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INTERNATIONAL BUT PERSONAL

DAC6
THE EU DIRECTIVE ON CROSS-BORDER TAX ARRANGEMENTS

INTRODUCTION

On 25 May 2018 the Council of the European Union adopted Directive 2018/822/EU as the sixth amendment to the Directive on Administrative Cooperation 2011/16/EU, commonly referred to as "DAC 6", which imposes extensive reporting requirements with respect to cross-border tax planning arrangements affecting at least one EU member state. DAC 6 is part of the continuing efforts of the EU Commission to clamp down on tax avoidance and evasion in the internal market by creating transparency regarding potentially aggressive cross-border tax planning schemes.

The reporting obligations under DAC 6 are very broad and do not just apply to tax lawyers and therefore create a new set of compliance issues for the legal profession, in particular for lawyers involved in cross-border M&A transactions. Since DAC 6 only provides a general framework and gives the member states significant discretion regarding the transformation into national laws, it is useful for any practitioner who can be a potential "intermediary" to have an overview over the various laws and regulations in the EU member states.

MALTA
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1. When was DAC 6 implemented into the National Tax Law of Malta?

Council Directive (EU) 2018/8222 ("DAC 6") regarding the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements was implemented into Maltese Law by virtue of Legal Notice 342 of 2019 which amended Subsidiary Legislation 123.127, entitled the Cooperation with Other Jurisdictions on Tax Matters Regulations (the "Cooperation Regulations"), and came into effect on 1 July 2020.

- Have the tax authorities in your jurisdiction issued guidelines for the application and enforcement of the obligations under DAC 6?

  Yes, the Office of the Commissioner for Revenue (the "CFR") issued guidelines on the mandatory automatic exchange of information in relation to cross-border arrangements (the "Guidelines") on 4 January 2021. So far, there have been no amendments thereto.

2. What constitutes a reportable cross-border tax arrangement under the laws and regulations of your jurisdiction?

In terms of the Cooperation Regulations as further interpreted in the Guidelines, a reportable cross-border arrangement refers to an arrangement that includes at least one of the hallmarks listed in Annex IV of the Cooperation Regulations.

In essence, where a cross-border arrangement includes any of the hallmarks set out in the Cooperation Regulations (and satisfies the "main benefits" test where required), such arrangement is considered reportable. Having said this, a cross-border arrangement does not necessarily imply that the arrangement involves unacceptable or aggressive tax planning.

- What constitutes a "cross-border" arrangement? To what extent are national structures also covered?

  DAC 6, and consequently the Cooperation Regulations, define cross-border arrangements as arrangements concerning more than one EU member state, or an EU member state and a third country, which satisfy at least one of the following conditions:

i. participants in the arrangement are not all resident for tax purposes in the same jurisdiction;

ii. one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;

iii. one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or is the whole business of that permanent establishment;

iv. one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment in that jurisdiction;

v. the arrangement has a possible impact on the automatic exchange of information or the identification of the beneficial ownership of the arrangement.

As evidenced in the aforementioned conditions, for an arrangement to qualify as a cross-border arrangement under the Cooperation Regulations, the arrangement must necessarily concern multiple jurisdictions wherein at least one is an EU member state. Moreover, the jurisdiction must be material to the arrangement for such to fall within the definition of a cross-border arrangement, taking into account all the circumstances of the arrangement.

– How are the hallmarks and the "main benefits" test in Annex IV to DAC 6 defined and interpreted in your jurisdiction?

A hallmark is defined as a characteristic or feature of a cross-border arrangement that poses an indication of a potential risk of tax avoidance. Listed in Annex IV of the Cooperation Regulations, the hallmarks replicate ad verbatim the hallmarks listed in Annex IV of DAC 6, and are grouped under the following 5 broad categories:

A. generic hallmarks linked to the main benefit test;

B. specific hallmarks linked to the main benefit test;

C. specific hallmarks related to cross-border transactions;

D. specific hallmarks concerning automatic exchange of information and beneficial ownership;

E. specific hallmarks concerning transfer pricing;

The Cooperation Regulations differentiate between hallmarks which must satisfy the main benefit test (the "MBT") so as to amount to reportable cross-border arrangement, and those which do not. In fact, hallmarks under category A, category B and sub-paragraphs (b)(i), (c) and (d) of paragraph 1 of category C may be taken into account in determining whether an arrangement is a reportable cross-border arrangement only if the main benefit test is satisfied. On the other hand, the MBT does not have to be satisfied for any of the other hallmarks to be taken into account.

In order to satisfy the MBT, it must be shown that, after taking into account all circumstances of the case, the main benefit or one of the main benefits of the arrangement is the obtainment of a tax advantage.

– What constitutes a "tax benefit" under the legislation in your jurisdiction?

Referred to as the "tax advantage", the tax benefit is broadly interpreted in the Guidelines and described as including repayment of tax, a tax relief, a reduction in the tax charge, a tax deferral or an absence of taxation. In defining same, the Guidelines refer to the Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU) which states that "in determining whether an arrangement or series of arrangements has led to a tax benefit as referred to in point 4.2, national authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s). In that context, it is useful to consider whether one or more of the following situations occur:

a. an amount is not included in the tax base;
b. the taxpayer benefits from a deduction;
c. a loss for tax purposes is incurred;
d. no withholding tax is due;
e. foreign tax is offset."

– Is it required that the achievement of the "tax benefit" is the sole or the main purpose of the structure?

As explained above, the MBT is met if it can be shown that the tax advantage is the main benefit or one of the main benefits that can be reasonably expected from the arrangement.

- Do the laws and regulations of your jurisdiction require a connection to a potential abuse of tax structures?

  The potential abuse element which Maltese law requires relates to the tax advantage component in the MBT.

- Did your jurisdiction adopt a whitelist of non-reportable "standard" tax arrangements?

  No, so far Malta has not adopted such a list.

3. Who is subject to the reporting obligation (taxpayer, intermediary, other)?

In terms of DAC 6, persons meeting the definition of an "intermediary" must identify and subsequently report to the local tax authorities any cross-border arrangement involving at least one EU member state where such arrangement has one or more of the hallmarks identified in Annex IV of the Cooperation Regulations.

The definition of intermediary in regulation 13(9) of the Cooperation Regulations contemplates two categories of intermediaries:

1. Primary Intermediary – in terms of the Guidelines, a primary intermediary is a person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement. This type of intermediary has a full understanding of the material aspects of the arrangement, including the legislation being relied on and the conditions that need to be met to achieve the planned outcome. In the absence of such knowledge it is likely that such person would be classified as a secondary intermediary.

2. Secondary Intermediary – in terms of the Guidelines, a secondary intermediary refers to a 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. Therefore, this type of intermediary encompasses a wider range of persons such as lawyers and accountants.

In order for a person to be identified as a primary or secondary intermediary under the Cooperation Regulations, at least one of the following conditions must be satisfied:

- the person is resident for tax purposes in an EU member state;
- the person has a permanent establishment in an EU member state, through which it provides the services with respect to the arrangement;
- the legal person is incorporated in an EU member state or governed by the laws of an EU member state;
- the person is registered with a professional association relating to legal, taxation or consultancy services in an EU member state.

Moreover, the reporting obligation shifts onto the relevant taxpayer itself where there are no intermediaries or where the intermediary involved has waived the obligation on the basis of professional secrecy (as explained in greater detail below). Hence, in such scenarios, the law requires relevant taxpayers to provide information on reportable cross-border arrangements to EU member states' tax authorities.

The Cooperation Regulations have defined a relevant taxpayer as any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

– Do the laws and regulations of your jurisdiction address the issue of potential legal conflicts of intermediaries with professional confidentiality obligations?

In recognising the importance of professional secrecy, the Cooperation Regulations granted intermediaries whose profession is regulated under the Professional Secrecy Act (Chapter 377 of the Laws of Malta), such as lawyers, the right to waive their reporting obligations where the information in question is covered by the obligation of professional secrecy.

In this respect, the reporting obligations effectively shift onto any other intermediary involved in the same arrangement, or in the absence of such the relevant taxpayer.

In such a scenario, the intermediary waiving his obligation, known as the non-disclosing intermediary, is bound to notify any other involved intermediaries or the relevant taxpayer of their reporting obligation. This must be done in writing within seven working days from when the reporting trigger point arises.

Having said that, one should note that the right to a waiver from the reporting obligation shall no longer apply where the intermediary fails to notify any other intermediary involved in the same arrangement, or the relevant taxpayer, of their reporting obligations within the prescribed deadline.

Finally, it should be noted that the waiver of the reporting obligations contemplated in regulation 13(7)(e) of the Cooperation Regulations is not applicable in case of a reportable marketable arrangement.

4. What information must be included in a report on cross-border tax arrangements under DAC 6 in your jurisdiction and is there a specific format to be used?

Reportable information shall be filed electronically via an online portal made available by the CFR following registration on the CFR website (https://cfr.gov.mt/en/inlandrevenue/itu/Pages/Reportable-Cross-Border-Arrangements.aspx).

The Cooperation Regulations set out the information which is required upon submitting a report with the CFR, namely:

- the identification information of intermediaries and relevant taxpayers, including name, date and place of birth (in the case of a natural person), residence for tax purposes, taxpayer identification number and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;
- details of all applicable hallmarks set out in Annex IV that make the cross-border arrangement reportable;
- a summary of the reportable cross-border arrangement;
- the date/proposed date of the first step in the implementation of the reportable cross-border arrangement;
- details of the national tax provisions that form the basis of the reportable cross-border arrangement;
- the value of the reportable cross-border arrangement;
- the identification of the EU member state of the relevant taxpayer(s) and any other EU member states which are likely to be concerned with the reportable cross-border arrangement;

- the identification of any other person in an EU member state likely to be affected by the reportable cross-border arrangement, indicating to which EU member states such person is linked.

5. Is there an obligation to report tax arrangements which were already implemented in the past? If yes, what is the cut-off date?

The Cooperation Regulations specify that Intermediaries, and/or relevant taxpayers where applicable, were required to file information in respect of reportable cross-border arrangements the first step of which was implemented between 25 June 2018 and 30 June 2020. Such report had to be filed by 28 February 2021.

The Guidelines go on to clarify that for this period, information in respect of any arrangements the first step of which was not implemented was not reportable.

6. Who is the competent authority for filing a report under DAC6 in your jurisdiction?

The competent authority entrusted with receiving reports in terms of the Cooperation Regulations is the CFR.

7. What is the deadline for filing a report?

Reporting trigger points and time limits for filing vary depending on who is to file the report.

A. Primary Intermediary

A primary intermediary is required to file information with the CFR within 30 days commencing on the earliest of the following:

i. the day after the reportable cross-border arrangement is made available for implementation; or

ii. the day after the reportable cross-border arrangement is ready for implementation; or

iii. when the first step in the implementation of the reportable cross-border arrangement has been made.

B. Secondary Intermediary

A secondary intermediary is required to file information with the CFR within 30 days commencing on the later of:

a. the day after such intermediary provided, 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; or

b. the earlier of the following:

- the day after the reportable cross-border arrangement is made available for implementation; or
- 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 arrangement has been made.

C. Relevant Taxpayer

Where the reporting obligation lies with the relevant taxpayer, the 30-day reporting time limit commences on the earliest of the following:

i. the day after the reportable cross-border arrangement is made available for implementation to the relevant taxpayer; or

ii. the day after the reportable cross-border arrangement is ready for implementation by the relevant taxpayer; or

iii. when the first step in its implementation has been made in relation to the relevant taxpayer.

b. Has there been an extension of deadlines due to the COVID-19 pandemic?

The CFR deferred the first reporting deadlines under regulation 13 of the Cooperation Regulations by six months as a response to the impacts caused as a result of the COVID-19 pandemic. This was done through an amending legal notice L.N. 315 of 2020 following the European Council's agreement on the postponement of such deadlines and the publication of Directive 2020/876.

The deferral has the effect of postponing the reporting deadlines as follows:

- by 28 February 2021 (previously 31 August 2020) for arrangements where the first step was implemented between 25 June 2018 and 1 July 2020.
- the start date for the 30-day reporting deadline to begin as from 1 January 2021 (originally 1 July 2020). This also applied for cross-border arrangements for which the reporting trigger occurred between 1 July 2020 and 31 December 2020.
- by 30 April 2021 for the first periodic report on marketable arrangements.

8. What are the penalties and/or other legal consequences for failing to submit a DAC 6 report within the applicable deadline?

The Cooperation Regulations set out penalties imposed on intermediaries and/or relevant taxpayers where they fail to comply with the reporting obligations. The law caters for different levels of penalties with respect to the below failures:

i. intermediary/relevant taxpayer fails to retain documentation and information in the course of meeting its reporting obligations for a minimum period of five years starting from the end of the year to which the information relates;

ii. intermediary/relevant taxpayer fails to report any of the information required to be reported in terms of the Cooperation Regulations within the stipulated time frame;

iii. intermediary/relevant taxpayer fails to report the information required to be reported in a complete and accurate manner;

iv. intermediary/relevant taxpayer fails to comply with a request for information made by the CFR.

Upon receiving a default notice by the CFR due to a failure listed above, the intermediary/relevant taxpayer is given the opportunity to contest the imposition of the penalty by means of a letter of contestation submitted to the CFR within 10 days.

9. Has your firm implemented specific processes regarding DAC 6 compliance? If yes, please describe.

Besides offering our employees training with respect to DAC 6 compliance, DF Advocates has ensured that clients and prospective clients are aware of the firm's rights and obligations with respect to DAC 6.

10. Contact details

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