

DAC6 clarifications by tax administrations

DAC6 rules in the light of the recent administrative instructions:

Germany (2 March 2020), Luxembourg (19 August 2020), UK (HMRC guidance 13 August 2020), Belgium (FAQ 15 June 2020), France (administrative commentary 29 April 2020),

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The new sources of interpretation of DAC6

- **Germany:** Anwendung der Vorschriften über die Pflicht zur Mitteilung grenzüberschreitender Steuergestaltungen, 2 March 2020.
- **UK:** UK HMRC guidance on Mandatory Disclosure Regime regulations, 13 August 2020
- **Luxembourg:** Precisions concerning the implementation of the law 25 March 2020 relative to the reportable arrangements, 19 Aug. 2020.
- **Belgium:** FAQ: DAC 6 – Reporting of cross border arrangements – article 326/1 à 326/10 of the Belgian Income Tax Code, 15 June 2020.
- **France:** Administrative Commentary, 29 April 2020

Main benefit test

- What is a tax advantage: an expense deduction? An income tax exemption? A withholding tax exemption? A tax credit?
- What is the tax regime of reference? Is a relatively minor/nominal tax saving compared to the normal tax regime sufficient?
- What if the fiscal advantage is obtained in another EU member state / outside of the EU or is explicitly contained in the fiscal law?

The category A general hallmarks

• The hallmark linked to a condition of confidentiality (A1)

- What about a condition which excludes the communication of information to tax authorities?
- What about a condition which protects a commercial secrecy?

• The hallmark linked to a success fee (A2)

- What if the fees are linked to the quality or the speed of service?

• The hallmark linked to a standardised arrangement (A3)

- What should be understood by «arrangement whose documentation and/or the structure are normalised for the greatest part»: what about the act of constitution of a company, the use of a service provider company / financing company lowly taxed, loan contracts, life insurance contracts, use of offshore companies / foundations / trust ?
- How to interpret the terms « without needing to be adapted in an important manner to be implemented»? What is an arrangement «which is available for more than one given taxpayer»?

The category B specific hallmarks

• Acquisition of a loss-making company (B1)

- 3 cumulative conditions: acquisition of a losing company, termination of the activity and use of the losses in order to reduce the tax basis

• The conversion of income belonging to a category into another category of income which is less taxed or not taxed at all (B2)

- Obligation to have a pre-existing situation
- The reduction of capital for the benefit of a foreign shareholder

• Circular transactions (B3)

- Round-tripping of funds without any valid commercial purpose?
- Is the sale and lease back targeted by this hallmark?

The category C specific hallmarks

• Deductible cross-border payments which are lowly taxed or tax exempt at the level of the beneficiary (C1)

- What if the payment is not deductible (because of national anti abuse rules)? What if there is no effective payment (but there is still a tax deduction of the expense)?

- Payment to a beneficiary who does not reside for tax reasons in any jurisdiction: what about payments to a partnership? Does the tax residency of the shareholders matter?
- Payment to a beneficiary who resides in a jurisdiction which does not levy corporate tax or which levies an almost null corporate tax: what is an almost null tax: 0 to 1%? 0% to 4%?
- Payment to a beneficiary in a list of third party non cooperative jurisdictions: which black list must be taken into account?
- The payment benefits of a total fiscal exemption in the jurisdiction of the beneficiary: the subtle distinction between a «subjective exemption» and an «objective exemption»; the payment of interest to a Luxembourg SICAR
- The payment benefits of a preferential tax regime: payment of royalties to a company which benefits from an IP regime, payment of interests to an investment fund

The category D specific hallmarks

The category E specific hallmarks

- Transfer of hard-to-value intangible assets between affiliated companies: how to determine if an intangible asset is difficult to evaluate?
- Intragroup transfer of business / of assets and functions: what about an intragroup corporate restructuring motivated by non tax reasons (organisational, economic and financial reasons)? What about a simple intragroup transfer of shares?

The intermediaries

- The condition of territoriality to be an intermediary
- The loophole for those who know or are reasonably supposed to know: what if the intermediary can demonstrate a reasonable diligence?
- Absence of a proactive investigation obligation
- What about the request for a second opinion?
- What about the employees of a legal person?
- Case studies: a person who:
 - a) processes an invoice only for accountancy reasons, without involving himself further into the reportable cross-border arrangement ;
 - b) provides an advice including general considerations (eg : what are the tax consequences ?);
 - c) performs a risk analysis such as, for example, the simple execution of a due diligence for a redemption, and when he notices a preexisting arrangement;
 - d) prepares and submits a tax return;
 - e) assists the taxpayer during a tax audit;
 - f) simply updates a transfer pricing reference;
 - g) drafts the transfer pricing documentation for existing structures
- Who must declare when several intermediaries are involved? How does it work in practice?

The information which must be communicated to the tax authorities

Deadlines for reporting

- General deadline
- When is an arrangement made available for implementation ?
- When is an arrangement ready for implementation ?
- When is the first step of implementation realised?
- The obligation to report after 1st January 2021

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PRACTICAL INFORMATION

Venue

Kameha Grand Zurich
 Dufaux-Strasse 1, Zurich

How to register

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 by fax: +41 (0) 22 849 01 10
 by e-mail: info@academyfinance.ch
 by post: Academy & Finance SA
 PO Box 6069, CH-1211 Geneva 6
 www.academyfinance.ch

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- 4 November 2020 refund of 100%
- 18 November 2020 refund 30%
- after 18 November no refund will be made for cancellation.

REGISTRATION FORM

I register for the seminar «DAC6 clarifications by tax administrations» in Zurich on wednesday 2 December 2020.

I am member of the association:

FIRST PARTICIPANT

Full name.....
 Position.....
 E-mail.....

SECOND PARTICIPANT (-50%)

Full name.....
 Position.....
 E-mail.....
 Company.....
 Address.....
 Postcode..... City.....
 Tel Fax.....

Person to which the invoice must be sent for payment:

Name..... Email.....
 Bank transfer Mastercard VISA AMEX
 Credit card No : ____/____/____/____ Expiry date : ____/____
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 Address of AMEX cardholder
 Date Signature.....

The organisers reserve the right to amend the programme if, despite their best efforts, circumstances oblige them to do so.

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