Recent developments in the legal profession in Belgium
Is there still a core business for lawyers?

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Lawyers represent and defend clients in Court. That is their traditional core business. Except for some minor exceptions[1], Belgian lawyers still have a monopoly to plead in court if they are members of the Bar.

There has, however, never been any monopoly in relation to legal advice in Belgium. A law degree is not even required in order to give legal advice. Lawyers admitted to the Bar have always shared this market with legal advisors who have not been admitted to the Bar, e.g. in-house lawyers employed by companies or legal advisors who have not sought admission to the Bar, and even with non-lawyers.

Legal advisors have always lobbied to obtain what they called a level playing field. They succeeded, for example, in having the VAT-exemption for Belgian lawyers (Bar members) abolished in 2014.

Another example can be found in the evolution of the anti-money laundering legislation. Initially the law of 12 January 2004 exempted only members of the Bar from the whistle-blower obligation in relation to money laundering operations, if they became aware of the relevant information in the context of legal advice to be given to their client (the law refers to "*determining the client's legal position*"). Other advisors remained obliged to report such information to the competent authority.

A law of 18 January 2010 extended the Bar members' privilege to notaries, statutory auditors, accountants and tax consultants (*experts fiscaux/ belastingconsulenten*). This law specifies, quite logically, that the reporting exemption will not apply if the legal advice is given for money laundering purposes or if the advisor knows or should have known that his or her advice is sought for money laundering purposes.

The reporting exemption was further extended to bookkeepers, tax advisors (*fiscalistes/ fiscalisten*) and bailiffs in a law of 18 September 2017. The outcome of this is that the legal professions as well as the regulated so-called "cipher-professions" (*professionnels du chiffre/*

[1] e.g. for the justice of the peace (*vrederechter/ juge de paix*) where a spouse or relative can act on behalf of a family member; for labour courts where a labour union representative is allowed to plead for a union member.

cijferberoepen) benefit from the legal professional privilege under the anti-money laundering law.

Surprisingly, however, the privilege for all of these professions relates, not only to legal advice, for which there is no monopoly, but the law[2] also refers to "*the representation and the defence of the client in court, including the advice on starting or avoiding litigation, irrespective if such information is obtained before, during or after such litigation*", although lawyers (members of the Bar) have a monopoly to represent a client in court.

The latest, alarming step in this evolution seems to be the implementation in Belgium of Directive 2018/822(EU) of 25 May 2018 (DAC6 – Disclosure of Aggressive international tax Constructions). This Directive allows a Member State to put in place an exemption from the (preliminary) mandatory disclosure of international aggressive tax schemes for professionals who are subject to legal professional privilege under domestic law. In such case the obligation to disclose is shifted from the exempted advisor to another intermediary (e.g. a bank) or to the client. The exempted advisor involved is obliged to inform the next intermediary and/or the client of the disclosure obligation.

According to the most recent version of the Belgian draft bill implementing these provisions, this exemption will be extended to any person who provides legal advice on a professional basis, even if the professional involved does not belong to any of the regulated professions. In contrast, the scope of the exemption is narrowed down when compared to the anti-money laundering law. The draft bill limits the concept of "*determination of the legal position of the client*" to the explanation of the legal consequences of the actual position of the client, but excludes advice (to be) given in respect of envisaged, future transactions.

If this wording is maintained, every legal advisor, irrespective of his or her being a member of the Bar, should disclose to the tax authorities any advice given on an envisaged transaction captured by the Directive. For Bar members this would be tantamount to an obvious violation of his or her professional secret as the same has been defined by the Belgian Constitutional Court[3] with reference to, among other, Articles 6 and 8 of the European Convention on Human Rights.

The authors of the draft bill appear to take the unsettling view that Article 6 ECHR does not prevent the Belgian parliament from voting a law that obliges a lawyer (member of the Bar) to disclose advice given to a client on a perfectly legal international construction. They pretend, not only that Article 6 provides for a "tax carve out", but also that the case law of the Belgian Constitutional Court only relates to criminal cases or laws that impose sanctions. They conclude that, since the schemes to be disclosed are (supposedly) perfectly legal, an exception to the legal professional privilege is permissible or, worse, that the legal professional privilege simply does not apply to legal advice in tax matters outside the context of court or administrative proceedings.

Last but not least, the draft bill contains a specific provision which forbids legal advisors (including members of the Bar) to invoke legal professional privilege in connection with an

[2] art. 53, L. 18 September 2017.
[3] Constitutional Court, 102/2008, 10 July 2008; 174/2018, 6 December 2018.

audit by the tax administration intended to verify their compliance with the new mandatory disclosure law[4].

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Another phenomenon is, not only that other professionals are entering the legal market, but also that lawyers are competing more and more often on markets which are traditionally not theirs.

Pursuant to Article 437 of the Judicial Code, as it is currently phrased, the profession of lawyers (Bar members) is incompatible with, *inter alia*, being engaged in trade or industry, or carrying out an activity in a capacity as employee, except, in this last case, if the employment does not jeopardize the lawyer's independence and the dignity of the Bar.

However, Belgian law treats lawyers as "entrepreneurs"[5]. The fact that they are legally treated as entrepreneurs tells us why, more and more often, lawyers also behave as entrepreneurs.

Because under Belgian law a director of a company is not deemed to be engaged in "trade or industry"[6], it has been accepted since 1968[7] that a member of the Bar can act as company director (board member), but not as a managing director on the ground that a managing director comes too close to the actual commercial activity carried out by the company.

French or German language lawyers – belonging to a Bar that is a member of OBFG, the association of French and German language Bars – who are also company directors cannot represent the company in court [8]. In contrast, for Dutch language lawyers – members of a Bar that belongs to the OVB, the association of Dutch language Bars – this is in principle allowed, except where the lawyer is personally involved or in cases where the liability of the board of directors may be engaged[9].

Since 2000 Bar members have also been allowed to act as "syndic" to manage the co-ownership in apartment blocks. It has also been accepted, in individual cases, that a lawyer sets up an additional activity as a therapist[10], a farmer[11], a compliance officer[12]. A further general rule allows Bar members to act as data protection officers[13].

Some of these activities are deemed to be "part of" the usual activities of a lawyer. Such activities are covered by the collective insurance for professional liability subscribed by the Bar[14]. Conversely, other types of activities are considered "non-lawyer activities", but are nevertheless covered by this insurance on the basis of an explicit provision in the insurance

[4] Exception to Art. 334 of the Income Tax Code, which recognises legal professional privilege in the context of tax audits.
[5] See *inter alia* ECJ, 19 February 2002, C-309/99, Wouters *et alii*/NOVA.
[6] For it is the company that is engaged in trade or industry, not the individuals that take responsibility as directors – at least that is the reasoning behind the rule.
[7] J. STEVENS, Advocatuur – Regels en deontologie, Wolters Kluwer, 2015, n° 546, p. 397.
[8] Art. 2.35.1 Code de déontologie OBFG.
[9] Art. 16 Codex Deontologie OVB.
[10] OVB-advice n° 170, 26 November 2002.
[11] OVB-advice n° 545, 12 October 2015.
[12] OVB-advice n° 600, 6 July 2016.
[13] Art. 2.100.a Internal Regulations French Brussels Bar; Art. 169bis Codex Deontologie OVB.
[14] DPO.

policy[15]. Other activities are not covered by the professional liability insurance[16] or are even explicitly excluded[17].

The legal professional privilege does not apply to these "side-activities". Consequently the lawyer is obliged to segregate his or her additional occupation from his law practice. It remains that having such other activity multiplies the potential for conflicts of interest in the law firm, affecting even the partners and associates of the "entrepreneurial" lawyer.

Recently, the General Assembly of the OVB (Association of Dutch language Bars) took a further step in this evolution[18]. As of 15 April 2019 a (Dutch language) Belgian lawyer will, as a rule, be entitled to engage in any other (additional) activity as long as it does not compromise his or her independence or professional secret as lawyer, and at all times subject to the proviso that he or she avoids all conflicts of interest resulting from this activity and the activity does not jeopardize the "public faith" in the legal profession or its core values.

Some activities are excluded *per se*, such as banking activities, investment advice and investment services, arms trading, the organisation of gambling etc. Other activities are subject to a formal preliminary notification to the President of the Bar[19]; this prior notification is intended to enable the Bar President to question the compatibility of the activity that is notified with the legal profession and, where appropriate, to submit the compatibility issue to the Bar Council.

It will also be possible for a Bar member to act as managing director of a company that is engaged in trade or industry (subject to the exception of the forbidden activities).

It goes without saying that this change will not make life easier for the Bar Presidents and Bar Councils. Some believe that this extension of the perimeter of what a lawyer is permitted to do is no change for the better for the legal profession. They think it is an unfortunate attempt to keep as many lawyers as possible aboard in a shrinking legal market, that has to be shared with other service providers, and where clients do not cease to put fee levels under pressure.

Optimists see the changes as a long expected opportunity that enables lawyers, at last, to compete with big auditing or other consultancy firms and offer their clients a true full service.

[15] Syndic.
[16] Therapist.
[17] Company director.
[18] Decision of 19 December 2018, BS 15 January 2019, applicable as of 15 April 2019.
[19] with the exception of academic activities, political functions and activities as arbitrator and mediator, that are exempt from notification.