



April 2018

EU Council Reaches Agreement on New Mandatory Transparency Rules for Intermediaries and Taxpayers

Earlier this month, the EU Economic and Financial Affairs Council (ECOFIN) reached political agreement on the proposed sixth amendment to the Directive on Administrative Cooperation in the field of taxation (Directive 2011/16/EU) in order to introduce an obligation on intermediaries to disclose cross-border tax arrangements which are seen as potentially tax aggressive (hereinafter referred to as DAC 6). The proposal is part of the Commission's agenda to enhance tax transparency in the EU with the aim to tackle tax abuse and ensure fairer taxation.

In this GT Alert, we will briefly discuss the main aspects of DAC 6. Member States must implement DAC 6 in their domestic laws ultimately on 31 December 2019 and apply the new reporting requirements as of 1 July 2020, with an obligation to exchange information every three months after that.

Main Aspects

The main aspects of DAC 6 can be summarized as follows:

1. intermediaries are obligated to disclose potentially aggressive tax planning arrangements to the relevant tax authorities;
2. automatic exchange of information received by the tax authorities with the tax authorities of all other Member States; and
3. implementation of penalties for noncompliance with the transparency provisions.

DAC 6 has the widest possible scope, covering all intermediaries and all types of direct taxes (income, corporate, capital gains, etc.). Accordingly, any company or professional that designs or promotes a tax planning arrangement that contains a cross-border element and includes any of the hallmarks set out in DAC 6 (see further below) will be covered.

For the purposes of DAC 6, cross-border arrangements are those which concern either more than one Member State or a Member State and a third country.

Mandatory Disclosure

The main purpose of the reporting and subsequent exchange is to provide tax authorities of Member States with more information on the tax planning schemes that intermediaries design and promote, so that they can then assess whether those schemes facilitate tax evasion or avoidance.

The obligation to report is in principle imposed on natural or legal persons who are identified as so-called intermediaries. For the purpose of DAC 6, intermediaries are defined as (i) any person who designs, markets, organizes, makes available for implementation or manages the implementation of any reportable cross-border arrangement and (ii) any person who knows or could reasonably be expected to know that they have undertaken to provide assistance with respect to a reportable arrangement. Such an intermediary is within the scope of the rules if it has an EU taxable presence or is registered with an EU professional services supervisory or regulatory body.

DAC 6 does not include a definition of “aggressive tax planning”. Instead, it includes a list of features (or so-called hallmarks) that may present a strong indication of aggressive tax planning or the undermining of reporting obligations. Examples of these hallmarks include arrangements which:

- involve a cross-border payment to a recipient resident in a no-tax or almost no-tax country;
- involve a jurisdiction with inadequate or weakly enforced anti-money laundering legislation;
- are set up to avoid reporting income as required under EU transparency rules;
- circumvent EU information exchange requirements for tax rulings;
- have a link between the intermediary's fee and the amount of the tax advantage from the arrangements, or impose a confidentiality obligation on participants preventing them from disclosing the arrangements, provided that the main benefit of the arrangements is to obtain a tax advantage;
- ensure that the same asset benefits from depreciation rules in more than one country;

- enable the same income to benefit from tax relief in more than one jurisdiction or have certain other “hybrid” features;
- do not respect EU or international transfer pricing guidelines.

The intermediary must disclose information to the competent authorities on a reportable cross-border arrangement within 30 days beginning on the day (i) after the arrangement is made available; (ii) the arrangement is ready for implementation to the taxpayer; or (iii) when the first step of such arrangement has been implemented – whichever occurs first.

To the extent that the intermediary is entitled to client-attorney privilege, the disclosure obligation shifts to any other intermediary in the first instance or to the taxpayer in the absence of any other intermediary.

Automatic Exchange of Information

The reported information must be automatically exchanged each quarter by the competent authorities of each Member State via a central directory on administrative cooperation, to be developed by the Commission by the end of 2019. There will be a standard format for the exchange of this information, which will include details on the intermediary, the taxpayer(s) involved, and the details of the tax scheme, amongst other information.

The automatic exchange of information must take place within one month from the end of the quarter in which the information was filed, with the first information having to be communicated by 31 October 2020.

Penalties

Member States must ensure effective, proportionate, and dissuasive penalties for intermediaries that do not respect the reporting requirements. The decision on the exact nature of these penalties is being left as a national competence and each Member State must decide its own national sanctions to apply. These could include, for example, fines or administrative sanctions. Beyond national sanctions, there would also be a reputational risk for intermediaries that fail to comply with the reporting obligations. The proposed reporting requirements may also create a disincentive for designing and marketing aggressive tax planning schemes, as they could be quickly blocked by the authorities.

Next Steps

DAC 6 will now be submitted for formal adoption at a forthcoming ECOFIN meeting and will enter into force on the 20th day following the date of its publication in the Official Journal of the European Union. The first reportable transactions will be those where the first implementation step occurs between that date and 1 July 2020 (the date of entry into force of DAC 6).

Given the very broad nature of some of the concepts in DAC 6, extensive guidance will be required at a national level. We will closely follow any further developments and will issue further alerts on this subject.

Authors

This GT Alert was prepared by **Thomas van der Vliet** and **Suzanne Hop**. Questions about this information can be directed to:

- **Thomas van der Vliet** | +31 (0) 20.301.7387 | tvv@gtlaw.com
- **Suzanne Hop** | +31 (0) 20.301.7339 | hops@gtlaw.com
- Or your **Greenberg Traurig** attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.[~] Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.[∞] Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.[^] Tokyo.[∞] Warsaw.[~] Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ∞Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2018 Greenberg Traurig, LLP. All rights reserved.*