KPMG Meijburg & Co Tax & Legal

2023 Guidelines on Mandatory Disclosure Rules (DAC6) published

As of July 1, 2020 the Mandatory Disclosure Rules (EU DAC6 Directive) took effect in the Netherlands. During the drafting of DAC6 it was acknowledged that it can be difficult in practice to establish whether or not specific arrangements are reportable.

On April 28, 2023 an updated version of the Guidelines on Reportable Cross-border Arrangements (hereinafter: Guidelines) were published to replace an earlier version dating from 2020. The updated Guidelines include several substantive changes compared to the earlier version. The hallmarks are discussed using 32 examples.

In this memorandum we address the changes to the Guidelines that most stand out compared to the earlier version.

Arrangement

The Guidelines clarify that a change in an already existing arrangement may also lead to a new reportable cross-border arrangement. This can, for example, be the case if the participants in the arrangement change, or if the legal form or residence for tax purposes of a participant changes, but also if there is a change to the funding structure. There can also be a (new) reportable cross-border arrangement without any other hallmark applying in this respect.

Participant

The Guidelines elaborate on the term 'participant'. In order to qualify as a participant a person should have a certain degree of involvement in the arrangement. This involvement may, for example, be evidenced by the taking of board resolutions, or being subject to accounting or tax consequences. The Guidelines also note that there can also be a cross-border arrangement with one participant, giving as example a transfer between a head office and its permanent establishment located abroad.

Intermediary

If an intermediary with legal professional privilege invokes their professional privilege and thus does not report a reportable arrangement, the intermediary with legal professional privilege must notify other intermediaries of this (or in certain circumstances: the relevant taxpayer). Following a recent judgment by the Court of Justice of the European Union[1], the Guidelines now also deal with this issue. If a lawyer acts as intermediary for a reportable arrangement and invokes the legal right of non-disclosure for tax purposes in respect of this, the notification obligation only applies if the client of the particular lawyer-intermediary is the person who must be notified about their reporting obligation. According to the Guidelines, depending on the circumstances of the case, this can be the relevant taxpayer but also an (other) intermediary. Whether other persons with legal professional privilege can also invoke this, is still under discussion. This question is currently pending before the Court of Justice of the European Union.[2]

---

[1] CJEU December 8, 2022, ECLI:EU:C:2022:963.
[2] Request for a preliminary ruling by the CJEU, submitted on September 29, 2022, C-623/22.

The Guidelines also contain various descriptive or compliance activities for which a person who only performs these activities does not qualify as an intermediary or auxiliary intermediary. For example, preparing and filing tax returns, preparing or updating transfer pricing documentation. These activities then, in principle, do not lead to a reporting obligation.

Main benefit test

Some arrangements only have to be reported if the main benefit test is also met. The predecessor of the Guidelines stated that if the main benefit of an arrangement is obtaining a tax advantage that is entirely in line with the policy intent of the legislator, this does not yet mean that the main benefit has been met. This passage no longer appears in the Guidelines, which now state that while the fact that a tax advantage is in line with the intention of the relevant rules can be taken into account for the main benefit test, it is not decisive for the question whether the test has been met.

Hallmarks

The Guidelines address the hallmarks using more than 30 simplified examples. Detailed explanations and/or new examples have been included for several hallmarks.

Hallmark B.2

A useful practical example has been included concerning the application of hallmark B.2. This hallmark covers the conversion of income into capital, gifts or other income categories that are subject to a lower tax rate or are exempt from tax. According to the example, for the purposes of hallmark B.2 there must be a conversion of an existing situation. If there is a new situation in which there is not yet any current income, then there is no conversion as referred to in hallmark B.2.

Hallmark B.3

An example in the Guidelines notes that preparing a will including a *fideicommissum* or two-tiered condition is regarded as a circular transaction for hallmark B.3.

Hallmark E.3

For the purposes of hallmark E.3, it is important that there is a cross-border intra-group transfer of functions and/or risks and/or assets, whereby the projected annual earnings before interest and taxes (EBIT) of the transferor(s) during the period of three years after the transfer falls to less than 50% as a result of the transfer.

The Guidelines detail how the EBIT test should be applied if the transferor is not an operating company but, for example, a holding company or a financing company, and in that capacity generates (virtually) no operating result or EBIT. For such companies, it is the core business of the company that should be used. For example, if financing activities are the company's core business, then the calculation of the EBIT must take account of the financial results of the company.

The Guidelines now also include examples about when the period of three years after the transfer starts, and how to deal with a negative EBIT at the transferor, which

becomes even more negative as a result of a transfer. These examples had already been published on the LinkedIn page of the Dutch Tax and Customs Administration (DTCA), and have now found their way into the Guidelines.

It follows from the second to last example in the Guidelines that transfers between a head office and a permanent establishment are also regarded as cross-border transfers that can trigger a reportable cross-border arrangement under hallmark E.3. According to the Deputy Minister of Finance, a separate entity approach must be used here for the permanent establishment.

Final remarks

The Guidelines offer insight into how the DTCA should interpret DAC6. However, the Guidelines present the interpretation of the Deputy Minister of Finance, which does not rule out that other interpretations are possible.

Please do not hesitate to contact us if you have any questions about the above. Meijburg's advisors would be pleased to use their expertise to help you.

KPMG Meijburg & Co
May 2023