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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.

GERMANY
Rittershaus

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

In Germany, the "Act on the Introduction of an Obligation to Notify Cross-Border Tax Arrangements" (the "DAC 6 Act"), which implements EU (Regulation) 2018/822, was passed by the German Bundestag on October 9, 2019 and came into effect on July 1, 2020.

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

  The Federal Ministry of Finance has published a notice on the application of the provisions on the obligation to notify cross-border tax arrangements on March 29, 2021, which contains detailed notes on the application of the DAC 6 rules (the "DAC 6 Notice").

  This notice is available (in German) at the following website: file:///C:/Users/mba/AppData/Local/Temp/dac6_bmf_schreiben.pdf%3bjsessionid=8165F0794F617D53652628258FECA919.pdf

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

A "tax arrangement" within the meaning of the law is any structure, process or situation that is created or changed by the tax arrangement and has an effect under the applicable tax laws that would otherwise not occur. (BT-Drs. 19/14685 v. 4.11.2019, 28).

Accordingly, the tax authorities require "a deliberate creative process that changes the (factual and/or legal) circumstances with a tax impact through transactions, regulations, actions, processes, agreements, commitments, obligations or similar events". (see DAC 6 Notice)

The requirement of a conscious and active conduct also contains a subjective element, i.e. a tax arrangement within the meaning of the DAC 6 Act only exists, if the tax consequence is intended (see Jochimsen/Dietrich, ISTR 2020, 529 [530])

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

  Pursuant to Sec. 138d para. 2, no. 2 German Tax Act (AO), a cross-border arrangement exists, if more than one jurisdiction (with at least one EU member

state) is affected by the arrangement and one of the following circumstances exists:

a) not all participants in the arrangement are resident for tax purposes in the same tax jurisdiction;

b) one or more of the participants in the arrangement are simultaneously resident for tax purposes in more than one tax jurisdiction;

(c) one or more of the participants in the arrangement have business activities in another tax jurisdiction through a permanent establishment located therein and the arrangement relates to part of or complete business of the permanent establishment;

d) one or more of the participants in the arrangement have business activities in another tax jurisdiction without being resident for tax purposes or having a permanent establishment in such tax jurisdiction;

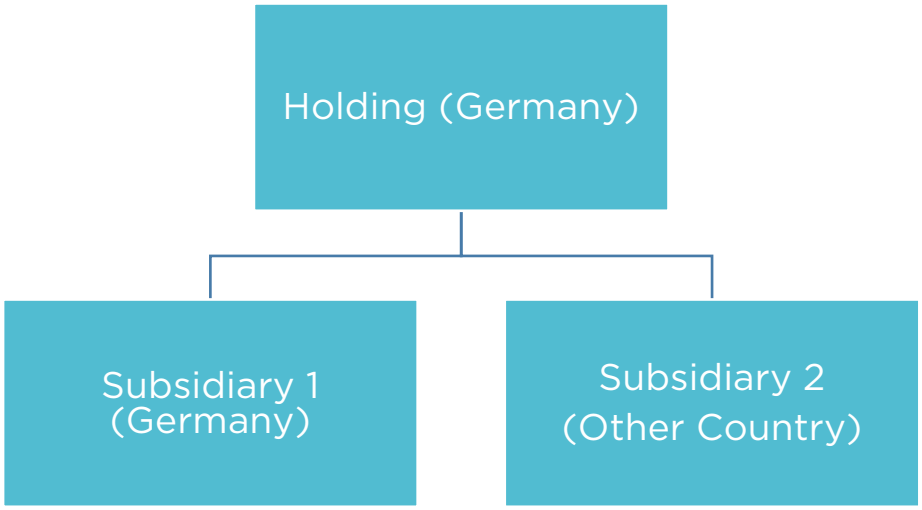
Key elements, therefore, are the connections to different tax jurisdictions created by the participants. Therefore the definition of who is considered a "participant" is key.

In Germany it is clarified that any person acting purely as an intermediary is not a participant Section 138d para. 7 German Tax Act. Primarily, participants in the tax arrangements are therefore the users, but also "other parties involved" in the tax arrangement. The term "user" is defined by Section 138d para. 5 German Tax Act as follows:

"User of a cross-border tax arrangement is any natural person, legal entity, partnership, association or estate(1) to which the cross-border tax arrangement is made available for use, (2) which is willing to implement the cross-border tax arrangement, or (3) which has taken the first step toward implementing the cross-border tax arrangement. "

In addition to the user(s), persons or entities closely associated with them within the meaning of Section 1 para. 2 of the German Foreign Tax Act (AStG) (which includes basically all persons or entities with a significant participation or some other form of control or profit rights) as well as their respective business or contractual partners, provided they are actively involved in the respective tax arrangement, are considered to be "other parties involved" in the tax arrangement.

The application of these rules are illustrated by the following example:



The holding company, which is resident for tax purposes in Germany, has two subsidiaries - one of which is also resident for tax purposes in Germany (Subsidiary 1) and one of which is resident for tax purposes abroad (Subsidiary 2). Subsidiary 1 has losses carried forward. The holding company has an interest-bearing receivable from Subsidiary 2. In order to reduce the tax burden in the group, the holding company plans to transfer the loan receivable from Subsidiary 2 to Subsidiary 1. The "user" of this possible tax arrangement would be the holding company. Subsidiary 1 would be considered an "other involved party " because the assignment requires a contract between the holding company and Subsidiary 1, however Subsidiary 1 would have no tax advantage from the arrangement, but rather increased profits and faster consumption of any losses carried forward.

If the loan agreement between the holding company and Subsidiary 2 requires consent for the change of creditor and Subsidiary 2 provides such consent, then Subsidiary 2 will probably also be regarded as an "other involved party" (but not as a user). If no such consent is required, then Subsidiary 2 is not a participant, but is probably an "other involved party" affected by the tax arrangement, sec. 138g para. 3 no. 10 German Tax Act.

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

a) Hallmarks

Sect. 138e German Tax Act contains an exhaustive list of hallmarks that trigger a reporting obligation. Section 138e para . 1 German Tax Act contains the conditional hallmarks to which the relevance test in Section 138d para. 2, sent. 1 no. 3 (a) German Tax Act applies. In contrast, Section 138e (2) German Tax Act contains the unconditional hallmarks which, without the requirement of a relevance test, result in a reportable tax arrangement.

aa) Hallmarks according to Section 138 e para. 1 German Tax Act (with relevance test)

Pursuant to Section 138e para. 1 German Tax Act, the following hallmarks are subject to the relevance test:

(1) Qualified confidentiality clauses prohibiting the user or another party involved in the tax arrangement from disclosing the manner in which the tax advantage created by the tax arrangement is obtained to other intermediaries who are also subject to the notification obligation or to the tax authorities (sec. 138e para. 1, no. 1 lit. a German Tax Act.

(2) The agreement for a remuneration related to the tax advantages created by the tax arrangement, if the remuneration depends on the amount of the achieved tax advantage or if the agreement contains the agreement to refund the remuneration in whole or in part if the tax advantage that was expected in connection with the tax arrangement is completely or partially not achieved (sec. 138e para.1 no. 1 lit. b German Tax Act).

(3) Standardized documentation or structures of a design that is available to more than one user without having to be substantially customized for such use (sec. 138e para. 1 no. 2 German Tax Act).

(4) Arrangements whereby a party to the arrangement deliberately takes inappropriate legal steps in order to acquire, directly or indirectly, a loss-making enterprise, in order terminate the principal business activity of that enterprise and to use its losses to reduce its own tax burden, including the transfer of the

losses to another tax jurisdiction or the use of those losses in the near future (sec. 138e para.1 no.3 lit. a German Tax Code).

(5) Arrangements for a conversion of revenue into assets, gifts or other tax exempt income or income with a lower tax rate income or non-taxable (sec. 138e para. 1, no. 3 lit. b German Tax Act),

(6) Circular transfers of assets with at least two transactions where the value of the assets concerned is returned to the original taxpayer after completion of the transactions (Section 138e para. 1 no. 3 lit. c German Tax Act).

(7) Intra group cross-border-arrangements under which the recipient of a payment which is deductible as a business expense of the party making such payment is tax resident in a tax jurisdiction that does not levy a corporate income tax at all or has a nominal corporate income tax rate of or near 0 percent (sec. 138e para. 1, no. 3 lit. d German Tax Act) or if such tax jurisdiction exempts such payment from corporate income tax or subjects it to a preferential tax treatment (sec. 138e para. 1, no. 3 lit. e German Tax Act).

bb) Hallmarks according to Section 138e para. 2 German Tax Act AO (without relevance test)

Pursuant to Section 138e para. 2 of the German Tax Act, the following hallmarks lead to a tax arrangement which is subject to reporting requirements without a further relevance test.

(1) Arrangements in which recipients of cross-border payments between two or more affiliated companies which are deductible as business expenses by the paying party are

(i) not resident in any tax jurisdiction because, for example, one state makes tax residency dependent solely on the place of management and a second state solely on the place of incorporation of the company, so that a so-called "ghost company" is created (sec. 138e para. 2 no. 1 lit. a) aa) German Tax Act)

(ii) resident in a tax jurisdiction that does not meet the standards adopted by the EU Member States with respect to transparency, fair tax competition or with respect to the implementation of the OECD's measures against profit shifting and retention (BEPS) (sec. 138e para. 2 no. 1 lit. a) bb) German Tax Act),

(2) Cases where amortizations can be claimed for the same assets in more than one jurisdiction (sec. 138e para. 2 no. 1 lit. b) aa) German Tax Act)

(4) Cases in which an exemption from double taxation is granted more than once for the same income or assets and the income or assets therefore remain completely or partially (sec. 138e para. 2 no. 1 lit. b) bb) German Tax Act)

(5) Arrangements for the transfer or relocation of assets taking advantage of valuation differences in two tax jurisdictions (sec. 138e para. 2 no. 1 lit. c) German Tax Act)

(6) Arrangements that may lead to an avoidance or undermining of reporting obligations pursuant to the rules for the implementation of the common reporting standards or take advantage of a lack of such regulations by exploiting insufficient implementation of the common reporting standard by tax jurisdictions or financial institutions or their delegates as well as the non-applicability of the common reporting standard (sec. 138e para. 2 no.2 German Tax Act), whereby these indicators correspond to the "Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures" (MDR) (OECD (2018)).

(7) Arrangements which, through the interposition of legal or beneficial owners involving different natural persons, legal agreements or structures, make it possible to conceal the identity of beneficial owners and thus install a non-transparent chain (sec. 138e para. 2 no. 3 German Tax Act),

(8) Transfer pricing arrangements that make use of a unilateral regulation that applies to a defined category of users or business transactions and that exempts eligible users from certain obligations that would otherwise have to be fulfilled due to general transfer pricing regulations of a tax jurisdiction (so-called safe harbor regulations) (sec. 138e para. 2 no. 4 lit. a) German Tax Act),

(9) Transfer pricing arrangements in which intangible assets or rights to intangible assets are transferred to an affiliated company or transferred between a company and its foreign permanent establishment, for which no sufficient comparative values are available at the time of their transfer or relocation and, at the time of the transaction, the forecasts of expected cash flows or the income expected to be derived from the intangible asset transferred or relocated or the assumptions underlying the valuation of the intangible asset or right to intangible assets are highly uncertain, making it difficult to predict the complete success at the time of the transfer or relocation (sec. 138e para. 2 no. 4 lit. b) German Tax Act)

(10) Transfer pricing arrangements under which functions, risks and assets or other benefits are transferred or relocated within a group of affiliated companies or to permanent establishments, if this has a significant negative impact on the expected annual earnings before interest and taxes (EBIT) of the transferring company, which is to be assumed if the EBIT of the transferring company over a period of three years after the transfer is less than 50 percent of the annual EBIT of the transferring company ,which would have been expected if the transfer had not taken place (sec. 138e para. 2 no. 4 lit. c) German Tax Act).

b) Main benefit test

In case of the conditional hallmarks according to sec. 138e para. 1 German Tax Act, a further requirement for the existence of a cross-border tax arrangement is that a reasonable third party, taking into account all material facts and circumstances, can reasonably expect that the main advantage or one of the main advantages of the arrangement is the obtaining of a tax advantage within the meaning of sec. 138d para. 2 German Tax Act. If this is the case, the relevance test is fulfilled.

The party which would be subject to the notification obligation can show the subordinate nature of such tax advantage by presenting considerable non-tax (in particular economic) reasons for the specific structuring of a transaction, so that the tax advantage is only a secondary effect. For this, it is sufficient to document that the tax advantage is not a main reason for the arrangement but only a reflex or a marginal effect. The appropriate documentary evidence can be provided in particular by means of corporate correspondence, memos or resolutions.

Since payments that are fully exempt from tax for the recipient as a result of an offsetting or deduction of losses or as a result of crediting foreign taxes may also be subject to notification, it can be assumed that offsetting against tax losses will also be regarded as a tax advantage. It is also not required that the tax advantage is actually achieved. Therefore, a notification obligation regarding a tax planning may also exist if a tax planning is not implemented or the tax advantage is not achieved due to factual reasons, as long as the achievement would have been theoretically possible. Thus, the main benefit test is extremely broad.

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

Pursuant to sec. 138d para. 3 sent. 1 German Tax Act, a tax advantage is deemed to exist if, as a result of the tax arrangement

- taxes shall be refunded,

- tax rebates shall be granted or increased,

- tax assets shall be eliminated or reduced,

- the creation of tax claims shall be prevented,

- the accrual of tax claims shall be postponed to different taxation periods or to other taxation dates.

A tax advantage according to the German regulations also exists if the tax advantage is exclusively realized in another EU member state or in a third country (sec. 138d para. 3 sent. 2 German Tax act).

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

In this respect a distinction between the subjective and the objective perspective. Subjectively, a tax advantage must be intended because otherwise the criteria for a tax arrangement is not fulfilled. Objectively, the structure has to be evaluated according to the respective hallmarks, which are divided into two categories.

The first category in sec. 138e para. 1 German Tax Act consists of external, generic characteristics of the tax structuring but also of some specific characteristics of certain business activities which result in a tax advantage. These hallmarks only trigger a disclosure obligation if the underlying tax arrangements actually lead to a tax advantage that is also a main benefit of the tax arrangement (so-called "main benefit test").

In contrast, the hallmarks of the second category in sec. 138e para. 2 German Tax Act no actual tax benefit is required to trigger a disclosure obligation.

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

No. The hallmarks are only indicative in nature. They do not require any abuse within the meaning of sec. 42 German Tax Act and therefore do not indicate

whether tax arrangements falling under one of the hallmarks shall be disregarded as an abuse of tax structure.

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

Section 138d para. 3 sent. 3 German Tax Act authorizes the Federal Ministry of Finance, in agreement with the tax authorities of the German states, to determine for certain cases that no tax advantage within the meaning of Section 138d para. 3 sent. 1 and 2 German Tax Act shall be assumed, provided that the respective tax advantage has an effect exclusively within the scope of application of the German Tax Act and is provided for by the statute, taking into account all circumstances of the tax arrangement. The authorization relates exclusively to cases within the meaning of sec. 138d para. 2 sent. 1 no. 3 lit. a) in conjunction with sec. 138e para. 1 German Tax Act. The following cases are exempted from the notification requirement under sec. 138d para. 3 sent. 3 German Tax Act by the Federal Ministry of Finance:

- Use of exemption limits and allowances

- Exercise of tax options,

- Fulfillment of the requirements for a tax exemption pursuant to sect. 5 German Corporate Income Tax Act (KStG) or sec. 3 German Trade Tax Act (GewStG),

- Transactions that are subject to the German Research and Development Tax Allowance Act (Forschungszulagengesetz - FZulG),

- Conclusion of agreements for pension schemes and basic pension contracts certified in accordance with sect. 5 and 5a of the Pension Contracts Certification Act (AltZertG),

- matrimonial property regime clauses using sect. 5 German Inheritance Tax Act (ErbStG),

- Amendment of the partnership agreement to meet the requirements of sect. 13a para. 9 German Inheritance Tax Act,

- Conclusion of pooling agreements within the meaning of sec. 13b para. 1 no. 3 of the German Inheritance Tax Act for the purpose of obtaining preferential treatment for shares in corporations,

- Pensions, compensation and benefits within the meaning of sec. 3 no. 8 and 8a German Income Tax Act,

- Company pension schemes for employees under sections 3 nos. 55, 55c, 63 and 66; sect. 4d (3) and 4e (3) and sect. 10a, 79 et seq. and 100 of the German Income Tax Act,

- Transfer of entitlements pursuant to sec. 3 nos. 55c and 55d German Income Tax Act,

- Conclusion of contracts for which the contributions can be recognized as pension expenses in accordance with sect. 10 para. 1 nos. 2, 3 or 3a the German Income Tax Act,

- Recognition of half of the difference pursuant to sec. 20 para. 1 no. 6 sent. 2 German Income Tax Act for capital-acruing life insurance policies,

- Insurance policies reported as part of the control reporting procedure pursuant to sect. 50d para. 6 in conjunction with para. 5 of the German Income Tax Act,

- Long-term increases or decreases in shareholdings aimed at triggering a different tax treatment (e.g. avoidance of sec. 8b para. 4 sent. 1 German Corporate Income Tax Act, fulfillment of the investment condition pursuant to sec. 26 no. 6 sent. 1 German Investment Tax Act) and

- Establishment of a fiscal unity for income tax purposes in accordance with sections 14 to 19 German Corporate Income Tax Act and sect. 2 para. 2 sent. 2 and sect. 7a German Trade Tax Act.

- Relocation of residence in order to claim or avoid the cross-border commuter regime under the DTAs,

- Additional (private) stay in the foreign jurisdiction in which professional activity is performed with the aim to exceed the 183-day time limit under the DTAs.

3. Who is subject to the reporting obligation (tax-payer, intermediary, other)?

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

In principle, the intermediary is responsible for reporting to the Federal Central Tax Office. This does not apply if (i) the user himself designs a cross-border tax arrangement, (ii) the intermediary has no relationship or connection to Germany or (iii) the intermediary is subject to a statutory confidentiality obligation.
In the first two cases, the reporting obligation is completely transferred to the user. For intermediaries who are subject to a statutory confidentiality obligation, the notification obligation with regard to certain personal data is partially transferred to the user if the user has not released the intermediary from the confidentiality obligation and the intermediary has provided the user with personal information, to the extent that it is not already known to the user, as well as the registration number and the disclosure number. Alternatively, in the case of intermediaries bound to professional secrecy who have not been released from their confidentiality obligation, all information can be provided by the user himself.
In any case, "another involved party" does not need report, but must only be included in the report by the user(s).

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?

Pursuant to sect. 138f para. 3 German Tax Act the following information must be included in the data record to be transmitted to the Federal Central Tax Office (Bundeszentralamt für Steuern):

- Information on the intermediary (sect. 138f para. 3 sent. 1 no. 1 German Tax Act)
- Information on the user of the tax arrangement (sect. 138f para. 3 sent. 1 no. 2 German Tax Act)
- Information on affiliated companies (sect. 138f para. 3 sent. 1 no. 3 German Tax Act)
- Details of the hallmark triggering the notification obligation (sect. 138f para. 3 sent. 1 no. 4 German Tax Act)
- Content of cross-border tax arrangement (sect. 138f para. 3 sent. 1 no. 5 German Tax Act)
- Date of the first step of the implementation (sect. 138f para. 3 sent. 1 no. 6 German Tax Act)

- List of the applicable statutory provisions (sect. 138f para. 3 sent. 1 no. 8 German Tax Act)
- Disclosure of the economic value of the tax arrangement (sect. 138f para. 3 sent. 1 no. 8 German Tax Act)
- List of the EU Member States concerned (sect. 138f para. 3 sent. 1 no. 9 German Tax Act)
- List of the persons involved (sect. 138f para. 3 sent. 1 no. 10 German Tax Act)
- Indication of the registration number and disclosure number.
- The notification of a cross-border tax arrangement must be submitted in German to the Federal Central Tax Office.

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

For the purpose of assessing whether a tax arrangement within the meaning of sect. 138d para 2 German Tax Act exists, only circumstances that occurred after June 24, 2018 shall be taken into account. Permanent facts (e.g. license and loan agreements) that came into effect before June 25, 2018 and are not itself subject to notification therefore only lead to tax structuring within the meaning of sec. 138d para. 2 German Tax Act if material changes occurred after June 24, 2018 which, on a stand-alone basis, must be regarded as a tax arrangement within the meaning of Section 138d para. 2 German Tax Act, in particular if they fulfill a hallmark of sect. 138e German Tax Act.
Acts of implementation in fulfillment of an existing contractual obligation shall not be considered a new tax arrangement.

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

The report must be sent to the Federal Central Tax Office (BZSt) in Bonn.

7. What is the deadline for filing a report?

Sect. 138f para 2 German Tax Act provides for a 30-day deadline for the notification to the Federal Central Tax Office, irrespective whether the notification obligation exists for the intermediary or the user. The notification period starts on the day on which the first of the following "relevant events" pursuant to sect. 138f para. 2 nos. 1 to 3 German Tax Act) occurred:
1. the cross-border tax arrangement is provided for implementation
2. the user of the cross-border tax arrangement is ready to implement it, or
3. at least one user of the cross-border tax arrangement has taken the first step of implementing this tax structuring.

Sect. 138f para6 sent. 4 German Tax Act provides for a suspension of the notification period in cases where intermediaries who hold professional confidential information, are subject to a statutory confidentiality obligation and are not released from this obligation by the user of the tax arrangement. Accordingly, the 30-day notification period of the user for the notification of the information specified in sect.138f para. 3 sentence 1 nos. 2, 3 and 10 German Tax Act does not commence until the user has obtained the required information from the intermediary.

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

Deliberate or reckless violations of the notification obligations constitute administrative offenses that can be punished with a fine of up to EUR 25,000 pursuant to sect. 379 paras. 2 and 7 German Tax Act.

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

Any transaction, which can possibly trigger DAC 6 notification obligations has to be evaluated by the responsible partner and, if a respective risk is identified, tax advice has to be obtained.

10. Contact details

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