



PwC's EU Direct Tax Group

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EU Direct Tax Newsalert

DAC6 – EC's feedback on the questions raised by Member States

On 24 September 2018, EU Member States dedicated the entire meeting of the European Commission (EC)'s Working Party IV to seeking more clarity from the EC concerning the interpretation of Council Directive 2018/822/EU of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (commonly referred to as DAC6).

The EC confirmed that the views expressed during the meeting cannot be regarded as a legally binding interpretation of the Directive. However, they provide valuable feedback on some key provisions of the Directive.

From the summary record of that meeting, which was published last week, the following key aspects were clarified by the EC.

Scope: taxes covered by DAC6 include all taxes levied by a Member State other than VAT, customs duties and some excise duties (Art.2 of the Directive). It is not possible to limit the scope of DAC6 to corporate taxation only.

Cross-border arrangement: DAC6 intentionally does not foresee a definition of the term 'arrangement'. Similarly to 'tax avoidance', it is not feasible to define the concept of 'arrangement'. A verbal act could be sufficient for making an arrangement reportable.

Marketable arrangement: key feature of such an arrangement is that it is available for use without a need for customisation.

Generic hallmark related to main benefit test (A1): where the taxpayer is under obligation to not disclose how such arrangement can secure a tax advantage *vis-à-vis* other intermediaries or the tax authorities, it is linked to commercial secrets and *know-how* (i.e. it does not relate to confidentiality requirements under professional secrecy rules).

Generic hallmark related to main benefit test (A3): standard banking arrangements, such as mortgages, do not need to be reported because the tax advantage represents an insignificant benefit compared to other main benefits.

Specific hallmark related to cross border transactions (C1): a tax transparent entity is not considered as a recipient, so in cases where a deductible cross-border payment between the as-

sociated enterprises is made to a tax transparent entity (e.g. partnership), one will need to search for the tax regime applying to the partners.

Where a deductible cross-border payment is made to a recipient that is a tax resident in a jurisdiction that imposes corporate tax at the rate of almost zero means that such jurisdiction applies a nominal rate below 1%.

Specific hallmark related to cross border transactions (C2): does not apply where the deduction is claimed in both the permanent establishment (PE) and its head office and the latter taxes the profits of such PE and gives a credit as a relief from double taxation. Application of controlled foreign corporation (CFC) rules also does not fall within the scope of this hallmark.

Specific hallmark related to transfer pricing (E1): covers an arrangement that involves the use of unilateral safe harbour rules meaning that such rules deviate from the OECD Transfer Pricing Guidelines.

Intermediaries: in cases where e.g. lawyers are employed by the taxpayer, work in his premises and devise a tax optimisation scheme for the taxpayer, the scheme would qualify as in-house and the taxpayer will have to report the scheme, provided it falls within the scope of the hallmarks.

Reporting shifts to taxpayers in situations where (i) it is an in-house scheme; or (ii) intermediary is in a third country without any taxable presence in the EU; or (iii) intermediary benefits from a waiver (under professional secrecy) and informs the taxpayer about reporting obligations.

Information to be exchanged: the 'value' of the arrangement to be reported depends on the arrangement and could be an amount of the consideration, registered capital, etc. The value however cannot be directly linked to the tax benefit.

Next steps

The EC noted that further meetings with stakeholders on DAC6 might be organised in the coming months, which would be a good opportunity to further discuss practical aspects related to the implementation of the Directive.