31 October 2018
Global Tax Alert

EU: Outcomes of the September meeting of EU Member States and the EC regarding Mandatory Disclosure

NEW! EY Tax News Update: Global Edition

EY's new Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration here.

Also available is our EY Global Tax Alert Library on ey.com.

Executive summary

The EU published minutes of a meeting held on 24 September 2018 where EU Member States and the European Commission (EC) discussed the subject of the transposition of Council Directive (EU) 2018/822 of 25 May 2018. This Directive is also known as the Mandatory Disclosure Directive or DAC6. The minutes provide some indications on the interpretation of several definitions of the Directive.

Detailed discussion

On 24 September 2018, the EU Member States met together with the Commission Services and discussed the transposition of Council Directive (EU) 2018/822 of 25 May 2018 (known as MDR or DAC6). The meeting was mostly dedicated to answering the questions that Member States submitted upfront. The published minutes of the meeting provide some indications on the interpretation of several definitions of the Directive. However, it was stressed upfront that only the European Court of Justice can provide legally binding interpretations on the Directive and that therefore the views expressed during the meeting are a not legally binding interpretation of the Directive.[1]

Scope

DAC6 covers all taxes except Value Added Tax (VAT), customs and excise duties, and compulsory social security contributions. Therefore, it is not possible to limit the transposition to corporate taxation.

The Directive sets out a minimum standard. Member States can extend the scope; namely, they can introduce reporting for purely domestic arrangements; they can extend the scope of taxes covered; or require reporting of additional information. However, in such cases, this additional information will not be subject to exchange, i.e., Member States shall not upload it to the central directory.

It was also clarified that DAC6 does not provide for the option for setting up a (white) list of reportable cross-border arrangements that do not need to be reported.

Definitions[2]

Cross-border arrangement

It is not feasible for the EC to define the concept of an "arrangement." Member States are free to define an "arrangement" insofar as the output does not limit the scope of the Directive. A verbal act could be sufficient for making an arrangement reportable.

Marketable arrangement

The definition of "marketable arrangement" does not include all kinds of tax planning schemes marketed or promoted by its creator, but only schemes that are available for use without a need for customization.

Associated enterprise

The definition of "associated enterprise" in article 3.23 applies to all references in DAC6, i.e., references both in the main body of the Directive and the Annex (hallmarks C1 and E2). As a consequence this definition may deviate from the domestic definitions for transfer pricing purposes.

Intra-group

The term "intragroup" refers to the concept of "associated enterprise" and the definition provided in article 3.23 of DAC6 applies. The implication of this is that intra-group situations (head office – permanent establishment) will not be covered.

Value reportable arrangement

The "value" of the arrangement in article 8ab, paragraph 14(f) refers to the transaction and the exact meaning depends on the type of arrangement. It could also be the amount of the consideration, the registered capital, depending on the facts of the arrangement. The value cannot however be directly linked to the tax benefit.

Intermediaries

Intermediaries are obliged to report information that is within their knowledge, possession or control on reportable cross-border arrangements. There is no specific obligation for an intermediary or relevant taxpayer to actively investigate in quest for reportable information.

In the case of outsourced lawyers, the company that supplies the legal services and keeps these lawyers on its payroll will be an intermediary. However, if the lawyers are employed by the taxpayer and work on its premises the taxpayer will have to report this scheme, provided that it falls within the scope of one of the hallmarks.

The Directive does not provide for a harmonized regime on the protection of professional secrecy. A Member State may revise its professional secrecy rules to narrow them down and place intermediaries within the reporting obligation of the Directive. Any set of national measures targeted to grant intermediaries a specific waiver from reporting under DAC6 would equal – at least, from a policy point of view - a circumvention of the Directive.

There are three basic situations, where the reporting obligation is shifted to the relevant taxpayer:

- In-house schemes; there is no intermediary; or
- Intermediary is in a third country without any taxable presence in the EU; or
- The intermediary benefits from a waiver (legal professional privilege). When an intermediary benefits from a reporting waiver, the intermediary has to inform the relevant taxpayer accordingly, but the Directive does not deal with how to enforce the obligation of the intermediary to proceed with this notification to the relevant taxpayer.

Main benefit test

It was emphasized that the main benefit test does not examine subjective intentions, but rather builds a reference to objective facts and circumstances.

Hallmarks

Hallmarks A

The concept of confidentiality under hallmark A1 is not related to professional secrecy.

Under hallmark A3, standard banking contracts, such as mortgages, would not need to be reported, because the tax advantage represents an insignificant benefit as compared to other main benefits, e.g., satisfaction of housing needs.

Hallmarks C

Tax at a rate of almost zero as defined in hallmark C1b(i) broadly refers to a nominal rate below 1%. Regarding tax transparent entities (such as partnerships) being recipients of a cross-border payment, one will need to search for the tax regime applying to the partners. Hallmark C1 would apply if the partners are tax exempt and resident for tax purposes in the same jurisdiction as the partnership.

The concept of "preferential" regime under hallmark C1d is wider than a "harmful" regime.

Hallmark C2 does not apply where "deduction for the same depreciation on an asset" is claimed in the State of the permanent establishment (PE) and the head office taxes the PE profits and gives relief for double taxation by credit. Similarly this hallmark does not apply if double depreciation is caused by controlled foreign corporation (CFC) rules.

Hallmarks D

Member States which comply with the Organisation for Economic Co-operation and Development (OECD) guidance on the model rules for mandatory disclosure against circumvention of the common reporting standard (CRS) shall also be compliant with hallmarks D of DAC6.

Hallmarks E

National rules on safe harbors should be "unilateral" when they depart from the international consensus, as this is enshrined in the OECD transfer pricing guidelines.

Data exchange and protection

The exchange of information will be ensured through the upload to the central directory where the data will be accessible to competent authorities of all other Member States. The IT solution will be similar to that on the exchange of tax rulings. The exact XML schema is not yet known. To avoid duplication, the XML schema is likely to closely reflect the one that the OECD will be presenting on mandatory disclosure against CRS avoidance in October 2018. Certain technical specifications are planned to be available in March 2019. Statistics on the exchange will be elaborated on the basis of the data filed on the central directory to which the Commission will have limited access. As regards data protection, the Commission Services consulted the European Data Protection Supervisor during the internal consultation process before adoption of the Commission proposal. In addition, it was also mentioned that the General Data Protection Regulation provides for a specific exemption for taxation matters in Article 23.

Implications

- A number of Member States seem to have already prepared a first draft of transposition measures and are at the stage of internal consultation or seeking political clearance at cabinet level. Others are at an early stage of the decision-making process, i.e., still consulting with stakeholders, identifying the types of legal acts for implementation, etc. Some Member States have already passed, or will do so shortly, empowering legislation to authorize the implementation of the Directive by secondary law, e.g., by Decree. A few have not commenced implementation procedures yet but are committed to comply with the deadline for transposition.
- The EC may have more meetings with stakeholders on DAC6 in the coming months.
- By 30 June 2019 the Commission shall adopt standard forms, including the linguistic arrangements, in accordance with the procedure referred to in article 26(2), for the automatic exchange of information on reportable cross-border arrangements pursuant to article 8ab.
- By 31 December 2019 the Commission shall develop and provide with technical and logistical support "a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of article 8ab(13), (14) and (16) shall be recorded in order to satisfy the automatic exchange." The Commission will be acting by way of implementing measures within the Committee on administrative cooperation for taxation.

Endnotes

1. For the a complete review of the meeting minutes, see Summary Record Working Party IV, 24-09-2018.
2. For background on MDR, see EY Global Tax Alert, *EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers*, dated 5 June 2018.

For additional information with respect to this Alert, please contact the following:

Ernst & Young Belastingadviseurs LLP, International Tax Services, Rotterdam
- Marlies de Ruiter marlies.de.ruiter@nl.ey.com
- Coen Bergenhenehouwen coen.bergenhenegouwen@nl.ey.com

Ernst & Young LLP, Global Tax Desk Network, New York
- Jose A. (Jano) Bustos joseantonio.bustos@ey.com
- Eva Warnier eva.warnier@ey.com

EY | Assurance | Tax | Transactions | Advisory

About EY
EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

EYG no. 011680-18Gbl

1508-1600216 NY
ED None

ey.com