

CCBE Workshop

The Impact of Anti-Money Laundering Legislation and Tax Legislation on Legal Professional Privilege and Professional Secrecy

Brussels, 27 June 2019

José de Freitas

CCBE President

Opening remarks

Panel Session I

The impact of anti-money laundering legislation on legal professional privilege

Rupert Manhart

Chair of the CCBE AML Committee

*“LPP, professional secrecy and AML -
Where are we and how did we get here?”*



1. Legal Professional Privilege ...

c. and the European Court of Human Rights (Article 6, 8 ECHR)

ECtHR, *Niemitz v. Germany*, judgement of 16 December 1992:

- Search of a lawyer's office in course of criminal proceedings for insulting behavior against a third party.
- The notion of "home" includes lawyer's premises.
- The interference had not been proportionate to the legitimate aim pursued – the prevention of crime and the protection of the rights of others – and could not be regarded as necessary in a democratic society.
- Where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (right to a fair trial) of the Convention.



1. Legal Professional Privilege ...

c. and the European Court of Human Rights (Article 8 ECHR)

ECtHR, *André and Another v. France*, judgement of 24 July 2008:

- Search of the offices of the applicants, both lawyers, by the tax authorities in the hope of discovering incriminating evidence against a client company of the lawyers which was suspected of tax evasion.
- The search and seizures had been disproportionate to the aim pursued, namely the prevention of disorder and crime. Searches and seizures at a lawyer's office interfere with the professional privilege at the heart of the relationship of confidence which exists between the lawyer and his client and is the corollary of the lawyer's client's right not to incriminate himself.



1. Legal Professional Privilege ...

c. and the European Court of Human Rights (Article 8 ECHR)

ECtHR, *Robathin v. Austria*, judgement of 3 July 2012:

- A practicing lawyer complained about a search carried out in his office and seizure of documents as well as all his electronic data following criminal proceedings brought against him on suspicion of theft, embezzlement and fraud of his clients. He was ultimately acquitted of all charges against him.
- Although the applicant had benefited from a number of procedural safeguards, the review chamber to which he had referred the case had given only brief and rather general reasons when authorizing the search of all the electronic data from the applicant's law office, rather than data relating solely to the relationship between the applicant and the victims of his alleged offences. In view of the specific circumstances prevailing in a law office, particular reasons should have been given to allow such an all-encompassing search. In the absence of such reasons, the Court found that the seizure and examination of all the data had gone beyond what was necessary to achieve the legitimate aim, namely crime prevention.



1. Legal Professional Privilege ...

c. and the European Court of Human Rights (Article 8 ECHR)

ECtHR, *Michaud v. France*, judgement of 6 December 2012, §§ 118-119:

“[W]hile Article 8 [of the European Convention on Human Rights] protects the confidentiality of all ‘correspondence’ between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves.

This additional protection conferred by Article 8 on the confidentiality of lawyer-client relations, and the grounds on which it is based, lead the [European] Court [of Human Rights] to find that, from this perspective, legal professional privilege, while primarily imposing certain obligations on lawyers, is specifically protected by that Article.”



1. Legal Professional Privilege ...

c. and the European Court of Human Rights (Article 6 ECHR)

ECtHR, *M. v. the Netherlands* (no. 2156/10), judgment 25 July 2017:

- This case concerned a former member of the Netherlands secret service (AIVD) who had been charged with leaking State secrets. In his capacity as audio editor and interpreter, he had access to classified information which he was under strict instruction not to divulge.
- Violation of Article 6 §§ 1 (right to a fair trial) and 3 (c) (right to legal assistance of own choosing) of the Convention, finding that, as a result of the threat of prosecution should the applicant divulge State secrets to his lawyers, communication between him and his counsel was not free and unrestricted as to its content, thus irretrievably compromising the fairness of the proceedings against him.



1. Legal Professional Privilege ...

Interim conclusion

- The protection of the legal professional privilege is a common legal tradition of all EU Member States, even though legal basis, type and scope may differ.
- The protection is however not absolute. Encroachment may be permissible
 - where defense rights are not at stake (see Article 6 ECHR) and
 - in accordance with the law and if 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 (proportionality principle, see Article 8 ECHR).

2. EU anti-money laundering legislation

a. A brief history of the EU anti-money laundering directives

EU legislation at fast pace:

- Directive 91/308/EEC of 10 June 1991 (1st AML Directive)
- Directive 2001/97/EC of 4 December 2001 (2nd AML Directive): Scope extended to legal professionals
- Directive 2005/60/EC of 26 October 2005 (3rd AML Directive)
- Directive (EU) 2015/849 of 20 May 2015 (4th AML Directive)
- Directive (EU) 2018/843 of 30 May 2018 (5th AML Directive)
- Directive (EU) 2018/1673 of 23 October 2018 on combating money laundering by criminal law

Difficulties to implement and adopt new rules, open infringement procedures against the majority of Member States.



2. EU anti-money laundering legislation

a. A brief history of the EU anti-money laundering directives

1st AMLD (1991)

- limited to financial sector

2nd AMLD (2001)

- Extended the 1st AMLD to non-financial activities and professions that were seen to be “vulnerable” to misuse by money launderers.
- Introduced requirements regarding:
 - client identification
 - record keeping
 - reporting of suspicious transactions
- Application to dealers in high value goods (precious stones and metals or works of art), auctioneers, casinos, and also to external accountants and auditors, real estate agents, notaries and lawyers.



2. EU anti-money laundering legislation

a. A brief history of the EU anti-money laundering directives

3rd AMLD (2005)

- money laundering and terrorist financing.
- incorporated many of the FATF 40 Recommendations on anti-money laundering and terrorist financing which were concluded in June 2003.
- Provided for a risk-based approach (an important and welcome addition!).
- Introduced more specific and detailed provisions relating to the identification and verification of the customer and the beneficial owner and contained a definition of the beneficial owner.
- Member States no longer had a discretion to allow tipping-off or not



2. EU anti-money laundering legislation

a. A brief history of the EU anti-money laundering directives

4th AMLD (2015)

- Heavy emphasis on employing a risk-based approach to money laundering at every level.
- National risk assessments, firms are to develop risk-based policies, and practitioners to conduct CDD in a risk-based manner.
- The 3rd AMLD automatically permitted “pooled accounts” (client accounts) to benefit from simplified due diligence requirements. The 4th AMLD requires obliged entities to request of their Member State that pooled accounts qualify for simplified customer due diligence measures or make their own risk-based assessment.
- 4th AMLD explicitly mentions tax advice provided by lawyers as being within the scope of reporting.
- Legal entities (companies, trusts) are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held. Such information should be held on a central register accessible to competent authorities.



2. EU anti-money laundering legislation

a. A brief history of the EU anti-money laundering directives

5th AMLD (2018)

- Enhanced access to beneficial ownership registers to improve transparency in the ownership of companies and trusts.
 - public access to beneficial ownership information on companies;
 - access on the basis of 'legitimate interest' to beneficial ownership information on trusts and similar legal arrangements;
 - public access upon written request to beneficial ownership information on trusts that own a company that is not incorporated in the EU;

The registers will also be interconnected to facilitate cooperation between member states.
- More powers to the FIU, who should in the context of their functions be able to obtain information from any obliged entity, even without a prior report being made.
- Additional requirements on self-regulatory bodies: e.g. publication of an annual report containing information e.g. about number and description of measures to monitor compliance, suspicious transaction reporting, record-keeping and internal controls
- Extension to cryptocurrencies / virtual currencies



2. EU anti-money laundering legislation

b. Particular challenges for the legal profession

Article 2(3)(b) AMLD:

- Directive applies to notaries and other independent legal professionals, where they participate ... in any financial or real estate transaction or by assisting in the planning or carrying out of transactions for their client concerning certain types of activities.

Article 33 AMLD:

- Suspicious Transaction Reporting (STR).

Article 35 AMLD:

- Transaction must be stopped, unless it is likely to frustrate efforts to pursue beneficiaries of the suspicious transaction.

Article 39 AMLD:

- Prohibition of disclosure of a STR (no tipping-off).



2. EU anti-money laundering legislation

b. Particular challenges for the legal profession

Article 34 AMLD:

- Member States may *designate an appropriate self-regulatory body of the profession concerned as the authority to receive the report, which shall forward it promptly and unfiltered.*
- *Member States shall not apply the obligations ... to independent legal professionals ... only to the strict extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.*



2. EU anti-money laundering legislation

b. Particular challenges for the legal profession

Article 32 (9) AMLD:

- *“Without prejudice to Articles 34(2), in the context of its functions, each FIU shall be able to request, obtain and use information from any obliged entity for the purpose set in paragraph 1 of this Article, even if no prior report is filed pursuant to Article 33(1)(a) or Article 34(1).”*

Provision may become even more important if cooperation between FIU and law enforcement is enhanced, as there is no clear distinction between powers to prevent crimes (FIU) and repressive powers in the case of past crimes (law enforcement) and as legal protection and remedies are different.



2. EU anti-money laundering legislation

b. Particular challenges for the legal profession

Main challenges of the EU anti-money laundering directives for the legal professional privilege therefore arise in relation with

- suspicious transaction reporting and providing information to FIUs vs. the scope of the protection of (i) legal advice (ascertaining the legal position) and (ii) defending or representing a client in judicial proceedings;
- prohibition to disclose information on a report made, the carrying out of a transaction if it may frustrate the efforts to pursue the client vs. the relationship of trust between lawyer and client.



2. EU anti-money laundering legislation

c. A closer look at the reporting obligation

First test: Application of AMLD to lawyers (Art 2§1(3)(b) AMLD)

“This directive shall apply to ...

notaries and other independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the:

- (i) buying and selling of real property or business entities;*
- (ii) managing of client money, securities or other assets;*
- (iii) opening or management of bank, savings or securities accounts;*
- (iv) organisation of contributions necessary for the creation, operation or management of companies;*
- (v) creation, operation or management of trusts, companies, foundations, or similar structures; ...“*

2. EU anti-money laundering legislation

c. A closer look at the reporting obligation

Second test: Is there a suspicious transaction? (Art 33(1) AMLD):

“Member States shall require obliged entities, and, where applicable, their directors and employees, to cooperate fully by promptly:

(a) informing the FIU, including by filing a report, on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing, and by promptly responding to requests by the FIU for additional information in such cases; and

(b) providing the FIU directly, at its request, with all necessary information.

All suspicious transactions, including attempted transactions, shall be reported.”

2. EU anti-money laundering legislation

c. A closer look at the reporting obligation

Third test: Does the “LLP exception” to filing a report apply? (Art 34(2) AMLD):

“Member States shall not apply the obligations laid down in Article 33(1) to notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.”

Open questions in practice relate to

- meaning of “ascertaining the legal position” and its implementation / interpretation by Member States;
- scope of “judicial proceedings” (e.g. all civil rights in the sense of Art 6 ECHR?);
- Application of the exception to the whole transaction or only to parts of it?



2. EU anti-money laundering legislation

c. A closer look at the reporting obligation

Member States' discretion to designate self-regulatory bodies (SRB) as institutions to receive and forward reports (Art 34(1) AMLD):

“By way of derogation from Article 33(1), Member States may, in the case of obliged entities referred to in point (3)(a), (b) and (d) of Article 2(1), designate an appropriate self-regulatory body of the profession concerned as the authority to receive the information referred to in Article 33(1).

Without prejudice to paragraph 2, the designated self-regulatory body shall, in cases referred to in the first subparagraph of this paragraph, forward the information to the FIU promptly and unfiltered.”

Can the SRB choose not to forward a report if the Art 34(2) exception applies?



Concluding remarks

The core of the legal professional privilege, as it is a common principle to all Member States, is protected both by Union Law and fundamental rights.

However, the privilege is seen as an obstacle to efficient prosecution of money laundering, as lawyers are seen as facilitators of illegal activities.

There is a political appetite to encroach on the legal professional privilege not only in order to combat financing of terrorism and severe crime, but also to broaden the national tax basis. Political groups and NGOs want to score easy points by depicting lawyers (and other intermediaries) in very negative way. It is (and will be) a tough challenge to protect the legal professional privilege as safeguard of the rule of law.



Thank you for your attention!

MMag. Dr. Rupert Manhart, LL.M. (LSE)

Manhart Einsle Partner Rechtsanwälte

Römerstraße 19

6900 Bregenz

Austria

T: +43 5574 42364

E: r.manhart@manhart-einsle-partner.at

Raluca Pruna

Head of the Commission Financial Crime Unit

Views from the Commission

Alain Claes

Partner, Sherpa Law, Belgium

*AML reporting obligations within civil
law jurisdictions*



AML reporting obligations within civil law jurisdictions

Alain Claes, *Partner Sherpa Law*

CCBE

27.06.2019

Overview

- Principles
- Jurisprudence
- Application



Overview





Principles

WHAT IS PROTECTED ?

- communications between lawyers and clients
- in the provision of **legal advice**
- and representation in current and future **litigation**
- are protected by legal professional privilege (a common law concept) and professional secrecy (a civil law concept)
 - Access to the courts and access to law



ADVICE

- Scope:
 - applies only to those communications which directly seek or provide advice or which are given in a legal context, that involve the lawyer using his legal skills and which are directly related to the performance of the lawyer's professional duties



LITIGATION

- Scope:
 - which is wider than advice,
 - protects confidential communications made in, or concerning, judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings





Our tools

AMLD

FATF RECOMMENDATIONS (2004)

- Recommendation 12 (22 – 2012) (DNFBPs)
 - **customer due diligence** applies to certain activities of lawyers and other independent legal professionals;
- Recommendation 16 (23 – 2012) (DNFBPs)
 - The requirements to make **STR** apply to all designated non-financial businesses and profession
 - *Interpretive note:*
 - *Professional secrecy*
 - *For each country to determine scope*
 - *Appropriate self-regulatory bodies*



AMLD

- Under Article 2a(5) of Directive 91/308, the following persons are [only] subject to the obligations laid down in that directive
 - (5) notaries and other independent legal professionals, when they participate, whether:
 - (a) by assisting in the planning or execution of transactions for their client concerning the
 - (i) buying and selling of real property or business entities;
 - (ii) managing of client money, securities or other assets;
 - (iii) opening or management of bank, savings or securities accounts;
 - (iv) organisation of contributions necessary for the creation, operation or management of companies;
 - (v) creation, operation or management of trusts, companies or similar structures;
 - (b) or by acting on behalf of and for their client in any financial or real estate transaction,



AMLD

- Article 6 of Directive 91/308 (after 2nd AMLD)
 - Member States shall not be obliged to apply the obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, **in the course of ascertaining the legal position** for their client or performing their task of **defending or representing** that client in, or concerning, judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.



AMLD

- Limitations confirmed in the 4th AMLD
 - Recital 17 of Directive 2001/97 (2nd AMLD)
=> Recital 9 of Directive 2015/849 (4th AMLD)
 - Recital 20 of Directive 2001/97 (2nd AMLD)
=> Recital 39 and Recital 40 of Directive 2015/849 (4th AMLD)
 - Article 2a(5) and Article 6 (=34) remained practically unchanged



CONCLUSION

- Can reporting obligations be imposed on lawyers?
- Yes, but only if the specific limitations are guaranteed:
 - Only for activities which do not go to the very essence of the lawyer's defence
 - No obligation to report when it relates to judicial proceedings or giving legal advice (advice privilege and litigation privilege)
 - not transmitting reports directly to the FIU but, as appropriate, to the President of the Bar Council





JURISPRUDENCE

BELGIAN IMPLEMENTATION OF AMLD (2)

- Law of 12 January 2004: lawyers submitted to AML- legislation:
 - Only for activities which do not go to the very essence of the lawyer's defence
 - No obligation to report when it relates to judicial proceedings or giving legal advice (advice privilege and litigation privilege)
 - not transmitting reports directly to the FIU but, as appropriate, to the President of the Bar Council
- Nevertheless, proceedings before Belgian Constitutional Court
 - OBFG
 - OVB
 - Intervention of CCBE



BELGIAN CONSTITUTIONAL COURT, 126/2005, *OBFG*

- AMLD challenged
- Prejudicial questions to the ECJ
- Can lawyers be submitted to AML-legislation (art. 6 ECHR) (fair trial) ?



ECJ, 26 JUNE 2007, C-305/05, OBF

- (32) Lawyers **would be unable** to carry out satisfactorily their task of **advising, defending and representing their clients**, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations



ECJ, 26/06/2007, C-305/05, OBF

- (33) *"... the obligations of information and cooperation apply to lawyers only in so far as they **advise** their client in the preparation or execution of certain transactions or when they act on behalf of and for their client in any financial or real estate transaction. As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial."*



ECJ, 26/06/2007, C-305/05, OBF

- (34) *"... as soon as the lawyer acting ... is called upon for assistance in **defending** the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt ... from the obligations laid down ... An exemption of that kind safeguards the right of the client to a fair trial."*



ECJ, 26/06/2007, C-305/05, OBF

- (36) *Given that the requirements implied by the right to a fair trial presuppose, by definition, a link with judicial proceedings, and in view of the fact that the second subparagraph of Article 6(3) of Directive 91/308 exempts lawyers, where their activities are characterised by such a link, from the obligations of information and cooperation laid down in Article 6(1) of the directive, **those requirements are respected.***
- (37) ... **do not infringe** the right to a fair trial as guaranteed by Article 6 of the ECHR and Article 6(2) EU.



BELGIAN CONSTITUTIONAL COURT, 10/2008, OBFG

- the Constitutional Court dismissed the appeal, subject to the twofold provision that the provision rendering the anti-money laundering legislation applicable to lawyers must be interpreted to mean that:
 - *- the information of which the lawyer became aware during the exercise of the essential activities of his or her profession, **including those matters listed in Section 2.3** of the impugned law, namely the **defence or representation in court of the client and the provision of legal advice**, even outside the context of judicial proceedings, **remained covered by professional secrecy** and could not therefore be drawn to the attention of the authorities, and that:*



BELGIAN CONSTITUTIONAL COURT, 10/2008, OBFG

- - it was **only when the lawyer was exercising an activity**, in one of those matters listed in aforementioned Section 2.3, which went beyond his or her specific role of defence or representation in court and the provision of legal advice, that he or she could be subject to the obligation to communicate to the authorities the information of which he or she was aware.



BELGIAN CONSTITUTIONAL COURT, 10/2008, OBFG

- *The Court also added another reservation: **all communications** of information to the Financial Intelligence Processing Unit had to be effected **through the intermediary of the chairman of the Bar**.*
- *Furthermore, the Court annulled the provision which allowed any **employee or representative** of a lawyer personally to forward information to the Unit.*





Application in Belgium



BELGIAN LEGISLATION

- Act of 18 September 2017 (AML)
 - Art. 2, 28°: scope
 - Art. 47: STR
 - But art. 52: to the President of the Local Bar Association
 - But art. 53: no STR if ascertaining legal position or judicial proceedings



Application in Belgium

BELGIAN APPLICATION

- STR's of lawyers:
- Transmitted through the President of the Local Bar Association

2004: 13	2005: 0	2006: 3
2007: 3	2008: 3	2009: 3
2010: 0	2011: 1	2012: 10
2013: 9	2014: 7	2015: 2
2016: 4	2017: 10	2018: 8



BELGIAN APPLICATION : ISSUES

- Professional secrecy:
 - Exceptions also applied to *“other independent legal professionals”*
 - Scope of ascertaining legal position
- Self regulatory bodies
- Link with DAC6 ?



BELGIAN APPLICATION

- Other independent legal professionals
- provision of legal advice = ascertaining the legal position
 - Belgian constitutional court, 10/2008, OBFG:
 - Reference to Opinion of PG before ECJ C-305/05
 - *In this case, it seems to me that the concept of 'ascertaining the legal position for a client' used by the directive can easily be construed as including that of **legal advice**. Such a reading is consistent with respect for fundamental rights and for the principles of a State governed by the rule of law, which are protected by the Community legal order. It is moreover consistent with the wording of the 17th recital in the preamble to the Directive, which provides that, in principle, 'legal advice remains subject to the obligation of professional secrecy'.*



Application in Belgium

BELGIAN APPLICATION

- Self-regulatory bodies:
 - Law: the President of the local bar association to which the lawyer is enlisted
 - OVB: 8 local bar associations
 - OBFG: 12 local bar associations
 - Bar of the lawyers to the Supreme Court
 - Coordination ?



BELGIAN APPLICATION

- DAC6:
 - Still ongoing discussion
 - Professional secrecy applies?
 - In the same way as AML ?
 - Waiver of professional secrecy by client ?
 - ...





Alain Claes

PARTNER SHERPA LAW

Buro & Design Center

Esplanade 1 / 88

B-1020 Brussels

Tel: + 32 2 474 01 10

Fax: + 32 2 474 01 19

Email: alain.claes@sherpalaw.be

Internet: www.sherpalaw.be

Suzie Ogilvie

Global Head of Financial Crime and
sanctions, Freshfields Bruckhaus Deringer

*AML reporting obligations within
common law jurisdictions*

Legal department

Privilege and money laundering reporting

From a common law perspective – the UK

Suzie Ogilvie, Global Head of Financial Crime and Sanctions, Freshfields
Bruckhaus Deringer LLP



Freshfields Bruckhaus Deringer



Introduction

1. The “Common” law
2. General overview of privilege
3. Application of privilege in the context of money laundering legislation
4. Challenges...

Common law principles

- Judicial decisions of courts and similar tribunals use precedent and the principles of past cases.
- Judges have the authority and duty to resolve fundamentally distinct issues
- Stands in contrast to and on equal footing with statutes
- Common law courts can reinterpret and revise the law to adapt to new trends in political, legal and social philosophy. evolves through a series of gradual steps, thereby reducing disruptive effects
- Evolves through a series of gradual steps, thereby reducing disruptive effects

Legal professional privilege (LPP)

- Two heads of privilege: litigation privilege and advice privilege
- LPP first developed as “litigation privilege”
- New Zealand/Canadian courts started to applying privilege to documents outside of court proceedings
- Privilege considered essential so that sound legal advice can be given in every area
- Justified “notwithstanding...cases may decided in ignorance relevant probative material” (Lord Scott; *Three Rivers* case)
- Must be expressly overridden in statute if it is not to apply

Types of LPP

Litigation privilege

- Protects confidential communications made after litigation has started, or is reasonably in prospect
- Between lawyer and client, agent, whether or not that agent is a lawyer and/or a third party
- Must be for the sole or dominant purpose of litigation

Advice privilege

- Confidential communications between a lawyer, and a client for the purpose of seeking legal advice from a lawyer or providing it to a client.
- Not privileged merely because a client is speaking or writing to a lawyer.
- Communications must directly seek or provide advice or be given in a legal context, that involve the lawyer using his legal skills
- Must be directly related to the performance of the lawyer's professional duties.
- Not all communications/documents are privileged: notes of open court proceedings/correspondence or meetings with opposing lawyers/conveyancing documents

Crime/fraud exemption

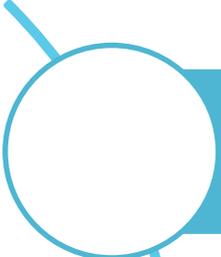
LPP protects advice given to a client:

- on avoiding committing a crime
- warning them that proposed actions could attract prosecution

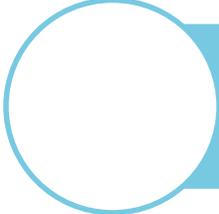
LPP does not extend to:

- documents which form part of a criminal or fraudulent act
- communications which take place in order to obtain advice with the intention of carrying out an offence.

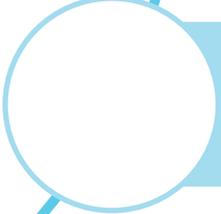
Money laundering legislation



General requirement on the regulated sector to report suspicions of money laundering



General requirement is subject to a “privileged circumstances” defence – not the same as LPP



Principal money laundering offences and a “consent regime”

Privileged circumstances defence

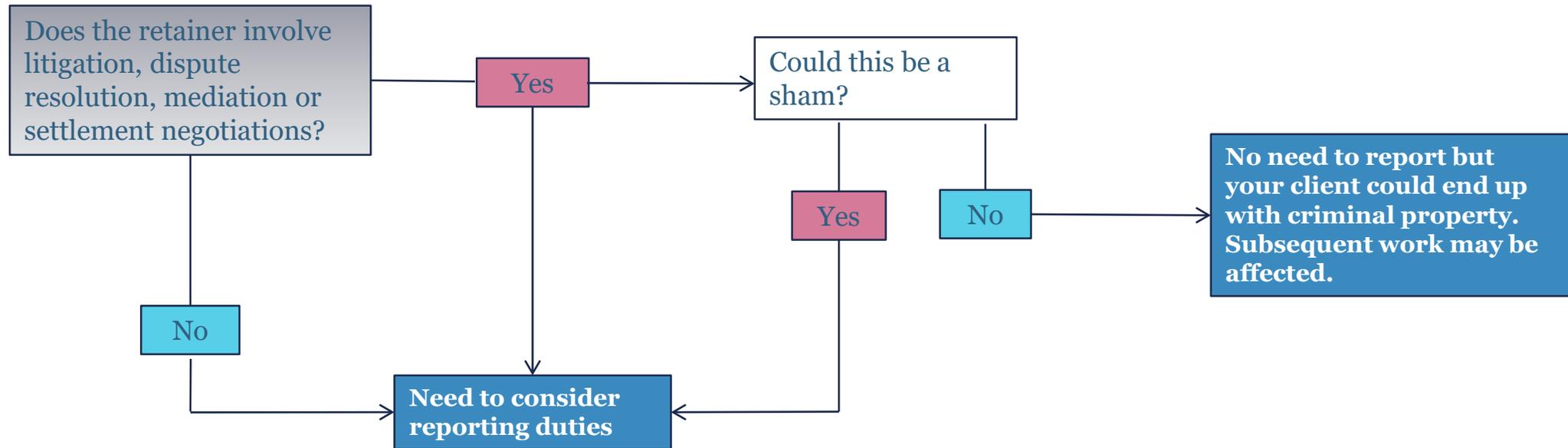
Designed to comply with the exemptions from reporting set out in the European money laundering directives.

Applies to information communicated:

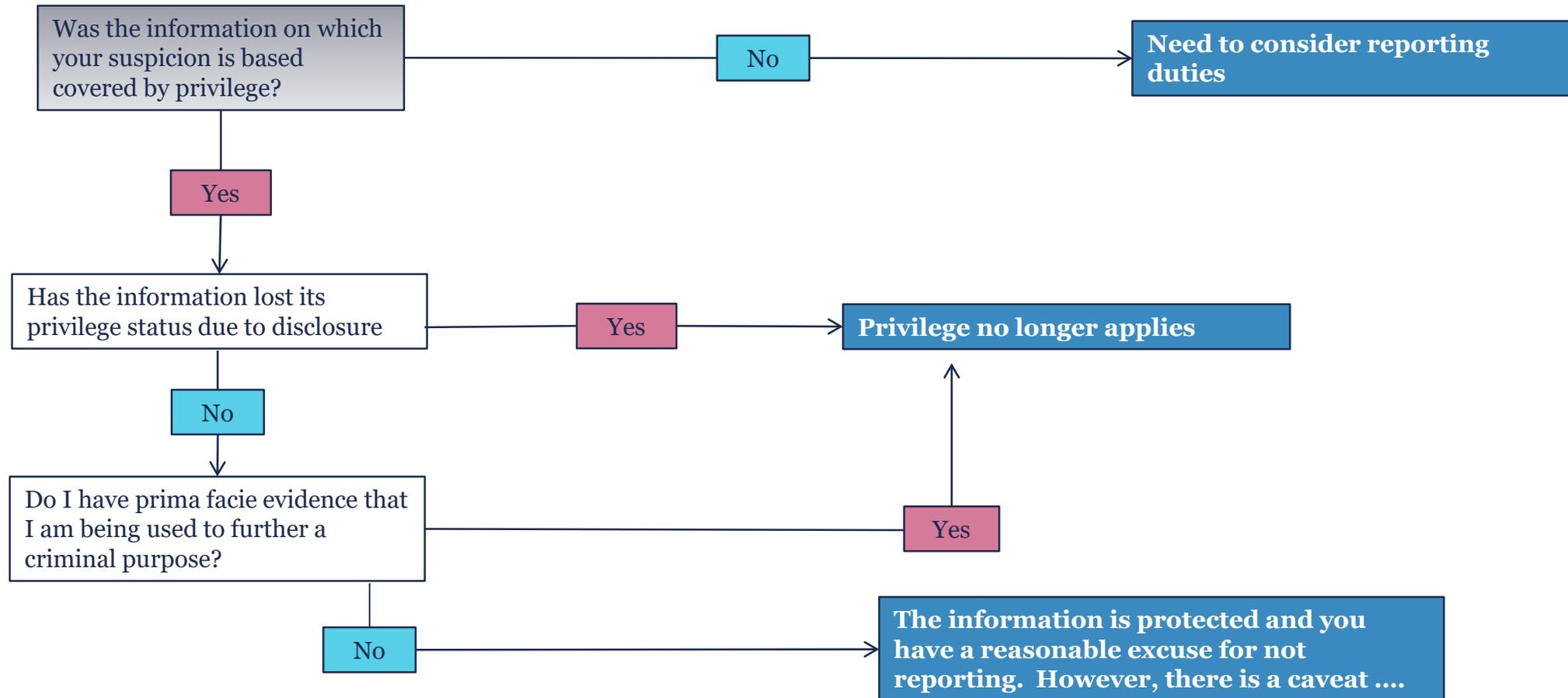
- by a client, or a representative of a client, in connection with the giving of legal advice to the client, or
- by a client, or by a representative of a client, seeking legal advice from you
- by a person in connection with legal proceedings or contemplated legal proceedings

Crime/fraud exemption applies

Litigation/other contentious work



What happens if you spot suspicious activity?



Principal offences of money laundering and “consent”

If a lawyer has a relevant suspicion and the information on which the suspicion is based is covered by LLP, the lawyer must consider if the crime/fraud exception applies

If the crime/fraud exception does not apply, the lawyer cannot, without a waiver of privilege, make the necessary consent request.

If the lawyer cannot obtain the necessary waiver of privilege, the lawyer may have no choice but to withdraw from acting.

The lawyer may be able to obtain the necessary waiver and so, in these circumstances, a consent request may be made.

If the crime/fraud exception does apply, the lawyer may make a disclosure. He may also technically request consent to proceed with the prohibited act but he will need to consider his ethical duties in continuing to act in these circumstances

Waiving privilege and challenges to privilege

Law enforcement complaints about privilege

Waiver of privilege in return for immunity from prosecution – recent issues

DAC6 position

Legal department

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the law of England and Wales authorised and regulated by the Solicitors Regulation Authority) (the UK LLP) and the offices and associated entities of the UK LLP practising under the Freshfields Bruckhaus Deringer name in a number of jurisdictions, and Freshfields Bruckhaus Deringer US LLP, together referred to in the material as 'Freshfields'. For regulatory information please refer to www.freshfields.com/support/legalnotice.

The UK LLP has offices or associated entities in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates and Vietnam. Freshfields Bruckhaus Deringer US LLP has offices in New York City and Washington DC.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2018

Peter Mc Namee

CCBE

*Things for Bars and
Law Societies to note*

Things for Bars and Law Societies to note

The 5th AML Directive introduces a number of new obligations on self-regulatory bodies:

Things for Bars and Law Societies to note

■ Article 34

The 5th Directive provides that **Self-regulatory bodies** shall publish an **annual report** containing information about, namely:

- **number of suspicious transaction reports** received by the self-regulatory body and the **number of STRs forwarded** by the self-regulatory body to the FIU where applicable;
- **number of reports of breaches received** as referred to in Article 61 (self-regulatory bodies, should establish effective and reliable mechanisms to encourage the reporting of potential or actual breaches of the national provisions transposing this Directive)

Things for Bars and Law Societies to note

- self-regulatory bodies should provide **secure communication channels to** ensure that the identity of persons providing information is known only to the competent authorities, as well as, where applicable, self-regulatory bodies
- **number and description** of measures carried out under Article 47 and 48 - these two articles relate to the **obligation of supervision to monitor compliance by obliged entities with their obligations under:**
 - (i) Articles 10 to 24 (customer due diligence);
 - (ii) Articles 33, 34 and 35 (suspicious transaction reporting);
 - (iii) Article 40 (record-keeping); and
 - (iv) Articles 45 and 46 (internal controls).

Things for Bars and Law Societies to note

It must be noted that, as provided for in Article 34 of the 4th Directive, the 5th Directive continues to provide that Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to receive STR Reports.

The designated self-regulatory body shall forward the information to the FIU promptly and unfiltered.

Open discussion

“What can Bars and Law Societies do/what should Bars and Law Societies do?”

Panel Session II

The impact of Tax legislation on legal professional privilege

Jacques Taquet

Chair of the CCBE Tax Committee

“DAC 6 explained - the obligation to inform, waiver and professional privilege, the consequences for violating privilege/professional secrecy, and the implications for not complying with the requirement to inform the client”.

Lawyer's Confidentiality and Related Tax Issues

Jacques Taquet
Chair CCBE Tax Committee

Brussels, 27 June 2019

Basic issues

- There are variations in the way professional secrecy is defined in Member States (legal professional privilege/professional secrecy)
- However, there are no variations regarding the fact that national legislation must comply with the EU Treaty, National Constitutions, the European Convention on Human Rights and the Charter of Fundamental Rights

Jurisprudence of the European Courts protects professional privilege

- Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. 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 other

- However, DAC 6 has nothing to do with the limitations.

France – The proposed measures provide for:

- a first declaration whereby the lawyer would reveal the objective and technical information of the cross-border scheme **without however revealing the name of his client**, and,
- a second declaration whereby the taxpayer would be responsible for making their own declaration on the basis of the file number previously assigned to the lawyer.

In France:

- The tax administration considers that **solicitor-client privilege is linked only to the "name of the client"** and not to the **"content"** of the services rendered; the draft order would thus preserve professional secrecy since the lawyer would not have to reveal the name of his client.
- The draft treats professional secrecy, for example bank secrecy, and other professional secrecy on the same level and thus **ignores the distinctive place given to lawyer-client privilege** by the European Court of Human Rights.

View of the *Conseil national des barreaux*

- The *Conseil national des Barreaux* **overwhelmingly rejects the proposal** in that it:
 - a) alters solicitor-client privilege in a way that is, on the one hand, in no way "necessary" and, in any event, is "disproportionate" to the objective to be achieved since the activities or transactions are in no way illegal,
 - b) the taxpayer can perfectly satisfy all the reporting obligations laid down by the Directive in the same way in all the information he provides to the tax authorities in his annual returns or, on request, during an audit.

- Under French law, information exchanged between a lawyer and their client is covered by professional secrecy and is not accessible to the administration, which cannot obtain it under duress;
- Where the administration nevertheless requests disclosure of such information, only the taxpayer may disclose it as the lawyer is never released from his professional secrecy obligations.

The purpose of the DAC6 Directive is:

- to enable Member States to identify any "gaps" in their respective laws and/or distortions of interpretation leading to imperfect taxation of taxable income,
- to take appropriate legislative or regulatory measures to fill the legal gaps thus identified so that 100% of the taxable income is effectively taxed in the various Member States and/or, for example, that a charge deducted in one Member State results in effective taxation in another Member State, etc.

- Lawyers cannot be held liable for any legal gaps in tax legislation or distortions of interpretation between Member States
- Lawyers are not "agents" who inform or declare the activities of their client and the violation of professional secrecy thus committed would be both unnecessary, and in any case disproportionate to the objective to be achieved.

Summary – Essentially, DAC 6:

- infringes solicitor-client privilege in a way that is both unnecessary and in any event disproportionate to the objective to be achieved;
- infringes the provisions of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7 of the Charter of Fundamental Rights of the European Union which protect lawyer-client privilege in a distinctive manner;

Summary – Essentially, DAC 6:

- constitutes a more serious alteration of the lawyer's professional secrecy than the one set up for the purposes of preventing the crime of money laundering and the fight against terrorism, since the report of suspicion excludes the activity of "legal consultation" and the lawyer does not make any report to an administration but only to the President of the Bar.

The Future

- Any measure impacting on professional secrecy should be contested and refused
- If the DAC 6 impact on professional secrecy is accepted it opens the door toNo limits!

Dariusz Gibasiewicz

Attorney at Law, Law firm Rykowski Jusiel

Implementation of DAC 6 in Poland



MDR REGULATIONS IN POLAND – IMPACT ON PROFESSIONAL PRIVILEGE

DARIUSZ GIBASIEWICZ, PH.D., ATTORNEY AT LAW



AN INTRODUCTION

Restrictive and broad Mandatory Disclosure Rules („MDR”) have been implemented into the Polish tax system since January 2019. At the end of January 2019 Polish Ministry of Finance issued an official document explaining some of the aspects of MDR (“Explanations”). Non-Polish entities / individuals may have reporting obligations working as promoters / supporters or being the beneficiary.

Not only advisors, but also group entities, asset/investment managers and other entities/individuals involved in dealing with Polish related arrangements may have to report tax schemes directly to Polish tax authorities. Moreover, those identified as promoters (may be any entity acting to the benefit of other group entities) are obliged also to have special internal procedure regarding mandatory disclosure rules. Non-compliance with those regulations is subject to sanctions up to EUR 5m. These sanctions can be applied to non-Polish individuals and not just entities.

AN INTRODUCTION (II)

The Polish Mandatory Disclosure Rules (in force since Jan 2019) legislation has much wider scope compared to DAC6 Directive, in particular:

- An extended definition of reportable tax arrangements to comprise not only cross-border but also domestic tax arrangements,
- A wider definition of covered taxes including VAT (with respect to the domestic tax arrangements)

Polish MDR require the reporting of:

- cross-border tax schemes, in relation to which the first activity related to their implementation was made after 25 June 2018;
- domestic tax schemes, in relation to which the first activity related to their implementation was made after 1 November 2018.

AN INTRODUCTION (III)

As stated above, the requirements of the Polish MDR regulations are significantly broader than the Directive. The Polish legislation extends the scope of taxes (including inter alia Value Added Tax) in addition to all other taxes covered by the Directive.

The Polish definition of "reportable arrangements" also includes non-cross-border tax arrangements in addition to cross-border arrangements (defined in accordance with the Directive). The Polish regulations also contain an extended catalogue of hallmarks, introducing specific hallmarks in addition to the Directive's hallmarks A-E.

The reporting obligation for tax arrangements can apply to entities acting as promoters, beneficiaries or service providers, including those entities not resident, established or managed in the territory of Poland.

AN INTRODUCTION (IV)

Official Tax Guidelines were published by the Polish Ministry of Finance

The main purpose of the official tax guidelines, issued on 31 January 2019, is to provide explanations and practical tips for intermediaries and relevant taxpayers who are expected to have a reporting obligation (obliged persons or entities).

According to the Polish Tax Code, taxpayers who act in accordance with the official tax guidelines in a given settlement period should be afforded the same level of protection that would apply in the case of obtaining a tax ruling (in principle, full protection).

The guidelines are based on the conclusions and comments submitted during public tax consultations conducted by the Ministry of Finance from December 2018 to January 2019.

The guidelines may be further supplemented in the future with new areas and comments. An assessment of how the Polish MDR regime works in practice will influence the direction of possible changes and developments.

REPORTING DEADLINES

Reporting obligation regarding tax schemes shared or implemented on or after 1 January 2019 arises as a general rule within 30 days from the date the scheme is shared or implemented. In some situations reporting may be as short as 5 working days. The 'trigger events' which start the 30 day disclosure timeline are capable of being satisfied very early in the development of a proposal. Merely verbally sharing an idea which could be implemented may start the clock. Parties that offer/make available (promoters), provide assistance/support in the implementation (supporters), or the taxpayers exercising arrangements are required to disclose information on reportable arrangements to the authorities.

PROMOTER

- Promoter is defined as any person / entity, especially tax advisor, attorney, legal advisor, bank / financial institution employee advising clients, that designs, markets, makes available, implements or manages the implementation of an arrangement. In practice, it is very common that within multinational groups, head entities play significant role in decisions impacting tax position of their Polish subsidiaries. This may result in them and their employees being the promoter, which has implications for their reporting obligations, and in the majority of cases requires them to have an internal procedure.

SUPPORTER

Supporter is defined as any person / entity, in particular a certified auditor, public notary, person providing bookkeeping services, accountant, or financial director, bank or other financial institution, as well as their employees, that (having regard the required duty of care applicable) undertakes to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or supervising the implementation of an arrangement. Lawyers and law firms may be treated as supporters.

This refers also to shared service centres and their employees. Although, the supporter is primarily obliged to ask the entity ordering the work to confirm whether the arrangement constitutes tax scheme, in some cases it may be obliged to report a tax scheme to Polish tax authorities independently.

BENEFICIARY

Beneficiary is defined as any person / entity to whom the arrangement is made available, for whom such arrangement is implemented or that is ready to it or has taken any steps in such implementation. Generally, any entity having a link to Polish taxes may become a beneficiary. In many cases, beneficiary will be obliged to report a tax scheme by itself, especially when the promoter is covered by professional secrecy or when he does not comply with his obligations (often when promoter has no link to Poland, e.g. local advisor).

Also arrangements prepared internally (without any support of promoter) may have to be reported to Polish tax authorities. In such a case it is the beneficiary's obligation.

SANCTIONS

Failure to report or other non-compliance may result in fines:

- up to EUR 2.5m with respect to entity being a promoter,
- up to EUR 5m with regard to individuals responsible for such noncompliance.

Any failure to meet a reporting obligation is a fiscal criminal offense which may be subject to a fine of up to PLN21.6 million (approximately €5 million).

An intermediary (or entity hiring or remunerating an intermediary) who fails to implement the required MDR procedures may be subject to a fine of up to PLN2 million (approximately €465,000).

PRIVILEGE

The Promoter shall provide the Head of the National Tax Administration with information on the tax scheme within 30 days of the day following the publication of the tax scheme, on the day following the preparation for the implementation of the tax scheme or on the day of the first action related to the implementation of the tax scheme - whichever is the earlier.

The Promoter shall inform the beneficiary in writing about the NSP of the tax scheme, including a confirmation of the NSP receipt, immediately after its receipt.

In the event that the promoter provides information about the tax scheme other than the standardized tax scheme (a tax scheme that can be implemented or made available to more than one beneficiary without changing its material assumptions, in particular concerning the type of activities undertaken or planned under the tax scheme) and the promoter is not released by the beneficiary from the obligation to maintain the legally protected professional secrecy in this respect, the Promoter:

- 1) informs the beneficiary in writing, within the time limit prescribed by law, of the obligation to transfer the tax scheme to the Head of the National Fiscal Administration, and
- 2) provide the beneficiary with the required data concerning the tax scheme.

PRIVILEGE (II)

The Promoter shall provide the Head of the National Tax Administration with information on the tax scheme within 30 days of the day following the publication of the tax scheme, on the day following the preparation for the implementation of the tax scheme or on the day of the first action related to the implementation of the tax scheme - whichever is the earlier.

The Promoter shall inform the beneficiary in writing about the NSP of the tax scheme, including a confirmation of the NSP receipt, immediately after its receipt.

In the event that the promoter provides information about the tax scheme other than the standardized tax scheme (a tax scheme that can be implemented or made available to more than one beneficiary without changing its material assumptions, in particular concerning the type of activities undertaken or planned under the tax scheme) and the promoter is not released by the beneficiary from the obligation to maintain the legally protected professional secrecy in this respect, the Promoter:

- 1) informs the beneficiary in writing, within the time limit prescribed by law, of the obligation to transfer the tax scheme to the Head of the National Fiscal Administration, and
- 2) provide the beneficiary with the required data concerning the tax scheme.

At the same time as informing the beneficiary, the Promoter shall inform in writing other entities known to him, obliged to provide information about the tax scheme, that he will not provide information about the tax scheme to the Head of the National Tax Administration.

PRIVILEGE (III)

The Promoter, within 30 days from the day on which it informed the beneficiary or other entities about the obligation to provide information on the tax scheme, notifies the Head of the National Tax Administration about the fulfilment of the obligation to provide the beneficiary or other entities with the above mentioned information indicating the date on which the tax scheme was provided or an action related to the implementation of the tax scheme was taken, and the number of entities which it informed.

PRIVILEGE (IV)

It does not constitute a breach of the obligation to maintain a legally protected professional secrecy:

- 1) the provision of information on the tax scheme where the person providing the information has been exempted from the obligation to maintain the professional secrecy;
- 2) the provision of information on the standardized tax scheme;
- 3) the provision the Head of the National Fiscal Administration with the information referred to in § 6 (fulfilment of the obligation to provide the beneficiary or other entities with certain information indicating the date on which the tax scheme was provided or an action related to the implementation of the tax scheme was taken, and the number of entities which it informed).

FINAL REMARKS

The Polish requirements are also different from the EU Directive in a number of very significant ways. The effect of these differences, such as the requirement to report domestic arrangements and the requirement that intermediaries implement MDR procedures, are further complicated by the early implementation dates. Reporting intermediaries are well advised to take immediate actions with respect to these new compliance obligations, especially the obligation to establish MDR procedures. Lessons learned from the Polish implementation of the EU Directive are likely to be useful when other EU countries promulgate their own MDRs.

Olivia Long

Matheson

Implementation of DAC 6 in Ireland



Matheson

Implementation of DAC 6 in Ireland

27 June 2019

International Firm in the Americas
International Tax Review 2018

Ireland Transfer Pricing Firm of the Year
International Tax Review 2018

Number One Ranked Irish Funds Law Practice acting for 29% of Irish
Domiciled Investment Funds by AUM
Monterey Insight Ireland Fund Survey 2017

Ireland M&A Legal Adviser of the Year
Mergermarket European M&A Awards 2017

Ranked Ireland's Most Innovative Law Firm
Financial Times Innovative Lawyers Report 2017

Mandatory disclosure – the Irish system

- Introduced in 2010
- Imposes reporting obligations on promoters
- Obligation to report shifts to taxpayer if:
 - Promoter is not located in Ireland
 - There is no promoter
 - Legal professional privilege applies
- Reporting required within 5 days of:
 - Date of first marketing contact
 - Date transaction made available for implementation
 - Date promoter becomes aware of any step in implementation
- Civil penalties including daily penalties (up to €500 per day) for failure to comply

MANDATORY DISCLOSURE OF CERTAIN TRANSACTIONS (PROMOTERS) Form MD1

In accordance with Chapter 3 of Part 33 of the Taxes Consolidation Act 1997

This form should be completed by a promoter, disclosing under section 817E of the Taxes Consolidation Act 1997,

and returned to:-

Mandatory Disclosure Unit
Office of the Revenue Commissioners
Large Cases Division
Balfour House
75 - 79 Mount St. Lower
Dublin 2

Internal use only
Transaction no:
Date Received:

The completed form must be received within 5 days after the relevant date (as defined in section 817D of the Taxes Consolidation Act 1997).
Receipt of completed form will be acknowledged promptly.

Guidance on making a disclosure is available at www.revenue.ie

1. Promoter Details (please complete in BLOCK CAPITALS)

Full Name:

Business Address:

E-mail Address, if any:

Telephone Number:

Tax Advisor Identification Number (TAN) if applicable:

Tax Reference Number (See Note 1):

Revenue
Cuide agus Clárú na hAidmear
300k Tax and Customs

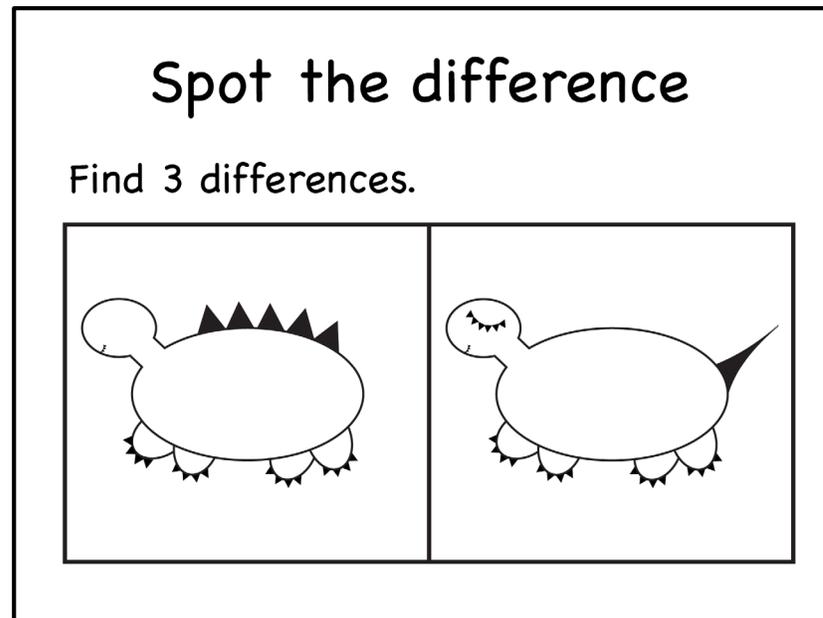
Mandatory disclosure – the Irish hallmarks

- All hallmarks are subject to ‘main benefit’ test
- Irish hallmarks:
 - Confidentiality from Revenue or other promoters
 - Contingent fees
 - Standardised tax products
 - Loss creation / loss buying transactions
 - Schemes reducing or deferring taxable employment income
 - Income to capital schemes
 - Income to gift schemes
 - Discretionary trusts



Key differences between the Irish and EU regimes

- Under the Irish regime no transaction will be reportable unless it passes the main benefit threshold
- Irish legislation directed at 'promoters' – narrower than 'intermediary'
- Fewer hallmarks



Legal privilege

- Core to administration of justice
- Enshrined in ECHR
- Legal advice v legal assistance
- Cases on disclosure of client names
- Does the reportable information reveal the legal advice?



"But . . . most of all, I'm thankful for things that are privileged and confidential."

Thank you

Olivia Long

Matheson

Ireland

D: +353 1 232 2363

T: +353 1 232 2000

F: +353 1 232 3333

E: olivia.long@matheson.com

W: www.matheson.com

Nathalie Fanoy

Fanoy Legal

*Implementation of DAC 6
in The Netherlands*

Open discussion

“What can Bars and Law Societies do/what should Bars and Law Societies do?”