

FIVE REASONS WHY THE LEGAL PROFESSIONAL PRIVILEGE OF BELGIAN LAWYERS IS INCOMPATIBLE WITH THE MANDATORY REPORTING UNDER D.A.C.6

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INTRODUCTION

The European Union's Council Directive 2018/822 of May 25, 2018 (better known as "D.A.C.6") requires Member States to impose a disclosure obligation on intermediaries who advise on, or are involved in, implementing aggressive cross-border arrangements.¹ The conundrum faced by some intermediaries is that they are bound by legal professional privilege ("L.P.P."), and therefore, are not allowed to share privileged information.² This is typically the case for persons who are engaged in the active practice of law. As a solution, the Directive allows Member States to exempt such "privileged intermediaries" from their reporting obligation where the reporting would breach L.P.P. under national law.³ While most European legislators used this option to exempt lawyers from their reporting obligation, the rules in each Member State have unique twists and turns.⁴

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¹ Council Directive (E.U.) 2018/822/E.U. of 25 May 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139/1 (hereinafter: the "Directive"). The acronym "D.A.C." stands for "Directive on Administrative Cooperation."

² The protection of L.P.P. is a common legal tradition of all E.U. Member States, even though legal basis, type, and scope may differ. What is identical, however, is that the protection is not absolute. Encroachment may be permissible (i) where defense rights are not at stake (see Section 6 E.C.H.R.) and (ii) the encroachment is in accordance with the law and is necessary in a democratic society because it is (a) in the interests of national security, public safety or the economic well-being of the country, (b) for the prevention of disorder or crime, (c) for the protection of health or morals, or (d) for the protection of the rights and freedoms of others (proportionality principle, see Section 8 E.C.H.R.).

³ See Directive, Section 8ab(5), which provides 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 * * *.

⁴ For a comparative view of D.A.C.6's implementation in different Member States, see, K. Resenig, "European Union - The Current State of DAC-6 Implementation in the European Union," Vol. 60, n° 12 *European Taxation*, pp. 527-535 (2020).

In this article, the authors identify five inconsistencies between the reporting obligation imposed by the Belgian Implementation Law of the Directive⁵ and the L.P.P. of Belgian lawyers.⁶

INCONSISTENCIES OF THE BELGIAN IMPLEMENTATION LAW WITH THE L.P.P. OF BELGIAN LAWYERS

Belgium made use of the option offered by the Directive to exempt privileged intermediaries by implementing Section 326/7 in the Belgian Income Tax Code (“B.I.T.C.”), which states as follows:

Section 326/7.

§ 1. Where an intermediary is bound by a L.P.P., he must:

1° [if there is one or multiple other intermediaries involved,] inform him or them, in writing and in a motivated manner, that he [read: the privileged intermediary] cannot comply with the reporting obligation, whereupon the reporting obligation automatically shifts to the other intermediary or intermediaries;

2° in the absence of another intermediary, inform [directly] the taxpayer or taxpayers, in writing and in a motivated manner, that the reporting obligation shifts to him or them. The exemption from the reporting obligation [for the privileged intermediary] is effective only from the moment [such] intermediary has fulfilled the obligation referred to in paragraph 1 [*i.e.*, inform in writing and in a motivated manner any other intermediary or the taxpayer].

§ 2 The taxpayer may, by written authorisation, allow the [privileged] intermediary to [nevertheless] fulfil the reporting obligation [...]. If the taxpayer does not give any authorisation, the reporting

⁵ Law of 20 December 2019, *Belgian State Gazette*, 30 December 2019 (hereinafter: “Belgian Implementation Law”); for further details, see Belgian Circular Letter, “F.A.Q.: DAC 6 - Déclaration des dispositifs transfrontières,” available in French and Dutch at www.myminf.be; See also, W. Heyvaert and V. Sheikh Mohammad, “European Union’s New Reporting Obligations for Tax Intermediaries: Key Features of the Belgian Administrative Guidance - D.A.C.6,” Vol. 8, No 2 *Insights*, pp. 3-10; D.-E. Philippe and E. Yuksel, “Mandatory Disclosure of Aggressive Cross-Border Tax Planning Arrangements: Implementation of DAC 6 in Belgium,” Vol. 60, No 4 *European Taxation*, pp. 121-128 (2020); J. Malherbe, “La déclaration obligatoire des dispositifs transfrontières – Directive DAC 6 du 25 mai 2018 et loi du 20 décembre 2019,” 1-2 *Revue Générale du Contentieux Fiscal*, pp. 29-40 (2020).

⁶ The L.P.P. of Belgian lawyers is an essential feature of the profession and the obligation to comply with it is formally set out in the professional rules of conduct (see Section 1.2.(b) of the French and German Code (O.B.F.G./Avocats.be); Section I.1.1. and Title I.3, of the Flemish Code (OVB)). Violation of the L.P.P. is criminally sanctioned under Section 458 of the Belgian Criminal Code; for an overview of the regulation of the legal profession in Belgium, see [here](#).



obligation remains with the taxpayer, and the [privileged] intermediary shall provide to the taxpayer the information necessary to comply with the reporting obligation [...].

§ 3 [The reporting exemption for privileged intermediaries] does not apply for marketable devices, that give rise to a periodic reporting [...]" [Unofficial translation.]

The foregoing provision of the B.I.T.C. is incompatible with the L.P.P. of Belgian lawyers for several reasons.

- The provision mandates disclosure of protected confidential communication.
- The provision fails to recognize that the scope and obligations of the L.P.P. for lawyers is broader than for other professions.
- Allowing a client to waive rights under the L.P.P. is invalid (even if the attorney agrees to the waiver).
- The reporting obligation for marketable arrangements is overly broad.
- The assertion that the L.P.P. does not apply to tax advice is without merit.

Each is discussed below.

The Provision Mandates Disclosure of Protected Confidential Communication

Belgium exempts lawyers from their reporting obligation *provided* they inform another intermediary or, if there is no other intermediary, the relevant taxpayer of its reporting obligations.⁷ In other words, lawyers are exempt from their “duty to report” only after they accomplish a “duty to inform.” However, the mere circumstance that a lawyer shares privileged information with someone other than the client (here, another intermediary, say an accountant or consultant or a bank) breaches the Belgian L.P.P. At a minimum, the mere fact that a client has chosen a specific lawyer is privileged. Moreover, the privilege not only covers advice given to the client by the lawyer, but also covers information received by the lawyer from the client. In sum, the exemption for Belgian lawyers is flawed, as it is incompatible with the L.P.P.⁸

The Provision Fails to Recognize that the Scope and Obligations of the L.P.P. for Lawyers is Broader Than for Other Professions

Belgium does not make any distinction between the various types of privileged intermediaries. This shortcoming goes against long-established case-law of the Belgian Constitutional Court (“*Cour Constitution-nelle/Grondwettelijk Hof*”), which sets apart the L.P.P. of lawyers from that of other professions:

[Lawyers] are subject to strict ethical rules * * *. It follows from the special status of lawyers, established by the Belgian Judicial Code

⁷ B.I.T.C., Section 326/7, § 1 (which is in line with Section 8ab(5) of the Directive).

⁸ This mechanism also goes against primary E.U. law, see Belgian Association of Tax Lawyers, *Issues Related to the European Directive 2018/822 (D.A.C.6) and its Transposition into National Law*, spec. pp. 11-12.

and by the regulations adopted by the [Bar Associations] that lawyers in Belgium are distinct from other independent legal professions. [Unofficial translation.]⁹

For the Belgian Constitutional Court, the lawyer's L.P.P. is the cornerstone that guarantees the right of a legal defense against challenges by the government.¹⁰ The protection against self-incrimination depends on the confidential bond between the lawyer and the client and the confidentiality of their written and oral conversations.

Allowing a Client to Waive Rights Under the L.P.P. is Invalid (Even if the Attorney Agrees to the Waiver)

Belgium allows a taxpayer to waive the L.P.P. and to authorize the lawyer to comply with his or her reporting duty.¹¹ However, the waiver is incompatible with the public policy (*ordre public/openbare orde*) that exists in the L.P.P. covering Belgian lawyers. Under Belgian law, when a statutory provision reflects public policy, one cannot derogate from it unilaterally or by mutual agreement. If it were otherwise, government pressure imposed on the taxpayer could easily jeopardize a taxpayer's right of defense, including the presumption of innocence.

For more than a century, the Belgian Court of Cassation explicitly acknowledges the L.P.P.'s public policy nature:¹²

Legal professional privilege relates to public order and protects a specific interest, which is to ensure the practicability of certain professions necessary for the proper functioning of [a democratic] society, the exercise of which necessarily implies a guarantee for the confidant that the trust in the person to whom he confides is not betrayed. [Unofficial translation.]

The Reporting Obligation for Marketable Arrangements is Overly Broad

Belgian lawyers cannot invoke their L.P.P. rights where the reporting obligation relates to a marketable arrangement.¹³ In contrast with a bespoke arrangement, the Belgian Implementation Law defines a "marketable arrangement" as "a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised."¹⁴

"Under Belgian law, when a statutory provision reflects public policy, one cannot derogate from it unilaterally or by mutual agreement."

⁹ Belgian Constitutional Court, No. 126/2005 of 13 July 2005, available on www.const-court.be, see spec. points B.6.1.-B.6.3.

¹⁰ Belgian Constitutional Court, No 127/2013 of 26 September 2013, available on www.const-court.be, spec. points B.29.2, B.29.3 and 30.

¹¹ B.I.T.C., Section 326/7, § 2.

¹² Belgian Court of Cassation, 20 February 1905, *Pasicrisie (Pas.)*, I, 1905, p. 141; For a more recent case, see Belgian Court of Cassation, 19 January 2001, *Journal des tribunaux (J.T.)*, 2002, p. 9; The Belgian Constitutional Court also acknowledges the public policy nature of the L.P.P., Belgian Constitutional Court, 3 May 2000, *Jurisprudence Liège Mons Bruxelles (J.L.M.B.)*, 2000, p. 868; Belgian Constitutional Court, 24 March 2004, *Jurisprudence Liège Mons Bruxelles (J.L.M.B.)*, 2004, p. 2080.

¹³ B.I.T.C., Section 326/7, §3.

¹⁴ B.I.T.C., Section 326/1, 6°, unofficial translation.

The rationale for this provision is that the Directive orders Member States to require intermediaries to report on a quarterly basis each marketable arrangement in which the intermediary participated. Since the first intermediary is the only one who has the knowledge and ability to make a quarterly report of marketable arrangements, he cannot pass this reporting obligation to another intermediary or to the taxpayer. Moreover, he or she cannot invoke any rights related to the L.P.P. for lawyers.

This looks quite similar to the German “*kurieren am Symptom*.” Since no effective solution can be found for the quarterly reporting of marketable arrangements, the first intermediary must breach his L.P.P. But why should the first intermediary not be able to provide the taxpayer with the information required to file the quarterly report? This mechanism works well for the first report and should work equally well for the quarterly reports.

When a lawyer advises a client (such as a bank or an insurance company) on a marketable arrangement, the client is rarely the end-user since he in turn sells the arrangement to the actual end-user. Such clients are sufficiently equipped to make the quarterly reporting themselves and may even be in a better position than the lawyer who merely provides legal or tax advice on the marketable arrangement.

The Assertion that the L.P.P. Does Not Apply to Tax Advice is Without Merit

the Explanatory Memorandum of the Belgian Implementation Law suggests that a lawyer’s tax planning advice would not be covered by the L.P.P., as the privilege only covers the legal defense or representation in court and/or the determination of the legal position of a taxpayer.¹⁵

The * * * implementation of cross-border arrangements * * * is not immediately related to any secret entrusted to an intermediary by his client but is more a matter of assistance or advice provided by the intermediary to the client. The protection of the trust that a client puts in an intermediary as a result of the exercise of his professional activity can only concern the assistance or advice provided by the intermediary to the client insofar as it relates to the determination of the legal position of a taxpayer or the defense of the taxpayer in a judicial action, which can also be found in the Law of September 18, 2017 on the prevention of money laundering and terrorist financing and the limitation of the use of cash. In particular, this refers to purely legal advice, excluding tax planning of a potentially aggressive nature. It is only for these activities that a statutory exemption from the reporting obligation may apply for the intermediary. On the other hand, an adviser who limits himself to the above-mentioned legal advice and who has at no time directly or through other persons provided help, assistance or advice concerning the design, marketing or organization of a reportable cross-border scheme or concerning its provision for implementation or the management of its implementation, will not be considered an intermediary, as defined in the Directive, and will therefore not be subject to the reporting obligation.

¹⁵ Belgian Parliamentary Documents, House of Representatives, 2019-2020, n° 55-791/001, pp. 18-22, spec. p. 19 (hereinafter: “Explanatory Memorandum”); To be read in parallel with the Law of 18 September on the prevention of money laundering and terrorist financing and the limitation of the use of cash, Belgian State Gazette, 16 October 2017, spec. art. 53.

This view is therefore consistent with Section 53 of the Law of September 18, 2017, as it implicitly recognizes that, in the context of the determination of the legal position and legal defense/representation, the L.P.P. applies. In this context, a statutory exemption from the reporting obligation for the intermediary can indeed be granted within the limits of the aforementioned regulation. [Unofficial translation.]

This reasoning of the Belgian legislator disregards the case-law of the Belgian Constitutional Court, which takes the opposite view:¹⁶

[I]nformation known to the lawyer in the course of the exercise of the essential activities of his profession * * *, namely the assistance and defense of the client in court, and legal advice, even outside of any legal proceedings, are covered by the L.P.P., and may not be brought to the attention of the authorities. [Unofficial translation.]

In the Explanatory Memorandum, the Belgian legislator ventures into a hazardous comparison with the reporting obligation in money laundering cases and to the fact that the L.P.P. is subordinated to a higher value (“*motif d’intérêt supérieur/reden van hoger belang*”).

No one disputes that even fundamental rights are subject to exceptions and must give way to an overriding interest. In this instance, however, the Belgian legislator is comparing apples to oranges. The mandatory reporting in money laundering cases relates to criminal offenses that the client is suspected of, whereas D.A.C.6 concerns legitimate cross-border arrangements that are neither fraudulent nor even abusive.

Moreover, when lawyers suspect a client of money laundering, they report it to the President of the Bar Association, not to the Belgian Financial Information Processing Unit (“C.T.I.F./C.F.I.”) and definitely not to the Public Prosecutor. For D.A.C.6, the Belgian legislator does not mention any overriding interest that would be proportionate to the objective to be achieved and justify lifting the L.P.P.

LEGAL CHALLENGE TO B.I.T.C. SECTION 326/7

At the time this article was written, the Belgian Bar Councils (the Flemish (O.V.B.) and the French and German (O.B.F.G.) Bars) and the Belgian Association of Tax Lawyers have challenged the restrictive interpretation of the L.P.P. in the Belgian Implementation Law before national and European courts. The identity of the appellants is no coincidence since the L.P.P. is a concept of great importance to all members of the legal profession.

On August 31, 2020, they lodged claims for the suspension and annulment of the Flemish Decree implementing the Directive before the Belgian Constitutional Court. On December 21, 2020, the Belgian Constitutional Court requested a preliminary

¹⁶ Belgian Constitutional Court, Case No. 10/2008 of 23 January 2008, available on www.const-court.be, spec. point B.9.6; The Belgian Constitutional Court also rules that the L.P.P. is a general principle of law that can only be overridden by an urgent reason of general interest and the lifting of it must be strictly proportionate to that general interest (see Case No 127/2013 of 26 September 2013, spec. point B.31.2).

ruling from the European Court of Justice on the Belgian implementation of D.A.C.6. The request for a preliminary ruling concerns the compatibility of the Directive with Section 7 (right to respect private life) and Section 47 (right to a fair trial) of the Charter of Fundamental Rights of the E.U. insofar as it requires legal counsel to notify other intermediaries of a need to report under D.A.C.6.

The Court's ruling is highly expected, as it will be important not only for Belgium, but also for all other Member States.

CONCLUSION

The important take-aways for the reader may be summarized as follows:

- The Belgian L.P.P. covers the mere fact that a taxpayer/client has chosen a specific lawyer to provide him with legal or tax advice. The L.P.P. covers both advice given to the client by the lawyer and information received by the lawyer from the client. Requiring a lawyer to inform another intermediary of confidential information received from a client as a condition to applying the L.P.P. is simply a gutless breach of the L.P.P. by the government.
- The Belgian L.P.P. reflects time honored public policy. A taxpayer cannot be forced to waive the privilege unilaterally or mutually, by reason of an agreement with his or her lawyer, and even if the taxpayer would be allowed to do so or do so on a voluntary basis, his or her consent would not be valid and would not be a sufficient legal basis for the lawyer to breach the L.P.P.
- The Belgian L.P.P. should apply to marketable arrangements, unless reasonable justification exists in a fact pattern for their exclusion, *quod non*.
- The Belgian L.P.P. applies equally when a lawyer gives tax advice to a client. The L.P.P. is not limited to legal defense or representation in court and/or the determination of the legal position of a taxpayer. The asserted comparison to anti-money laundering legislation is flawed because (i) the reporting obligation under D.A.C.6 relates to legitimate acts that are neither fraudulent nor abusive, and are not directed to facts constituting a criminal offense, (ii) no "filter" exists between the lawyer and the authorities as exists in anti-money laundering cases, where the President of the Bar serves as an intermediary, and (iii) the lifting of the L.P.P. is not proportional to any overriding interest.



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