KPMG Meijburg & Co
Tax Lawyers

New mandatory disclosure requirements for intermediaries and taxpayers will enter into force on June 25, 2018

The new mandatory disclosure requirements for intermediaries and relevant taxpayers will enter into force on June 25, 2018. These are the most recent amendments to the Directive on administrative cooperation in the field of taxation ("DAC6"). Member States have until December 31, 2019, to implement the amendments. Although the disclosure requirements will apply from July 1, 2020, it should be noted that intermediaries and relevant taxpayers are also required to disclose information on reportable cross-border arrangements, the first step of which was implemented between June 25, 2018, and July 1, 2020. The information about these arrangements should be filed by August 31, 2020.

Background

DAC6 introduces an obligation (in principle) on intermediaries to disclose potentially aggressive tax planning arrangements and the subsequent exchange of this information between tax administrations.

DAC6 targets aggressive tax planning arrangements. Although the terms 'arrangement' and 'aggressive tax planning' have not been defined, the following should be noted. An annex to DAC6 lists a number of 'hallmarks' that are characterized as indicators of tax avoidance or abuse. A cross-border arrangement becomes reportable if it meets one or more of these hallmarks. Certain hallmarks can only result in reporting if a "main benefit" test is also satisfied. The main benefit test is drafted along the lines of the principle purpose test in BEPS Action 6. The main benefit test is met if it can be established that obtaining a tax advantage (including avoidance of double taxation) is the main benefit or one of the main benefits which a person may reasonably expect to derive from an arrangement. For further information on the details of DAC6 we refer to our previous report from earlier this year.

Who will be affected by DAC6?

With DAC6 entering into force on June 25, 2018, the first thing that must be done is to identify who will be affected. Under DAC6, qualifying cross-border arrangements have to be reported to the tax authorities by "intermediaries". The definition of an intermediary is broad and does not only include tax advisors, but may also include lawyers, accountants, notaries, consultants, financial advisors, banks, trust companies, etc. DAC6 refers to any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement. It also includes persons that are aware (or should have been aware) that they provide aid, assistance or advice within the framework of designing, marketing, organizing or making available for or managing the implementation of reportable arrangements. The intermediary must have a link with the EU. The intermediary must be either a resident for tax purposes in a Member State, or be incorporated in or governed by the laws of a Member State, have a permanent establishment in a Member State through which the services with respect to the arrangement are provided; or be registered with a professional association related to legal, taxation or consultancy services in a Member State.

In the absence of any intermediary with a link to the EU, or if no intermediary whatsoever is involved with a reportable arrangement, the obligation to disclose falls on the taxpayer. A relevant taxpayer is – in short – defined as any person that uses a reportable cross-border arrangement. This includes not only companies, but also individuals.

If an EU intermediary is involved, but this intermediary is protected by legal professional privilege, the protected intermediary must notify any other EU intermediary involved with the arrangement of the reporting obligation. If in such a case no other unprotected EU intermediaries are involved, the protected intermediary should inform the relevant taxpayer that the latter is obliged to disclose the reportable arrangement.
Where more than one intermediary is involved in a reportable arrangement, the obligation to disclose information rests with all the intermediaries involved. In such a case, an intermediary can claim an exemption, provided it proves that all disclosable information has already been filed by another intermediary.

Penalties
The Directive leaves it up to the Member States to lay down rules on the penalties applicable for infringements of the mandatory disclosure requirements, with the only requirement being that any penalties are effective, proportionate and dissuasive.

Our comments
As a result of the broad definition of an intermediary, DAC6 does not solely target tax advisors but also many other service providers in the legal, financial and consultancy branches. In certain situations the obligation to disclose is shifted to the taxpayer.

Despite the July 2020 application date, intermediaries and relevant taxpayers will be required to file information on reportable cross-border arrangements, the first step of which is to be implemented after June 25, 2018. Although information related to such arrangements must be reported by August 2020, we advise persons that could qualify as intermediaries or relevant taxpayers to consider collecting the necessary information as early as June 25, 2018.

We will, of course, keep you informed of developments. Please feel free to contact your Meijburg advisor if you have any questions or would like to discuss the above matters.

Meijburg & Co
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