

Briefing



DAC6 Directive – reporting obligation on the cross-border tax arrangements

15 December 2020

Based on the Hungarian law adopted following the new Council Directive of the European Union, a reporting obligation arises on the cross-border tax arrangements that comply with one of the hallmarks (which indicate possible tax evasion) listed in the Act.

The most important provisions of the regulation are presented below.

Scope of the Act

In order to comply with [Council Directive \(EU\) 2018/822](#) on the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements – [DAC6 Directive](#) - the [Act XXXVII of 2013](#) (the "Act") on certain rules for international administrative cooperation in the field of taxation and other public charges was amended by [the Act LXXII. of 2019](#). The Act imposes reporting obligation in the case of transactions subject to law.

Obligation of notification, deadline

The regulation imposes a data reporting obligation to those who are involved in the tax planning of cross-border tax structures, in the case of "in-house" schemes to the taxpayer concerned. The concept of "cross-border" is fulfilled if a person or organization involved in the tax structure has its tax domicile in any other country of the world outside Hungary. The reporting obligation does not cover all types of taxes: value-added tax, excise tax and contributions are exceptions.

Intermediary means any person that designs, markets, organises or facilitates or manages the implementation of a reportable cross-border arrangement, or any person based on available information knows or could be reasonably expected to know that they contribute directly or through others.

The most common intermediaries are tax advisers, accountants, financial and investment service providers, business advisers and banks, but include all persons who fall within the above definition.

An intermediary shall be exempt from filing the information if the fulfilment of the obligation would result in a breach of the professional privilege (e.g.: in the case of attorneys at law, the reference to legal professional privilege exempts, but the client's attention must be drawn to the existence of the reporting obligation). In such a case, this obligation falls on the other intermediary, ultimately the taxpayer concerned.

The deadline for the reporting obligation is 30 days. The Act for the diverse cases of the data reporting obligation determines differently the day from which the 30-day deadline must be calculated.

The tax authority shall communicate the received information on a quarterly basis through automatic exchange of information to the appropriate authorities of all Member States involved in the tax scheme.

Tax avoidance hallmarks

The reporting obligation covers those cross-border schemes which comply with one of the hallmarks listed in the legislation indicating possible tax evasion.

By largely transposing the DAC6 Directive, Annex 4 of the Act sets out the hallmarks that can characterize potentially aggressive tax arrangements. The occurrence of each hallmarks results in an actual reporting obligation just in those cases if the arrangement fulfils the "main benefit test", which occurs when the purpose of the transaction or arrangement **is primarily to obtain a tax advantage**. These hallmarks are underlined in the list below.

"A" hallmarks: Generic hallmarks linked to the main benefit test (e.g.: traded tax avoidance schemes)

1. Confidentiality: An arrangement where one of the participants undertakes to comply with a condition of confidentiality which may require them not to disclose to the tax authorities how the arrangement could secure a tax advantage.

2. Fee related to a tax advantage: An arrangement where the intermediary is entitled to receive a fee if a tax advantage is derived from the arrangement. (or remuneration is determined on the basis of its amount).

3. Standardised documentation: application of standardised documentation or structure.

"B" hallmarks: Specific hallmarks linked to the main benefit test (e.g.: structured agreements on tax avoidance planning)

1. Acquiring a loss-making company: An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company.

2. Converting income into capital: An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.

3. Circular transactions: An arrangement which includes circular transactions resulting in the round-tripping of funds without other primary commercial function.

“C” hallmarks: Specific hallmarks related to cross-border transactions

1. Deductible cross-border payments: Made between two or more associated enterprises where:

(a) the recipient is not resident for tax purposes in any tax jurisdiction;

(b) (i) in the tax system of the recipient the corporate tax at the rate of zero or almost zero;

(ii) the tax system of the recipient is included in a list of the OECD as being non-cooperative;

(c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;

(d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.

2. Depreciation: Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.

3. Relief from double taxation: Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

4. Transfer of assets: There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

“D” hallmarks: Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. Breach of the reporting obligation: An arrangement which results the breach of the reporting obligation of the automatic exchange of information;

2. Concealing the beneficial owner: An arrangement involving a non-transparent legal or beneficial ownership chain with the use of structures that do not carry on a substantive economic activity.

“E” hallmarks: Specific hallmarks concerning transfer pricing

1. Unilateral safe harbour: An arrangement which involves the use of unilateral safe harbour rules.

2. Hard-to-value intangibles: An arrangement involving the transfer of hard-to-value intangibles.

3. Cross-border transfers: An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

Initial deadline of the reporting obligation, fines

In June 2020, the Member States of the EU agreed to postpone the original reporting deadline (defined in the DAC6 Directive) by six months, that is, for arrangements subject to the reporting obligation on or after 1 July 2020 the 30-day period shall begin on 1 January 2021 (i.e.: arrangements to be notified from 31 July 2020 to 31 December 2020 must be notified by 31 January 2021).

For the existing arrangements there is a onefold data reporting obligation. Data shall be reported by 28 February 2021 for those cross-border arrangements which are subject to the data reporting obligation and which first implementation took place between 25 June 2018 and 30 June 2020.

On 3 July 2020, the Hungarian legislature passed the bill on the six-month postponement.

In the event of neglected, delayed, errored, false, or incomplete reporting the tax authority may impose a default penalty up to HUF 500,000 on the obligee. The tax authority may impose a default penalty up to HUF 5 million if the obligee fails to comply with the obligation or does not fulfil the obligation within the time limit of the relevant tax authority notice.

Contact

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