

Belgium's Tax Authority publishes MDR FAQs

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Executive summary

The Belgian Tax Authority published, on 26 June 2020, the long-awaited list of Frequently Asked Questions (FAQs)¹ regarding the interpretation of certain requirements and terminology of the final Mandatory Disclosure Rules (MDR) legislation, adopted on 12 December 2019,² to implement the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive). Under DAC6, taxpayers and intermediaries are required to report cross-border reportable arrangements from 1 July 2020. However, reports will retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.³

The first reporting deadline in Belgium was recently deferred to the end of January of 2021.⁴

Key highlights of the issued FAQs are summarized below.

Key highlights

Reportable arrangements

With respect to the term "arrangement," the FAQs confirm that, in principle, this term should be interpreted broadly and includes among others; the conclusion of a contract (except if this would constitute the daily activity of the intermediary),

the incorporation of a subsidiary, and the migration of a company. However, the FAQs exclude (among others) the mere application of a domestic tax regime such as the application of the Belgian Innovation Income Deduction, the Dividend Received Deduction and the Belgian Expatriate Regime, etc., provided that it does not form part of a larger set of steps that would qualify as a (series of) arrangement(s). Moreover, certain services rendered by an intermediary are considered out of scope, such as accounting services, tax return compliance services, transfer pricing documentation services, services consisting of the assistance with a tax audit and a tax due diligence.

According to the FAQs, an arrangement is not “cross-border” if for example a Belgian company sells shares held in another Belgian company to the Belgian permanent establishment of a nonresident taxpayer. The FAQs provide similar examples of lacking a cross-border component.

Main benefit test

The FAQs mention that the “Main Benefit Test” (MBT) would only be met if the primary advantage or one of the primary advantages that one would reasonably expect to obtain from the arrangement, is a **direct** tax benefit. Such benefit can be obtained within or outside of the EU. The FAQs also provide a non-exhaustive list of tax benefits, such as a tax deduction, a non-inclusion in the tax basis and a tax deferral. The mere application of a foreign tax regime (even if preferential) does not automatically mean that the MBT would be met.

Intermediary

As to the concept of an intermediary, the FAQs outline the difference between a “promoter” and a “service provider.” The FAQs provide that an internal financial department of a corporate taxpayer may also constitute an intermediary. In such case, the corporate taxpayer may have to report (and not its employees). In situations where there is more than one intermediary, then the reporting intermediary gives relief to the other intermediaries by passing on the reference number and a summary of the reported arrangement. The FAQs also recognize that an intermediary may invoke Legal Professional Privilege.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The FAQs also provide some clarifications regarding the hallmarks included in the final MDR legislation such as:

- ▶ Hallmark A3 (Standardized arrangements): the FAQs state that this hallmark relates to pre-fabricated fiscal products which can be sold and implemented without any form of professional assistance. The FAQs do not however provide any guidance with respect to the presumed link (or differential) to the concept of “marketable arrangements.”
- ▶ Hallmark B1 (Transfer of tax losses): the FAQs mention that this hallmark also includes a company which is in a profitable situation and has tax losses carried forward. Furthermore, while the arrangement must include a participant taking contrived steps to: (i) acquire a loss-making company; (ii) discontinue the main activity; and (iii) use the losses, the order of the contrived steps included in hallmark B1 should, according to the FAQs, be irrelevant.
- ▶ Hallmark B2 (Conversion to low-tax income): the FAQs clarify that pre-existing income should effectively be converted into a new category of income which is taxed at a lower rate (or not at all) in order for the hallmark to apply.
- ▶ Hallmark C4, (Transfer of assets): the FAQs confirm that transfers between a head office and branch and vice versa, may fall within the scope of this hallmark.
- ▶ Hallmark D2 (Obscuring beneficial ownership): the FAQs mention that this hallmark would not be applicable in cases where the ultimate beneficial owner identification was done in accordance with anti-money laundering legislation.
- ▶ Hallmark E1 (Unilateral transfer pricing safe harbor rules): the FAQs define a unilateral safe harbor rule (EU or non-EU) as a deviation from a jurisdiction’s transfer pricing regulation and confirms that Belgian domestic tax law currently does not have any unilateral safe harbor rules.
- ▶ Hallmark E2 (Transfer of hard-to-value-intangible (HTVI)): the FAQs mention that a transfer is to be understood in the economic sense and not in the strict legal sense. As such, transfers between a head office and branch should be included as well. The granting of the right to use an HTVI, such as a license or a cost contributing arrangement, may also be considered a transfer of an HTVI.
- ▶ Hallmark E3 (Transfer of business): the FAQs clarify that a tax neutral cross-border merger, as well as the liquidation of a company or branch, provided that functions, risks or assets have not been transferred out shortly before the liquidation should not fall within the scope of hallmark E3.

Next Steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. 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 these obligations.

Endnotes

1. Link to the FAQs can be accessed through this link: [FR/NL](#).
2. See EY Global Tax Alert, [Belgium publishes legislation on Mandatory Disclosure Rules](#), dated 8 January 2020.
3. See EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.
4. See EY Global Tax Alert, [Belgian update regarding deferred MDR reporting deadlines for reportable cross-border arrangements](#), dated 5 June 2020.

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