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INDEPENDENT TAX CONSULTING



DAC6: The Mandatory Disclosure Regime

Overview

Mandatory reporting of (cross-border) arrangements, which contains one or more *hallmarks*, i.e. objective proxies, which may induce a presumption of aggressive tax planning.

How does it work?

Intermediaries must report information, within their knowledge, possession or control, on reportable arrangements to the Competent Authorities within 30 days of:

- a) The day after the reportable arrangement is made available for implementation;
- b) The day after the reportable arrangement is ready for implementation; or
- c) When the first step towards implementation have been taken;

Whichever occurs first.

Intermediaries can be exempt from reporting, in which case the duty to report is shifted unto the relevant taxpayer.

- a) This would *inter alia* be the case for lawyers covered by (statutory) legal privilege.

Intermediaries and taxpayers must make the initial report no later than 31 August 2020, i.e. information on arrangements made available or implemented from 25 May 2018 until 30 July must be stored and reported at once.



Hallmarks subject to Main Benefit Test

| General | Specific | Cross-border |
|-------------------------|---|---|
| Confidentiality | Acquisition of certain loss-making entities | Deductible payments to <i>subs</i> in zero- or low tax countries |
| <i>Contingent fee</i> | Conversion of income to more favorably taxed income | Deduction/no-inclusion payments |
| Over-the-counter advice | Round-tripping of funds /circular transactions | Deductible payments to <i>subs</i> , which are subject to favorable tax regimes |



Hallmarks not subject to Main Benefit Test

| AEoI and BO | Cross-border | Transfer pricing |
|---|--|--|
| Structures which may prohibit automatic exchange of information | Double-dip transactions | Application of unilateral <i>safe-harbours</i> |
| | Double relief | |
| Structures involving opaque ultimate legal- or economic ownership | Cross-border transfers with <i>value mismatch</i> | Transfers of HTVI |
| | Deductible payments to non-domiciled connected parties | |
| | Deductible payments to entities on EU/OECD <i>black list</i> | Controlled transactions, which involve the transfer of DEMPE functions, that will result in significant, permanent reduction of EBIT |



Main Benefit Test

Certain arrangements are only reportable insofar as the *Main Benefit Test* is met:

- *"That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage."*

The interaction between the ATAD GAAR and DAC6 reporting requirements is interesting.

The place of disclosure

If an intermediary is required to report information on a reportable arrangement in more than one Member State, such information must be reported in the Member State, which is first on the following list:

- a) The Member State, in which the intermediary is resident for tax purposes;
- b) The Member State, in which the intermediary has as PE, through which services leading to a reportable arrangement is rendered;
- c) The Member State, in which the intermediary is establish and/or regulated;
- d) the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

Where there is a multiple reporting obligation, the intermediary shall be exempt from filing the information if it has proof, that the same information has been filed in another Member State.

Taxpayer's duty of disclosure

If intermediary is exempt from disclosure, or the taxpayer has developed the scheme in-house

Duty to report is shifted unto that taxpayer.

If the relevant taxpayer must disclose information on a reportable arrangement in more than one Member State, such disclosure shall only be done to the Competent Authority in the Member State, which is first on the following list:

- a) the Member State in which the taxpayer is resident for tax purposes.
- b) the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement;
- c) the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;
- d) the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State.

Contents of disclosure

In accordance with the Directive, the following information must be reported to the Competent Authority (non-exhaustive):

- a) identification of intermediaries and relevant taxpayer(s),
- b) details of the hallmark(s) that make the cross-border arrangement reportable;
- c) a summary of the content of the reportable cross-border arrangement
- d) the date on which the reportable arrangement has been or will be *made available*.
- e) details of the national provisions that form the basis of the reportable cross-border arrangement
- f) total value of the reportable arrangement;
- g) identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable arrangement
- h) the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked

In summary, fairly comprehensive disclosure is required relative to reportable arrangements.

Practical approach

- **Sanctions**
 - The Directive contains no specifics on sanctions for non-compliance with the duty to report; for intermediaries and taxpayers alike.
 - However, it is stated that: The penalties provided for shall be effective, proportionate and dissuasive.
- Is Danish (legal) privilege enough to shift the burden of reporting?
- How close attention should be paid to the advisors' actions?
- Review of historical types of tax planning and transactions
- Prepare internal guidelines and examples on this basis
- **When is an arrangement delivered?**
 - An arrangement must be reported when it is ready for implementation; however significant uncertainty relative to when an arrangement is made ready or is ready to implement.
- Examples?



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