

CCBE Workshop 27 June 2019 – Implementation of DAC 6 in NL

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Introduction

I will focus on the relevance and the consequences for lawyers and for legal privilege in the Netherlands of the new reporting obligations on intermediaries under DAC – 6 (Mandatory Disclosure Directive). When I speak of lawyers, I refer to a member of the Netherlands Bar.

DAC-6 can be seen as an ongoing trend showing that transparency and exchange of information seem to prevail more and more over confidentiality. In relation to this trend, in the Netherlands over the past years, in political discussions and public statements made by or on behalf of the Public Prosecution Service, it is argued that legal privilege of lawyers form an obstacle for the fight against crime.

For example: In a panel discussion at an anti-corruption congress a year ago a public prosecutor mentioned: ‘The Public Prosecution is in favour of legal privilege, but...it is still in the position of 1830, when Brussels belonged to the Netherlands and the world we live in is significantly different now’. To summarise this message: Legal privilege is old, the statutory rules are outdated and unclear, which easily leads to abuse of the privilege; it ought to be restricted in scope.

Thus, in the above trend: the scope of legal privilege is under attack.

Professional secrecy and legal privilege in the Netherlands

In the Dutch legal system, confidentiality in the relationship between a lawyer and his client is deemed to be of fundamental importance to be able to properly fulfil the role of a lawyer in the administration of justice. This role is basically: the safeguarding of the legal position of his client. The lawyer fulfils this task by providing legal advice as well as representing and defending the client in legal proceedings and conflicts.

A person who requires a lawyer in order to gain insight into his legal position or to implement his rights, must be able to discuss the matter that he submits to the lawyer in strict confidentiality. It must be prevented that, out of fear of disclosure, a person seeking justice does not share specific facts with his lawyer, which facts are relevant for the purpose of legal advice.

The confidentiality in the lawyer-client relationship is safeguarded in the Netherlands by the lawyer’s obligation of secrecy (*geheimhoudingsplicht van de advocaat*) and, as a corollary, the right to refuse to give evidence

(*verschoningsrecht van de advocaat*) (hereafter also referred to as: legal privilege).

The obligation to observe secrecy and the right to refuse to give evidence of the lawyer are summarily arranged by law. The extent and scope thereof have been detailed mainly in case law.

Obligation to observe secrecy

In the Netherlands, the obligation of the lawyer to observe secrecy applies as a fundamental principle of law, which the lawyer must observe during the exercise of his profession, and which clients must be able to rely upon unconditionally for the purpose of the correct safeguarding of their interests. The obligation to observe secrecy is enshrined in the law (as of 1 January 2015; art. 11a Act on Advocates) and in the lawyers Code of Conduct (Rule 3).

The duty of professional secrecy is a duty of the lawyer towards the client. Pursuant to Article 11a Act on Advocates, insofar as not stipulated otherwise by law, a lawyer has a duty of confidentiality with regard to everything he learns of by virtue of practicing his profession. The same obligation applies to the employees and staff of the lawyer, as well as other persons involved in the exercise of the lawyer's profession.

Rule 3 (1) Code of Conduct: Lawyers have a legal obligation to observe secrecy; they shall not divulge the details of cases they are handling, the identity of their clients, or the nature and extent of their interests.

Intentional infringement of the obligation of secrecy by the lawyer has been made punishable (art. 272 Criminal Code). In addition disciplinary measures can be taken against a lawyer who infringes the obligation to observe secrecy. Finally, in civil proceedings damages may be claimed if a breach of the obligation of secrecy by the lawyer has caused harm to the client.

The right to refuse to give evidence

The lawyer's right to refuse to give evidence is protected in legislation (art. 165 (2)(b) Code of Civil Procedure and art. 218 Code of Criminal Procedure) and in a number of specific areas of law and legal procedures. Legal privilege is more than the right to refuse to give evidence. It means in summary: the right of the lawyer to maintain his obligation to observe secrecy with regard to his client towards everyone, therefore also to the court and other authorities. For example, lawyers claiming legal privilege regarding to matters that fall under their obligation to observe secrecy are entitled to decline to provide information requested by authorities, such as tax authorities. Also, the legislature has determined that certain powers

pertaining to criminal procedure cannot be applied against professionals who are entitled to refuse to give evidence. Specific provisions apply in case of a search of a lawyer's office.

The basis of legal privilege is a general principle of law applicable in the Netherlands. In 1985 the Dutch Supreme Court (Hoge Raad; ECLI:NL:HR:1985:AC9066) ruled that the right to refuse to give evidence of specific professionals who are in a position of trust is based on a general principle of law that is applicable in the Netherlands. This principle of law entails that, upon engaging certain confidential advisers, the general public interest of establishing the truth must give way to the general public interest that 'anyone must be able to turn to them for assistance and advice freely and without fear of disclosure of the matters that have been discussed'. A balancing of interests. The lawyer is one of the confidential advisers referred to in this context. When it regards lawyers, the general public interest of confidential and unhindered legal assistance should prevail.

The principle applies, irrespective of the existence of legislation in this respect (and should be reflected in legislation; the principle is also laid down in several articles).

The principle primarily serves the interests of society as a whole. It is the lawyer who decides if invoking the privilege is appropriate or not, in the given circumstances. This claim to privilege needs to be respected unless it is evident that such a claim is not justified.

It also ensues from the Supreme Court ruling that, with a view to legal certainty, any restrictions of and exceptions from this general principle of law are only permissible in very exceptional circumstances.

The legal privilege (obligation to observe secrecy and the right to refuse evidence) is not absolute, in the sense that it can be set aside by a statutory obligation or if other, more significant, interests prevail.

Examples of exceptions:

- The lawyer may decide to breach the obligation of secrecy when the lives and death of others are at stake;
- The lawyer may defend himself against a disciplinary claim by the client; he may provide information only to the extent necessary in order to defend himself;
- In disciplinary matters, in case a local Bar president ("*deken*") conducts an investigation to establish whether the lawyer complied with the law or Code of Conduct, the lawyer can not refuse to give information that falls under the scope of professional secrecy.

- A 'very exceptional circumstance' may be at hand when a lawyer is suspected of a criminal offence of a serious nature, for example when he is suspected of forming a criminal association with clients and of committing crimes like money laundering;
- Statutory Law exception: see for example Article 18a of the Act to Prevent Money laundering and Financing of Terrorism (" *Wwft*"); duty to report certain unusual transactions.

Only certain professions with certain characteristics can claim privilege: specific expertise, admission requirements as to education and experience, the profession must be of ongoing importance for society, there has to be disciplinary rules and sufficient supervision and it can not be performed without confidentiality.

About the scope

In the Dutch legal system, the protection of 'legal privilege' relates to information 'that the lawyer has been entrusted with in his capacity as a lawyer'. The information must have been obtained, produced or exchanged in 'the normal practice of the lawyer's profession', that is when providing legal services to a client who turned to him because of his capacity as a lawyer (see for example: ECLI:NL:HR:2011:BN0526).

It is therefore assumed that lawyers can claim privilege for both (i) activities relating to the avoiding of, preparing for, assisting, representing and/or defence in legal proceedings and (ii) the providing of legal advice on different legal matters, including tax(related) matters.

DAC-6

In the Netherlands, draft legislation for the implementation of DAC 6 was published on 19 December 2018. New provisions are included in the WIB (*Wet op de internationale bijstandsverlening bij heffing en invordering van belastingen*): The Netherlands International Assistance (Levy of Taxes) Act.

It was open for comments (consultation) until 1 February 2019. The Netherlands Bar has sent its advice in January 2019 on this draft legislation. I will focus on the provisions relating to legal privilege, but as a general remark: the draft legislation and its explanatory note seem to follow the wording of the Directive quite closely.

As a consequence it does not really help to clarify certain obligations and concepts of DAC-6. For example: as concerns the hallmarks: reference is simply made to the annex IV of DAC-6. As you know, the wording of the

hallmarks is rather broad. This leaves room for uncertainty as to the scope of the reporting obligation.

So as a general comment, that was also expressed by the Netherlands Bar: with a view to legal certainty, (much) more explanation is required.

Under this draft legislation, lawyers fall within the definition of an 'intermediary'. The definition of an intermediary is the same as in DAC-6.

Under the DAC, Member States may choose to adopt an exception ('a right to a waiver') to the reporting obligations for intermediaries who are entitled to a legal privilege and/or bound to professional secrecy obligations.

*At first sight, the draft legislation in the Netherlands appears to protect legal privilege, since it is stated (in art. 10h (5) WIB) that Article 53a (1) General State Tax Act (GSTA; AWR) shall apply mutatis mutandis. Pursuant to this provision, certain professional practitioners that are bound to confidentiality, including lawyers, can claim privilege and decline to provide information to the tax administration requested for third party enquiries relating to the levying of taxes.

Art. 53a (1) GSTA:

With regard to any refusal to comply with obligations relating to the levying of taxes on third parties only ministers of faith, notaries, lawyers, physicians and pharmacists may appeal to the circumstances that they are in the capacity of their status, office or profession, bound to confidentiality.

According to the draft explanatory memorandum, this means that legal privilege in tax matters as laid down in Article 53a (1) GSTA will be fully respected.

* However:

There is some discussion with the Ministry of Finance as to the scope of legal privilege when lawyers are providing legal advice in tax matters. In January 2017 the State Secretary for Finance expressed the intention to limit (or at least to clarify) the scope of legal privilege in tax (related) matters as laid down in Article 53a (1) GSTA.

According to the State Secretary for Finance, the scope is unclear and not in line with other jurisdictions. Reference was made to the 2011 recommendations of OECD Global Forum on Transparency and Exchange of Information. According to this peer review report it was recommended to clarify whether the scope of this provision was in line with Par. 19.3

commentary on art. 26 of the OECD Model Tax Convention. (NB: in the new report this is no longer a recommendation).

On this issue, no draft legislation has been published so far. Therefore, at this stage it is uncertain in what way and to what extent the scope of legal privilege in tax matters will be limited or clarified. In earlier messages from the State Secretary for Finance, reference was made to the following possibilities: a limitation to certain activities, excluding pre-existing documents, a duty to disclose certain information relating to client monies bank accounts.

In its advice on the draft legislation, the Netherlands Bar emphasized that legal privilege as laid down in Article 53a (1) GSTA should not be limited and that the underlying general principle of law should be respected. Legal privilege covers all information that has been obtained, produced or exchanged in 'the normal practice of the lawyer's profession', that is when providing legal services to a client who turned to him because of his capacity as a lawyer. It is irrespective of type of law, case or client, both for assistance in litigation and advise matters.

A limitation of the scope of legal privilege in tax matters may have consequences for the existence and scope of reporting obligations on lawyers under the DAC. So: as long as we don't know whether and how art. 53a (1) GSTA will be amended: not certain if the wording of the draft legislation respects legal privilege.

* Also:

Tax advisers that are not lawyers admitted to the Bar are not entitled to legal privilege under Dutch law, since their profession is not legally regulated. They have an informal (limited) right of non-disclosure only, which means that they may refuse to give access to the tax authorities to the tax advise (advising the taxable person on its tax situation) provided to their clients. Under the draft legislation for the implementation of DAC 6 in the Netherlands, such tax advisers are not exempted from the reporting obligations for intermediaries.

* Under the draft legislation for the implementation of DAC 6 in the Netherlands, a lawyer who invokes legal privilege has the obligation to immediately notify any other intermediary involved or, in the absence of another intermediary, the relevant tax payer of their reporting obligations. **NB** The draft legislation does not clarify what is meant by "immediately notify".

* It is not clear yet whether the sanctions/penalties that apply to the failure to comply with the obligations under the draft legislation also apply to lawyers if they fail to comply with their obligation to notify their clients or other intermediaries of their reporting obligations. (art. 11 (2) WIB): not complying of the obligations intentionally or gross negligence in the non compliance, may lead to severe administrative sanctions: EUR 830.000 max)

The Netherlands Bar has stressed in its advice that it should be clarified that such sanctions do not apply to the (non) compliance of the notification obligation by lawyers.

* It is not clear yet which authority supervises the compliance of the lawyers' obligations under the draft legislation for the implementation of DAC 6. The Ministry of Finance is the competent authority. Would it permit for example the tax authorities to enquire whether the lawyer has complied with the provision? If this would involve an examination of correspondence between the client and the intermediary this would effectively override legal privilege.

The Netherlands Bar has argued in its advice that the supervision of such lawyers' obligations should rest with the local Bar president, who in the Netherlands is also the supervisory authority under the Act on Advocates. (also for AML obligations).
