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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.

NETHERLANDS

Ekelmans Advocaten - Insurance & Corporate

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

Date: 1 July 2020

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

Yes.

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?

The law directly refers to article 3 paragraph 18 of EU Directive 2011/16/EU for the definition of "cross-border arrangement". National structures are not reportable under DAC 6.

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

The law directly refers to Addendum IV EU Directive 2011/16/EU for the definition of the hallmarks. The interpretation is further clarified in the Parliamentary History (law proposal number 35 255) and an Administrative Decree of 30 June 2020, State Gazette 2020, number 34,991.

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

The Administrative Decree of 30 June 2020, State Gazette 2020, number 34,991 refers to a UK policy document for EU Directive 2018/822: "7.7 The main benefit of an arrangement, for the purposes of the Regulations, will therefore not be to obtain a tax advantage if the tax consequences of the arrangement are entirely in line with the policy intent of the legislation upon which the arrangement relies. This will mean that the use of certain products which are designed and intended to generate a certain beneficial tax outcome, such as ISAs or pensions will not inherently mean that the "main benefits" test is met. However, it is important to note that these products could be included as part of a wider arrangement designed to generate a tax outcome outside that intended by the legislation.

Such an outcome would still be a 'tax advantage' and so the "main benefits" test could still be triggered."

(assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818842/International_Tax_Enforcement_-_disclosable_arrangements_consultation_.pdf)

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

No. This Decree stipulates that an arrangement is reportable if the "tax benefit" is one of the most important benefits.

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

No.

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

No. There is, however, guidance in a kind of FAQ issued by the Dutch tax authorities.

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

Primary: intermediary, secondary: taxpayer

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

Yes, core client/attorney privilege is in principle respected, although there are exceptions based on the set-up of an engagement.

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?

Dutch tax authorities have implemented an XML-based reporting portal. If needed a summary of the XML reporting structure can be sent.

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

Yes. For reportable arrangements implemented (see 7) between 25 June 2018 and 1 July 2020 the cut-off date was 28 February 2021. For reportable arrangementd implemented (see 7) between 1 July 2020 - 1 January 2021, the cut-off date was 31 January 2021.

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

Dutch tax authorities. There are special rules for resolving reporting conflicts in multiple jurisdictions given the cross-border nature of reportable arrangements and the parties involved.

7. What is the deadline for filing a report?

Effective 1 January 2021: 30 days after a reportable arrangement is made available for implementation or is ready for implementation, or the first step in implementation has occurred.

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

Yes. The final date was 28 February 2021.

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

Maximum penalty €870,000 (2020 amount by reference to category 6 of penalties in the Criminal Code, which amount is changed periodically).

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

No structured DAC 6 compliance. DAC 6 compliance is done on a case-by-case basis.

10. Contact details (law firm, name, position, email):

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