

# Mandatory Disclosure Rules

## Belgium enacts DAC6 transposition bill

This article provides a summary of the Belgian legislation to transpose mandatory disclosure rules under DAC6 into domestic law.

### Status

On December 12, 2019, the Belgian Parliament adopted a bill to transpose Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter “DAC6” or “the Directive”) into domestic law. The bill was published in the Belgian Official Gazette on December 30, 2019.

The provisions will come into operation on July 1, 2020.

Please note that the summary is based on information available as at January 1, 2020.

### Scope

The scope of the legislation is closely aligned with the Directive, with no extension of scope proposed for VAT, customs duties or excise duties. Belgian MDR will also only apply for “cross-border arrangements with a potential tax avoidance risk” (i.e. domestic transactions will not be in scope).

### Definitions

The legislation is closely aligned with the Directive.

In particular, the definitions of “associated enterprise”, “marketable arrangement”, “cross-border arrangement” and “relevant taxpayer” have the same meaning as the Directive.

In addition, the bill includes the following definitions:

#### 1) Intermediary

The definition of intermediary mirrors the definition presented in the Directive.

According to the explanatory memorandum, to the extent the employees do not exercise a management function, the tax advisory firm itself and not its employees should qualify as the intermediary.

#### 2) Arrangement

The MDR provisions do not provide a definition of the term “arrangement”. However, according to the explanatory memorandum, an arrangement requires positive action to be taken by a relevant taxpayer, a participant or an intermediary.

The following examples are provided where the requirements for arrangement are not met (provided that the step is not part of a wider set of steps that, when taken together, could fall within the definition of an arrangement):

- Application of a domestic tax regime (e.g. the innovation income deduction);
- Daily transactions between a head office and its foreign permanent establishment that are purely driven by economic / business reasons (i.e. not for tax purposes);
- The mere execution of a routine transaction (e.g. bank transaction).

Although the term “arrangement” is not defined, it applies to tax planning structures where taxable profits are shifted to a more favorable tax regime or which reduce the overall tax burden of the tax payer.

#### 3) Participant

According to the explanatory memorandum, the following persons would not be considered “participants”:

- A loan provider whose main business activity is granting loans;
- An intermediary who only acts as an intermediary in the arrangement (e.g. only provides assistance and is not acting as a managing director of an entity involved in the arrangement).

### 3) Participant (cont.)

- An authorized representative of the relevant taxpayer that files tax returns on behalf of the taxpayer.

The explanatory memorandum also provides an example of a foreign real estate transfer between two Belgian tax residents and states that the transfer should not be considered a cross-border arrangement because the asset (i.e. the real estate) is not a participant in the arrangement.

The same applies to a Luxembourg branch 23 product which is subscribed by a Belgian resident (unless it is part of a wider set of steps that form a cross-border arrangement).

According to the explanatory memorandum, the relevant taxpayer always qualifies as participant.

### 4) Tax Advantage

The explanatory memorandum lists four cases where a tax advantage may be realized:

- an amount is not included in the tax base;
- the taxpayer benefits from a deduction;
- a loss for tax purposes is incurred;
- no withholding tax is due and foreign tax is offset.

This should not be considered to be exhaustive.

### Hallmarks & Main Benefit Test

The list of hallmarks is closely aligned with Annex IV of the Directive.

The main benefit test should also apply to the same hallmarks as those in the Directive (i.e. category A and B hallmarks and paragraphs (1)(b)(i), (c) and (d) of the category C hallmarks).

The explanatory memorandum provides some additional guidance on selected hallmarks:

- Hallmark A(1) (confidentiality clauses): the explanatory memorandum notes that provisions which seek to limit the liability of an advisor should not fall within the scope of this hallmark.
- Hallmark A(3) (standardized documentation and/or structures): the explanatory memorandum notes that internal documents that contain unfinished ideas or concepts should not be covered by this hallmark.

- Hallmark E(1) (unilateral safe harbor rules): the explanatory memorandum notes that the hallmark should not apply where an advance pricing agreement covers the transfer pricing aspect of an arrangement.
- Hallmarks E(2) and E(3): the explanatory memorandum states that OECD transfer pricing guidelines should be referred to when assessing arrangements under these hallmarks.

### Reporting - Intermediaries

The intermediary is only obliged to report if it has a presence in a EU Member State (local residency, PE, incorporation or professional registration).

Reporting timelines mirror the requirements of the Directive, i.e. for bespoke arrangements, 30 days as of the relevant reporting trigger.

The information that is required to be disclosed largely mirrors the requirements of the Directive. The information should be provided in English and in one of the official Belgian languages.

According to the explanatory memorandum, an intermediary is only required to report information of which they are aware (i.e. the intermediary should not have an obligation or duty to investigate).

The Belgian tax authorities will assign a unique reference number that will be used to identify the arrangement in all Member States. The reference number received from the Belgian authorities and a summary of the reportable arrangement need to be immediately forwarded to other intermediaries and the relevant taxpayer. No further guidance on the term "immediately" is provided.

Where there is a reporting obligation in multiple Member States, the priority of reporting will be determined in the following order:

- 1) Member State where the intermediary is resident for tax purposes;
- 2) Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;

### Reporting – Intermediaries (cont.)

- 3) Member State which the intermediary is incorporated in or governed by the laws of;
- 4) Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

An intermediary will not be required to report if:

- The intermediary has written evidence that the same information is reported in another Member State; or
- There is written evidence that the same information has already been reported by another intermediary.

According to the explanatory memorandum, the reference number and a summary of the reportable arrangement should be considered sufficient proof.

### Legal Professional Privilege

When an intermediary is subject to Belgian professional confidentiality provisions, it is required to:

- notify other intermediaries that it cannot comply with his reporting obligation, and therefore the obligation shifts to the other intermediaries;
- if there is no other intermediary, notify the relevant taxpayers about their reporting obligations.

It is also possible for the relevant taxpayer to discharge the intermediary from its professional confidentiality obligations, in which case, the reporting obligation would revert to the intermediary.

According to the explanatory memorandum, professional confidentiality should not apply in cases of aggressive tax planning. Professional confidentiality should also not apply to marketable arrangements.

### Reporting – Relevant Taxpayer

Reporting timelines for relevant taxpayers should mirror the requirements of the Directive.

Where a taxpayer has a reporting obligation in multiple Member States, the priority of reporting will be determined in the following order:

- 1) Place of residency;
- 2) Place of business or designated base which benefits from the arrangement is based;

- 3) Member State where income is received; or
- 4) Member State in which the business is pursued.

Where multiple taxpayers are involved, the relevant taxpayer that is to file information will be the one that features first in the list below:

- 1) Taxpayer that agreed the arrangement with the intermediary;
- 2) Taxpayer that is managing the implementation of the arrangement.

A taxpayer will not be required to report if:

- The taxpayer has written evidence that the arrangement has been reported by an intermediary; or
- The taxpayer has written evidence that the arrangement has been reported by another taxable person; or
- The taxpayer has evidence that the arrangement (i.e. the same information) has been reported in another Member State.

### Penalties

Non-fulfilment of reporting obligations will be penalized as follows:

- Incomplete reporting:
  - Gross negligence: EUR 1,250 to EUR 12,500;
  - Intentional: EUR 2,500 to EUR 25,000
- Failure to report or delayed reporting:
  - Gross negligence: EUR 5,000 to EUR 50,000;
  - Intentional: EUR 12,500 to EUR 100,000

The provisions include ranges of penalties for offences to allow scope for graduated penalties to be applied which can be increased with reference to frequency of offences committed.

For more information, please refer to KPMG's [EU Mandatory Disclosure Rules page](#) or contact the following:

**Kris Lievens**

Partner, Corporate Tax  
KPMG in Belgium  
klievens@kpmg.com

**Raluca Enache**

Director  
KPMG's EU Tax Centre  
Enache.Raluca@kpmg.com

[kpmg.com/socialmedia](https://kpmg.com/socialmedia)



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