TFEU.

Question referred for a preliminary ruling

Does Article 1(2) 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 infringe the right to a fair trial as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union and the right to respect for private life as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, in that the new Article 8ab(5) which it inserted in Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, provides that, where a Member State takes the necessary measures to give intermediaries the right to waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State, that Member State is obliged to require the intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer, of their reporting obligations, in so far as the effect of that obligation is to oblige a lawyer acting as an intermediary to share with another intermediary, not being his client, information which he obtains in the course of the essential activities of his profession, namely, representing or defending clients in legal proceedings and giving legal advice, even in the absence of pending legal proceedings?

Provisions of European Union law cited

Charter of Fundamental Rights of the European Union: Articles 7, 8, 20, 21, 47, 48, 49 and 51

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: Article 1, paragraph 2

European Convention on Human Rights: Articles 6 and 8

Provisions of national law cited

Grondwet (Constitution): Articles 22 and 29

Decreet van 21 juni 2013 betreffende de administratieve samenwerking op het gebied van belastingen (Decree of 21 June 2013 on administrative cooperation in the field of taxation): Articles 11/6 and 11/7

Decreet van 26 juni 2020 tot wijziging van het decreet van 21 juni 2013 betreffende de administratieve samenwerking op het gebied van de belastingen, wat betreft de verplichte automatische uitwisseling van inlichtingen op belastinggebied met betrekking tot meldingsplichtige grensoverschrijdende constructies (Decree of 26 June 2020 amending the Decree of 21 June 2013 on administrative cooperation in the field of taxation as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements): Articles 14 and 15

Brief summary of the facts and the procedure in the main proceedings

- 1 By applications of 31 August 2020 and 1 October 2020, the applicants lodged claims with the Constitutional Court for the suspension and annulment, in whole or in part, of the above-mentioned Decree of 26 June 2020.

Main submissions of the parties to the main proceedings

- 2 The applicants submit that Article 14 of the Decree of 26 June 2020 infringes Articles 22 and 29 of the Constitution, whether or not read in conjunction with Articles 6 and 8 of the European Convention on Human Rights and with Articles 7, 8, 20, 21, 47, 48, 49 and 51 of the Charter of Fundamental Rights of the European Union. They contend that, pursuant to Article 11/6, § 1(1)(1^o) of the Decree of 21 June 2013, as inserted by Article 14 of the Decree of 26 June 2020, the lawyer-intermediary who wishes to invoke professional secrecy is required to inform the other intermediaries involved, in writing and giving reasons, that he cannot fulfil his reporting obligation. They argue that it is impossible to fulfil that requirement without breaching professional secrecy. Moreover, such a requirement is not necessary to ensure that the cross-border arrangement is reported, since the client, whether assisted by the lawyer or not, can inform the other intermediaries and ask them to fulfil their reporting obligation.
- 3 The Flemish Government submits that there is no problem where the other intermediary referred to in the decree is the client of the lawyer-intermediary or

where the client has put him in touch with the lawyer. Where that is not the case and the lawyer is not working with the other intermediary, he would also be unaware of the latter's existence and the reporting obligation is shifted to the taxpayer.

Brief summary of the reasons for the referral

- 4 The Decree of 26 June 2020 transposes Directive (EU) 2018/822 into national law. It is apparent from recital 2 of that directive that the directive forms part of the framework of the European Union's efforts to facilitate tax transparency at EU level. In practice, the Member States must designate a competent authority to assume responsibility for the exchange between Member States of the necessary information about aggressive tax arrangements. In order to ensure that such information is available to the competent authorities, the directive introduces a reporting obligation with respect to potentially aggressive cross-border tax arrangements. The reporting obligation is primarily incumbent on the so-called intermediaries who are usually involved in the implementation of such arrangements. However, if there are no such intermediaries, or if they are able to invoke a legal professional privilege, the reporting obligation shifts to the taxpayer. In order to transpose that reporting obligation in the Flemish Region, the Decree of 26 June 2020 makes a number of amendments to the Decree of 21 June 2013.
- 5 Article 11/6 of the Decree of 21 June 2013, as inserted by Article 14 of the Decree of 26 June 2020, determines the way in which the reporting obligation relates to the professional secrecy by which certain intermediaries are bound. By virtue of that provision, an intermediary who is bound by professional secrecy is exempt from the reporting obligation only if he informs the other intermediary or intermediaries involved or, if there is no such intermediary, the taxpayer(s), in writing and giving reasons, of the fact that he is unable to comply with the reporting obligation. In particular, Article 11/6 provides as follows:
- ‘§ 1. When an intermediary is bound by professional secrecy, he is required:
- 1° to notify any other intermediary or intermediaries in writing, giving reasons, that he is unable to comply with the reporting obligation, as a result of which that reporting obligation automatically rests with the other intermediary or intermediaries;
- 2° in the absence of any other intermediary, to notify the relevant taxpayer or taxpayers of their reporting obligation, in writing, giving reasons.
- [...]’
- 6 A lawyer's professional secrecy is an essential component of the right to respect for private life and the right to a fair trial. According to the case-law of the Grondwettelijk Hof (Constitutional Court), the information that lawyers are

required to pass on to the competent authorities about their clients is protected by professional secrecy if such information relates to activities covered by the lawyer's specific task of legal defence or representation and the provision of legal advice. The mere fact of having had recourse to a lawyer results in protection under professional secrecy. The same applies a fortiori to the identity of a lawyer's clients. The information that is protected by professional secrecy in respect of the authorities is also protected in respect of other actors, such as, for example, any other intermediaries who may be involved. The rule of professional secrecy should only be waived if this can be justified by an overriding reason relating to the public interest and if the waiver of secrecy is strictly proportionate. According to the *travaux préparatoires* leading to the adoption of the Decree of 26 June 2020, an intermediary's obligation to notify the other intermediaries involved, giving reasons, that he is invoking professional secrecy and will therefore be unable to comply with the reporting obligation, would be necessary in order to meet the requirements of that directive, and to ensure that invoking professional secrecy does not prevent the necessary reporting from taking place.

- 7 Where a lawyer can be regarded as an intermediary within the meaning of the Decree of 21 June 2013, his client will in principle be either the taxpayer or another intermediary. If the lawyer's client is another intermediary, professional secrecy does not prevent the lawyer from reminding his client of his reporting obligation. If the lawyer's client is the taxpayer and other intermediaries are involved in the reportable arrangement, it will be apparent from Article 11/7 of the Decree of 21 June 2013, as inserted by Article 15 of the Decree of 26 June 2020, that in any case, the reporting obligation is also incumbent on the other intermediaries involved, unless they can provide written proof of the fact that another intermediary has already complied with the reporting obligation. If the lawyer's professional secrecy prevents him from notifying another intermediary of the fact that he will not be complying with the reporting obligation, he will a fortiori not be able to provide that other intermediary with written proof that he has complied with the reporting obligation. In that case, every other intermediary involved remains automatically bound by the reporting obligation. Consequently, the question arises whether the obligation incumbent on the intermediary under Article 11/6, § 1, first paragraph, 1^o, of the Decree of 21 June 2013, is justified by an overriding reason relating to the public interest.
- 8 According to Article 2 of the Decree of 26 June 2020, the objective of that decree is to transpose Directive (EU) 2018/822 into national law. Article 1(2) of that directive inserts Article 8ab(5) into Directive 2011/16/EU, and reads as follows:

‘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.’

- 9 It follows from the foregoing that the obligation incumbent on the intermediary who invokes legal professional privilege to notify other intermediaries or the taxpayer of their reporting obligations, was laid down by the regional legislature pursuant to Directive (EU) 2018/822. According to the Constitutional Court, it must take this element into account before evaluating the compatibility of the decree with the Constitution. However, the Constitutional Court is not competent to rule on the compatibility of the aforementioned Directive with Articles 7 and 47 of the Charter of Fundamental Rights of the European Union. Since the actions for suspension and annulment of the Decree of 26 June 2020, which transposes Directive (EU) 2018/822, call into question the latter’s validity, the validity of the aforementioned Directive must first be determined. Consequently, in accordance with Article 267 TFEU, the question formulated above should be referred to the Court of Justice of the European Union for a preliminary ruling.