

Mandatory Disclosure of Aggressive Cross-Border Tax Planning Arrangements: Implementation of DAC 6 in Belgium

In this article, the authors discuss Belgian legislation transposing DAC 6 into domestic law.

1. Introduction

On 20 December 2019, a Bill¹ implementing Directive 2018/822 of 25 May 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (hereinafter DAC 6 or the Directive) into Belgian law, was adopted by the Belgian parliament.² As from 1 July 2020, “intermediaries” (or taxpayers) established in Belgium will be obliged to report certain cross-border arrangements to the Belgian tax authorities.

The impact of this legal text should not be underestimated. First, the list of reportable arrangements is very broad: several reportable schemes are defined in general and vague terms, which will undoubtedly cause headaches to intermediaries (and taxpayers). Second, the reporting obligation will not only apply to major international law firms or advisory firms; indeed, the definition of “intermediary” is so wide that it may also include banks, accountants, wealth managers, auditors, asset managers of investment funds, insurance companies, family offices, etc.

The Belgian Minister of Finance has indicated that an administrative circular, which will clarify a certain number of aspects of the new law, is forthcoming.³ Intermediaries will definitely welcome further guidance on the new bill, especially with respect to the hallmarks. It is indeed already worth noting that the explanatory memorandum to the law contains few clarifications on the hallmarks, which does not foster legal certainty. Needless to say, a few practical examples would have been welcome. For the time being, Belgian intermediaries (and taxpayers) find themselves in a complicated situation, as they must form their own opinion about the interpretation of

the different hallmarks, with the very limited guidance that they have.

This exercise is not a walk in the park. The Belgian law provides relatively high penalties (up to a maximum of EUR 100,000) for failure to comply with the reporting obligations. In addition, one should not forget that, even though the law will enter into force on 1 July 2020, the reporting obligation will apply with retroactive effect to reportable arrangements in respect of which the first step was implemented between 25 August 2018 and 1 July 2020. The horrifying complexity of the law, combined with a lack of guidance, retroactive effect and high penalties, is quite Kafkaesque. This article will now turn to how DAC 6 has been implemented in Belgium.

2. Who Is Required to Report?

2.1. Introductory remarks

The person who is primarily subject to the reporting duty is defined as the “intermediary”. The Belgian bill refers to the definition of intermediary laid down in DAC 6 (new article 326/1, 4° of the Belgian Income Tax Code, hereafter BITC).⁴

According to the explanatory memorandum to the Belgian law, the notion of “intermediary” should be interpreted in a broad sense, obliging “any natural or legal person that, in one way or another, designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement” to report such arrangement to the competent national authority.⁵

2.2. Promoters and service providers

It is interesting to note that the explanatory memorandum refers to Action 12 of the OECD Base Erosion and Profit Shifting Project,⁶ which makes a distinction between two types of intermediaries: “promoters” and “service providers”.

The first category (promoter) encompasses any person “that, in one way or another, designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement”.⁷ This definition mainly targets, in the authors’

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1. Council Directive (EU) 2018/822/EU of 25 May 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139/1 (2018), Primary Sources IBFD [hereinafter DAC-6].
2. BE: Bill implementing into Belgian law Directive 2018/822 of 25 May 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, Belgian Gazette (30 Dec. 2019).
3. BE: Parliamentary Documents, House of Representatives (2019-2020), n° 791/3, p. 17.

4. BE: Income Tax Code, Primary Sources IBFD.

5. BE: Parliamentary Documents, House of Representatives (2019-2020), n° 791/1, p. 9.

6. This report sets guidelines for the design of mandatory disclosure rules for aggressive arrangements.

7. Parliamentary Documents, *supra* n. 5, at pp. 9-10.