

DAC6: Interpretation of the Hallmarks and the Main Benefit Test in Belgian and International Tax Practice

The Belgian tax authorities have announced that they will be carrying out the first DAC6 audits as from September 2022. In this article, the author focusses on the interpretation of reportable arrangements, as well as the impact of DAC6 on well-known planning structures in the Belgian and international tax practice (for example, arrangements involving the use of holding vehicles, fund structures, management incentive schemes and corporate restructurings).

1. Introduction

The Amending Directive to the 2011 Directive on Administrative Cooperation [on reportable cross-border arrangements] (2018/822) (DAC6),¹ is undoubtedly one of the most important developments in recent years in the field of international taxation.

On 20 December 2019, a Bill implementing DAC6 into Belgian law was adopted by the Belgian Parliament. A number of key concepts are, however, still subject to interpretation, which causes headaches for many tax advisers and other “intermediaries”. In this context, the detailed guidelines (58 pages!) published by the Belgian tax authorities on 15 June 2020 in the form of Frequently Asked Questions (FAQ) were welcome.² In this article, the author will guide the reader through the FAQ, with a particular focus on the main added value of the FAQ: the definition of “reportable arrangements”. More precisely, the author looks at the interpretation of the hallmarks and the main benefit test (MBT).

Throughout this contribution, the author assesses the impact of DAC6 on several well-known planning structures in the Belgian and international tax practice, for example, arrangements involving the use of holding vehicles, estate planning entities (for example, foundations, trusts, etc.), fund structures (for example, Luxembourg SICAV, et seq.), management incentive schemes (stock

option plans, etc.), corporate restructurings (transfer of seats, business restructurings, etc.). The author will share his own practical experience but also the outcome of his discussions with other tax professionals.

2. Upcoming Tax Audits Based on DAC6 Reports

In its second action plan against tax and social fraud, of 1 April 2022, the Belgian government announced that the Belgian tax authorities have been reviewing the initial DAC6 reports (filed by intermediaries and taxpayers) and that the first tax audits will begin as from September 2022.

This is not surprising. The Belgian tax authorities are following in the path of the tax authorities of other Member States. By way of illustration, the Luxembourg tax authorities already started an investigation, at the end of 2021, into the internal procedures implemented by Luxembourg tax intermediaries in order to comply with the mandatory disclosure rules (DAC6).³

The Belgian tax authorities have acknowledged that going through the DAC6 reports is quite a challenging task. One reason is that the summary of the content of reportable arrangements must first be analysed by experienced staff on a case-by-case basis. Once the tax authorities receive feedback on the initial tax audits, they will conduct targeted tax audits using data mining.⁴

Initial feedback is planned by the end of 2022 so that a new analysis cycle can be started at the beginning of 2023, during which time the necessary refinements and adjustments will be made to the selection of tax audits.

Needless to say, DAC6 will be at the top of the agenda for Belgian tax practitioners in the coming months. In this context, they are facing, on a daily basis, the following dilemma: “Is the arrangement in which I am involved reportable?” In this contribution, the author will try to provide some tools for intermediaries to help them answer this question. The following developments will show that the answer is far from straightforward.

Intermediaries (and taxpayers) are not required to report all their tax schemes to the tax authorities: only certain “aggressive” “cross-border” “arrangements” need to be

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1. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139 (5 June 2018), Primary Sources IBFD [hereinafter DAC6].
2. *Federale Overheidsdienst Financiën, FAQ: DAC6 – Melding van grensoverschrijdende constructies*, available at <https://financien.belgium.be/nl/Actueel/dac-6-%E2%80%93-melding-van-grensoverschrijdende-constructies-circulaire-faq> (accessed 4 Oct. 2022).

3. O. Hoor & R. Fiffon, *Le régime de communication obligatoire (DAC 6): Êtes-vous prêts pour l'audit?*, AGEFI Luxembourg p. 12 (Dec. 2021).
4. A data warehouse and applications will be developed in order to apply data mining techniques in relation to the information contained in the DAC6 reports.