EU Direct Tax Newsalert

DAC6 formally adopted

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On 25 May 2018, the Economic and Financial Affairs Council (ECOFIN) formally adopted the Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements in order to disclose potentially aggressive tax planning arrangements (also commonly referred to as DAC6).

The main purpose of DAC6 is to strengthen tax transparency and fight against aggressive tax planning. The term aggressive tax planning is undefined, however, and instead, reference is made to a number of pre-determined hallmarks, which are features that could render a cross-border arrangement reportable under this Directive. DAC6 provides for mandatory disclosure of cross-border arrangements by intermediaries, or individual or corporate taxpayers, to the tax authorities and mandates automatic exchange of this information among Member States.

The DAC6 Directive

Scope: The adopted Directive applies to a cross-border arrangement which generally means an arrangement or series of arrangements concerning either more than one Member State or a Member State and a third country.

Reportable cross-border arrangement: For cross-border arrangements to require being reported to the tax authorities, at least one of the hallmarks must be met. These hallmarks may be generic or specific. As regards the generic hallmarks and a number of specific hallmarks, these may only be taken into account insofar as they meet the so-called "main benefit test". This test will be met if obtaining a tax advantage constitutes the main benefit or one of the main benefits a person is expected to derive from an arrangement.

Generic hallmarks include, for example, an arrangement or series thereof whereby the taxpayer is under the obligation to not disclose how such arrangement can secure a tax advantage *vis-à-vis* other intermediaries or the tax authorities or when the intermediary receives a fee for its services proportionate to the amount of the tax advantage.

Specific hallmarks include (but are not limited to) the trade in loss-making companies to reduce tax liability under certain conditions, conversion of income into lower-taxed revenue streams, circular transactions, and those relating to certain cross-border transactions, more specifically, deductible cross-border payments between associated enterprises in cases where:

- the recipient is not resident for tax purposes in any jurisdiction, or
- the recipient is resident for tax purposes in a jurisdiction levying corporate income tax at the rate of zero or almost zero, or
- the recipient is resident for tax purposes in a jurisdiction which is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the Organisation for Economic Co-operation and Development as non-cooperative, or
- the payment benefits from full exemption from tax in the jurisdiction where the recipient is resident for tax purposes, or
- the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.

Specific hallmarks which relate to some other cross-border transactions (deductions for the same depreciation, relief from double taxation in more than one Member State, material difference in the amount being treated as payable in consideration for the transferred assets in the jurisdictions involved), transfer pricing and automatic exchange of information and beneficial ownership, which do not need to comply with the main benefits test, are incorporated in the Directive.

Intermediaries: For the purposes of this Directive, an intermediary is defined as:

i) any person that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement, and

ii) any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to the services mentioned above.

Key provisions

The intermediary must disclose information to the competent authorities on a reportable cross-border arrangement within thirty days beginning on the day after the arrangement is made available or is ready for implementation to the taxpayer or when the first step of such arrangement has been implemented.

To the extent that the intermediary is entitled to legal professional privilege (please note that the French version refers to secret professional which is different and of larger application than just the privilege of the legal profession as such) under national law, the disclosure obligation shifts to any other intermediary in the first instance or to the taxpayer in the absence of any other intermediary. Equally, wherever there is no intermediary required to report, including because the taxpayer implements a scheme in-house or the intermediary does not have presence within the EU, it is the taxpayer's responsibility to disclose such information within thirty days beginning on the day after the arrangement is available or is ready for implementation or when the first step of such arrangement has been implemented. In addition, taxpayers shall file information about their use of reportable arrangements in each of the years for which the arrangement is used.

Automatic exchange of information: Insofar as the intermediary files information on a reportable cross-border arrangement or series of arrangements, the Member State in which the information was filed will, by means of an automatic exchange, communicate that information to all other Member States. The automatic exchange of information shall take place every quarter.

Penalties: It is up to the Member States to lay down rules on effective, proportionate and dissuasive penalties for failure to comply with the provisions of this Directive.

Next steps

The Directive will enter into force on the twentieth day following the date of its publication in the Official Journal of the EU (which is expected to happen shortly) and the first reportable transactions will be those where the first implementation step occurs between that date and 1 July 2020 (the date of application of the Directive). This information will then be required to be filed by 31 August 2020.

Member States must transpose the Directive into their national laws and regulations by 31 December 2019. The first automatic exchange of information should be communicated among Member States by 31 October 2020.