

Belgium publishes draft proposal on Mandatory Disclosure Rules

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Executive summary

The Belgian Government has published draft legislation, accompanied by detailed explanatory notes, implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

The draft legislation was published on 26 November 2019.

The Belgian draft legislation is subject to the formal legislative process and is unlikely to be amended before final enactment. If implemented as currently proposed, the Belgian Mandatory Disclosure Rules (MDR) legislation will be broadly aligned to the requirements of the Directive. The draft explanatory notes contain some useful clarifications for the purposes of interpreting the concepts included in the draft legislation.

The draft legislation is expected to be finalized by the end of this year.

Detailed discussion

Background

The Council of the European Union Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (the Directive or DAC6), entered into force on 25 June 2018.¹

The Directive requires intermediaries (including EU-based tax consultants, banks and lawyers) and in some situations, taxpayers, to report certain cross-border arrangements (reportable arrangements) to the relevant EU member state tax authority. This disclosure regime applies to all taxes except value added tax (VAT), customs duties, excise duties and compulsory social security contributions.² Cross-border arrangements will be reportable if they contain certain features (known as hallmarks). The hallmarks cover a broad range of structures and transactions. For more background, see EY Global Tax Alert, [Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers](#), dated 14 March 2018.

EU Member States are to adopt and publish national laws required to comply with the Directive by 31 December 2019. Belgium will introduce domestic legislation, which will take effect from 1 July 2020.

A comparison between the draft Belgian legislation and the Directive is summarized below.

Scope of taxes covered

The scope of the taxes covered under the Belgian draft legislation is fully aligned with the Directive and applies to all taxes except VAT, customs duties, excise duties and compulsory social security contributions.

Reportable arrangements

Under the Directive, an arrangement is reportable if:

- ▶ The arrangement meets the definition of a cross-border arrangement; and
- ▶ The arrangement meets at least one of the hallmarks A-E specified in Annex IV of the Directive.

Under DAC6, cross-border arrangements are defined as arrangements concerning more than one Member State or a Member State and a third country. The hallmarks can be distinguished as hallmarks which are subject to the main benefit test (MBT), and those which by themselves trigger a reporting obligation without being subject to the MBT.

The Belgian draft legislation defines a reportable cross-border arrangement exactly in line with the Directive.

According to the explanatory notes, the concept of “arrangement” must be interpreted very broadly.

The Belgian draft legislation does not cover domestic arrangements and does not include any hallmarks in addition to hallmarks A-E included in Annex IV of the Directive.

Hallmarks A-E of the Directive

The description of the hallmarks included in the draft Belgian legislation follows the text of the hallmarks included in DAC6.

Most elements of the hallmarks included in DAC6 are not expressly defined. The explanatory notes provide some examples of the practical elements of the hallmarks, some of which are listed below:

- ▶ **Hallmark A.3 (an arrangement that has substantially standardized documentation and/or structure):** The explanatory notes clarify that the concept of arrangements which have standardized documentation and/or structure do not include internal working documents which merely reflect unfinished ideas or concepts.
- ▶ **Hallmark D.1 (an arrangement that may have the effect of undermining reporting obligations under EU legislation or equivalent agreements on the automatic exchange of Financial Account information):** A cross-border arrangement may only be reportable under hallmark D.1 where it can reasonably be assumed that the cross-border arrangement was designed with the intention of avoiding reporting obligations under Common Reporting Standard (CRS) legislation. The mere fact that a cross-border arrangement has the effect of not having to be reported under the CRS Law of 16 December 2015 is insufficient to conclude that the reporting obligation under that legislation is undermined, within the meaning of hallmark D.1.
- ▶ **Hallmark E.1 (arrangements which involve the use of unilateral safe harbors):** The explanatory notes indicate that the concept of “unilateral safe harbor rules” refers to rules that apply only to a particular category or categories of taxpayers or transactions and that such rules relieve the taxpayers concerned of obligations imposed by the general transfer pricing rules in that country. In other words, such rules impose simpler obligations than under that country’s general transfer pricing regime. Alternatively, unilateral safe harbor rules may exempt categories of taxpayers or transactions from the application of all or part of the general transfer pricing rules. However, this does not

cover mere administrative simplification of rules, nor does it cover advance pricing arrangements. Moreover, safe harbor rules do not relate to rules on thin capitalization.

- ▶ **Hallmark E2 (arrangements involving the transfer of hard to value intangibles):** The explanatory notes indicate that for the purposes of interpreting the concept of “hard to value intangible”, reference should be made to Chapter 6 of the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines on Hard to Value Intangibles.

Main benefit test

In accordance with DAC6, the MBT will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, is the obtaining of a tax advantage.

The explanatory notes indicate that for the purposes of determining whether a tax advantage has been obtained, without being exhaustive, the analysis should consider whether one or more of the following elements exist: an amount is not included in the taxable base; the taxpayer benefits from a deduction, losses were incurred for tax purposes, no withholding tax is due and there is a credit for foreign tax.

Intermediaries

Under the Directive, intermediaries with EU nexus have the primary obligation to report arrangements to the tax authority. The Directive gives Member States the option to exempt intermediaries from the obligation to report where the reporting obligation would breach legal professional privilege (LPP). If there are no intermediaries which can report, the obligation will shift to the relevant taxpayers.

The definition of an intermediary under the Belgian draft legislation is in line with the Directive.

The draft Belgian legislation exempts intermediaries from the obligation to report where the reporting obligation would breach the LPP. The exemption for LPP is only expected to apply in limited cases, namely where the determination of the legal position of the relevant taxpayer is at stake (e.g., where an intermediary advises the taxpayer on the possible outcome and risks of starting legal proceedings), or where the relevant taxpayer is represented or defended in court. In addition, the LPP exemption can only apply if the intermediary advising on the determination of the

legal position of the relevant taxpayer has taken no part in co-planning, designing or implementing the reportable arrangement.

The LPP exemption can only be claimed if the relevant intermediary informs the other intermediaries or relevant taxpayer of its LPP exemption and their obligations to report. The relevant taxpayer can, in writing, waive the LPP and permit the concerned intermediary to comply with his reporting duty.

The LPP cannot be applied for marketable arrangements.

The Belgian explanatory notes confirm that where an intermediary is a legal person with employees, the liability of an intermediary to report cross-border arrangements does not apply to the employees provided that they do not perform a management function.

The same principle applies to the employees of the relevant taxpayer in so far as they are not advising their own clients as part of a private business.

Reporting deadlines

Under DAC6, for intermediaries (and relevant taxpayers), the trigger events for reporting (from 1 July 2020) are when the reportable arrangement is “made available for implementation”, when the reportable arrangement is “ready for implementation” or when “the first step of implementation has been made.”

Under the Directive, reporting will start from 1 July 2020 and exchanges between jurisdictions will start from 31 October 2020. However, reports will retroactively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.

The Belgian reporting deadlines are fully aligned with DAC6.

Penalties

Penalties apply to both intermediaries and relevant taxpayers.

Failure to report or late reporting is expected to result in monetary penalties ranging between €5,000 and €50,000, and insufficient or incomplete reporting is expected to result in monetary penalties ranging between €1,250 and €12,500.

Penalties in the higher range will apply to the extent that the intermediary or relevant taxpayer has a high number of failures or infringements in respect of their reporting obligations.

Non-compliance with reporting obligations for arrangements implemented in the interim period (i.e., between 25 June 2018 and 1 July 2020) will attract a lower penalty if reported before 31 December 2020.

Next steps

The Belgian draft legislation clarifies some questions with respect to the interpretation and implementation of DAC6, however many questions remain unanswered. It is anticipated that administrative guidelines will provide more clarification.

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Due to the scale and significance of the regulations included in the draft legislation, taxpayers and intermediaries who have operations in Belgium should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations and specific deadlines.

Endnotes

1. For background on MDR, see EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.
2. DAC6 sets out a minimum standard. Member States can take further measures; for example, (i) introduce reporting obligations for purely domestic arrangements; (ii) extend the scope of taxes covered; (iii) bring forward the start date for reporting.

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