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SME INFO

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DAC6 – REPORTING OBLIGATION IN RESPECT OF THE AGGRESSIVE TAX STRUCTURES

This publication is based on the **actual DAC6 regulations**, so it is to replace SME INFO Nr.2020-13 published on the same topic on 18 June 2020.

Struggle against tax avoidance or evasion is one of the EU's political priorities. Exchange of information among the individual national tax authorities in respect of cross-border transactions is an efficient means for this. The reporting obligation concerning aggressive tax arrangements is regulated by the Council Directive (EU) 2018/822 of 25 May 2018 or shortly DAC6 Directive, which was taken over into the Hungarian legislation with an effect of 1 July 2020. The European Parliament accepted the proposal to defer certain time limits for the filing and exchange of information on 24 July 2020 with an option to take it over into the national legislations. In this connection the Hungarian Parliament published the Act LXXVI of 2020 On the State Budget of the Year 2021 on 14 July 2020 and within the frames of it decided on the deferral of the original reporting deadlines.

The purpose of SME INFO is to provide general information and to draw the attention to the current changes in law which we believe to be important for the business operation of our clients. It is not a replacement for careful review of the acts and rules and the consultation with your tax advisor.

subject matter expert team

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1. LEGISLATION, SCOPE, OBJECTIVE

Provisions of the directive were incorporated in V/F chapter of Act XXXVII. of 2013 On Certain Rules of International Administrative Co-operation in the Field of Taxes and Other Public Charges.

Scope: it provides obligation for an exchange of information to the tax authorities concerning certain cross-border tax planning structures.

- The obligation applies only to cross-border arrangements and excludes domestic ones.
- The objective is to take action against the so-called aggressive tax planning and to achieve that every entity pays tax in the place where the income is generated.
- The data supply obligation does not apply to VAT, excise duty and contributions.

2. WHICH TAX STRUCTURES FALL UNDER THE REPORTING OBLIGATION?

„Reportable cross-border arrangement" (hereinafter **RCB arrangement**) means any cross-border arrangement that contains at least one of the hallmarks set out in Annex 4 of Act XXXVII of 2013.

It follows from the definition that it can be established in 2 steps, if it is necessary to fulfil the data supply obligation to the tax authority in concern of a tax planning structure.

Step 1 — Is the tax structure in question a cross-border arrangement?

Cross-border arrangement means a structure that concerns more than one member state or a member state and a third country, provided that at least one of the following conditions is met:

- not all of the participants in the arrangement are residents for tax purposes in the same jurisdiction; or
- one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction; or
- one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement or any part of it forms part of this business activity; or
- one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction; or
- such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

Step 2 **If it is a cross-border arrangement, does it contain any of the listed „hallmarks"?**

The hallmarks are listed in Annex 4 of the Act and are divided into five categories („A"–„E").

In the case of hallmarks in categories A and B and some hallmarks in category C, the "main benefit" of that specific structure should be investigated. If it can be established that the main benefit or one of the main benefits is obtaining of a tax advantage, then the cross-border arrangement has to be reported.

If obtaining of a tax advantage is not the main benefit, the arrangement need not be reported.

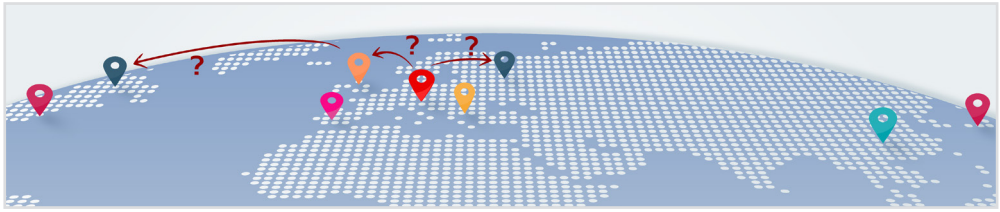
(This is the so-called „main benefit test".)

Some examples of the listed hallmarks:

„A" – Generic hallmarks linked to the main benefit (where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage).

„B" – Specific hallmarks linked to the main benefit (e.g. acquiring a loss-making company in order to reduce tax liabilities).

„C" certain items – Specific hallmarks related to cross-border transactions (e.g. the specific jurisdiction does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero).



Hallmarks in „D" and „E" and some hallmarks in „C" are in themselves sufficient to trigger reporting obligation irrespectively of the result of the „main benefit test".

„C" further items – Special hallmarks related to cross-border transactions (e.g. relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction).

„D" – Specific hallmarks concerning automatic exchange of information and beneficial ownership (e.g. an arrangement involving a non-transparent legal or beneficial ownership chain and also other related characteristics make the business suspicious).

„E" – Specific hallmarks related to transfer pricing (e.g. an arrangement involving the transfer of hard-to-value intangibles).

Annex 4 of the Act contains several additional examples.

3. SCOPE OF PERSONS WITH REPORTING OBLIGATION

a) Intermediary in tax planning

Basically, the intermediary in tax planning has to fulfil the reporting obligation in concern of the RCB arrangements, which are

- known to him, or
- in his possession, or
- under his control.

Who shall be considered as an intermediary in tax planning?

- "Intermediary" means any person that designs, markets, organises or makes available for implementation or manages the implementation of an RCB arrangement, or

- It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of an RCB arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in an RCB arrangement

To be an intermediary, in both cases a person shall meet at least one of the following additional conditions in one of the member states:

- be resident for tax purposes; or
- have a permanent establishment through which the services with respect to the arrangement are provided; or
- be incorporated, or governed by the laws there; or
- be registered with a professional association related to legal, taxation or consultancy services.

If there are more than one intermediaries involved in the tax planning, the reporting obligation applies to each of them. The intermediary will be exempted from the reporting obligation if he can prove that another participant has complied with this obligation in Hungary or in another member state.

If the reporting obligation concerns more than one member state, then it has to be performed in only one member state, selected in accordance with the relevant legislation.

The intermediary has the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege. In such circumstances, however, the intermediary is required to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations.

b) The relevant taxpayer

"Relevant taxpayer" means any person to whom an RCB arrangement is made available for implementation, or who is ready to implement an RCB arrangement or has implemented the first step of such an arrangement.

When is the relevant taxpayer responsible for the reporting obligation?

In the case when there is no intermediary in the tax planning or another, so-called notified intermediary.

The reporting obligation has to be met only in one member state as provided by the law, and only one of the taxpayers concerned should meet the reporting obligation, first of all the contractor in the agreement and in second place the implementor of the arrangement.

4. REPORTING OBLIGATION DEADLINES

In general, the reporting deadline is 30 days, but the cases differ in consideration of the start date.

a) In case of intermediaries

- If the intermediary designs, markets, organises or makes available for implementation or manages the implementation of the arrangement, the deadline for reporting shall be: within 30 days after the earliest of the events here below:
  - the RCB arrangement is made available for implementation,
  - the RCB arrangement is ready for implementation,
  - the first step in the implementation of the RCB arrangement has been made.
- Other intermediaries shall also be required to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice

In the case of marketable arrangements the law also specifies a quarterly deadline in addition to the 30-day-deadline: if new data become available in respect of certain data specified by the law the intermediary is obliged to report it until the last day of the quarter year following the availability of the new data.

- The notified intermediary in tax planning: within 30 days after receiving the notification.

b) In case of the relevant tax payer

- If the relevant tax payer was notified of his reporting obligation: the deadline of reporting is 30 days after receiving such notification.
- In the absence of an intermediary: within 30 days after the earliest of the events here below:
  - the RCB arrangement is made available for the tax payer for implementation,
  - the RCB arrangement is ready for implementation by the tax payer,
  - the first step in the implementation of RCB arrangement in connection with the tax payer has been taken.

5. SCOPE OF THE REPORTABLE DATA

The regulation gives a detailed list of the scope of data and information to which the reporting obligation applies:

- The identification data of intermediaries and relevant tax payers, and the related enterprises of the relevant taxpayer which are involved in the arrangement
- Detailed description of the hallmarks that make the cross-border arrangement reportable
- A summary of the content of the RCB arrangement.
- The date on which the first step in implementing the RCB arrangement has been made or will be made.
- Details of the legal provisions that form the basis of the RCB arrangement.
- The value of the RCB arrangement.
- The identification of the member state of the relevant taxpayer(s) and any other member states which are likely to be concerned by the RCB arrangement.
- The identification of any other person in a member state likely to be affected by the RCB arrangement, indicating to which member states such person is linked.

6. SANCTIONS

a) Default penalty

In case of default, delay, false or defective performance of the data supply and notifying obligation the national tax authority may impose on the person liable for fulfilling the obligation a default penalty amounting up to HUF 500 thousand.

A default penalty amounting up to HUF 5 million can be imposed if the person liable for the data supply or notification obligation fails to perform or faultily performs his obligation within the deadline of the call of the tax authority to fulfil its tax obligation.

b) Exemption

The person in default will be exempted from the penalty payment if he excuses his default, delay, false or defective performance by attesting that he acted as it could be generally expected in the given situation.

7. TRANSITION RULES

Transition rules according to the Act LXXVI of 2020 On the State Budget of the Year 2021 published on 14 July 2020 are the following:

- Intermediaries in tax planning and relevant tax payers shall supply data of every reportable transaction, **the first implementation step of which was made between 25 June 2018 and 1 July 2020, till 28 February 2021**. The tax authority will fulfil its relevant data forwarding obligation until 30 April 2021.
- **For an intermediary in tax planning,** if he designs, markets, organises or makes available for implementation or manages the implementation of an RCB arrangement **and for a relevant tax payer** (in the lack if an intermediary) if the date of:
  - the RCB arrangement is made available for implementation,
  - the RCB arrangement is ready for implementation,
  - the first step in the implementation of the RCB arrangement has been made

  falls between 1 July and 31 December 2020, the deadline for reporting shall be within 30 days starting **on 1 January 2021,**
- **For other intermediaries if the date** of the direct or indirect **support or consultancy service and for intermediaries in tax planning and the relevant tax payers** if the date of the **receipt of the notification** about the data reporting obligation falls **between 1 July and 31 December 2020,** the deadline for reporting shall be within 30 days starting on 1 January 2021.
- For intermediaries in tax planning regarding marketable **arrangements,** the **quarterly reporting** for the first time shall be fulfilled **till 30 April 2020**.

In case of default, delay, false or defective performance of the data supply and notifying obligation listed above, default penalty can only be ignored if the letter of excuse is **valid**.

Recommendation to international groups

When applying the above it has to be taken into account that DAC6 is a data supply regulation elaborated at EU-level. It may happen that the individual member states implement it into their own legislations creating deviating details in the individual national legislations. Therefore, it is expressly recommended to international groups to study the DAC6-relevant local legislations before elaborating their own related inner procedures.