International Tax Bulletin
Date: 30.06.2020
Issue: 2020/31

TAX TRANSPARENCY INCREASES IN INTERNATIONAL TAXATION, NEW REPORTING REQUIREMENTS ARE OBTAINED WITH THE CROSS-BORDER REPORTING OBLIGATIONS (DAC6).

CENTRUMAUDITING
Sworn-In Financial Advisory & Consulting

TAX TRANSPARENCY INCREASES IN INTERNATIONAL TAXATION, NEW REPORTING REQUIREMENTS ARE OBTAINED WITH THE CROSS-BORDER REPORTING OBLIGATIONS (DAC6).

The dynamics of international taxation is in a great transformation, especially in recent years, through the practices put into effect by tax authorities one after another. While this situation naturally causes groups that have been structured abroad for a long time to change their practice for years and to restrict the movement area with the additional obligations imposed. For potential entrepreneurs who are planning to invest abroad for the first time, it is added new question marks in their minds, while additional cost items to be paid to business partners in the target countries occur.

In one way or another, the basic truth is now that nothing will be the same in the international tax axis and the field of movement which was quite large in the old times will obviously begin to be restricted slowly, with each mandatory reporting obligation introduced within the principle of 'transparency in taxation'. We will witness how this will cause investors to change their action plans over time, but these additional obligations are expected to lead to revising international structures and simplification in these structures in line with the needs and targets in the first place.

While the dynamics of international taxation are changing radically, we would like to publish a bulletin on Directive 2011/16 / EU on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, which is also known as DAC6 (Directive of Administrative Cooperation), explaining what changes await investors who have investments in the European Union geography or people who are planning to invest in this region. In this series of articles, we will elaborate on the studies for transparency in international taxation, what DAC6 means, what changes it will bring, and what will be included in the scope of reporting in detail.

Before we get into the details, let's make a final note about the implementation calendar of DAC6: In the meeting held by the commision of European Union member countries (Coreper) on June 3, 2020, a maximum 6-month delay from the first planned calendar for the DAC6 reporting was proposed.

While we prepared this article series, we got the information that the European Parliament also voted in favor of this postponement proposal on 19 June 2020. Beginning of the reporting period, 1 July 2020 on the regular calendar, will be postponed for sure, while which member states will continue with the determined first calendar and which member countries will tend to postpone these dates will become clear in the coming days. However, the unchanging truth is that, even after 6 months at the latest, the inevitable transformation in international taxation will be mandatory, and cross-border reporting obligations will enter our lives very soon.

1. The Concept of Tax Transparency and OECD's Work in This Direction

The concept of transparency in tax law is the establishment of standards to reduce tax evasion attempts and the determination of the obligations on the states in order to turn this standard into

an agreement between the parties and to take common steps towards automatic exchange of information.

Especially after the 2008 economic crisis, G20's policy on "closing the period of bank secrecy" was introduced as a result of countries' budget deficits, efforts to combat money and terrorist financing, and in 2009 important steps have been taken regarding the tax obligations of the countries for taxpayers in the international tax area.

Information stored by banks will no longer be subject to confidentiality, and the idea of subjecting information exchange in the international arena has been the first step in the forthcoming change and transformation process. The fact that the 'secrets', which were the greatest value of international banks until that time, will no longer have a secret value, is one of the most important factors that pushed both real people and institutions to search for solutions today.

The Global Forum for Tax Purpose Transparency and Information Exchange, which was established in the early 2000s under the Organization for Economic Cooperation and Development ("OECD"), which was focused on tax transparency since the 1990s, was restructured in September 2009 and has been studied on the implementation of international standards on tax transparency. The Forum includes the participation of 154 countries, also carries out studies on accessing ultimate beneficial owner information in order to determine the standards of tax transparency and increase the functionality of information exchange standards and encourages the implementation of internationally agreed standards for exchange of information for tax purposes.

2. Directive on Mandatory Information Obligations for Intermediaries in the EU

The European Union ("EU"), a member of the G20, as well as 17 countries among the world's largest economies, gathered at the ECOFIN Council meeting on 13 March 2018 to adopt the standards set for tax transparency and to be implemented in the member states. They reached an agreement on mandatory information rules for intermediaries and taxpayers.

The EU adapted the Directive 2018/822 on Mandatory Disclosure Rules for Intermediaries ("Directive") and Administrative Cooperation in the Field of Taxation ("DAC 6") laid down as a result of the agreement. The mandatory disclosure rules mainly target intermediaries that offer "**aggressive cross-border tax planning arrangements**" in one or more member states.

As a result of the European Commission's proposal June 5, 2018, the Directive on Administrative Cooperation ("DAC 6") was introduced in the tax field, which introduced mandatory disclosure rules for intermediary institutions, and the final version of the Directive was published in the Official Journal of the European Union. It entered into force on June 25, 2018. The rationale for the Directive includes the purpose of helping member states maintain their "direct income tax (income and corporate tax) bases and increase tax revenues, and also the purpose of providing a fairer tax environment with those rules.

The Directive obliged Member States to adopt legislation, regulations and administrative provisions that will comply with by 31 December 2019 and to publish

them in their official newspapers. Accordingly, the provisions adopted into the domestic legislation would come into force in all member states and the United Kingdom from 1 July 2020 as per the provisions of the Directive. Although the notifications within the scope of the Directive was going to made until 31 August 2020, it is on the agenda that this period will be postponed by the EU Commission to a later date due to Coronavirus Pandemi which effected all countries around the World.

3. The Concept of "Intermediary" Within the Scope of the DAC6

The notification obligation within the scope of the Directive applies to real or legal persons defined as "**intermediaries**" in prinipal. Intermediaries describes:

- Any person who provides or manages any "cross-border tax planning implementation, marketing, organization and implementation",
- Any person who is knowledgeable or reasonably knowledgeable about the provision of support in relation to the "cross-border tax planning" to be reported,

The intermediaries covered by the Directive are designated as those who have any asset which will result in the taxpayer status (workplace, company and similar asset) within the scope of EU legislation and those who provide professional services at EU borders, registered or registered in the supervisory or regulatory body.

The rules set by the Directive are related to the potential aggressive tax planning design or regulation of tax professionals (professional accountants such as sworn-in financial advisors, self-employed accountants, in-house accountants, lawyers and tax advisors). It requires that these kinds of professionals to inform the tax authorities in the EU.

4. Aggressive Tax Planning Application within the scope of DAC6

A clear definition of "aggressive tax planning" is not directly included in the text of the Directive. Instead of a clear definition of the term, signs which indicates the existence of tax planning or presumptions of weakening the obligation of mandatory disclosure are described in the Directive. In cases where at least one of the distinctive presumptions outlined in the Directive is exemplified, the disclosure obligations will arise. These are:

- To realize a cross-border payment to the recipient in a country with zero or low tax rates which will be a reducible expense in the source country.
- To is a connection between the tax advantage to be provided by the tax planning arrangement and the intermediary service,
- To ensure using depreciation in more than one country over the same asset,
- To ensure benefiting from tax discounts in more than one country over the same income,
- Noncompliance with EU or international transfer pricing rules in transactions with related persons,
- To include a country / state with inadequate or poorly implemented anti-money laundering legislation,

- To include a structure which was established to avoid declaring income in accordance with EU transparency rules,
- Evasion of EU information exchange requirements for tax rulings/agreements.

5. The Sanctions to be Applied in the event that the Mandatory Obligations Are Not Met

Only direct tax related transactions are included in the scope of the notification obligation, as a rule and the Directive primarily focuses on corporate tax and income tax. VAT, customs duties and social security payments are not in the scope of the disclosure obligation.

The Directive imposes the obligation on member states to determine rules on penalties in case of violation of mandatory disclosure rules by intermediaries under the Directive, and let the member states regulate penalties with the principles of "effective, proportionate and dissuasive". Accordingly, the penalties determined by member states regarding violations of the Directive provisions may differ. For example, the penalty for not fully complying with the notification obligation in the Netherlands has been determined as imposing an administrative fine up to 830,000 Euros. Poland has declared that the maximal potential fine will be 5 million Euro. Although the sanctions to be applied for the violations of the directive obligations will differ from country to country, it is obvious that the taxpayers who do not comply with the DAC6 regulation are expected to face high and dissuasive penalties.

6. Reporting Obligation Under DAC6

Cross-border tax planning covered by the Directive is required to be reported to the relevant authorities within **30 days** of any of the following:

- On the day after the reportable cross-border arrangements is made available for implementation,
- on the day after the reportable cross-border arrangement is made available for implementation; or
- when the first step in the implementation of the reportable cross-border arrangement has been made,

The data subject to the notification will be automatically changed **within a month** following the close of the quarterly financial period for which the notification is made, using the Common Communication Network to be established by the competent authorities of each Member State on administrative cooperation.

Intermediaries and relevant taxpayers are required to provide information on cross-border regulations to be reported on or after 25 June 2018, and the first actions to be reported will be between 25 June 2018 and 1 July 2020, when the DAC6 regulations will be implemented across the EU. However, due to the pandemic, the last notification date of these notifications is expected to be postponed by the EU Commission to 30 October 2020, instead of 31 August 2020.

As you may recall, the start date foreseen in the first official calendar of the DAC6 action plan announced was 1 July 2020, but in the meeting held on 19 June 2020, the European Parliament

announced that the member states will benefit a maximum 6-month optional postponement due to the global Covid-19 outbreak. Consequently, negotiations regarding the DAC6 enforcement calendar are ongoing and the new calendar is expected to be announced soon.

6.1. Reporting Obligation

The term "**intermediary**" includes all tax consultants, accountants, lawyers and other professionals who advise taxpayers in related cross-border transactions. In addition, professionals who manage the implementation of transactions such as trust services and family offices will also be within the scope of the intermediary definition. International Holding companies and departments which realize group treasure function are also determined as intermadiaries.

If an intermediary does not exist (for example, if the obligation is not applicable to intermediary lawyers due to the confidentiality, if the intermediary resides outside the EU or if the relevant arrangements are developed within the institution), the relevant taxpayer is obliged to report these arrangements.

The relevant taxpayer is defined as "any person who is prepared to implement a cross-border arrangement to be notified or who is ready to implement a cross-border regulation that will be considered as the basis for the reporting obligation or who applies the first step of such arrangement". In addition, the obligation to report is not limited to cross-border arrangements offered to EU taxpayers, but the arrangement must include at least one EU Member State to be reportable.

6.2. Arrangements Subject to Reporting Obligation and Hallmarks

Cross-border arrangements, which include certain **hallmarks**, must be reported in cases where the main benefit or one of the main benefits are for providing a tax advantage.

Since the scope and criteria of the notifications to be made to the relevant tax authorities in cross-border transactions have not yet been set to a certain standard on the basis of all member countries, this appears as a gray area. It is obvious that this situation will lead to some practices in countries that are fixed in theory but differ in practice. While the member states transferred the agreed framework arrangements to their internal legislation, they acted in line with the meaning and expectation they derived from the concept of 'main benefit', which resulted in constructing subjective interpretations among countries instead of objective concepts.

The concept of **hallmarks** in the Directive is defined as "the feature of a cross-border regulation that shows possible tax evasion risk". The hallmarks are divided into two as general and special hallmarks. **General and some special hallmarks are only applied in the event that the main benefit test is carried out.**

The main benefit test is considered as realized "in cases where an independent third person who considers all conditions is reasonably expected to determine that all the relevant situations and conditions are deemed to be subject to tax advantage as a result of the cross-border transactions"

As we have stated above, since a standard concept and scope has not been determined for such arrangements, the

situations that should be reported with the hallmarks test are explained with the examples listed below:

- The taxpayer searches for confidentiality about obtaining tax advantage,
- The situation in which the intermediary's fee for the service they provide is determined based on the tax advantage to be created.
- Where the arrangements are based on general and simple documents without the need to greatly customize for the implementation.
- In the event that the party participating in the arragement acquires a company in a loss situation to take advantage of tax losses
- When the arrangement has the effect of lowering taxation of income or has a re-characterization effect on another type of income covered by the exception
- When the arrangement includes circular fund transactions to be made by businesses that do not have a commercial function.
- The arrangements that include cross-border payments, which are subject to tax deduction among companies associated with the fulfillment of certain special conditions,
- Arrangements that include a deduction for depreciation of a certain asset to be used in more than one country,
- Arrangements involving the transfer of assets in one country to another country where the tax amount will differ significantly, for this purpose,
- Arrangements that contains the purpose of preventing the obligation to report in accordance with legal obligations;
- Arrangements in which ultimate beneficial owners cannot be identified,
- Arrangements using safe harbors for unilateral transfer pricing,
- Arrangements involving the transfer of intangible assets that are difficult to validate,
- Arrangements with intra-group cross-border function, risk or asset transfer so that the estimated EBIT will shrink by at least 50% within 3 years

7. Information to be Provided Within the Scope of Reporting

The following information set will be used in the reporting of cross-border transactions that are subject to DAC6:

- General information about all taxpayers and intermediaries who are parties to cross-border transactions:
  - Tax residency
  - Identification Information ve Birth Place-Date (For real persons)
  - Tax Number

- Transaction details subject to reporting and hallmarks specific to these transactions,
- Summary explanation of the transactions subject to reporting and main activities carried out by the parties to these transactions,
- The first date of the realization of the arrangement subject to reporting,
- Brief description of local legislation in the country concerned,
- Volume/value of the transaction subject to reporting,

Information on taxpayers (legal or natural person) resident in an EU member state that is tax-affected by the transaction subject to reporting.

8. The Effect of Compulsory Reporting Obligation Within the Scope of DAC6 on Existing and New Turkish Investors and Our General Evaluations

First, let's start with a positive overall assessment: DAC6 regulations, which are the subject of our article series and which we have touched on all its aspects in the most comprehensive way possible, theoretically seem to impose additional reporting obligations on the back of investors that have never been on the agenda in the European Union geography. It seems that it will take a long time for its application to settle on a standard axis across the European Union geography, as there are many question marks, subjective initiatives and blurred areas in inter-member applications.

As we have mentioned in the first part of our article series, even which member countries will benefit from the optional postponement option for 6 months and which ones will not benefit, are still ambiguous after the postponement option because of global Covid-19 epidemic which the European Parliament voted with regard to the reporting effective date of July 1, 2020, announced in accordance with the first calendar agreed by the European Union member states commission (Coreper). While we anticipate that the new calendar will become clear within a short time, we do not have an estimate of when the practical implementation will become functional in the member states.

Leaving aside our general positive estimates at the point of timing and practical standardization, the 'globalizing world order', which is one of the most popular terms in the business world of the 2000s, that all recent changes in the field of international taxation will sooner or later require transformation in this area. It can be easily foreseen that it will lift the curtains between the borders one by one.

At this point, the advantage of cross-border taxation and its dynamics in practice, which are regarded as the main movement and benefits point in the construction of global group structures for international investors, and the tax advantage obtained as a result of an international transaction, without touching the texts of double taxation agreements, It is natural that the obligation to report to the relevant tax administration, on the back of the taxpayer who obtained this benefit, creates an additional query area for the final investment decision before international investors.

9. Will Multi-tiered Group Structures Enter the Collapse Process?

These changes, which have been experienced in the field of international tax for a long time, raise a very important question: Will multi-tiered group structures, which have been invested in years, undergo collapse? Let's answer this question without going into detail, the answer is of course "no". But of course, the issues of tax transparency and the prevention of aggressive tax planning, which have been dealing with by international authorities for a long time and that are the basis of the action plans, seem to destroy the structures that were established only to gain tax advantage. As a matter of fact, the substance requirements in the structures established in countries such as the Netherlands, Luxembourg, and Singapore, which have risen in the international arena especially as the most popular international holding centers in the world, have been the precursors of this change and once only had an advantageous tax regime. It narrowed the circle for structures that were registered in a country's trade registry and managed directly from another country without physically creating presence and capacity.Now, the new reporting and mandatory notification obligations introduced with DAC6 will further narrow the circle that has been narrowing for some time for such structures established with a full tax advantage, and even bring serious penal sanctions to the agenda if necessary measures and actions are not taken.

As a result of all the reasons mentioned above and these changes in the international arena, multi-layered group structures will not completely collapse, but will enter an absolute and inevitable process of change.

10. Our Recommendations to Turkish Investors Who Have International Investments or Plan to Invest

Especially in the last 10 years, we observe that Turkish investors have made significant investments in the international arena and observe that they have been benefiting from the investment models which have been correctly constructed.We believe that the new and additional obligations brought by the European Union, which is the biggest and most important target investment region of Turkish investors, will not pose a major problem for Turkish investors who are already investing or planning new investments from scratch.

Although each additional reporting obligation imposed will emerge as an additional cost item and more responsibility for Turkish investors, to business partners and corporate service providers working together in these countries, as long as there is full compliance with all steps taken in tax transparency, it will not pose a risk and even this practice will contribute to Turkish investors in becoming a global player in a real sense.

At this point, our advice to Turkish investors will be to fully understand the internal and external legislation of the invested or target country and the obligations envisaged, and to fully comply with all notification and reporting obligations without exception.

It will be the most important starting point to act in the most professional way to decide on the structure to be invested abroad or to restructure the existing structure in the most accurate way and to

follow all legal obligations correctly after the structure is put into practice.

The importance of the establishment or implementation of international structures is to protect the structures established in foreign countries within the scope of full harmonization within the scope of domestic and international legislation, in order to protect them from serious sanctions and, more importantly, it is critical to prevent loss of reputation that may arise.

Kind Regards,

Please contact us for the further details on our international tax bulletin

Can DOĞRUSÖZ

Director, International Tax Consultation Services

E-mail: can.dogrusoz@centrumdenetim.com

Tel: 0212 267 21 00

Tahsin Can NALCI

Senior Manager, International Tax Consultation Services

E-mail: tahsin.nalci@centrumdenetim.com

Tel: 0212 267 21 00