



June 2018

EU Directive on administrative cooperation in the field of taxation – introduction of mandatory disclosure rules

On 25th May 2018, the Economic and Financial Affairs Council (ECOFIN) adopted the amendments to the Directive on administrative cooperation in the field of taxation (commonly referred to as DAC 6) as regards the mandatory automatic exchange of information in relation to reportable cross – border arrangements. On 5th June 2018 DAC 6 has been published in the Official Journal of the European Union.

Background

The amendments to DAC 6 are the response of the European Parliament to harmful practices and the use of offshore companies (revealed by the so-called "Lux Leaks", "Panama Papers" and "Malta Leaks") and are in line with those proposed by the Organization for Economic Co-operation and Development (OECD) in Action 12 of the Base Erosion and Profit Shifting (BEPS) initiative.

Main assumptions

The aim of the mandatory disclosure obligation imposed by DAC 6 is to give the tax authorities early warning on new potential risks of avoidance and carry out audits more effectively.

DAC 6 requires that:

- intermediaries (i.e. advisors) who provide their clients with complex cross border financial schemes will be obliged to report these structures to their tax authorities;

- EU Member States will exchange this information with each other through a centralized database.

The scope of new rules should cover all taxes with the exception of VAT, customs duties, excise duties and compulsory social contributions.

Reportable transactions

The intermediaries will have to report any cross-border arrangement if it bears at least one of the broadly described features (called hallmarks), e.g.:

- includes cross-border payment between associated enterprises to a recipient resident in a no-tax or low-tax country;
- involves a jurisdiction with inadequate or weakly enforced anti-money laundering legislation;
- is set up to avoid reporting income as required under EU transparency rules;
- falls under any of the specific hallmarks on transfer pricing, e.g. transfers of hard-to value intangibles;
- uses losses to reduce a taxpayer's tax liability;
- allows that deductions with respect to the same depreciation on an asset are claimed in more than one jurisdiction;
- claims relief from double taxation for the same income or capital in more than one jurisdiction.

DAC 6 provides also for a 'main benefit' test as an additional criteria for some hallmarks. The main benefit test is satisfied if it can be established that – having regard to all relevant facts and circumstances - the main benefit or one of the main benefits a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

Reporting obligation

The primary obligation to disclose information to the tax authorities will rest with the intermediary.

The term *intermediary* is also defined very broadly as any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement. *Intermediary* also means 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 designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.

Tax intermediaries will be required to disclose qualifying cross-border arrangements to the tax authorities within 30 days beginning on:

- the day after the reportable cross-border arrangement is made available for implementation;
- the day after the reportable cross-border arrangement is ready for implementation; or
- when the first step in the implementation of the reportable cross-border arrangements has been made, whichever occurs first.

For reporting purposes a standard form will be developed and will include: the identification of the taxpayers and intermediaries involved, the hallmarks that generated the reporting obligation, a summary of the arrangement, details of the relevant domestic tax rules, the date on which the first step in the implementation has been or will be made, the value of the arrangement, identification of any other person or Member State likely to be affected by the arrangement.

In the absence of an intermediary (e.g. the obligation is not enforceable upon an intermediary due to legal professional privilege, the intermediary is located outside the EU or because an arrangement is developed in-house), **the obligation to disclose falls on the taxpayer** – defined as any person that uses a reportable cross-border arrangement to potentially optimize their tax position.

Entry into force and application

The DAC 6 will enter into force on 25th June 2018 and will start to apply on the 1st July 2020. Member States will be required to implement the DAC 6 into their domestic legal systems by 31st December 2019.

Intermediaries and relevant taxpayers will also be required to disclose information on reportable cross-border arrangements, the first step of which was implemented between the date of entry into force of the DAC 6 (25th June 2018) and the date of application of the DAC 6 (1st July 2020). This information will have to be filed by 31st August 2020.

The reported information will be automatically exchanged each quarter by the competent authorities of each Member State via a central directory on administrative cooperation.

Penalties

The DAC 6 leaves it to the Member States to lay down the rules on penalties applicable for infringements of the mandatory disclosure rules, with the only requirement that any penalties are effective, proportionate and dissuasive.

Polish implementation

Polish Government is currently working on the bill which will implement the DAC 6. The first draft is expected to be released shortly.

On the basis of unofficial information it appears that the Ministry of Finance considers extending the reporting obligation to domestic arrangements as well. It is also expected that legally protected professional privileges (e.g. Legal and Tax Advisors' privileges) will be taken into account and respected by the new rules (i.e. with the effect of shifting reporting obligation to the taxpayers or other intermediaries).

Consequences

The existence of the mandatory disclosure obligation will need to be verified with respect to each transaction. Moreover, bearing in mind the disclosure obligation in the interim period (**25 June 2018 – 1 July 2020**), the intermediaries and taxpayers should start tracking reportable arrangements immediately after the entry into force of the new rules. It may be also necessary for the intermediaries and taxpayers to consider adjustments to their internal processes that are required to comply with the new obligations.

Please contact us if you would like to obtain more information on the aforementioned changes or discuss their impact of the discussed changes for your company.

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