Tax Alert: Mandatory disclosure rules in Europe

June 21, 2018

On June 25, 2018 the amended Directive on administrative cooperation in the field of taxation (DAC6) will enter into force. Under DAC6, EU member states will be obligated to include rules in their national legislation that will require advisors and/or their clients to disclose information on certain cross-border transactions and structures - the Directive speaks of 'arrangements' - to national tax authorities.

EU member states will be required to exchange the information they receive with other EU member states automatically. These new rules have three functions: (i) determining risks of tax avoidance so loopholes can be closed; (ii) supervising and enforcement in the field of taxation; and (iii) to dissuade taxpayers and their advisors to make use of aggressive tax planning.

These new reporting requirements will apply as from July 1, 2020, however, it will have retroactive effect materially as information will have to be disclosed on all reportable cross-border arrangements the first step of which was implemented between June 25, 2018, and July 1, 2020.

Scope of the new mandatory disclosure rules

The mandatory disclosure rules concern any person (legal person or individuals) that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement. Persons who provide aid, assistance or advice in respect hereto may also fall under the scope of these rules. DAC6 does not just apply to tax advisors but to all advisors (lawyers, civil-law notaries, consultants, bankers, accountants and other service providers) that are involved in the implementation of cross-border structures and/or transactions. If a client has designed its own 'arrangement' or if the advisors involved are outside of the EU, the obligation to report can shift to the taxpayer. Also in case legal professional privilege would stand in the way of reporting, the obligation to report may shift to the taxpayer. A taxpayer in this context is any person that uses a reportable cross-border arrangement.

Specific hallmarks have been developed to identify the types of arrangements that need to be reported to the tax authorities. A transaction or a series of transactions does not necessarily have to be tax-driven in order to qualify as a reportable arrangement. The requirement to report an arrangement or structure does not imply that it is harmful, only that it may be of interest to tax authorities for further scrutiny.

Implementation of Directive into national law and retroactive effect

The EU member states have until December 31, 2019 to transpose these new rules into national laws and regulations. The new reporting requirements will apply from July 1, 2020. These new rules will effectively have retroactive effect for all reportable arrangements the first step of which was implemented after the date that this new Directive has entered into force, i.e. June 25, 2018.

Penalties

Not meeting the reporting obligations will be punishable. The Directive leaves it up to the EU Member States to lay down rules on the penalties applicable for non-compliance with these new rules.

What does this Directive mean in practice?

As of the end of this month, taxpayers and their advisors should monitor if advice with a cross-border character may have to be reported and in which jurisdiction transaction will have to be reported so that they can meet the reporting obligations in the future. The actual implementation of the Directive into national law should be monitored carefully. It is expected that these new reporting obligations and the automatic exchange of the reported information will result in more scrutiny by taxing authorities.

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