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The European Union Directive (DAC6) Compelling Advisors to Report Transnational Tax Schemes

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I. INTRODUCTION

The May 2018 European Union Council Directive (hereinafter the "Directive") requires promoters or intermediaries, and sometimes taxpayers, to disclose certain cross-border tax arrangements to the relevant EU member state tax authority starting on July 1, 2020.[1] The Directive has its origin in the OECD's 2015 BEPS (Base Erosion Profit Shifting) Action 12 Report,[2] which recommended mandatory reporting for aggressive or abusive transactions, arrangements, or structures taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules. The main purpose of mandatory reporting is twofold: (1) to increase transparency by providing the tax administration with timely information about potentially aggressive or abusive tax planning arrangements and to identify the promoters and users of such arrangements; and (2) to dissuade taxpayers while limiting the opportunities for promoters and users to implement such arrangements before they are eliminated by law.[3]

The OECD recognizes that mandatory reporting overlaps with general anti-abuse rules but considers this to be desirable.[4] The following other initiatives have had similar goals: (1) rulings regimes to provide taxpayers legal certainty regarding proposed transactions; (2) reporting obligations regarding specific transactions; (3) questionnaires to gather information; (4) voluntary declarations to reduce applicable penalties; and (5) cooperative compliance programs where participating taxpayers agree to disclose the tax aspects of all their transactions.[5] It must be stressed that mandatory reporting concerns more transactions than a general anti-abuse clause: it covers not only transactions that could be abusive but also transactions that could be aggressive or high-risk.

The BEPS Action 12 Report drew on existing legislation in many countries, particularly the United States, Canada, and the United Kingdom. The approaches in these countries primarily fall into two basic categories — transactions-based approach or

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[1] EU Council Directive 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, 5.6.2018, p. 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2018:139:FULL&from=NL .

[2] OECD (25 Oct. 2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241442-en (hereinafter "BEPS Action 12 Report"), https://www.oecd-ilibrary.org/docserver/9789264241442-en.pdf?expires=1582566697&id=id&accname=guest&checksum=3D7DCB6321AA907FE4DA103235D03BDF.

[3] BEPS Action 12 Report, p. 9.

[4] BEPS Action 12 Report, p. 23, ¶35.

[5] See the preceding reports of the OECD: *Tackling Aggressive Tax Planning Through Improved Transparency and Disclosure* (2011); *Cooperative Compliance — A Framework: From Enhanced Relationship to Cooperative Compliance* (2013); BEPS Action 12 Report, pp. 20-21.

ISSN 0090-4600

promoters-based approach — and are usually a combination of these two approaches. The obligation to report sometimes rests on both the promoter and the taxpayer. Some countries set a threshold for reportable transactions (''Multi Step Approach''), others advocate generalized reporting (''Single Step Approach''). The OECD has found inspiration in the fact that all of them include hallmarks for reportable transactions.

With regard to cross-border operations, the BEPS Action 12 Report stresses the identification of structures already identified in the OECD's 2013 BEPS Action Plan (e.g., hybrid mismatch and treaty shopping arrangements).[6] Once collected, information should be exchanged between countries. States will be able to use the Joint International Tax Shelter Information and Collaboration network (JITSIC) created by the Forum on Tax Administration (FTA) in which each country has designated a single point of contact (SPOC). Some countries have centralized the information exchanged in a ''directory'' of aggressive tax planning arrangements.

As a practical matter, the OECD advocates assigning a scheme reference number to the arrangement revealed by a promoter that the taxpayer would be obliged to reproduce in his return.[7]

The Directive is,[8] in fact, the sixth amendment to the original Directive on Administrative Cooperation (DAC) on the exchange of information which is why this directive has the acronym ''DAC6.''[9] The following changes have been previously successively introduced:

- Automatic exchange of information in accordance with the Common Reporting Standard (CRS) on financial accounts;[10]
- Automatic exchange of information on advance tax rulings in cross-border cases;[11]
- Exchange of information through the country-by-country reporting of multinational enterprises on transfer pricing;[12]
- Obligation to grant tax authorities access to money laundering due diligence procedures.[13]

It should be noted that, in addition to the exchange of information on existing arrangements, the Directive introduces a completely new concept, namely the obligation to declare intentions or projects.

An analysis of the content of the law, in conjunction with that of the Directive, itself informed by the aforementioned OECD's Directive, must successively address the description of reportable cross-border arrangements, which is the core of the regulation, the definition of the intermediary subject to the reporting obligation, the contents of the information to be transmitted and the provisions that could be described as procedural as regards the mode of transmission of information and, of course, sanctions.

II. ANALYSIS OF NEW REGIME

A. Reportable Cross-Border Arrangements

Under the Directive, the reporting requirements apply to ''reportable cross-border arrangements.''

1. "Arrangements"

Curiously, the notion of ''arrangement'' (i.e., ''constructie,'' ''Gestaltung,'' ''mecanismo'') is not defined in the Directive, nor is that of ''aggressive tax planning,'' which serves as the intellectual basis for the rules. However, the OECD, in its 2018 Model Rules for the Mandatory Reporting of Certain Arrangements, defined the term ''arrangement'' as including any agreement, arrangement or plan, whether or not legally enforceable, and all the steps and transactions by which it takes effect.[14]

Cross-border arrangements reporting obligations are triggered by certain hallmarks (i.e., features or characteristics). The concept of an ''arrangement'' must, therefore, be understood in relation to the hallmarks that will apply to it.

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[6] BEPS Action 12 Report, p. 71, ¶239.

[7] Directive, p. 10.

[8] Directive, OJ L 139, 5.6.2018, p. 1.

[9] EU Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.03.2011, p. 1, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:064:0001:0012:EN:PDF.

[10] Council Directive 2014/107/EU of 9 December 2014, OJ L 359, 16.12.2014, p. 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0107&from=EN.

[11] EU Council Directive 2015/2376 of 8 December 2015, OJ L 332, 18.12.2015, p. 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2376&from=en.

[12] EU Council Directive 2016/881 of 25 May 2016, OJ L 146, 3.06.2016, p. 8, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0881&from=EN.

[13] EU Council Directive 2016/2258 of 6 December 2016, OJ L 342, 16.12.2016, p. 1, https://www.bportugal.pt/sites/default/files/diretivaue2016n2258_en.pdf.

[14] OECD, *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures*, p. 17 (2018), https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf.

ISSN 0090-4600

In December 2019, the Belgium legislature adopted legislation implementing the Directive that will be effective July 1, 2020, but will also apply retroactively to arrangements that started being implemented after June 24, 2018.[15] The explanatory memorandum issued with the legislation indicates that a merely passive approach should not be considered an arrangement, nor does the pursuit of the independent application (in Dutch ''op zichzelf staande toepassing'') of a national tax system, such as the deduction of income from innovation, provided that it is not part of a package.[16] A simple transaction whose tax regime is derived from the direct application of the law should not be considered an arrangement: it could not be considered potentially aggressive.[17] The reasoning behind the Dutch law refers to the Commission's recommendation on aggressive tax planning.[18] Nor would purely economic movements between a headquarters and its foreign permanent establishments or the mere execution of a banking transaction constitute arrangements.

In contrast to other regulations such as the Anti-Tax Avoidance Directive (ATAD)[19] or transfer pricing rules, an arrangement may include transactions that are ''genuine,'' i.e., not abusive or that take place under arm's-length principles (ALP).

2. "Cross-Border"

To determine whether an arrangement is cross-border, it is important to look at its participants. However, the notion of participant is also not defined: it is to be inferred from the combined definitions of intermediary and relevant taxpayer. If an intermediary is not active in the arrangement it has created, it is not a participant in the arrangement. He will become one if, for example, he is a director of a company that is part of the arrangement. The simple grantor of a credit is no more a participant than is a tax return preparer.[20] The taking out of Luxembourg life insurance by a resident of another country will not be a cross-border arrangement, as the insurance contract is not a participant.[21] The same will apply to the donation of foreign property between two national residents.[22]

The arrangement will be cross-border if it involves several Member States or a Member State and a third country, a foreign element being sufficient: the participants are not resident for tax purposes in the same jurisdiction; a participant is resident in several jurisdictions simultaneously; a participant has a permanent establishment in another State whose business includes the arrangement; a participant carries on business in another jurisdiction even though there is neither residence nor a permanent establishment there. In addition, the cases are included where the arrangement has consequences for the automatic exchange of information or the identification of beneficial owners.[23]

Some examples of cross-border arrangements illustrate the notion. With regard to contributions to companies, this will include, for example, a merger at the initiative of a parent company of two foreign subsidiaries where the parent company is a participant. On the other hand, the sale by a subsidiary of a participant in a sister subsidiary in the same country will not constitute a cross-border arrangement since the parent company does not participate.

With respect to loans, if one resident company makes a loan to another resident company that has a foreign permanent establishment, the arrangement will be cross-border if the borrower uses the loan in its foreign establishment. On the other hand, if a resident grants a loan to another resident who owns real estate abroad or has granted a license to a foreigner, thereby receiving foreign income, there will be no cross-border arrangement as long as the borrower does not carry on business outside the country.[24] The treatment of tax-transparent companies may give rise to discussion if the partners are resident in two different States, one of which considers the company to be transparent and the other considers it to be opaque.[25]

B. Hallmarks

Hallmarks act as tools to identify the characteristics or features of schemes that tax administrations are interested in. Certain hallmarks will apply only if they

[15] Belgian Official Gazette (30 Dec. 2019).

[16] Doc. 55/0791/001 of 26 November 2019, Belgian House of Representatives, Explanatory Memorandum to Belgium Law of 20 December 2019 (hereinafter ''Explanatory Memorandum to Belgium Law'') (Moniteur belge, 30 Dec. 2019), p. 7.

[17] P. Maes and L. Pinte, *DAC 6: Comment donner du sens? Revue Internationale du Patrimoine*, Legitech (2019), p. 8.

[18] Lower House of the States General, session year 2018-2019, 35255, no. 3, p. 4, note 14; Recommendation of 6.12.2012, C (2012), 8806 final.

[19] EU Council Directive 2016/1164 of 12 July 2016 laying down rules to combat tax avoidance practices that directly affect the functioning of the internal market, OJ L 19.07.2016, p. 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1164&from=EN.

[20] Explanatory Memorandum to Belgian Law, p. 8.

[21] This ignores the foreign insurance company.

[22] Explanatory Memorandum to Belgian Law, p. 9.

[23] Directive, art. 3.18. References are made to Directive 2011/16/EU, as amended by article 1 of Directive 2018/822.

[24] A. Schnitger, T. Brinck, and T. Welling, *Die neue Meldepficht für grenzüberschreitende Steuergestaltungen*, Part I, IstR (2018), pp. 515-517.

[25] D. Eberhardt, *Die Reichweite der Anzeigepficht für grenzüberschreitende Steuergestaltungen — dargestellt an hand von Praxisfällen*, IstR, 2019, p. 697.

ISSN 0090-4600

meet the threshold main benefit test.[26] These hallmark will be considered only if the main benefit or one of the main benefits that a person may reasonably expect to derive from an arrangement, taking into account all relevant facts and circumstances, is the obtaining of a tax benefit. This tax benefit must relate to one of the taxes covered by the law and the Directive, thus excluding value-added taxes, customs duties, and consumption taxes such as excise duties. A tax benefit may, for example, consist in the non-inclusion in a taxable base, the benefit of a deduction, the realization of a loss, or the absence of a withholding tax accompanied by a tax offset of the foreign tax.[27] The latter hypothesis may involve the granting of a fictitious tax credit provided for in a few rare international conventions. Does a taxpayer who obtains a foreign income exemption instead of a tax credit get a tax benefit? The European Court of Justice, for its part, considered, with certain reservations, these two regimes for the prevention of international double taxation to be equivalent.[28]

1. General Hallmarks Linked to the Main Benefit Test

The general hallmarks related to the existence of a tax benefit are the confidentiality imposed on participants, the determination of the intermediary's fees by reference to the tax benefit or, moreover, its obligation to reimburse fees in the absence of this expected benefit, and the materialization of the system in standardized documents that do not require significant adaptation for their implementation. The concept of standard documentation is questionable. What about the advice to wait until a period of ownership has elapsed to avoid capital gains tax? Drafting standard articles of association for the creation of a foreign company?[29] In any case, a working document containing only ideas cannot be reportable.

2. Specific Hallmarks Linked to the Main Benefit Test

Arrangements of the following types are frequently used. The first one is the acquisition of a loss-making company followed by the interruption of its principal activity and the use of its losses to reduce the tax burden of another company, possibly by transferring the losses to another jurisdiction. Both the Belgian French text and the Directive require the measures taken to be artificial (''contrived'' in English, ''künstlich'' in German) whereas the Belgian Dutch text does not contain that requirement. The participants in such a transaction are the buyer and the seller but not the loss company itself. The cessation of the activity must be the result of an action by the acquirer: there is no mechanism if it results solely from economic circumstances.[30]

Another hallmark is the conversion of income into capital, donations or other categories of less or non-taxable income. The classic example is the contribution by a resident company of an interest-bearing loan receivable to a foreign subsidiary that will distribute exempt dividends to it. However, the foreign subsidiary must have no need for this additional capital since the main tax benefit test is applicable here.

What if a corporation owning 9% of a subsidiary acquires an additional 1% without any economic reason? The dividend it will receive will be exempt where previously it was not. The transaction may be reportable but does not constitute[31] a tax abuse.

Another hallmark is circular transactions, which have no commercial function and offset or cancel each other out, transacted within a carousel of interposed entities.

Should a ''sale and lease back'' be included? An example might be a contribution to a subsidiary that makes a loan to its parent company for no economically functional purpose. On the other hand, a contribution to a financing subsidiary of the group or to an operating company would not be reportable.

3. Specific Hallmarks Related to Cross-Border Transactions

Transactions that give rise to deductions are the first to be covered. This is the case if the recipient does not reside in any tax jurisdiction, if the recipient resides in a jurisdiction that does not levy corporate income tax or levies tax at or near a zero rate or is on a list of non-cooperative jurisdictions established collectively by the Member States or by the OECD, if the payment enjoys total tax exemption or preferential tax treatment in the recipient's jurisdiction. The criterion of aiming at a tax benefit must be met except for deductions where the beneficiary is a tax-stateless person or resides in a country on a list of non-cooperative states. The first hypothesis is reminiscent of the famous Apple case on state aid.[32]

The Directive envisages the hypothesis where a State applies the rule relating to the prohibition of imported hybrid arrangements: companies of the group,

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[26] Directive, Annex IV.

[27] Explanatory Memorandum to Belgian Law, p. 12.

[28] Terra/Wattel, *European Tax Law*, Vol. I (Alphen aan den Rijn, Wolters Kluwer, 7th ed. 2019), p. 822 and references cited.

[29] A. Schnitger, T. Brinck, and T. Welling, *Die neue Meldepficht für grenzüberschreitende Steuergestaltungen*, Part I, IstR, 2018, pp. 518-519.

[30] *Id.* at 519.

[31] *Id.* at 520.

[32] Commission Decision of 30 August 2016, Case No 5A.3873, OJ L 187, 19.07.2017, p. 1, against which an appeal was lodged.

ISSN 0090-4600

foreign to the State in question, conclude a loan contract whose interest is deductible in the country of the debtor subsidiary while they constitute dividends that are not taxable in the country of the creditor parent company. At the same time, the group capitalizes an operating subsidiary located in the country whose regulations are opposed to imported hybrids. There would be an obligation to disclose the arrangement although no cross-border transaction necessarily takes place in the latter country.[33]

A Luxembourg real estate fund invests through a Luxembourg Soparfi by combining capital and loans in various real estate companies. Dividends and interest paid to the Soparfi are subject to normal tax treatment. The structure is non-reportable in the absence of a tax benefit. Even if the fund were established in the Cayman Islands, it would still be necessary to verify whether the main tax benefit test is met at the subsidiary level.[34]

It also includes deductions for the depreciation of the same asset in more than one jurisdiction or relief from double taxation for the same item of income or capital in more than one jurisdiction. Finally, transfers of assets between jurisdictions will be affected if there is a significant difference in the consideration payable. All of these latter forms of specific hallmarks do not require participants to seek tax benefits. The transaction is reportable because of its nature.

4. Specific Hallmarks Regarding Information Exchange and Beneficial Owners

Other specific hallmarks are aimed at operations that may prejudice the automatic exchange of information provided for by European Union legislation or equivalent agreements, even with third countries, or which take advantage of the absence of such agreements.

The hallmarks of arrangements that interfere with the automatic exchange of information on financial accounts are close to the model reporting rules established by the OECD on this subject:[35] use of an instrument that is not a financial account but has similar characteristics; transfer to jurisdictions not bound by the automatic exchange of information; recharacterization as products not subject to the exchange; transfer to accounts or assets which are not reportable under the automatic exchange; use of entities that suppress reporting by holders or controlling persons; arrangements that undermine the due diligence procedures of financial institutions. An example of the latter would be an arrangement designating a charity as the discretionary beneficiary of a trust before substituting the true beneficiaries intended from the outset.[36]

A second group of hallmarks concerns the concealment of beneficial owners, legal arrangements or structures by non-transparent formal or effective chains of ownership where the beneficiaries are those of arrangements not carrying on substantial economic activity, managed in jurisdictions other than their jurisdiction of residence and are made impossible to identify.

The opaque extraterritorial structure is also defined by the OECD.[37] It is designed to enable a person to be the beneficial owner of a passive offshore vehicle, i.e. a construction which does not carry out an economic activity, while at the same time not making it possible to determine precisely who is the beneficial owner or creating the appearance that the person concerned is not.

Examples include contracts similar to agency but not revealing the identity of the agent or the existence of a control due to informal arrangements.[38]

5. Transfer Pricing Hallmarks

A final list of hallmarks concerns transfer pricing:

- seeking unilateral protection regimes (''safe harbors'');
- transfers of intangible assets that are hard to value due to lack of comparators or uncertainty about future revenue streams;
- cross-border transfers of functions, risks or assets within a group, if the expected profit before interest and taxes within the next three years is less than 50% of the profit before interest and taxes expected in the absence of such a transfer.

The concept of associated enterprises is subject to a specific new definition.[39] The association is defined by the possibility of exercising significant influence or having a holding of more than 25% of the voting rights, capital or profit rights. In the case of indirect holdings, the holding percentages are multiplied successively at the different levels.

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[33] BEPS Action 12 Report, p. 75.

[34] K. O'Donnell and O.R. Hoor, *Les nouvelles obligations de déclaration des intermédiaires fiscaux dans l'Union européenne (DAC 6). Effet sur les investissements alternatifs au Luxembourg*, Rev. Intern. Patr. (2019), p. 109.

[35] OECD, *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures*, https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf.

[36] *Id.* at 27-28.

[37] *Id.* at 15.

[38] *Id.* at 32.

[39] Directive, art. 3.23.

ISSN 0090-4600

C. Intermediaries

The intermediary[40] is defined by his action on a reportable cross-border arrangement. This action can be broken down into five hypotheses:[41]

(1) Design: The intermediary designs, for example, an arrangement that allows a group to deduct business expenses that, in a given country, have just been made non-deductible.

(2) Marketing: If a law firm associate prepares a cross-border arrangement for a client, the arrangement will be reportable even if it has not yet been adapted to the individual needs of the potential user. On the other hand, there will be no marketing if the arrangement is not finalized, as certain questions remain open. Marketing occurs if a conference participant disseminates the arrangement that was used at the conference or if a person with knowledge of an arrangement designed by another person sends customers to the conference participant.

(3) Organization: The general practitioner working on a problem involving tax aspects organizes a cross-border arrangement if he consults tax colleagues to prepare it for a client.

(4) Making available for implementation: A practitioner who is aware of a reportable arrangement prepared by another practitioner makes it available if he presents it to his clients. This hypothesis is to be distinguished from that of marketing, although it is similar.

(5) Management of the implementation of an arrangement: If a cross-border arrangement involves the transfer of a company abroad, the person who finds premises, hires staff and carries out the necessary steps while knowing the tax purpose of the operation is the manager of its implementation.

1. Auxiliary Intermediaries

The intermediary to whom we will refer as an auxiliary intermediary is one who —based on the relevant facts and circumstances, the information available, and the individual's expertise and understanding — knows or could reasonably be expected to know that he has undertaken to provide aid, assistance, or advice in connection with the activities of the principal intermediary.

This will be the case for those who are called upon to give a second opinion on an arrangement or to resolve a particular tax problem included in a reportable arrangement.

The distinction made in the Directive between the promoter, who is the principal intermediary, and the service provider, who is the ancillary intermediary, can be found here.

One who merely issues general considerations, provides a risk analysis or performs due diligence in the event of a takeover is not an intermediary.

The intermediary must be a professional, all professions being, in principle, covered: tax advisors, lawyers, accountants, bankers, asset managers, financial advisors, etc.

The intermediary must be the owner or the manager of the business, excluding employees who do not exercise a management function. The reporting obligation rests on the intermediary for whom the employee works.

There are no means for the intermediary required to report to know beforehand whether the arrangement that concerns him is subject to declaration. In a detailed opinion issued at the request of the German government, the Max Planck Institute for Tax Law and Public Finance stressed the need for the reporting obligation not to be a one-way street, but for advisers to be able to obtain rulings on their projects for the sake of legal certainty.[42]

2. Relationship With Member State

The intermediary must meet a condition of relationship with a Member State. There are four possibilities:

(1) He resides in a Member State for tax purposes.

(2) He has a permanent establishment there providing services relating to the arrangement.

(3) He shall be constituted in or governed by the law of a Member State.

(4) He is registered with a professional association in connection with legal, tax or advisory services in a Member State.[43]

D. Taxpayers Concerned

The taxpayer concerned is any person to whom a cross-border reporting arrangement is made available for the purposes of its implementation, who is prepared to implement it or who has implemented the first stage of it.[44]

E. Information To Be Transmitted

The intermediary must transmit to the competent Belgian authority the information of which he is

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[40] Directive, art. 3.21.

[41] A. Schnitger, T. Brinck and T. Welling, *Die neue Meldepflicht für grenzüberschreitende Steuergestaltungen*, Part II, IstR, 2019, pp. 158-161.

[42] C. Osterloh-Konrad, C. Heber, T. Beuchert, *Anzeigepflichten für Steuergestaltungen in Deutschland Verfassungs — und europarechtliche Grenzen sowie Überlegungen zur Ausgestaltung* (Berlin, Springer 2017).

[43] Directive, art. 3.21, §3.

[44] Directive, art. 3.22.

ISSN 0090-4600

aware, which he possesses or controls concerning the reportable cross-border arrangements.[45] If, under foreign legislation implementing the Directive, he has to inform the competent authorities of several Member States, he only has to inform the Belgian authority if Belgium is at the top of the list of States to which the intermediary is linked by one of the above-mentioned location links (see II.C.2.).[46]

The competent Belgian authority shall, in turn, communicate to all the other Member States the information that has been provided.[47] This information is described in an enumeration which makes it possible to specify the elements that must be contained in the reporting to be transmitted by the intermediary:

(1) Identification of the intermediaries and taxpayers concerned;

(2) Detailed information on the hallmarks which entail the obligation to declare;

(3) A summary of the contents of the arrangement, including its usual name and a description of the commercial activities or relevant arrangements presented in an abstract manner without disclosing secrets or processes whose disclosure would be contrary to public policy;

(4) The date of the first stage of implementation of the system;

(5) The national provisions on which it is based;

(6) Its value;

(7) The identification of the Member State of the taxpayer concerned and of any other Member State likely to be affected by the arrangement; and

(8) The identification of any other person located in a Member State and likely to be concerned by the arrangement.

The duty to inform applies to any arrangement of which the intermediary has knowledge, possession, or control. However, the intermediary is not obliged to carry out an active search, but it is advisable that he inform the taxpayer of the latter's possible obligation to declare the arrangement himself (see II.F.5., below).

If the system developed within a company is the subject of a request for advice from an intermediary, the intermediary must report it. On the other hand, an adviser who gives a second opinion that does not alter the first opinion in any way will not be considered an intermediary since he has not fulfilled one of the roles attributed to him by the text, particularly in the design.[48] The information must be provided even if the arrangement is the subject of a ruling application or a request for regularization.[49]

The absence of reaction by a State to the communication of an arrangement cannot be interpreted as approval.[50]

F. Procedural Provisions

1. Deadline

The intermediary must transmit the information within 30 days of the first of the following dates:

(1) The day following the day the arrangement has been made available for implementation;

(2) The day following the day on which the arrangement is ready to be implemented; or

(3) The day on which the first stage of its implementation is completed.

Ancillary intermediaries must transmit the information within 30 days of the day following the day on which they provided assistance.[51]

2. Reference Number

When a cross-border arrangement is reported, a reference number is assigned to it. It will have to be communicated at the time of each subsequent reporting as well as at the time of the reporting of any intermediary involved or of the taxpayer. The intermediary who receives the number must communicate it to the other interested parties.

3. Specific Obligation for Marketable Arrangements

If the arrangement is marketable, i.e., if, as opposed to a tailor-made arrangement, it is ready to be implemented without significant adaptation,[52] the intermediary must draw up every three months an updated report on the new reportable information concerning the identification of the intermediaries and taxpayers concerned, the date of the first step of the arrangement, the Member States concerned, and the identification of other persons likely to be affected in other Member States.[53]

4. Plurality of Intermediaries

If several intermediaries are involved in the same reportable arrangement, all must make the declaration

[45] Directive, art. 8ab.1.

[46] Directive, art. 8ab.3.

[47] Directive, art. 8ab.13.

[48] Explanatory Memorandum to Belgian Law, p. 15.

[49] Explanatory Memorandum to Belgian Law, p. 16.

[50] Directive, art. 8ab.15.

[51] Directive, art. 8ab.1.

[52] Directive, arts. 3.24, 3.25.

[53] Directive, art. 8ab.2.

ISSN 0090-4600

except those who provide written proof that another intermediary has already transmitted the information listed in the text concerning information to be provided by one State to another (see II.E., above).[54]

5. Legal Privilege

The Directive gives Member States the possibility of exempting intermediaries from their obligation to make a declaration where this would be contrary to the professional secrecy applicable under national law.[55]

As an example, Belgium has implemented these provisions with regard to professional secrecy. Professional secrecy in Belgium is, on the one hand, enshrined in Article 458 of the Penal Code concerning all persons who, by reason of their status or profession, have knowledge of secrets entrusted to them and are not authorized to publish them outside the context of testimony before a court or when the law obliges or permits them to do so and, on the other hand, constitutes a general principle of law recognized by the Court of Cassation as having the force of a legal provision. For the Belgian legislator, however, the design or other actions concerning a cross-border arrangement are not directly related to a secret but are more a matter of assistance or advice. As in the prevention of money laundering, secrecy covers only the advice that is relevant to the determination of a taxpayer's legal position or the defense of the taxpayer in legal proceedings. It is, therefore, purely legal advice to the exclusion of aggressive tax planning.

On the other hand, an adviser who limits himself to such advice and does not provide any assistance to an action concerning a cross-border arrangement is not to be considered as an intermediary and therefore the question does not arise with respect to him.[56] The determination of a legal situation implies that this situation is pre-existing and not non-existent: in the latter case, it is the preparation of a cross-border arrangement. Furthermore, the management of the execution of cross-border arrangements cannot be exempted. In addition, the legislation on compulsory reporting is in the area of tax law where an obligation to cooperate is, in principle, applicable. The right to remain silent, in particular, does not apply to purely administrative matters aimed at making material findings as long as the person concerned is not charged.

Tax returns and other documents required by law cannot be covered by professional secrecy.[57]

6. Obligations of the Taxpayer Concerned

The obligation to report may, in certain cases, be incumbent on the taxpayer concerned. This is the case where no intermediary is involved, but also where the intermediary is exempted from his reporting obligation by professional secrecy and has informed the taxpayer concerned of his reporting obligation. In this case, if he does not give the intermediary bound by secrecy permission to declare, the taxpayer concerned is obliged to provide the information himself.[58]

7. Deadlines

The taxpayer concerned must provide the information within the same time limits as those applicable to the intermediary. Where there is more than one Member State, the same priority rules apply to the taxpayer concerned and to the intermediaries.

8. Plurality of Taxpayers Concerned

When several taxpayers are involved, the one who has to declare is, in the first instance, the one who has agreed on the reportable arrangement with the intermediary and secondly the one who manages the implementation of the arrangement, one in the absence of the other.[59]

9. Duty to Inform Others With Regard to Professional Secrecy

An intermediary who is bound by professional secrecy must inform the other intermediaries concerned that he cannot comply with his reporting obligation and that this obligation is therefore incumbent on them. In the absence of other intermediaries involved, the intermediary must inform the taxpayer and point out his own reporting obligation.

10. Request for Additional Information From the Taxpayer Concerned

National laws will add details in this respect to the Directive. For example, Belgian law provides that the taxpayer concerned shall provide the administration with all the information that he has, himself or with the assistance of his intermediary, reported or should have reported, including the underlying documents prepared by himself or by his intermediary with regard to the reportable arrangement.[60] It is necessary to impose this obligation on taxpayers as part of the measures required to implement the Directive. The application of the latter requires the verification of

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[54] Directive, art. 8ab.9.

[55] Directive, art. 8ab.5.

[56] Explanatory Memorandum to Belgian Law, p. 19. Comp. Law of 18 September 2017, art. 53, on the prevention of money laundering and terrorist financing and on restrictions on the use of cash.

[57] Explanatory Memorandum to Belgian Law, p. 20.

[58] Directive, art. 8ab.6.

[59] Directive, art. 8ab.10.

[60] Code of Income Taxes (CIT), art. 315 quater.

ISSN 0090-4600

positive information without the administration being able to satisfy itself with mere assertions or denials.[61] If the administration has indications that the provisions implementing the Directive have not been properly complied with, it may address requests for information to third parties, including banking institutions, in the same way as when there are indications of tax fraud.[62]

11. Request for Additional Information From the Intermediary

Under the national laws, details will be added in this respect to the Directive. In Belgium, the administration, having first requested the relevant information from the taxpayer, may request it from the intermediary concerned.[63]

12. Communication by the National Authority to the Competent Authorities of Other Member States

As explained, the national competent authority communicates the information listed above (see II.E., above) by automatic exchange to the competent authorities of the other Member States within one month from the end of the quarter in which the information was transmitted. The first communication will take place before October 31, 2020. Not all of the information to be provided is communicated to the European Commission (identification of intermediaries and taxpayers, contents, arrangements and identification of other persons concerned by these arrangements).[64]

13. Sanctions

The penalties to be imposed under the Directive should be ''effective, proportionate and dissuasive.''[65]

14. Retroactivity

The Directive entered into force on the 20th day following its publication in the Official Journal of the European Union on June 5, 2018.[66] Member States had to transpose it by December 31, 2019 at the latest and must apply the provisions from July 1, 2020.[67]

Information on arrangements of which the first step was implemented between June 25, 2018 and the date of application of the Directive must be filed before August 31, 2020.[68]

III. CRITICAL COMMENTS

There has been much criticism of the Directive.[69] The Directive, it is claimed, would undermine the right to legal certainty and the right of taxpayers to have their legitimate expectations respected. The vagueness of the terms used does not allow taxpayers to know precisely what their obligations are. The very functioning of the Directive would require legislative changes and administrative interpretation, particularly in the area of abuse of rights, in a cascade fashion, whereas the amendment of laws must be based on economic developments and be carried out at a reasonable pace. This situation would frustrate the taxpayer in carrying out legal transactions that he had undertaken.

The French Finance Act for 2014 introduced an obligation to declare tax optimization arrangements. This measure was deemed unconstitutional as being general and imprecise, while it restricted the freedom

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[61] Explanatory Memorandum to Belgian Law, p. 24.

[62] CIT, art. 322, §2, §1 modified.

[63] CIT, new art. 323ter; CRD, art. 289bis/13; CS, art. 146septdecies (read septemdecies); CMDT, art. 211bis/12.

[64] Directive, art. 8ab.17.

[65] Directive, art. 25.a.

[66] Directive 2018/822, art. 3.

[67] Directive 2018/822, art. 2; on the transposition in Germany, see A. Patzner and J. Nagler, *Die Anzeigepflicht für Steuergestaltungen als Herausforderung für Steuerpflichtige*, IStR (2019), p. 402; F. Haase, Steuerliche Anzeigepflichten bei nationalen und internationalen Sachsverhalten, *in* J. Lüdicke, G. Frotscher, and L. Hummel, *Steuerliche Entwicklungen im Kontext der Globalisierung* (Köln, Otto Schmidt, 2020); in Spain, Moreno González, La Directiva sobre revelación de mecanismos transfronterizos de planificación fiscal agresiva y su transposición en España: Transparencia, certeza y derechos fundamentales, Nueva Fiscalidad, 2019, p. 21; in the U.K., T. Duttiné and I. Blanke, Umsetzung der DAC 6 im Vereinigten Königreich — Ein Überblick, IStR, 2019, p. 888; in The Netherlands, J. Korving and J. Verbaarschoot, *Netherlands — Mandatory Disclosure in the Netherlands — To Disclose or Not to Disclose: That Is the Question*, Eur. Tax., Vol. 59, No. 10 (2019).

[68] Directive, art. 8ab.12.

[69] CFE Professional Affairs Committee, CFE — Opinion Statement PAC 3/2017 on the European Commission's Proposal for a Council Directive Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (COM/2016/025final — 2016/010 (CNS)), Eur. Tax., No. 12 (2017); N. Čičin-Šavin, *New Mandatory Rules for Tax Intermediaries and Taxpayers in the European Union-Another 'Bite' into the Rights of the Taxpayers*, WTJ (Jan. 2019); T. Clappers and P. Mac-Lean, *European Union/Netherlands — Tax Avoidance in the Spotlight: The EU Mandatory Disclosure Rules and Their Impact on Asset Managers and Private Equity, Derivatives & Financial Instruments*, No. 3 (2019); R. Offermanns, *International — Symposium on Mandatory Disclosure*, Eur. Tax., No. 5 (2018); A. Patzner and J. Nagler, *Die Anzeigepflicht für Steuergestaltungen als Herausforderung für Steuerpflichtige*, IStR (2019), p. 402; J. Voje, *European Union — EU Implementation of BEPS Action 12 in Light of Human Rights Requirements*, Eur. Tax., No. 5 (2017); Belgian Association of Tax Lawyers, *Bekomernissen inzake Europese Richtlijn 2018/822 (DAC 6) en omzetting daarvan in nationale wetgeving*,; A. Sanz Clavijo, *La cooperación interadministrativa y privada en el ámbito internacional y UE: obligación de reveler mecanismos de planificación fiscal agresiva e intercambio de información*, *in* F.M. Carrasco González and M. Bertrán Girón, dir., *La colaboración privada y entre administraciones en la aplicación de tributos* (Cizur Menor, Aranzadi, 2019), p. 189.

ISSN 0090-4600

of entrepreneurship and was severely accompanied by heavy sanctions.[70]

A. Legal Privilege

The most serious flaw in the Directive is the infringement of professional secrecy. Despite the divergent opinions in Europe, the Court of Justice has not recognized this right to lawyers who practice not independently but as ''in-house lawyers.'' In the case of self-employed lawyers and other holders of professions subject to professional secrecy, which differs from State to State, reference should be made to the case law of the European Court of Human Rights and the European Court of Justice. The Court of Justice approaches professional secrecy on the basis of the right to a fair trial and not on the basis of the right to privacy. With regard to the rules to prevent money laundering, it considers that secrecy does not cover the preparation and execution of certain operations.[71] The design of the Directive is the same. The Court of Human Rights, on the contrary, considers that the confidentiality of the relationship between counsellors and clients is based on both Article 6 and Article 8 of the Convention, but that crime prevention may justify restrictions on confidentiality.[72] The Directive jeopardizes professional secrecy since, if it protects the intermediary, it requires that his client disclose the arrangement which was the subject of the notice.

Secrecy does not protect the periodic reports required for standard arrangements.

The essential difference between the rules for preventing money laundering and the Directive is that the latter applies to arrangements that are generally perfectly legal. If there is a risk that they are not and that criminal sanctions may be attached to them, the Directive clearly violates the right to not incriminate oneself.

B. Data Protection

Finally, as regards data protection and privacy, it should be noted that the general data protection regulation (the ''Regulation'')[73] applies only to natural persons and not to companies, except to the limited extent that the names of natural persons appear in the company name.[74] Article 23 of the Regulation allows restrictions to its scope where fundamental rights are respected and important economic or financial interests are at stake, including fiscal interests. The Directive on mutual assistance seems to provide guarantees that comply with the Regulation, since the information exchanged is subject to professional secrecy (Article 16) and may be used only for judicial and administrative purposes unless there is agreement between Member States and in accordance with the law of the receiving State.[75]

C. Legal Basis

It is difficult to find a real legal basis for the Directive in the Treaty on the implementation of the European Union. This basis can be found only in the need for harmonization in order to ensure the establishment and functioning of the internal market (Article 113), in the determination of the laws and regulations which directly affect the establishment or functioning of this market (Article 115) or in the prevention of a distortion of competition which would result in legislative differences (Article 116). A loss of income cannot, according to settled case law, constitute a justification. The prevention of tax evasion may justify measures which are necessary in the public interest and meet the criteria of subsidiarity and proportionality. It is doubtful whether these criteria are met in this case. European case-law allows only artificial arrangements to be ruled out and refuses the use of general presumptions of fraud or abuse.[76] As the Commission's action on state aid has shown, there are as many legislative or administrative loopholes created by the states themselves as there are by taxpayers.

IV. CLOSING COMMENT

The real purpose of the Directive is to put an end to tax planning. This was also the purpose of the rules on tax abuse and country-by-country transfer pricing reporting. The difference is that the latter apply to existing operations whereas the Directive addresses prior intellectual activity. It would probably find its place better in Aldous Huxley's ''Brave New World'' than in legislation.

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[70] Const. Council, No. 2013/685 DC, RJF, 2014, Nos. 267 and 268 (29 Dec. 2013).

[71] CJEU, Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke Gbr and Harmut Elfret v Land Hessen*.

[72] *Michaud v. France*, European Council of Human Rights (6 Dec. 2012).

[73] EU Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (...), OJ L 119, 4.05.2016, p. 1.

[74] CJEU, Joined Cases C-92/09 and C-93/09 Volker and Markus Schecke Gbr and Harmut *Elfret v Land Hessen*.

[75] N. Čičin-Šavin, op. cit. p. 38.

[76] D. Blum and A. Langer, *European Union at a crossroads: Mandatory Disclosure under DAC 6 and EU primary law*, part I, Eur. Tax. (June-July 2019).

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