EUROPEAN UNION'S NEW REPORTING OBLIGATIONS FOR TAX INTERMEDIARIES: KEY FEATURES OF THE BELGIAN ADMINISTRATIVE GUIDANCE – D.A.C.6

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INTRODUCTION

The E.U.'s Directive 2018/822/E.U. introduced mandatory disclosure rules for aggressive cross-border arrangements for tax intermediaries ("D.A.C.6" or "the Directive").[1] On the surface, the Directive is a uniform European framework. In practice, however, the Directive's national implementation by Member States differs in several key aspects, such as the exclusion of purely domestic arrangements, the level and type of penalties, and the application of professional privilege. Likewise, the Directive's broad and vague terminology leads to differing interpretations among Member States.[2]

As a result, intermediaries and taxpayers are left in a quandary. They must chart their reporting path as to the interpretation of the Directive, while being under the threat of high penalties if the path ultimately results if a finding of noncompliance. Surprisingly, over-reporting is not a solution, as it may contravene data protection and professional secrecy obligations. In light of the situation, many Member States are currently publishing their own administrative guidance on the interpretation of the Directive.

In this article, the authors discuss the key features of the Belgian administrative guidance. They focus on the Explanatory Memorandum of the Belgian Law implementing

1 Council Directive (E.U.) 2018/822/E.U. 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. The acronym "D.A.C." stands for "Directive on Administrative Cooperation."

2 See B. Peeters and L. Vanneste, "European Union/International – DAC 6: An Additional Common EU Reporting Standard?", World Tax Journal, 2020, Vol. 12, n° 3, p. 502:

> As DAC 6 applies a broad (and thereby vague) terminology, substantial differences in domestic application will appear. Different domestic implementations not only already reveal these differences in material, subjective and temporal scope, but the formal implementation is also far from uniform

For a comparative view of D.A.C.6's implementation in different Members States, see K. Resenig, "European Union - The Current State of DAC-6 Implementation in the European Union", European Taxation, 2020, Vol. 60, n° 12, pp. 527-535.

the Directive[3] and the list of Frequently Asked Questions ("F.A.Q.") recently published by the Belgian Revenue Service.[4]

REPORTABLE CROSS-BORDER ARRANGEMENTS

The Directive does not require intermediaries to reveal all tax tricks to the national tax authority. The reporting obligation covers only "reportable" (2.C.) "cross-border" (2.B.) "arrangements" (2.A.).

What is an "Arrangement?"

The Directive and the Belgian Law deliberately stop short of defining the term "arrangement" (*dispositif* in French, *constructie* in Dutch). In this fashion, the reporting obligation remains wide-ranging and covers continuously evolving tax-planning schemes.[5]

At first glance, the F.A.Q. follows a similar all-encompassing approach and indicates that

> The concept of "arrangement" is extremely broad and covers any agreement, act, contract, convention, plan, scheme, project, structure, process of incorporation, transaction, or any combination of these elements, express or implied, written or oral, aiming to achieve a particular purpose or implementing a particular idea.[6]

Nonetheless, the F.A.Q. provides various helpful examples of what would and would not qualify as arrangements.[7]

- Transactions qualifying as arrangements include the migration of a company, the incorporation of a subsidiary, and the conclusion of a contract.
- Transactions not qualifying as arrangements are the mere application of a Belgian tax incentive, such as the Belgian innovation income deduction

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3 Law of 20 December 2019, Belgian State Gazette, 30 December 2019 (hereinafter: "the Belgian Law"); For further details on the Belgian Law, see D.-E. Philippe et E. Yuksel, "Mandatory Disclosure of Aggressive Cross-Border Tax Planning Arrangements : Implementation of DAC 6 in Belgium", European Taxation, 2020, vol. 60, n° 4, pp. 121-128 ; J. Malherbe, "*La déclaration obligatoire des dispositifs transfrontières – Directive DAC 6 du 25 mai 2018 et loi du 20 décembre 2019*", *Revue Générale du Contentieux Fiscal*, 2020/1-2, pp. 29-40.

4 Belgian Circular Letter, "F.A.Q.: DAC 6 - *Déclaration des dispositifs transfrontières*", available in French and Dutch at www.myminfin.be.

5 F.A.Q., no. 3.1.; See also Belgian Parliamentary Documents, House of Representatives, 2019-2020, n° 55-791/001, p. 8 (hereinafter: "Explanatory Memorandum").

6 F.A.Q., no. 3.1 (our translation); See also Explanatory Memorandum, p. 8 (our translation):

> Although the directive does not define the concept of 'arrangement', it refers to tax planning structures that allow shifting taxable profits towards more beneficial tax regimes or reducing the taxpayer's overall tax bill.

7 F.A.Q., no. 3.1; Explanatory Memorandum, p. 7.

regime, the performance of certain services provided by intermediaries, such as the filing of tax returns, performing benchmark studies, providing accounting services or assisting the taxpayer during a tax audit or a tax due diligence review. In general, there is no arrangement where the relevant intermediary, participant or taxpayer remains passive.

What is a "Cross-Border" Arrangement?

Under the Directive and the Belgian Law, an arrangement is a cross-border arrangement when it concerns (i) more than one E.U. Member State or one E.U. Member State and a third country[8] and (ii) one or more participants are tax resident in different jurisdictions or carries out activities in different jurisdictions.

In contrast with certain other Member States, such as Poland or Portugal, Belgium does not cover purely domestic arrangements.[9] For arrangements with a cross-border aspect, the F.A.Q. specifies that an arrangement is not a cross-border arrangement in any of the following circumstances:[10]

- An entity in an E.U. Member State has a foreign shareholder
- An intermediary is located in a jurisdiction that is different from the participants' jurisdiction, unless the intermediary qualifies as a participant, within the meaning explained below
- The taxpayer and all participants are in countries outside the E.U., unless there is a permanent establishment within the E.U.
- A Belgian corporation sells the shares of another Belgian corporation to the Belgian permanent establishment of a foreign corporation

The Directive and the Belgian Law distinguish intermediaries from participants.

- Under the Directive, an "intermediary" is anyone who designs, markets, organizes, or makes available or implements a reportable arrangement or anyone who helps with reportable activities and knows or could reasonably be expected to know that it is doing so.[11] Belgian Law is in line with this broad definition.[12] The F.A.Q. mentions typical intermediaries, such as consultants, lawyers, auditors, accountants, notaries, in-house legal counsel, banks, and holding companies.
- Neither the Directive nor the Belgian Law define the concept of "participant." The F.A.Q. indicates the following:[13]
  - The relevant taxpayer is always a participant.
  - An intermediary becomes a participant when he plays an active role in an arrangement. For instance, the mere fact that an intermediary

8 Directive, art. 1, (1), (b), 18; Belgian Income Tax Code, art. 326/1, 1°.

9 Explanatory Memorandum, p. 8.

10 F.A.Q., no. 3.2.1.

11 Directive, art. 1, (1), (b), 21.

12 Belgian Income Tax Code, art. 326/1, 4°.

13 F.A.Q., no. 3.2.2.

advises a resident of an E.U. Member State to use a foreign corporation in an arrangement does not make the intermediary a participant. Conversely, if the intermediary is a director of the foreign corporation that is recommended to a participant, the intermediary has taken an active role in the arrangement and is considered to be a participant.

- Any legal entity or person – such as a corporation, limited liability company, and the like – becomes a participant when it plays an active role in the arrangement.

When a Belgian tax resident transfers real property located outside of Belgium to another Belgian tax resident, the transaction is not a cross-border arrangement because the participants are residents of Belgium. The foreign property is not a "participant."[14] Similarly, the F.A.Q. mentions that the formation of a corporation outside of Belgium by two Belgian tax residents does not have any cross-border dimension, in principle. At the time of formation, the new corporation does not qualify as a "participant" because no activity has yet been carried on by the corporation. As a result, the two founders in the example are the only participants and the arrangement does not involve cross-border activity. The conclusion would differ if the two founders were tax resident in different jurisdictions, carried on activity in different jurisdiction, or one more played active roles in the arrangement.

"Hallmarks are broad categories setting out characteristics identified as indicative of aggressive tax planning."

When is a Cross-Border Arrangement Reportable?

Cross-border arrangements are reportable when at least one of the "hallmarks" set out in the Belgian Law is met. Belgian hallmarks are identical to those listed in the Directive. Hallmarks are broad categories setting out characteristics identified as indicative of aggressive tax planning.[15] While some hallmarks automatically trigger a reporting obligation, others apply only if they meet a so-called "Main Benefit Test" ("M.B.T."). The M.B.T. is met where a tax advantage is the main or one of the main benefits of an arrangement. However, the Directive does not define the concept of "tax advantage." As a result, Member States have opted for slightly different interpretations.

Regarding the M.B.T., the F.A.Q. mentions that Belgium requires a "direct tax advantage" such as a tax deduction, an exclusion from the tax base, a deferral of tax, or the elimination of a withholding tax.[16] Conversely, the mere application of a preferential foreign (non-Belgian) tax regime does not constitute a direct tax advantage. Under the Belgian M.B.T., a direct tax advantage covers taxes within or outside the E.U.

Regarding the hallmarks, the F.A.Q. provides various examples and sheds some light on the vague terminology of Belgian law.[17] In broad terms, the following are the key elements that come out of the Belgian administrative guidance:

- Hallmark A3 – Standardized documentation and/or structure:[18] This hallmark aims at so-called "mass-marketed schemes," involving prefabricated tax products that can be sold and implemented without much professional

[14] Explanatory Memorandum, p. 9.

[15] Belgian Income Tax Code, art. 326/1, 3°.

[16] F.A.Q., no. 5.2; Explanatory Memorandum, p. 12.

[17] See Belgian Income Tax Code, art. 326/2.

[18] F.A.Q., no. 4.1.5.

assistance. For instance, the mere inclusion of the taxpayer's name on a readymade arrangement could lead to the application of this hallmark. In comparison, newsletters, brochures or leaflets providing general information about an arrangement are not considered to be standardized documentation. The same applies to internal working documents that merely reflect incomplete ideas or concepts.

- Hallmark B1 – Transfer of tax losses:[19] This hallmark applies only where artificial steps are taken to (i) acquire a loss-making corporation, (ii) discontinue the corporation's principal historic activity, and (iii) utilize the losses. The order of steps is irrelevant, but all three must be present.

- Hallmark B2 – Conversion to low-tax income:[20] This hallmark applies only when pre-existing income is effectively converted into a new category of income that is taxed at a lower rate or is completely exempt from tax. However, this hallmark does not apply when a Belgian corporation issues a convertible bond to a foreign shareholder.

- Hallmark C4 – Transfer of assets:[21] Transfers of assets between a Belgian corporation and its foreign permanent establishment are covered by this hallmark no matter which is the transferor or transferee. Also covered is the transfer of the shares of a subsidiary when the investment in the subsidiary constitutes a participation. The share investment in this circumstance constitutes an asset and the transfer of the asset across a border is covered by this hallmark.

- Hallmark D2 – Obscuring beneficial ownership:[22] This hallmark refers to arrangements that have the effect of undermining the rules on beneficial ownership, the Common Reporting Standards or any other equivalent agreement on the automatic exchange of financial account information. According to the F.A.Q., this hallmark does not apply when the ultimate beneficial owner identification is made in accordance with the E.U.'s anti-money laundering legislation.

- Hallmark E1 – Unilateral transfer pricing safe harbor rules:[23] A unilateral safe harbor rule, whether implemented by an E.U. Member State of another country, is a deviation from a jurisdiction's transfer pricing regulation. Belgium does not have any unilateral safe harbor rules.[24]

- Hallmark E2 – Transfer of a hard-to-value-intangible asset:[25] The term "transfer" refers more to the economic reality of beneficial enjoyment rather than to legal title of the asset. Licensing or cost contributing agreements are covered. Transfers across a border between the head office of a corporation

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[19] F.A.Q., no. 4.2.3.

[20] F.A.Q., no. 4.2.4.

[21] F.A.Q., no. 4.3.4.

[22] F.A.Q., no. 4.4.4.

[23] F.A.Q., no. 4.5.3.

[24] *Id.*

[25] F.A.Q., no. 4.5.4.

and this branch are also covered. It does not matter whether the head office is the transferor or the transferee.

- Hallmark E3 – Transfer of a business:[26] Tax neutral, cross-border mergers and liquidations are not covered by this hallmark when functions, risks and assets have not been transferred in advance of the transaction.

ADVANCE TAX RULING

*"**. . .the Belgian Ruling Commission will not take any position on the D.A.C.6 reporting obligation in an Advance Tax Ruling.**"*

The F.A.Q. clearly mentions that the Belgian Ruling Commission will not take any position on the D.A.C.6 reporting obligation in an Advance Tax Ruling ("A.T.R.").[27] The rationale is that the timeline for the reporting obligation is difficult to match with the timing of an A.T.R. application.[28]

LEGAL PROFESSIONAL PRIVILEGE

The Directive allows intermediaries to waive filing information on reportable cross-border arrangements where the reporting obligation would breach a legal professional privilege ("L.P.P.") under the national law of that Member State.[29] In such circumstances, each Member State must take the necessary measures to require intermediaries to notify any other intermediary without delay or, if there is no such intermediary, to promptly notify the relevant taxpayer of its reporting obligation.

In line with the Directive, the Belgian Law requires intermediaries bound by the L.P.P. to inform in writing any other intermediary or the relevant taxpayer of the fact that the reporting obligation shifts to them.[30]

The Belgian L.P.P. exemption contains two peculiar provisions.

- The exemption under the L.P.P. rule does not apply when the transaction is a "marketable arrangement."[31] This is an arrangement that is "designed, marketed, ready for implementation or made available for implementation without a need to be substantially customized."[32]

- According to the Explanatory Memorandum of the Belgian Law, the L.P.P. exemption applies only where legal counsel has been retained to defend the

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[26] F.A.Q., no. 4.5.5.

[27] F.A.Q., no. 2.6.

[28] In line with the Directive, the Belgian Law mentions that intermediaries must report within 30 days beginning: (i) on the day after the reportable cross-border arrangement is made available for implementation; (ii) on the day after the reportable cross-border arrangement is ready for implementation; or (iii) when the first step in the implementation of the reportable cross-border arrangement has been made, whichever occurs first (Belgian Income Tax Code, art. 326/3).

[29] Directive, art. 1, (2), 8ab, par. 5.

[30] Belgian Income Tax Code, art. 326/7, par. 1; The taxpayer may however waive the L.P.P., and request the intermediary to fulfil the reporting obligation on his behalf (Belgian Income Tax Code, art. 326/7, par. 2).

[31] Belgian Income Tax Code, art. 326/7, par. 3.

[32] Directive, art. 1, (1), (b), 24; Belgian Income Tax Code, art. 326/1, 6°.

taxpayer in a matter that is before judicial courts or where legal counsel is representing the taxpayer in actual or threatened litigation.[33]

The Flemish Bar Council and the Belgian Association of Tax Lawyers disagree with this restrictive interpretation of the L.P.P. On August 31, 2020, they lodged claims for the suspension and annulment of the Flemish Decree implementing the Directive before the Belgian Constitutional Court. At the time of writing, the Belgian Constitutional Court requested a preliminary ruling from the Court of Justice of the E.U.[34] The request for a preliminary ruling concerns the compatibility of the Directive with Article 7 (right to respect for private life) and Article 47 (right to a fair trial) of the Charter of Fundamental Rights of the E.U. insofar as it requires legal counsel to notify other intermediaries of a need to report under D.A.C.6.

SANCTIONS

In case of noncompliance, the Directive requires Member States to provide for "effective, proportionate and dissuasive" penalties.[35] Member States interpret this requirement differently.[36] Poland, for instance, imposes fines of up to €4.7 million (8 million Polish zloty), whereas the maximum penalty in Ireland is €4,000.

Belgium appears to be on the reasonable side, with the following fines:[37]

- Insufficient or incomplete reporting:
  - Without fraudulent intent, a fine is imposed in the range of €1,250 and €12,500.
  - With fraudulent intent, a fine is imposed in the range of €2,500 and €25,000.
- No reporting or late reporting:
  - Without fraudulent intent, a fine is imposed in the range of €5,000 and €50,000.
  - With fraudulent intent, a fine is imposed in the range of €12,500 and €100,000.

CONCLUSION

The Directive's vague wording and undefined concepts are currently leading to significant differences in the application of D.A.C.6 among E.U. Member States. Moreover, as illustrated in the case of Belgium, administrative guidance is helpful.

33 Explanatory Memorandum, p. 19; This approach is in line with the exemption from the reporting obligations laid down in the Belgian Law of 18 September 2017 related to the prevention of money laundering.

34 Case C-694/20, Orde van Vlaamse Balies and Others v. Vlaamse Regering, 21 December 2021.

35 Directive, art. 1, (2), 25a.

36 For a comparison between E.U. Member States, see K. Resenig, op. cit., pp. 530-531.

37 Belgian Income Tax Code, art. 445, par. 4; See also Belgian Royal Decree of May 20, 2020, Belgian State Gazette, June 4, 2020.

Nonetheless, intermediaries and taxpayers must form their own views about most practical questions. As a result, the intended harmonized approach remains a distant prospect. Uniform action with the E.U. remains a goal, but not a reality.

As with many other E.U. initiatives in the direct tax area, the Directive can be seen as another attempt to achieve a harmonization of the direct tax systems of Member States, even though the founding fathers of the E.U. made such harmonization subject to the unanimous consent of Member States, as only national governments are accountable to national parliaments which are empowered to impose direct taxes. It is a reality that unanimous consent is nearly impossible to reach among the 27 Member States. Consequently, E.U. bureaucracy leaves no occasion unused to fulfill its ultimate dream of harmonization achieved through the back door.