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DAC6

THE EU DIRECTIVE ON CROSS-BORDER TAX ARRANGEMENTS

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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.

BULGARIA
Varadinov & Co Attorneys at Law

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

A new section has been created in the Tax and Social Insurance Procedure Code: Section VII, "Special rules for the automatic exchange of information on cross-border tax arrangements", effective as of 1 July 2020.

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

  An Order of the executive director of the National Revenue Agency (NRA) has been adopted.

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

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

  Art. 143z of the Bulgarian Tax and Social Insurance Procedure Code provides a definition of the term “cross-border tax arrangement”, being a tax consultation where there is a potential risk of tax avoidance . A cross-border tax arrangement may include an arrangement, agreement, stipulation, opinion, scheme, plan, transaction or series of those listed, and may consist of several parts or several stages of implementation. The list is not exhaustive and aims to cover some of the basic variations of tax arrangements .

  As per art. 143z of the Bulgarian Tax and Social Insurance Procedure Code, a cross-border tax arrangement is a scheme that affects more than one member state, or a member state and a third country, where at least one of the following conditions has been met:

  1. not all participants in the arrangement are local persons for tax purposes of the same jurisdiction;

  2. one or more of the participants in the arrangement are also local persons for tax purposes of more than one jurisdiction;

  3. one or more of the participants in the arrangements carry out economic activity in another jurisdiction through a place of economic activity or a certain

base and the arrangement covers part or the whole economic activity at the place of economic activity or the relevant base;

4. one or more of the participants in the arrangement carry out activity in another jurisdiction, without being local persons for tax purposes or setting up a place of economic activity or a certain base in this jurisdiction; or

5. the arrangement may have an impact on the automatic exchange of information or the determination of the beneficial owner.

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

Cross-border tax arrangements with a potential risk of tax avoidance are divided into the following categories/hallmarks:

1. an arrangement in which the taxable person or another participant undertakes to observe a condition for confidentiality, which may require them to not disclose to other consultants/intermediaries or to tax authorities the manner in which the arrangements may provide a tax advantage;

2. an arrangement under which the consultant/intermediary has the right to receive remuneration of any kind and this remuneration is determined depending on:

(a) the amount of the tax advantage resulting from the arrangement, or

(b) whether a tax advantage has been obtained as a result of the arrangement, including an arrangement for the consultant/intermediary to reimburse partially or totally the remuneration where the expected tax advantage arising from the arrangement has not been partially or fully achieved;

3. an arrangement in which there is a substantially standardised documentation and/or structure and which is accessible to more than one taxable person, without the need to be substantially changed for the purposes of application;

4. an arrangement in which a participant undertakes wilful actions for acquisition of a company which has tax losses for termination of its main activity and for use of the losses for reduction of its tax liabilities, including by transfer of these losses to another jurisdiction or by accelerating the use of these losses;

5. an arrangement which provides for a result equivalent to requalification, transformation or conversion of income into property, capital, donation or other types of income which are taxed at a lower rate or are exempt from taxation;

6. an arrangement which includes successive transactions where funds have been transferred for the purpose of their return through the participation of one or more intermediate entities that have no other economic function, or the use of transactions that are mutually compensated or invalidated or have other similar result;

7. an arrangement involving cross-border payments representing tax-deductible expenses between two or more related undertakings where at least one of the following conditions has been met:

(a) the recipient is not a resident for tax purposes of any tax jurisdiction;

(b) the recipient is a resident for tax purposes of a jurisdiction which

(aa) does not impose corporate tax or imposes corporate tax at a zero or near zero rate, or

(bb) is included in a list of third jurisdictions which have been assessed jointly by the member states or within the Organisation for Economic Cooperation and Development as non-assisting jurisdictions for tax purposes;

(c) the payment is completely exempt from taxation in the jurisdiction in which the recipient is a resident for tax purposes;

(d) the payment is subject to a preferential tax treatment in the jurisdiction in which the recipient is a resident for tax purposes;

8. an arrangement which provides for the deduction of depreciation expense on the same asset in more than one jurisdiction;

9. an arrangement which seeks to avoid double taxation in respect of the same element of income or property in more than one jurisdiction;

10. an arrangement that involves a transfer of assets and where there is a significant difference in the amounts that are considered as due consideration for the assets in the jurisdictions concerned;

11. an arrangement which may lead to a reduction or circumvention of the obligations to provide information under chapter 16, section IIIa of the Code or

similar provisions in the legislation of other member states or jurisdictions or agreements for the automatic exchange of information on financial accounts, or which takes advantage of the lack of such legislation or agreements, including through:

(a) the use of an account, product or investment which is not or is alleged not to be a financial account but which has characteristics substantially similar to those of a financial account;

(b) the transfer of financial accounts or assets to jurisdictions or the use of jurisdictions which are not required to automatically exchange financial account information with the state of which the taxable person is a resident for tax purposes;

(c) the reclassification of income or funds into products or payments that are not subject to an automatic exchange of financial account information;

(d) the transfer or transformation of a financial institution or financial account, or of the assets contained therein, into a financial institution or a financial account or assets for which no information is provided by the automatic exchange of information on financial accounts;

(e) the use of legal entities, arrangements or structures that circumvent or are considered to circumvent the provision of information on one or more account holders or controllers through the automatic exchange of information on financial accounts;

(f) circumventing or exploiting weaknesses in the comprehensive verification procedures that financial institutions apply to comply with their obligations to provide financial account information, including the use of jurisdictions with inappropriate or ineffective enforcement regimes in the area of anti-money-laundering measures in cash or with insufficient transparency requirements for legal entities or legal arrangements;

12. an arrangement involving a chain of non-transparent legal or beneficial ownership using persons, legal arrangements or structures

(a) which do not carry out significant business activities carried out with the necessary staff, equipment, assets and premises, and

(b) which are established, managed, controlled, established or resident for tax purposes in a jurisdiction other than that in which one or more of the beneficial

owners of the assets held by those persons are resident for tax purposes, legal arrangements, or structures, and

(c) whose beneficial owners within the meaning of the Anti-Money-Laundering Measures Act or a similar provision of the law of a member state cannot be established;

13. an arrangement that includes the use of unilateral rules for facilitated regimes for the purposes of transfer pricing;

14. an arrangement that includes the transfer or provision of intangible assets that are difficult to assess for the purposes of transfer pricing;

15. an arrangement that includes intra-group cross-border transfer of functions and/or risks and/or assets, if the projected annual profit before interest and taxes of the transferor or transferors in the three years after the transfer is less than 50% of the projected annual profit before interest and taxes of the same transferor or transferors, if the transfer has not been made.

When a cross-border tax arrangement falls into one of the categories under para. 4, items 1-6 or item 7(b)(aa), 7(c) or 7(d) of the Code, information shall be provided only when it can be established that the main benefit or one of the main benefits which, in view of all the relevant facts and circumstances, a taxable person may reasonably expect to achieve from the cross-border tax arrangement is to obtain a tax advantage.

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

"Tax advantage/benefit" within the meaning of chapter 16, section VII of the Code is any benefit for a taxable person which may be expressed as a reduction in the tax base or tax due, avoidance or deferral of tax payment, or use of a tax relief or tax relief in excess of the amount due, as well as other benefits or advantages that could improve the tax status of the person.

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

Some but not all of the hallmarks are only triggered if it can be established that the main benefit or one of the main benefits which a person may reasonably expect to achieve from the cross-border arrangement is to obtain a tax advantage, that is, the arrangement satisfies the “main benefits” test. Those hallmarks that are only triggered if it is established that the main purpose is

achievement of the “tax benefit” are under para. 4, items 1-6 or item 7(b)(aa), 7(c) or 7(d) as stipulated above.

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

The arrangement as stipulated according to DAC 6 does not have to be illegal or a criminal offense. If it falls into any of the listed criteria, it will be subject to reporting under the Bulgarian Tax and Social Insurance Procedure Code. With this in mind, the concept differs from tax avoidance, which is a crime and is prosecuted under the general criminal code.

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

There is not an explicit whitelist of arrangements that should not be disclosed. Instead, a comprehensive set of criteria are provided, and if a certain criterion has been met then the arrangement should be disclosed. Otherwise, if the criteria for a tax arrangement have not been met, it should not be disclosed. One of the interesting matters that managed to create some tension among the legal tax community is related to the application of the rules for disclosure of tax arrangements in the context of the legal non-disclosure rule . In this sense, the following text is provided in the Bulgarian Act: “A consultant is released from the obligation to provide information on a cross-border tax arrangement when:

....

3. by law he is obliged to keep this information as a professional secret, except when the taxable person has expressed consent for its provision.

....

Notwithstanding para. 10, item 3 and para. 12 the consultant shall notify the executive director of the National Revenue Agency of the other consultants under the tax scheme or the taxable person who should provide information, although for them the obligation to provide may arise in another Member State.”

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

Obliged to provide information, according to the law, are mainly the consultants, and in some cases the taxpayers themselves.

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

There is an exception to the notification rules for consultants who are required by law to maintain professional secrecy. In this case, however, the obligation to notify the revenue administration lies with the taxpayer. The consultant is obliged to remind the respective person about this obligation.

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?

The information that consultants or taxpayers provide to the executive director of the National Revenue Agency must contain the following information:

• identification data of the consultant and the taxable person,

• description of the characteristics of the arrangement,

• unique number of the tax arrangement,

• a summary of the tax arrangement, including an indication of the name under which it is known and a general description of the relevant business activities or arrangements,

• the date on which the first step in the implementation of the tax arrangement was made or is to be made,

• the national legal provisions on which the tax arrangement is based,

• value,

• the member states that are likely to be affected by the tax arrangement, and

• identification of any other person in a member state who is likely to be affected by the tax arrangement.

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 amendments in accordance with DAC 6 were implemented in the Bulgarian Tax and Social Insurance Procedure Code in 2019 and are in force since 1 July 2020. After that date, the consultants or taxable persons are obliged to perform their obligations under the said amendments. However, the consultants and respectively the taxable persons were obliged to submit information by February 2021 on each cross-border tax arrangement the first step of the implementation of which was carried out between 25 June 2018 and 30 June 2020 as per para. 6 of the transitional and final provisions of the Law for amendment and supplementation of the tax and social security procedure code.

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

The submission of information on cross-border tax arrangements is carried out before the National Revenue Agency.

7. What is the deadline for filing a report?

The consultant should provide information on a cross-border tax arrangement that he is aware of or owns or that is under his control within 30 calendar days.

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

No.

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

The control over the observance of the rules shall be carried out by the NRA, as a number of sanctions for violation of the new obligations are provided. Administrative sanctions for non-compliance by the consultant or participants are provided. The most serious among them is a penalty up to BGN 10,000.

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

No.

10. Contact details

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