



DAC6

THE EU DIRECTIVE ON CROSS-BORDER TAX ARRANGEMENTS

COUNTRY

LAW FIRM

Austria Polak & Partner Rechtsanwälte GmbH

Bulgaria Varadinov & Co Attorneys at Law

Cyprus Ioannides Demetriou LLC

Czech Republic Felix a Spol. Attorneys at Law

France Bersay & Associés

Germany Rittershaus

Gibraltar Hassans International Law Firm Limited

Greece Moussas & Partners

Italy Cocuzza Associati

Luxembourg Brucher Thieltgen & Partners

Malta DF Advocates

Netherlands Ekelmans Advocaten

- Insurance & Corporate

Poland FKA

Portugal Sérvulo & Associados

Slovak Republic Paul Q

Sweden Hellström

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.

AUSTRIA

Polak & Partners Rechtsanwälte Gmb

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

- 22 October 2019: Directive 2018/822/EU was implemented in Austria by the passing of the EU Mandatory Reporting Act (*Bundesgesetz über den verpflichtenden automatischen Informationsaustausch über meldepflichtige grenzüberschreitende Gestaltungen im Bereich der Besteuerung [EU-Meldepflichtgesetz]*)).
 - 24 June 2020: Directive 2018/822/EU provides for an option to postpone the start of the reporting obligation by six months. Austria does not make use of this option.
 - 01 July 2020: The EU Mandatory Reporting Act comes into force in Austria.
 - 1 October 2020: Reporting of tax arrangements subject to a reporting obligation is possible via Austrian e-Government portal FinanzOnline:

(<https://finanzonline.bmf.gv.at/fon/>).
 - 31 October 2020: Deadline for reporting tax arrangements implemented between 25 June 2018 and 1 July 2020 ("old cases").
 - 31 October 2020: Deadline for the reporting of tax arrangements that were implemented between 1 July 2020 and 1 October 2020 ("new cases").
 - 31 October 2020: first quarterly exchange between member states.
 - From 31 October 2020 onwards: 30-day reporting deadline provided for in the EU Mandatory Reporting Act will apply (see Question 7).
- **Have the tax authorities in your jurisdiction issued guidelines for the application and enforcement of the obligations under DAC 6?**

On 7 July 2020, the Austrian Federal Ministry of Finance published a non-binding draft assessment on the interpretation and application of the EU Mandatory Reporting Act. It is currently being commented on by the relevant stakeholders. No final and binding version has been published yet.

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

- What constitutes a cross-border arrangement?

According to Sec. 3 no. 2 EU Mandatory Reporting Act, cross-border arrangements are defined as follows:

"cross-border arrangement" means an arrangement involving either more than one Member State or at least one Member State and at least one non-member state, where at least one of the following conditions must be met

- a) Not all persons involved in the arrangement are resident for tax purposes in the same territory,
- b) one or more persons involved in the arrangement are simultaneously resident for tax purposes in several territories,
- c) one or more persons involved in the arrangement carry on a business activity in another territory through a permanent establishment situated there and the arrangement constitutes in whole or in part the business activity carried on by the permanent establishment,
- d) one or more persons involved in the arrangement carry on an activity in another territory without being resident there for tax purposes or without establishing a permanent establishment there, or
- e) such design may have implications for the automatic exchange of information on financial accounts or the identification of beneficial owners.

The term "cross-border arrangement" also covers an arrangement consisting of one or more steps, also refers to a part or parts of a cross-border arrangement or a series of cross-border arrangements."

From the Austrian Federal Ministry of Finance's draft assessment of 7 July 2020:

- The term "arrangement" according to the EU Mandatory Reporting Act can be understood as a process in which a certain structure, a certain process or a certain situation is consciously and actively brought about or changed by the user or for the user and this structure, this process or this

situation thereby acquires a fiscal significance that would otherwise not occur.

- An arrangement can include one or more steps and one or more parts or a series of transactions. In accordance with Sec. 3 no. 2 EU Mandatory Reporting Act, a structure is considered “cross-border” if it involves Austria and one or more member states or Austria and one or more non-member states, whereby at least one of the conditions listed in litera a - e (see above) must be fulfilled.
- The “person” named in Sec. 3 no. 2 (a)-(d) EU Mandatory Reporting Act is defined as either
 - a) a natural person;
 - b) a legal entity;
 - c) an association of persons that has been granted legal capacity but does not have the legal status of a legal person; or
 - d) all other legal arrangements of whatever nature and form - with or without legal personality - which own or manage assets which, including the income derived therefrom, are subject to one of the taxes covered by this federal law.
- A person is “involved” in an arrangement subject to reporting if the arrangement would not have come about without the action or acquiescence of this person.

– **To what extent are national structures also covered?**

Purely domestic arrangements are not covered by the EU Mandatory Reporting Act.

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

The “main benefits” test is fulfilled if the main benefit or one of the main benefits a person can expect to receive from the arrangement is a tax benefit.

A “hallmark” is a characteristic or feature of a cross-border arrangement entailing its mandatory reporting if met. For a distinction between hallmarks which trigger mandatory reporting without the need to satisfy the “main benefits” test and hallmarks where additionally the “main benefits” test has to be fulfilled, see below.

- Hallmarks of an arrangement which must be reported without the need to fulfill the “main benefits” test are defined in Sec. 5 EU Mandatory Reporting Act: For instance, deductible cross-border payments between associated companies where the payee has no tax residence or is tax resident in a territory which is on the EU or OECD blacklist; the depreciation of an asset or the exemption from double taxation for the same income or assets in more than one territory.
 - Hallmarks of an arrangement which must be reported only if the “main benefits” test is fulfilled are defined in Sec. 6 EU Mandatory Reporting Act: For instance, confidentiality clauses which obligate the taxable person or another involved person not to inform other intermediaries assigned by the taxable person or the tax authorities how a tax benefit is accrued through the arrangement; compensation agreements with intermediaries correlating with the amount of the tax benefit accrued through the arrangement.
- **What constitutes a "tax benefit" under the legislation in your jurisdiction?**
- The Austrian legislator has defined “tax benefit” in Sec. 3 no. 10 (a)-(c) EU Mandatory Reporting Act:
- A “tax benefit” is accrued if, due to an arrangement subject to reporting,
- the accrual of the tax claim is prevented or postponed in whole or in part to another taxable period (lit. a),
 - the tax base or the tax claim is reduced in whole or in part (lit. b), or
 - a tax is refunded or reimbursed in whole or in part (lit. c).
- **Is it required that the achievement of the "tax benefit" is the sole or the main purpose of the structure?**

According to the Austrian Ministry of Finance’s draft assessment of 7 July 2020, the “main benefits” test consists of determining the main purpose or one of the main purposes of the arrangement. Pursuant to Sec. 6 EU Mandatory Reporting Act, an arrangement is subject to reporting if

- the main benefit or one of the main benefits that a person can reasonably expect from the arrangement, considering all relevant facts and circumstances, consists in obtaining a tax benefit, and

- the requirements of Sec. 4 EU Mandatory Reporting Act are fulfilled (see Question 2 (6)), and
 - the arrangement consists of one of the hallmarks laid out in Sec. 6 EU Mandatory Reporting Act (see Question 2 (3)).
 - Do the laws and regulations of your jurisdiction require a connection to a potential abuse of tax structures?
- Austrian law (Sec. 4 EU Mandatory Reporting Act) requires
- a risk of tax avoidance, or
 - a risk of circumvention of the reporting requirements of the Common Reporting Standards, or
 - a risk of preventing the identification of the beneficial owner through the arrangement.
- Did your jurisdiction adopt a whitelist of non-reportable "standard" tax arrangements?

A whitelist has not been adopted in Austria yet. However, the Ministry of Finance may still do so by decree.

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

The “intermediary”, being a person

- who conceives, markets, organises, makes available for implementation or administers the implementation of an arrangement subject to reporting (main intermediary), or
- who knows or must have known that he/she/it directly or indirectly provided assistance, support or advice with regard to the conception, marketisation, organisation, provision for implementation or administration of the implementation of an arrangement subject to reporting (auxiliary intermediary)

and who additionally fulfils one of the following conditions:

- has his/her habitual residence, its registered office or its headquarters in Austria,

reporting obligation that he can make a proper report according to the EU Mandatory Reporting Act.

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?

According to Sec. 16 EU Mandatory Reporting Act the report must contain the following information:

1. Details of all involved intermediaries and all relevant taxable persons, including
 - a) information on their name, date of birth, place of birth, tax residence and tax identification number for natural persons, or
 - b) information on their names, registered office or business headquarters, tax residence and tax identification number in the case of legal entities or associations of persons,
2. the identification of all affiliated companies of the relevant taxable person,
3. details regarding the hallmarks of the arrangements (Sec. 5 or 6 EU Mandatory Reporting Act),
4. a summary of the content of the arrangement subject to reporting,
5. if available, a designation of the arrangement subject to reporting by which the arrangement is commonly known,
6. an abstract description of the relevant business activities, unless such description would lead to the disclosure of a trade, business or professional secret or of a commercial process or unless the disclosure of such information would infringe on public order,
7. if available, the date on which the first step towards implementing the arrangement subject to reporting has been or will be taken,
8. details regarding the provisions of national law which form the basis of the arrangement subject to reporting,
9. if available, the value of the arrangement subject to reporting,
10. naming of the member state in which the relevant taxable person(s) is/are a tax resident,

11.naming of all member states affected by the arrangement subject to reporting, and

12.information on all other persons affected or potentially affected by the arrangement subject to reporting, including the member state of their tax residence.

The above information may be provided in German or English. The information pursuant to Sec. 16 (1) nos. 3 to 6 EU Mandatory Reporting Act above shall be submitted in English.

According to Sec. 18 EU Mandatory Reporting Act, the report has the following formal requirements:

The transmission of the report must be made electronically via FinanzOnline, the online service of the Austrian Ministry of Finance. If the arrangement was already reported in another member state or by another intermediary, only the reference number of the reporting must be submitted.

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

EU member states decided on 24 June 2020 to provide an option to postpone the start of the notification deadlines (DAC 6) by up to six months due to the coronavirus crisis.

Austria has decided not to take up this option. However, the Austrian Ministry of Finance's draft assessment, which concretises the EU Mandatory Reporting Act, allows for late reporting until 31 October 2020 without financial penalties.

This leads to a de facto extension of the reporting deadlines:

- Arrangements subject to reporting, implemented between 25 June 2018 and 30 June 2020 ("old cases") must be reported by 31 October 2020 instead of by 31 August 2020;
- Arrangements subject to reporting, implemented between 1 July 2020 and 1 October 2020 ("new cases") must be reported within 30 days or by 31 October 2020 at the latest;
- first periodic follow-up reports for arrangements subject to reporting conceived from 1 July 2020 must be submitted by 31 October 2020

For arrangements subject to reporting implemented from 1 October 2020 onwards, the 30-day deadlines of the EU Mandatory Reporting Act apply (see Question 7).

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

The competent authority in Austria is the Ministry of Finance.

7. What is the deadline for filing a report?

According to Sec. 8 (1) EU Mandatory Reporting Act, the main intermediary (Sec. 3 no. 3 (a) EU Mandatory Reporting Act, see Question 3) must provide a report on an arrangement subject to reporting within 30 days from the day

1. following the day on which the arrangement subject to reporting is made available for implementation,
2. following the day on which the relevant taxable person is ready to implement the arrangement subject to reporting, or
3. on which the relevant taxable person has initiated the implementation of the arrangement subject to reporting.

The auxiliary intermediary (Sec. 3 No 3 (b) EU Mandatory Reporting Act, see Question 3) must report the information on an arrangement subject to reporting within 30 days from the day following the day on which the direct or indirect assistance, support or advice was provided.

If the above-mentioned 30-day deadline for the main or auxiliary intermediary has not yet expired, the deadline begins on the day following the day on which the intermediary has been released from his confidentiality obligation by the relevant taxable person.

According to Sec. 13 EU Mandatory Reporting Act the relevant taxable person must file a report on an arrangement subject to reporting within 30 days from the day

1. following the day on which the arrangement subject to reporting is made available for implementation,
2. following the day on which he is ready to implement the arrangement subject to reporting,
3. on which he initiated the implementation of the arrangement subject to reporting, or

4. following the day, on which he was informed by an intermediary exempted from the obligation to report of this exemption pursuant to Sec. 11 (3) Mandatory Reporting Act (see Question 3 at the end).

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

See Question 5.

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

Anyone who violates the EU Mandatory Reporting Act by

- not or not fully filing the reporting,
- not fulfilling their reporting obligation within the prescribed deadline,
- reporting incorrect information, or
- not fulfilling their obligations in connection with the legal professional privilege

must settle a monetary penalty. If the obligated person did not comply with the EU Mandatory Reporting Act intentionally, the penalty will be up to €50,000 (€25,000 in case of gross negligence). There is no possibility to avoid this penalty by filing a voluntary self-disclosure.

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

N/A

Contact details

Polak & Partner Rechtsanwälte GmbH

Peter Polak
Senior Partner
E-mail: p.polak@fplp.at

Philipp Felbermair
Associate
E-mail: p.felbermair@fplp.at



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