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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.

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

DAC 6 was originally implemented by an Act amending the Personal Income Tax (PIT) Act, the Corporate Income Tax (CIT) Act and the Tax Ordinance which entered into force on 1 January 2019. Because of incorrect implementation the provisions had to be amended so that exchange of information with authorities from other member states is possible. The necessary amendments entered into force on 1 July 2020.

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

  On 31 January 2019 the Ministry of Finance issued guidelines regarding the application of regulations concerning submitting of reports regarding tax planning arrangements to the Head of National Revenue Administration.

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

According to Polish regulations, every arrangement defined according to these regulations as a cross-border tax arrangement is reportable. The definition of a cross-border arrangement is clarified in the answer to the next question.

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

  A cross-border arrangement is an arrangement fulfilling the so-called “cross-border test” and

  a) fulfilling the “main benefits” test and having at least one generic hallmark,

  b) having at least one specific hallmark.

  The underlined terms should be understood according to the meaning defined in Polish regulations which will be clarified in the answer to the next question.

  The cross-border test is fulfilled if at least one of the following conditions is met:

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

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

c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;

d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;

e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

National structures, in order to be reportable, have to fulfil the "qualified relevant taxpayer" test. The "qualified relevant taxpayer" test is fulfilled if at least one of the following conditions is met:

a) revenues, costs or assets – as defined according to accounting regulations – of a given relevant taxpayer, determined according to the accounting records, exceeded in the preceding financial year the equivalent of €10,000,000.

b) the arrangement which is implemented or made available concerns goods or rights with a market value exceeding the equivalent of €2,500,000.

c) the relevant taxpayer is a person related to a person fulfilling one of the conditions mentioned above.

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

Generic hallmarks as defined in Polish regulations include:

a) generic hallmarks defined in DAC 6,

b) specific hallmarks related to the "main benefits" test as defined in DAC 6, and

c) specific hallmarks listed in category C paragraph 1(b)(i), 1(c) and 1(d) of Annex IV of Directive 2011/16/EU.

Specific hallmarks as defined in Polish regulation include specific hallmarks listed in category C (excluding points listed above in the definition of generic hallmark) and in categories D and E of Annex IV of Directive 2011/16/EU.

The “main benefits” test is fulfilled if, according to the circumstances and facts, it should be assumed that a person acting reasonably and guided by the aim of conforming with the law rather than achieving tax benefit could legitimately choose another way of performance with which no tax benefit reasonably expected or resulting from the arrangement is entailed, and the tax benefit is a main benefit or one of the main benefits which a person expects to achieve as a result of implementation of that arrangement.

According to the guidelines issued by the Ministry of Finance, the “main benefits” test should be analysed from the perspective of three conditions:

a) the achievement of a tax benefit,

b) the tax benefit should be the main benefit, or one of the main benefits, of the arrangement,

c) the existence of an alternative way of performance.

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

  A tax benefit according to Polish regulations is:

  a) lack of incurring a tax obligation, deferral of a tax obligation or reduction of the amount of tax obligation,

  b) appearance of tax loss or overstatement thereof,

  c) appearance of overpayment or a right to tax refund or overstatement thereof,

  d) lack of obligation to collect the tax by a tax remitter if it is a result of circumstances mentioned in point a),

  e) increase of the amount of surplus of VAT input tax over VAT output tax to be transferred to the next settlement period,

  f) lack of incurring, or deferral, of the obligation to prepare and submit tax information, including preparing and submission of reports concerning tax arrangements.

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

  It is required that tax benefit is the sole or main purpose of the structure if neither a specific hallmark nor a so-called “other specific hallmark” is present in the arrangement. If only generic hallmarks are present in the tax arrangement, the “main benefits” test also has to be fulfilled.

- 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?

  There is no specific list of non-reportable tax arrangements.

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

Polish regulations distinguish between two kinds of intermediaries:

a) a promoter, who is an intermediary mentioned in Article 1 No. 21 paragraph 1 of DAC 6,

b) a supporter, who is an intermediary mentioned in Article 1 No. 21 paragraph 2 of DAC.

In the first place it is a promoter who is obliged to report the tax arrangement. If a promoter fails to submit a report to Head of National Revenue Administration, the taxpayer and the supporter are sequentially liable for submission of the report.

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

  Yes. If a promoter is obliged to preserve professional confidentiality with regard to the arrangement and he has not been released from that obligation by the taxpayer, he is not obliged to report the tax arrangement to the Head of National Revenue Administration. In such a case he has to inform the taxpayer about the obligation to prepare and submit the report and provide him with the information necessary to prepare the report. The promoter is obliged to inform the taxpayer and other persons obliged to submit the report that he will not report the tax arrangement. In the case of a marketable arrangement, the promoter has to report the arrangement to the Head of National Revenue Administration without indicating the taxpayer’s data.

Similar obligations refer to a supporter who is obliged to preserve professional confidentiality. He has to inform the promoter and the taxpayer that a given arrangement is a reportable tax arrangement. He has to report to the Head of National Revenue Administration about such situations. In the case of a marketable arrangement the promoter has to report the arrangement to the Head of National Revenue Administration without indicating the taxpayer's data.

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?

A report on a cross-border tax arrangement should include:

a) data identifying the information provider and the taxpayer to which the tax arrangement scheme has been made available, including information concerning a business name or name and surname, date and place of birth, tax identification number, place of residence, registered office or management office, and, in the case of a person not having a place of residence in Poland or an entity not having a registered office or management office in Poland, a number and series of a passport or other identity-proving document or other identification number, if this person does not have a tax identification number and if the arrangement concerns persons being persons or entities related to the promoter or taxpayer;

b) the legal basis for reporting tax arrangement together with an indication of the features resulting in considering a given arrangement to be a tax arrangement, including indication of a hallmark and the role of the report provider;

c) an indication of whether the provided report on the tax arrangement concerns a cross-border tax arrangement or a marketable arrangement

d) a summary of the description of the arrangement, name of the arrangement, if assigned, and description of the business to which the tax arrangement applies, without disclosing the information constituting a trade, industrial or professional secret or a secret regarding production process

e) an exhaustive description of the arrangement together with an indication of the value of the arrangement, the assumptions of the arrangement, the operations carried out as part of the arrangement and their chronology, and existing links between related subjects;

f) a description of goals which are known to the report provider, for achievement of which the tax arrangement will be used;

g) the tax law provisions applicable to the tax arrangement, according to the knowledge of the report provider;

h) an estimated value of the tax benefit or approximate value of deferred income tax, if existing and known to the report provider or possible to be estimated by him;

i) an indication of performed actions which resulted in providing a report on the tax arrangement, together with an indication of the day on which the first operation was or will be performed for implementation of this arrangement;

j) an indication of the last progress of the tax arrangement and, in particular, information on the dates on which it was made available or implemented, or the date of operations within the arrangement, according to the knowledge of the report provider;

k) data referred to in point (a) of persons or entities that participate or are to participate in the tax arrangement or whom the tax arrangement may affect, and the countries and territories in which these persons or entities have a place of residence, registered office or management office, or whom this arrangement may concern, known to the report provider;

l) other data referred to in point (a) of other persons or entities obliged to provide a report on the tax arrangement, if any, known to the report provider;

m) an electronic address to which the Tax Arrangement Number (NSP) and other correspondence regarding the tax arrangement with competent authority will be delivered;

n) any NSP assigned by another EU member state in relation to a cross-border tax arrangement, if the NSP has been assigned to this arrangement by another EU member state.

In the case of a marketable arrangement, the information included in the report does not contain data related to the taxpayer and data mentioned in points (k) and (l) if the tax arrangement is reported by a promoter or supporter who is obliged to keep professional confidentiality with regard to the tax arrangement.

The report on tax arrangement is filed electronically as an XML file which has to be electronically signed by the report provider.

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. The obligation to report concerns cross-border tax arrangements for which the first action aimed to implement the arrangement was taken after 25 June 2018. For domestic structures, the obligation to report concerns structures for which the first action aimed to implement these structures was taken after 1 November 2018.

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

The Head of National Revenue Administration (Szef Krajowej Administracji Skarbowej) is the competent authority for filing a report under DAC 6 in the Polish jurisdiction.

7. What is the deadline for filing a report?

The deadline for filing the report is 30 days after:

a) having made the tax arrangement available, having prepared the tax arrangement for implementation or having taken the first action aimed to implement the tax arrangement – for promoter,

b) the tax arrangement has been made available to the taxpayer or the taxpayer has prepared the tax arrangement for implementation or after having taken the first action aimed to implement the tax arrangement – for taxpayer, if he has neither received information regarding the Tax Arrangement Number nor been informed by the promoter that a Tax Arrangement Number has not been assigned yet to the tax arrangement,

c) having granted assistance, support or having advised on the preparation, introduction, organising, making available for implementation or supervising of implementation of the tax arrangement – for supporter, if he has neither received information regarding Tax Arrangement Number nor been informed by the promoter or taxpayer that a Tax Arrangement Number has not been assigned yet to the tax arrangement.

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

  For domestic structures the deadline to report the tax arrangement to the Head of National Revenue Administration has been suspended since 31 March 2020 until the thirtieth day after the state of epidemic and the state of epidemic threat will have ended.

For cross-border tax arrangements the first action aimed to implement which was taken between 26 June 2018 and 30 June 2020, the deadlines to file the report fall on:

a) 31 December 2020 – for promoter,

b) 31 January 2021 – for taxpayer,

c) 28 February 2021 – for supporter.

For cross-border tax arrangements which, as of 31 December 2020:

a) will have been prepared for implementation, or

b) for which the first action aimed to implement it has been taken, or

c) for which the supporter will have granted assistance or support or will have advised on the preparation, introduction, organising, making available for implementation or supervising the implementation of the tax arrangement

- the 30-day deadline to report the cross-border tax arrangement will run from 1 January 2021.

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

According to the Penal Fiscal Code, not reporting the tax arrangements to the Head of National Revenue Administration is subject to a penalty in maximum amount of ca. PLN 25 million (ca. €5.5 million). As of 1 January 2021 the penalty will amount to ca. PLN 26.9 million (ca. €6 million).

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

Yes, our firm introduced internal procedures regarding recognition of reportable tax arrangements among arrangements which we deal with while performing our advisory services. The procedure also describes the reporting process.

10. Contact details

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