NATIONAL BANK OF BELGIUM

Annex to the Circular of the National Bank of Belgium of 6 July 2021 to credit institutions, stockbroking firms, insurance and reinsurance companies, payment institutions and electronic money institutions, central counterparties, central securities depositories and institutions supporting central securities depositories operating in Belgium

"Special Mechanisms" Document

Legal basis

Credit institutions

Law of 25 April 2014 on the legal status and supervision of credit institutions and stockbroking firms: Article 21, § 1/1; Article 236, § 5; Article 329, § 2, first paragraph; Article 329, § 3, first paragraph; Article 329, § 3, second paragraph, and Article 340, § 1.

Stockbroking firms

Law of 25 April 2014 on the legal status and supervision of credit institutions and stockbroking firms: Article 502 (reference to Article 21); Article 585 (reference to Article 236); Article 599 (reference to Article 329) and Article 607 (reference to Article 340).

Insurance and reinsurance companies

Law of 13 March 2016 on the legal status and supervision of insurance or reinsurance companies: Article 42, § 1/1; Article 517, § 5; Article 569, § 1, fourth paragraph; Article 598, § 1, first paragraph, and Article 600.

Payment institutions and electronic money institutions

Law of 11 March 2018 on the legal status and supervision of payment institutions and electronic money institutions, access to the activity of payment service provider and the activity of issuing electronic money, and access to payment systems.

Payment institutions

Article 21, § 1/1; Article 117, § 5 and Article 143/1 (references to Articles 120, 124 and 127).

Electronic money institutions

Article 176, § 1/1; Article 215, § 5; Article 227; Article 228 and Article 231.

Central counterparties, central securities depositories and institutions supporting central securities depositories

Law of 22 February 1998 establishing the Organic Statute of the National Bank of Belgium: Article 36/25, § 4 and Article 36/26/1, § 5/1. CSD Regulation (EU) No 909/2014 of 23 July 2014.

I. Special mechanisms in credit institutions, stockbroking firms, insurance and reinsurance companies, payment institutions and electronic money institutions, central counterparties, central securities depositories and institutions supporting central securities depositories established in Belgium

Where the practices listed below are offered or repeatedly carried out by a credit institution, stockbroking firm, insurance or reinsurance company, payment institution or electronic money institution, central counterparty, central securities depository or institution supporting central securities depositories operating in Belgium, they are considered as constituting a special mechanism.

This list is not exhaustive. Consequently, the above-mentioned provisions also apply in full to any other special mechanism within the aforementioned meaning set up by credit institutions, stockbroking firms, insurance or reinsurance companies, payment institutions or electronic money institutions, central counterparties, central securities depositories or institutions supporting central securities depositories established in Belgium. The list is without prejudice to the exceptional measures to be taken in specific cases pursuant to the aforementioned provisions.

A. Practices relating to income from movable property subject to withholding tax

§ 1. – Foreign income from movable property

1. Reference is made to the following practices relating to foreign income from movable property where the institution, company or firm knows or cannot in good faith be unaware that the act in question relates to income from movable property subject to withholding tax, unless this act is accompanied or followed by the deduction of the withholding tax:

1°) the transmission abroad of client orders related to the collection or allocation of such income abroad or to its intended use there, and participation in the drafting of client orders for the same purpose;

2°) the provision to Belgian residents of advice or information on how to collect such income from Belgium without deducting the withholding tax;

3°) any provision of services and any assistance to a foreign financial institution or to a third party, resident or not, to enable it to contact clients in Belgium with a view to the payment of foreign income from movable property.

The above applies in particular regarding countries which have not entered into multilateral agreements that provide for the automatic exchange of financial information and where the competent authorities have committed themselves to apply the new common standard of transparency and exchange of information with regard to financial accounts in tax matters (the Common Reporting Standard and FATCA agreements in force).

2. For the purposes of point 1 above, it is considered that the institution, company or firm knows or cannot in good faith be unaware that the services provided relate to income subject to withholding tax:

a) where the nature of the income is clear from information mentioned in the document itself, from correspondence or writings in connection with the services provided that are in the possession of the institution, company or firm, or from statements made by the beneficiary;

b) where the institution, company or firm provides de jure or de facto investment services in respect of financial instruments held abroad;

c) where the institution, company or firm has been entrusted by the client with the discretionary or non-discretionary management of accounts opened or deposits of funds or securities held abroad, or when it provides de jure or de facto management services relating to such accounts or deposits of funds or securities;

d) where accounts are opened or deposits of funds or securities are held at the institution, company or firm by a non-resident under a fiduciary agreement or a nominee agreement entered into on the initiative or through the intermediary of that institution, company or firm between its client and the non-resident.

3. The institution, company or firm is also presumed to know that the Belgian tax legislation must be applied and that withholding tax may have to be levied when it pays out income from movable property resulting from foreign insurance or capitalisation operations that are marketed by a foreign company belonging to the same group or with which there is contractual collaboration.

Consequently, when the institution, company or firm makes such a payment, it must apply the Belgian tax legislation. It must ensure that it has all the information needed to correctly fulfil its tax obligations, including the submission of the required forms to the tax authorities. If necessary, it should ask the client concerned for the necessary information in order to deduct any withholding tax. Where appropriate, it must also remind the client of the obligation to report these amounts in the personal income tax return. If the client does not wish to provide the necessary information, the institution, company or firm should refrain from paying out to the beneficiaries.

§ 2. – <u>Belgian income from movable property</u>

Reference is made to the granting or payment of Belgian income from movable property without deduction of withholding tax pursuant to Articles 261 et seq. of the Income Tax Code 1992 and Articles 107 et seq. of the Royal Decree implementing the Income Tax Code 1992, where the institution, company or firm knows or cannot in good faith be unaware that this income is subject to withholding tax.

§ 3. – <u>Belgian or foreign income from movable property</u>

Reference is made to the participation in operations involving securities where the institution, company or firm knows or cannot in good faith be unaware that these practices are aimed at obtaining a reduction or reimbursement of withholding tax illegally.

B. <u>Intermediation for a foreign institution, company or firm which facilitates tax fraud by residents</u>

Intermediation in the context of a contractual or de facto collaboration with a foreign credit institution, stockbroking firm, insurance or reinsurance company, payment institution, electronic money institution or with a foreign branch, whether or not belonging to the same group, is considered to be a special mechanism if it has the aim or effect of facilitating tax fraud by residents who have opened an account or concluded an asset management or investment advice agreement or an insurance policy with this foreign institution, company or firm, as a result of which these residents can use a Belgian establishment for the banking, investment or insurance services associated with the account or agreement in question.

A special mechanism can also consist in accepting that a foreign institution, company or firm directly or indirectly pays a compensation to the institution, company or firm, or its employees or authorised agents, that is calculated in proportion to the volume of funds held in an account or deposited by its clients with that foreign institution or company.

The above applies in particular regarding countries which have not entered into multilateral agreements that provide for the automatic exchange of financial information and where the competent authorities have committed themselves to apply the new common standard of transparency and exchange of information with regard to financial accounts in tax matters (the Common Reporting Standard and FATCA agreements in force).

C. Participation in operations carried out in particular by or with (legal) persons established in a State referred to in Article 307, § 1/2, third paragraph, of the Income Tax Code 1992

An institution, company or firm is considered to be involved in a special mechanism when it engages in a pattern of conduct or omissions (assisting or allowing the client to perform certain operations) where it knows or cannot in good faith be unaware that these operations are intended to commit tax fraud.

Institutions, companies and firms must verify whether this is the case in particular with regard to operations – including but not limited to direct or indirect participation in the setting up of structures – that are carried out by or with (legal) persons established in a State referred to in Article 307, § 1/2, third paragraph, of the Income Tax Code 1992.

D. Practices that enable clients to mislead the tax authorities

§ 1. – Failure to mention guarantees in the credit agreement or consideration of undeclared income or income that will not be declared when granting credit

1. Reference is made to the practice whereby a credit institution or stockbroking firm does not make precise mention, in the document by which it reports the granting or increase of a credit or credit opening, of all the guarantees it actually took into account in its decision to grant or increase the credit or credit opening. A precise mention of the guarantees implies in particular specifying the identity of the person granting the guarantee, the amount of the guarantee as well as its nature.

However, the list of guarantees in the document reporting the granting or increase of a credit or credit opening may be replaced by a reference in that document to other documents or instruments in which those guarantees are mentioned.

The practice whereby an institution or company, when deciding to grant or increase a credit or credit opening, actually takes guarantees into account but does not inform the borrower of this decision in writing in circumstances where it is sector-wide practice to do so, is also considered to be a special mechanism.

2. The concept of “guarantees” comprises the following:

1° the contractual collateral securities provided by the borrower or a third party;

2° any transfer or delegation of debt claims, including the transfer of remunerations;

3° the mandate to mortgage or to provide other collateral securities;

4° the deposit with the institution or company or with an agreed third party, by the borrower or by a third party, of unpledged funds or securities, if that deposit is actually tied to the credit.

A deposit is considered to be actually tied to a credit, inter alia:

a) when the depositor, possibly for a fixed amount and as long as the loan has not been settled, may freely use all or some of the funds or securities in question only with the agreement of the institution or company, by virtue of commitments undertaken by the depositor or the agreed third party or by virtue of clauses or agreements having the same effect; or

b) where the agreed maturity of the deposit of funds or securities, which may be staggered, coincides with or is set at a later date than the agreed maturity of the credit, which may be staggered;

5° contractual personal securities provided in favour of the institution or company, including avals;

6° the guarantees referred to in points 1° to 4° provided in support of a contractual personal security referred to in point 5°:

a) where such guarantees are lodged with or managed by the institution or company; or

b) where such guarantees are lodged with the guarantor or an agreed third party under an agreement between the guarantor and the borrower, with the institution or company having participated in the preparation, conclusion or execution of the agreement.

Clauses intended to protect the institution, company or firm against a deterioration in the assets of the borrower or against a deterioration in the relative position of the institution, company or firm in relation to other creditors are considered equivalent to guarantees, e.g. a commitment not to dispose of or mortgage immovable property, a commitment not to provide real guarantees in favour of other creditors, a commitment by third-party creditors of the borrower not to demand payment of their claim until the credit granted by the institution, company or firm has been repaid.

Conversely, the following are not considered guarantees:

1) clauses in the general terms and conditions of the institution, company or firm stipulating that anything owed by it to the borrower or held on his behalf at the time of the final closing of accounts will be applied in discharge of all his liabilities to the institution or company;

2) recourse against bills of exchange or bankers' acceptances drawn in respect of commercial transactions and discounted or pledged by the institution, company or firm;

3) credit insurance taken out with an insurance company by the institution, company or firm. However, such credit insurance should be mentioned when the institution or company knows or cannot in good faith be unaware that the borrower or a third party has provided a guarantee in favour of the credit insurer. In that case, this guarantee should also be mentioned in the credit agreement;

4) a risk-sharing agreement concluded by the institution, company or firm on its own initiative with another institution, company or firm. By way of derogation from the above, such an agreement should be considered a guarantee where the institution, company or firm knows or cannot in good faith be unaware that the borrower or a third party has provided a guarantee in favour of the institution, company or firm with which the credit risk is shared. In that case, this guarantee should also be mentioned in the credit agreement.

3. Guarantees taken into account by the institution, company or firm are guarantees which the institution, company or firm has actually taken into account in its decision to grant or increase the credit or credit opening, irrespective of the date on which these guarantees were actually provided, and regardless of whether they were already provided or promised at that time or whether the institution, company or firm attached a condition to their provision.

The guarantees provided at or in favour of another establishment in Belgium or abroad of an institution, company or firm are included in the guarantees provided at or in favour of the institution, company or firm.

The terms “credit” and “credit opening” should be understood in their usual meaning in banking practice, covering, inter alia, loans, overdrafts, acquisition of bills of exchange, deferrals of securities, acceptance, guarantee or aval credits, collateral securities provided on behalf of third parties, documentary credits, etc.

The renewal of a credit is considered as the granting of a new credit.

4. Point 1 of this paragraph does not apply to the authentic instrument establishing the granting or increase of a credit or credit opening or the provision of guarantees, provided that a document containing the information specified in point 1 is drawn up in private and referenced in the authentic instrument.

5. Point 1 of this paragraph also does not apply to the failure to mention the following guarantees:

1° guarantees published in Belgium pursuant to the law;

2° transfers of remunerations payable in Belgium;

3° the guarantees referred to in 1° to 4° of point 2 which are provided by agricultural credit institutions, discount houses or mutual guarantee societies on their own assets, or by their directors or managers, in support of all their guarantee or aval commitments to the institution or company.

6. The granting of credits, whether or not linked to a credit card, whereby the institution, company or firm determines the borrower's ability to repay taking into account income of which it knows or cannot in good faith be unaware that it has not been declared or will not be declared for tax purposes, is also considered to be a special mechanism.

§ 2. – <u>Improper use of internal accounts</u>

For the purposes of this provision, an internal account means an account of an institution, company or firm over which the client has no signature rights and which is therefore not a client account.

Improper use of an internal account refers to the use of an internal account of an institution, company or firm to carry out transactions from or for clients, in particular credit transfers to or from abroad, purchases and sales of gold or the subscription of securities in order to conceal, contrary to normal procedures, the real nature and/or purpose of the transaction in the client's account statements.

§ 3. – <u>Transmission of statements of account for accounts operating as a single account</u>

Where a client has opened multiple accounts with the same institution, company or firm which operate as a single account in the relationship between the account holder and the institution or company, in particular for the calculation of debit and credit interest, the practice of sending the client statements of account for some or all of the sub-accounts without mentioning that they relate to sub-accounts and without sending, at least at the annual closing date, a statement of account showing the balances of all these accounts is considered to be a special mechanism.

Where clients belonging to the same group of companies have opened one or more accounts with the same institution, company or firm which operate as a single account in the relationship between those clients and the institution, company or firm for the calculation of debit and credit interest, the failure to include a reference to the agreement on the calculation of interest at group level in the statement of interest account for each of the clients concerned is considered to be a special mechanism. The account statement for each of the clients concerned should include, at least at the time of the annual interest statement, a document showing the interest for all accounts and the allocation given to it by the institution or company.

For the purposes of this provision, clauses providing for the possibility of set-off in the event of the bankruptcy or financial default of the client do not in themselves entail that separate accounts are considered to be operating as a single account.

§ 4. – <u>Failure to mention cross purchase and sales orders of financial instruments on the order statement</u>

For the purposes of this paragraph, “cross purchase and sales orders” mean orders in the opposite direction relating to such a number of instruments and at such a price that, after the execution of both orders, the financial position of the client has not changed or has changed only slightly.

Where an institution or company simultaneously executes a cross purchase and sales order in relation to the same financial instrument and for the same client, the practice of sending an order statement to the client for one of the transactions without mentioning the cross transaction is considered a special mechanism insofar as the institution or company knows or cannot in good faith be unaware that it is a cross transaction.

For the purposes of this provision, a cross purchase and sales order is considered to be executed simultaneously if the institution or company knows or cannot in good faith be unaware, from the first transaction, that the client will place an order for a cross transaction.

This arrangement applies without prejudice to stricter conduct of business rules imposed by the market authorities of the relevant stock exchanges.

§ 5. – <u>Preparation and issuance of insurance policies, addendums or certificates which contain inaccurate information and which consequently give rise to an unduly favourable tax treatment</u>

Examples of these practices include:

1° the backdating of insurance policies;

2° the failure to include a breakdown on the receipt of premiums that, in an individual insurance policy, only partially give rise to a tax reduction. This concerns, for instance, premiums for supplementary cover (disability, accidents, etc.) for life insurance, which in themselves do not give rise to a tax reduction, or the failure to include a breakdown on the certificates of the premium and capital for insurance products that include guaranteed income cover;

3° the issuing of certificates for individual payments made outside the group insurance scheme, giving the impression that these payments were made under the scheme;

4° the payment of an insurance benefit or a surrender value of a directors liability insurance policy (bedrijfsleidersverzekering/assurance dirigeant d'entreprise), without drawing up the required tax form, on the basis of an addendum that attributes the benefit to the director instead of to the company in its quality as policyholder, as originally stipulated;

5° the issuing of certificates allowing the unlawful enjoyment of tax benefits when the beneficiaries mentioned on the certificate do not meet the tax conditions;

6° the issuing of certificates or documents to the tax authorities that deliberately contain incorrect information on the nature, characteristics or terms of an insurance product.

It should be noted that, in many cases, the intentional issuing of inaccurate certificates may be qualified as forgery under criminal law.

It should also be recalled that, according to Belgian legislation, insurance policies, including insurance bonds, must be drawn up in the name of the policyholder (see Article 158 of the Law of 4 April 2014 on insurance).

§ 6. – <u>Participation in practices that reduce or impede transparency and visibility with regard to the tax authorities with the aim or effect of facilitating tax fraud</u>

In this context, participation in practices that reduce or impede transparency and visibility with regard to the tax authorities with the aim or effect of facilitating tax fraud is considered to be a special mechanism.

This includes:

- the participation in operations where the institution, company or firm, when consulting the register of ultimate beneficial owners (UBO register), knows or cannot in good faith be unaware that the act committed by the client relates to operations where the identity of the beneficial owners as specified in that register is inaccurate or incomplete;

- the direct payment of interest on a company's deposits to the account of its managers or directors, without legitimate justification available;

- the participation in operations the sole purpose of which is to unlawfully circumvent, in whole or in substantial part, the automatic exchange of financial information to which the competent authorities have committed themselves under the common standard of transparency and exchange of information with regard to financial accounts in tax matters (the Common Reporting Standard and FATCA agreements in force).

E. Participation in insurance simulation, in artificial profit shifting through insurance operations and in VAT avoidance schemes

§ 1. – Reference is made inter alia to the conclusion of insurance policies without insurance risk and for which the premium is often deducted for tax purposes. In most cases, use is made of a reinsurance captive over which the policyholder exercises control in order to subsequently recover the premiums in some way without any taxation.

Examples of insurance simulation operations include:

1° the conclusion of side agreements stipulating that no compensation will be claimed in case of materialisation of the risk;

2° the conclusion of policies for non-existent risks;

3° the conclusion of policies for a past period in which no claim could have occurred.

§ 2. – The following practices are also prohibited:

1° participation in profit shifting by third parties to (inter alia) low or untaxed entities through the payment of (reinsurance) premiums that are artificially high in relation to the risks transferred, or of artificially high (reinsurance) commissions;

2° participation in simulated arrangements whereby non VAT taxable persons, partially VAT taxable persons or mixed VAT taxable persons evade VAT.

F. Repeated violation of tax obligations

An institution, company or firm is also considered to be involved in a special mechanism when, in carrying out operations for its clients, it repeatedly and intentionally fails to fulfil its obligations under the tax legislation or the prohibitions contained therein, even though this violation is punishable under criminal law.

This is the case, inter alia:

- if the institution or company fails to enter the required information in the special register referred to in Article 96 of the Royal Decree implementing the Income Tax Code 1992;

- if the institution, company or firm or its agents are aware of a client's death but allow, through backdating, the withdrawal of funds from accounts belonging to that client or the transfer of securities held in open deposit belonging to that client;

- if the institution or company fails to meet the obligations regarding the tax on stock exchange transactions, for example by failing to draw up an order statement for each transaction;

- if the institution, company or firm does not comply with the obligations relating to the annual tax on securities accounts or the obligations towards the central point of contact for accounts and financial contracts.

For insurance companies specifically, reference is made to the obligations regarding the correct deduction of the withholding tax on wages and the withholding tax on income from movable property, the obligations regarding the tax on long-term savings, the tax on insurance policies and the tax on profit-sharing, as well as the disclosure requirements regarding inheritance taxes.

II. Special mechanisms in foreign credit institutions, stockbroking firms, insurance and reinsurance companies, payment institutions and electronic money institutions, central counterparties, central securities depositories and institutions supporting central securities depositories operating in Belgium under the freedom to provide services

Where the practices listed below are offered or repeatedly carried out in Belgium by an institution, company or firm which is governed by the law of another Member State of the European Union and which operates under the freedom to provide services, they are considered as constituting a special mechanism.

The list is not exhaustive, i.e. the above-mentioned provisions also apply to any other special mechanism within the aforementioned meaning set up by credit institutions, stockbroking firms, insurance and reinsurance companies, payment institutions and electronic money institutions, central counterparties, central securities depositories and institutions supporting central securities depositories operating in Belgium. The list is without prejudice to the exceptional measures to be taken in specific cases pursuant to the aforementioned provisions.

This arrangement applies without prejudice to obligations under international treaties.

A. Practices relating to income from movable property subject to withholding tax

These are the practices referred to in I.A., § 1, 1° and 2°. Point 2, a) to c) of I.A., § 1 applies, as does I.A., § 3.

C. Participation in operations carried out in particular by or with (legal) persons established in a State referred to in Article 307, § 1/2, third paragraph, of the Income Tax Code 1992

D. Practices that enable clients to mislead the tax authorities

These are the practices referred to in point I.D., §§ 1 to 6.

As indicated above, according to Belgian legislation, insurance policies, including insurance bonds, must be drawn up in the name of the policyholder (see Article 158 of the Law of 4 April 2014 on insurance). It follows that insurance policies that are related to risks located in Belgium and marketed under the free provision of services by companies from other Member States of the European Union must also be drawn up in the name of the policyholder.

E. Participation in insurance simulation, in artificial profit shifting through insurance operations and in VAT avoidance schemes