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KPMG

Mandatory Disclosure Rules

Austria adopts DAC6 transposition bill

This article provides a summary of the Austrian legislation to transpose mandatory disclosure rules under DAC6 into domestic law.

Status

The legislative process to implement Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter "DAC6" or "the Directive") into Austrian law was finalized in October 2019, with the transposition law adopted as part of a broader tax package. In that course, the Austrian Government also provided some clarifications in relation to various terms and hallmarks addressed in the bill.

Note that Austria does not postpone DAC6 reporting deadlines in its national law (the EU mandatory disclosure act). However, a postponement to October 31, 2020 is provided for in the draft information letter on the EU mandatory disclosure act. Therefore, a de facto three-month deferral– to October 31, 2020, applies with respect to all DAC6-related reporting obligations, including those related to the retrospective period.

Please note that the summary is based on information available as at July 20, 2020.

Scope

The scope of the Austrian law mirrors the text of DAC6. An intermediary is required to report cross-border tax arrangements (i.e. the law does not address domestic arrangements) that relate to taxes set out in the Directive on Administrative Cooperation.

Definitions

The bill is closely aligned with the Directive.

In particular, the definitions of "relevant taxpayer", "associated enterprise", "marketable arrangement" and "cross-border arrangement" have the same meaning as the Directive.

In addition, the bill includes a definition of the term "tax advantage", which is deemed to arise, if:

- a tax claim is prevented (e.g. Austria loses its taxing rights due to a cross-border arrangement);
- a tax claim is deferred completely or partly to other tax periods (e.g. arrangements that are used to shift profits to tax loss periods);
- the tax base is reduced (e.g. arrangements that reduce the tax base at the level of a partnership which is decisive for the partners' individual tax base) or
- taxes are to be refunded.

Further, the main benefit test in Austria should apply to both EU and non-EU tax advantages.

Hallmarks & Main Benefit Test

The list of hallmarks is closely aligned with Annex IV of the Directive.

The main benefit test also should apply to the same hallmarks as those in the Directive (i.e. category A and B hallmarks and paragraphs (1)(b)(i), (c) and (d) of the category C hallmarks).

Hallmarks linked to main benefit test

- Hallmark A(1) (confidentiality clauses): the guidance states that it is not intended that standard legal and professional confidentiality clauses used in engagements would fall in scope. However, if the tax authorities and other intermediaries engaged by the taxpayer are specifically included in the confidentiality clause, a disclosure requirement may arise.
- Hallmark A(2) (performance-based remuneration of the intermediary): the guidance notes that the hallmark could also be triggered if the intermediary is obliged to reimburse all or part of the remuneration if the intended tax advantage is not obtained or is only partially obtained.

Hallmarks & Main Benefit Test (cont.)

- Hallmark A(3) (standardized documentation and/or structure): the guidance refers to arrangements "ready to be signed" that do not require any essential adjustments prior to implementation and that are available for more than one taxpayer.
- Hallmark B(1) (acquiring loss-making companies): the guidance states that the hallmark applies if the main activity of the acquired loss-making company is either ceased or continued in only a marginal manner.
- Hallmark B(3) (circular transactions that have an offsetting or cancelling effect): the guidance notes that hedging transactions fall in the scope of this hallmark. The guidance further provides an example of company A acquiring shares in company B in the course of a capital increase which is subject to the condition that company B buys products/services from company A for the same amount of the purchase price of the shares.
- Hallmark C(1)(b)(i) (deductible cross-border payments where the recipient is subject to a corporate tax rate of zero or almost zero): the guidance notes that "almost zero" should mean a rate between zero and 1%.
- Hallmark C(1)(d) (preferential regimes): the guidance notes that arrangements that are subject to preferential tax regimes are disclosable insofar as they do not comply with the spirit of the legislation.

Hallmarks not linked to main benefit test

- Hallmark C(2) (depreciation of the same asset in more than one jurisdiction): the guidance provides the example of a leasing transaction, in which both the leasing company and the lessee claim depreciation on the value of the leased asset in their respective jurisdictions, on the basis that the domestic legislation in both jurisdictions requires the leased asset to be recognized at the level of the respective party.
- Hallmark C(3) (relief from double taxation in more than one jurisdiction): the guidance provides an example of a cross-border payment that is classified by one jurisdiction as an interest payment that is not subject to WHT and as a tax-exempt dividend distribution in the other jurisdiction.
- Hallmark C(4) (cross-border transfers of assets with a material difference in the amount being treated as payable): the guidance does not provide a fixed percentage threshold that is deemed material. Instead, the guidance notes that a materiality threshold is reached if – based on a case-by-case assessment – it is reasonable to expect that the difference would affect decisions being made by the taxpayer.
- Hallmark D(1) (concerning the automatic exchange of information): the guidance notes that automatic exchange of information reporting obligations are deemed to be undermined where an arrangement is designed to take advantage of:
  - the lack or inadequate implementation of the OECD Common Reporting Standard in a jurisdiction's domestic law,
  - the absence of an information exchange agreement with one or more of the relevant taxpayer's states of residence,
  - weaknesses in the due diligence procedures used by financial institutions to comply with their obligations to report Financial Account information.

  An example is provided of the transfer of a Financial Account from an Austrian bank to its US branch. According to the guidance, the transfer could fall in the scope of this hallmark as the US does not comply with the information exchange requirements set out by the OECD.
- Hallmark E(1) (unilateral safe harbor rules): the guidance clarifies that the measures which do not directly determine an arm's length price but only simplify documentation requirements should not trigger the hallmark.
- Hallmark E(2) (transfer of hard-to-value intangibles): the guidance notes that the term "hard-to-value intangibles" relates to the definition from the OECD transfer pricing guidance 2017. An example is provided of a partially developed intangible at the time of the transfer the commercial exploitation of which can only be expected after a delay of time or which has never been exploited commercially before.
- Hallmark E(3) (intragroup cross-border transfer of functions, risks and/or assets): the guidance provides the following examples:

Hallmarks & Main Benefit Test (cont.)

- Conversion of sales entities (i.e. companies with comparatively larger functions and risks) into low-risk distributors, marketing companies, sales agents or commission agents (i.e. companies with comparatively smaller functions and risks) working for an affiliated foreign company that may act as principal.
- Conversion of manufacturing entities (i.e. companies with comparatively larger functions and risks) into contract manufacturers (i.e. companies with comparatively smaller functions and risks) that work for an associated foreign company that may act as principal.
- Consolidation of functions in a central group entity, with a corresponding reduction in the range or scope of functions exercised by individual entities (possible examples are procurement, sales support or supply chain logistics).

Reporting - Intermediaries

The intermediary is only obliged to report if it has a presence in Austria (by virtue of local residence, a permanent establishment, incorporation or professional registration).

Reporting timelines mirror the requirements of the Directive, i.e. for bespoke arrangements 30 days as of the relevant reporting trigger.

The information that is required to be disclosed largely mirrors the requirements of the Directive. The content of the report can generally be reported in German or English. However, the following information is to be provided in English:

- details of the applicable hallmarks;
- a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any; and
- a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy.

Reporting should be completed electronically using the E-Government portal "FinanzOnline".

An intermediary will not be required to report if:

- The intermediary has evidence that it reported the same information in another Member State; or
- There is evidence that the same information has already been reported by another intermediary.

To demonstrate that the reporting requirement was satisfied by another intermediary, the Austrian tax authorities should be presented with the reference number obtained by the other intermediary within 30 days after the reporting obligation arises.

Legal Professional Privilege

An intermediary may receive a waiver from filing information (i.e. be entitled to rely on legal professional privilege) if it is subject to Austrian professional confidentiality provisions.

For the reporting exemption to apply, the intermediary must immediately also notify all other intermediaries and the relevant taxpayer that it benefits from a waiver and that the reporting obligation therefore has shifted to the other party. No further guidance is provided on the meaning of the term "immediately".

It is also possible for the relevant taxpayer to discharge the intermediary from its client confidentiality obligations, in which case, the reporting obligation would revert to the intermediary.

Legal professional privilege should also not apply to marketable arrangements.

Reporting – Relevant Taxpayer

In cases where there is no qualifying intermediary or where legal professional privilege applies, the relevant taxpayer is only obliged to report:

- when resident in Austria (by virtue of domicile, habitual place of abode, place of management or registered office); or
- when a domestic nexus can be established for a non-EU user (by operating through a domestic permanent establishment, earning income or engaging in an economic activity in Austria).

Reporting – Relevant Taxpayer (cont.)

The reporting timelines for relevant taxpayers should mirror the requirements of the Directive.

Where multiple taxpayers are involved, the relevant taxpayer that is to file information will be the one that features first in the list below:

1. The taxpayer that agreed the arrangement with the intermediary;
2. The taxpayer that is managing the implementation of the arrangement.

A taxpayer will not be required to report if:

- There is evidence that the arrangement has been reported by an intermediary; or
- There is evidence that the arrangement has been reported by another taxable person; or
- The taxpayer has evidence that it reported the arrangement in another Member State.

To demonstrate that the reporting requirement was satisfied by another taxpayer, the Austrian tax authorities should be presented with the reference number obtained by the other taxpayer within 30 days after the reporting obligation arises.

Penalties

Non-fulfilment of reporting obligations can arise in the following cases:

- Failure to file a (complete) report;
- Breach of the reporting deadlines;
- Inaccurate reporting

The penalties applicable should be as follows:

- Gross negligence: EUR 25,000;
- Intentional breach: EUR 50,000.

For more information, please refer to KPMG's EU Mandatory Disclosure Rules page or contact the following:

Christoph Plott
Partner
KPMG in Austria
cplott@kpmg.at

Raluca Enache
Director
KPMG's EU Tax Centre
Enache.Raluca@kpmg.com

kpmg.com/socialmedia