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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.

LUXEMBOURG

Brucher & Thieltgen

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

DAC 6 was implemented in Luxembourg by the amended law of 25 March 2020 on cross-border devices subject to declaration (the “Law of 2020”).

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

On 12 February 2021 the tax administration published clarifications concerning the implementation of the Law of 2020.

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?

Cross-border tax arrangements are schemes which combine the following three characteristics:

- (i) the scheme must involve several member states or a member state and a third country, and one of the conditions listed below must be met:
 - not all participants in the scheme are resident for tax purposes in the same jurisdiction;
 - one or more of the participants in the scheme are resident for tax purposes in more than one jurisdiction simultaneously;
 - one or more of the participants in the scheme carry on business in another jurisdiction through a permanent establishment in that jurisdiction, the scheme constituting part or all of the business of that permanent establishment;
 - one or more of the participants in the scheme carry on business in another jurisdiction without being resident for tax purposes or establishing a permanent establishment in that jurisdiction;

- the scheme may have consequences for the automatic exchange of information or for the identification of beneficiaries.
 - (ii) the subject matter of all types of taxes levied by the state and municipalities of the Grand Duchy of Luxembourg; and
 - (iii) including at least one of the hallmarks listed in the annex to the Law of 2020.
- How are the hallmarks and the "main benefits" test in Annex IV to DAC 6 defined and interpreted in your jurisdiction?

The main benefit criteria are not met where the main tax advantage obtained through the scheme is consistent with the object or purpose of the applicable legislation and consistent with the intention of the legislature. In order to determine whether the scheme in question is consistent with that intention, all the elements constituting the device must be taken into consideration, so that a provision which, taken as a whole, does not comply with that intention – for example, by taking advantage of the subtleties of a tax system or the inconsistencies between two or more tax systems to reduce the tax payable – nevertheless meets the criteria of the main advantage.

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

The primary benefit criteria must be met in relation to the types of taxes referred to in Article 2 of Directive 2011/16/EU. This includes direct taxes and certain indirect taxes, such as inheritance tax. It does not include value added tax, customs duties, excise duties and compulsory social security contributions. The tax advantage does not necessarily have to be obtained in a member state but may also occur in a third country.

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

General hallmarks under category A and specific hallmarks under category B as well as under category C, paragraph 1(b)(i), (c) and (d) can only be taken into account when they fulfil the "primary benefit test".

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

“Hallmarks” means a feature or characteristic of a cross-border arrangement that indicates a potential risk of tax evasion, as identified in the annex to the Law of 2020.

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

No.

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

The declaration must be made by an intermediary or, failing that, by a taxpayer concerned.

An intermediary is any person who designs, markets or organises a cross-border device that is subject to declaration; or makes available such a cross-border device for the purpose of implementation or manages its implementation; or knows or could reasonably be expected to know that it has undertaken to provide, directly or through others, help, assistance or advice relating to the design, marketing or organisation of such a device; or the making available for implementation or the management of its implementation.

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

Lawyers are protected by legal client-attorney privilege. As a consequence, they benefit from a waiver of reporting obligation under the Law of 2020 (unless they act outside the limits applicable to the exercise of their profession. In this case the exemption does not apply). The Law of 2020 also extends this legal professional privilege to chartered accountants and auditors.

For intermediaries benefiting from professional secrecy (lawyers, chartered accountants and auditors), the no-name-basis reporting is replaced by an exemption from any kind of reporting. Instead, these intermediaries are only required to notify any other intermediary that is not protected by professional secrecy, or the taxpayer in the absence of such an intermediary, within 10 days. If a taxpayer is notified, the intermediary must also include any necessary

information required for reporting, in enough time for the taxpayer to meet their reporting obligation deadline and to the extent that the intermediary has this information at their disposal. Taxpayers may also appoint the intermediary to perform the reporting on their behalf.

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 following information must be submitted to the tax administration by way of electronic filing on the secure state platform, MyGuichet:

- a) identification of the intermediaries and taxpayers concerned, including their name, date and place of birth (for individuals), tax residence and tax identification number. In the event that an associated enterprise of the taxpayer concerned is involved in the cross-border reporting scheme, the identification shall also include the name, date and place of birth (for natural persons), tax residence and tax identification number of that associated enterprise;
- (b) details of the hallmarks listed in the Annex to the Act under which the cross-border scheme is to be reported;
- (c) a summary of the contents of the reportable cross-border device, including a reference to the name by which it is commonly known, if any, and a description of the relevant business activities or devices, presented in abstract form, without giving rise to the disclosure of any trade, business or professional secret, business process or information the disclosure of which would be contrary to public policy
- (d) the date on which the first stage of the implementation of the cross-border scheme to be declared has been or will be completed;
- (e) details of the legal provisions of the states concerned on which the trans-boundary device to be declared is based;
- (f) the value of the cross-border device to be declared;
- (g) identification of the member state of the taxpayer(s) concerned and of any other member state likely to be concerned by the reportable cross-border

scheme;

(h) identification of any other person likely to be involved in the cross-border reporting scheme, indicating to which member states that 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?

Intermediaries and taxpayers are required to provide information on reportable cross-border arrangements where the first stage has been implemented between 25 June 2018 and 30 June 2020.

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

The filing shall be made with the tax administration.

7. What is the deadline for filing a report?

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

- Reportable cross-border arrangements whose first implementation step occurred between 25 June 2018 and 30 June 2020 are to be reported as from 1 July 2020, and by 28 February 2021 (initially 31 August 2020 - postponed due to the COVID-19 pandemic) at the latest.
- Reportable cross-border arrangements whose first implementation step occurred between 1 July 2020 and 31 December 2020 are to be reported by 1 January 2021 (initially within 30 days of the “key date” - postponed due to the COVID-19 pandemic) at the latest.
- As from 1 January 2021 (initially 1 July 2020 - postponed due to the COVID-19 pandemic), the required information has to be reported to the domestic tax authorities within 30 days of the “key date”, which will be the earliest of the following:
 - when the arrangement becomes available to the taxpayer for implementation; or
 - is ready for implementation; or
 - when the first step has been implemented.

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

Luxembourg law provides for a fine amounting to a maximum of €250,000 against the intermediary or taxpayer concerned who has an obligation to transmit or notify the Grand Duchy of Luxembourg under the Law in case of failure to transmit information, late transmission or transmission of incomplete or inaccurate data, or in case of non-compliance by intermediaries with their obligations.

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

We indeed implemented internal processes to provide taxpayers or relevant intermediaries with the requested information to allow them to comply with their reporting obligations under DAC 6.

10. Contact details

Brucher Thieltgen & Partners

Me Nicolas Bernardy

Partner

E-mail: nicolas.bernardy@brucherlaw.lu



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