Working Party IV – Direct Taxation

24 September 2018

SUMMARY RECORD

– prepared by the Commission Services

Overview of the meeting and general points

The meeting dealt with the transposition of Council Directive (EU) 2018/822 of 25 May 2018 (known as 'DAC6'). Experts from 27 Member States took part in the event. The meeting was mostly dedicated to answering the questions that the Commission Services received from eleven Member States prior to the event.

From the outset, the Commission Services clarified that the views expressed during the meeting shall not be taken to be a legally binding interpretation of the Directive, as this is exclusively reserved to the Court of Justice of the European Union based on the Treaties. Furthermore, it was pointed out that the goal of the meeting was to help Member States with the challenges that they may be facing in transposing the Directive and not to re-open policy matters for re-negotiation, since this step closed when Member States reached political agreement on DAC6 in Council. The Commission Services also explained that the general rules on the material scope of the DAC (Article 2) delineate which taxes are covered by DAC6. Therefore, it is not possible to limit the application of the Directive to corporate taxation for the purpose of DAC6. It was also mentioned that the Commission Services' views should neither be taken as a pre-clearance of Member States' transposition plans.

As a first point of the agenda, Member States shared the state of play in the implementation of DAC6 at the national level.

To facilitate the discussion of the questions, the Commission Services divided them in 8 blocks by reference to the input received from the Member States. In addition to going through the questions that had already been received previously, the Commission Services responded to follow-up queries at the end of each block.

Although a further meeting with Member States was not excluded, the Commission Services did not give any fixed dates at this stage. They did inform Member States that they (the Commission Services) may also be meeting stakeholders on DAC6 in the coming months.

The Commission Services informed the Member States about certain upcoming steps in connection with DAC6, more specifically:

- 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 (CACT).

Summary on the specific points of the agenda of the meeting

I. State of play of the implementation in Member States

In the *tour de table,* it emerged that a number of Member States seem to have already prepared a first draft of their transposition measures and are now at the stage of internal consultation (including with regions, etc.) 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 informed the group that they have already passed, or will do so shortly, empowering legislation to authorise 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.

II. Feedback on questions concerning the implementation of DAC6

1. Definitions

Definition of cross-border arrangement - Several MS wondered why DAC6 does not include a definition of what is an "arrangement" and enquired whether it would be possible to introduce such a definition in their national legislation. The Commission Services clarified that similarly to tax avoidance, it is not feasible to define the concept of an "arrangement". In fact, if it were possible to precisely delineate an "arrangement", administrations could directly legislate to block the targeted schemes. This is why the jurisdictions which already operate mandatory disclosure regimes have opted to give content to the concept of an "arrangement" through the hallmarks. The Commission Services observed that Member States are free to define an "arrangement" (especially if this is required by their legislative traditions) insofar as the output does not limit the scope of the Directive. This said, the Commission Services added that a principles-based definition of an arrangement in the Directive would be likely to be very broad and would probably not change the fact that the precise scope is defined primarily through hallmarks. This approach is also consistent with the Report on OECD BEPS Action 12.

Furthermore, it was clarified that a verbal act could be sufficient for making an arrangement reportable. In the case of a book from a bookshop with a tax-planning subject, the connection between the arrangement, as it stands in the book, and its readers would be too remote.

Definition of hallmark – It was clarified that "*an indication of a potential risk of tax avoidance*" in definition do not set out an additional condition. They rather describe the purpose or logic of the reporting mechanism; that is, to identify the tax planning arrangements which tax administrations may wish to have closer look at. Hallmarks do not as such constitute a finding of tax avoidance.

Definition of marketable arrangement – There was a need to clarify that a "marketable arrangement" should not be confused with any kind of tax planning scheme that is marketed or promoted by its creator. A marketable arrangement has the key feature that it is available for use without a need for customisation.

Definition of intermediary – It was clarified that in case of outsourced lawyers, the company that supplies the legal services and keeps these lawyers on its payroll will be an intermediary. However, there can be other forms of relationship in this context: e.g. if the lawyers are employed by the taxpayer, work in its premises and devise a tax optimisation scheme for taxpayer, the scheme would qualify as in-house and the taxpayer will have to report this scheme, provided that it falls within the scope of one of the hallmarks.

Definition of Associated Enterprise – it was clarified that despite the delimiting wording in Article 3 point 23 which refers only to Article 8ab, the definition shall be taken to apply to all references in DAC6, i.e. references both in the main body of the Directive and the Annex (Hallmarks C1 and Hallmark E2).

2. Timing for reporting

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 that the intermediary/ relevant taxpayer does not hold at the first place.

3. Professional secrecy

It was stressed that the Directive does not provide for a harmonised regime on the protection of professional secrecy. It was observed that professional secrecy usually concerns lawyers and sometimes the protection is linked to the right to fair trial and is therefore limited to advocates when they plead in Court. In some Member States, professional secrecy may extend to other professions, such as tax advisers or auditors.

It was explained that a Member State may revise their professional secrecy rules to narrow them down and place intermediaries within the reporting obligation of the Directive. Regarding the prospect for extending the scope of the waiver, the Commission Services responded that a Member State may wish to overhaul their professional secrecy regime altogether. Yet, 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 through the back door.

4. Reporting obligation shifted to Relevant Taxpayer

It has been clarified that there are three basic situations, where the reporting obligation is shifted to 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. In this case, the intermediary has to inform the relevant taxpayer accordingly. It was explained that the Directive does not deal with how to enforce the obligation of the intermediary to proceed with this notification to the relevant taxpayer. The additional issue that came to the fore is when the deadline for reporting shall start counting for the relevant taxpayer. One Member State found it more appropriate to use the information by the intermediary as the starting point of the deadline for reporting rather than subject the relevant taxpayer to the general triggers of the 30-day deadline laid down in the Directive.

5. Information to be exchanged

As regards the information to be exchanged, the Commission Services took the view that:

- The reference to "national provisions" in para. 14(e) usually concerns more than one Member State or jurisdiction and this follows from the fact that reportable arrangements have a cross-border element.
- The "value" of the arrangement in para. 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, registered capital, depending on the facts of the arrangement. The value cannot however be directly linked to the tax benefit.

It was highlighted that intermediaries will report to their "own" Member States and that the competent authorities should ensure that the supplied information complies with the requirements of the Directive.

6. Implementing measures

Several issues were clarified concerning implementing measures and IT solutions. The exchange of information will be ensured through the upload to the central directory where the data will be accessible to competent authorities all other Member States. The IT solution will be similar to that on the exchange of tax rulings. The exact XLM 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 (EDPS) during the internal consultation process before adoption of the Commission proposal. In addition, it was also mentioned that the General Data Protection Regulation (GDPR) provides for a specific exemption for taxation matters in Article 23.

7. Penalties and "retroactivity"

To prevent misunderstandings, the Commission Services stressed that penalties are meant to be applied for breaching the obligation to report only, not as a tax-related sanction against the taxpayer following an audit. It was also clarified that there is no retroactive application of penalties, as the reporting of arrangements devised during the so-called transitional period (i.e. 25 June 2018 – 30 June 2019) will only be possible as of 1 July 2020 when the Directive starts applying. By then, the national transposition measures shall be in place (due on 31 December 2019) and therefore intermediaries should know about the penalties regime.

8. Hallmarks

The main benefit test - It was highlighted that it only applies together with certain hallmarks (i.e. categories A & B, hallmark C.1 points (b)(i),(c)&(d)) and has the aim of filtering down which arrangements shall be reported. The test does not examine subjective intentions, but rather builds a reference to objective facts and circumstances. For more details on the concepts of a "tax benefit" and "tax advantage", it was suggested consulting **the Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU)** that also includes a comparative test on the concept of an "advantage".

Category A - It was clarified that:

- under Hallmark A.1, the concept of the confidentiality is linked to commercial secrets and the business know-how and that it 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.

Category B – Several examples were presented on how the hallmarks under this category could be applied.

Category C – It was clarified that:

- the tax at the rate of almost zero 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. C.1 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 is wider than a "harmful" regime.
- hallmark C2 does not apply where "*deduction for the same depreciation on an asset*" is claimed both in the State of the PE and the Head Office which taxes the PE profits and gives relief for double taxation by credit. Other examples of a similar nature were mentioned, e.g. CFC rules.

Category D - It was underlined that Member States which comply with the OECD guidance on the model rules for mandatory disclosure against circumvention of the common reporting standard (CRS) shall also be compliant with the hallmarks under category D of DAC6. More broadly, Recital 13 stipulates that the OECD work should be used as a source of illustration or interpretation.

Category E – The Commission Services took the view that national rules on safe harbours should be "*unilateral*" when they depart from the international consensus, as this is enshrined in the OECD transfer pricing guidelines (TPG). The Commission Services also explained that the term "intragroup" refers to the concept of "associated enterprise" and the definition provided in Article 3 point 24 of DAC6 applies.

Other issues

It has been explained that the Commission is not institutionally in the position to issue guidance, however Member States can do so in the context of DAC.

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 under DAC6.

The Commission Services mentioned that DAC6 sets out a minimum standard and so Member States can go further; namely, they can introduce reporting for purely domestic arrangements; they can extend the scope of taxes covered; or require reporting of additional information. Yet, in such cases, this additional information will not be subject to exchange, i.e. Member States shall not upload it to the central directory.