News

Tax Professionals Grapple With EU Transparency Challenges

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- *European tax advisers see challenge in "DAC 6" disclosure rules*
- *Member nations must approve and implement them by 2020.*

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Companies in Europe are being advised to work now to comply with new rules requiring them to report certain aggressive cross-border tax planning arrangements to national tax authorities.

The DAC 6, the EU council directive targeting "potentially aggressive tax arrangements" with mandatory disclosure requirements won't apply until 2020, but companies should start collecting information for national tax authorities now, tax professionals told Bloomberg Tax Nov. 23.

They spoke at the 11th European Tax Advisers' Professional Affairs Conference in Madrid Nov. 23, where participants discussed how to implement the new disclosure rules. The EU directive went into force June 25, and member nations have to approve and implement it by 2020.

"Even though we still don't know the final content of national transposition laws," multinational companies "will need to establish mechanisms for identifying transactions that could be considered potentially aggressive under the terms of this directive," Eduardo Gracia, head of tax at Ashurst law firm and chair of the international tax committee at the Association of Spanish Tax Advisors, told Bloomberg Tax Nov. 23.

Gracia said companies might want to avoid having too many reportable transactions and to keep in mind that any operation initiated after June 25 could potentially be reportable upon implementation starting July 1, 2020. The "excessive uncertainty" surrounding the new rules could raise questions of unconstitutionality or even lawsuits in some EU member states, Gracia said.

Ian Hayes, first vice president of CFE Tax Advisers Europe, told Bloomberg Tax Nov. 23 that the new rules as framed and phrased could have significant effects on multinational corporations, particularly when they have subsidiaries throughout Europe that might be considered intermediaries subject to reporting or could see routine chain transactions being unnecessarily affected.

Gracia and Hayes spoke to Bloomberg Tax in a joint interview prior to the conference.

Vague Language

The new rules will affect a broad array of "intermediaries," such as accountants, lawyers, or tax advisers who sell cross-border tax arrangements to their clients. The term "intermediary" can apply to anyone who designs, markets, organizes, makes available for implementation or manages implementation of such an arrangement. This can include individuals, companies, or legal arrangements such as trusts.

One of the defining themes of the conference was the vague language of the directive and how terms such as "intermediary" and "arrangement" might be defined by member nations. Further discussion focused on differing state criteria on issues such as professional privilege, avoiding market distortion, and achieving a "level playing field" in the European single market.

In limited cases, the reporting requirement would fall on the taxpayer, such as when there are no intermediaries or there is a non-EU intermediary.

The directive defines "reportable arrangements" through a series of defining "hallmarks," provided they meet the "main benefit test" showing that the arrangement was made with the objective of obtaining a tax advantage.

'Early Warning Mechanism'

Intermediaries such as tax advisers involved in cross-border tax planning must report information on these arrangements to tax authorities in their member nations.

The information provided may ultimately be uploaded to a central depository shared among tax administrations, according to Reinhard Biebel, deputy head of the European Commission's corporate tax transparency unit.

According to the European Commission, DAC 6 will serve as an "early warning mechanism on new risks of tax avoidance," to enable more effective tax authority audits and allow member states to close tax-planning loopholes. EU legislation previously didn't require the reporting of cross-border arrangements, but has taken the lead on Action 12 of the OECD Base Erosion and Profit Shifting (BEPS) Project.

Guidance Needed

"I think that there is a fundamental flaw at the moment within the structure of what is being proposed," and it needs to be addressed, Hayes told Bloomberg Tax.

By way of example, Hayes said the required definitions needed for implementation of the directive will be the result of potentially "very narrow" interpretations arising in member state laws, with the risk of gaps between them that could ultimately be exploited for tax avoidance.

Biebel said the European Commission so far hasn't committed to issuing any sort of "binding guidance or handbook" for DAC 6.

"That is not what we have in mind, because we believe the directive as such is not a text that is directly applicable" and is up to interpretation and application by member states, who may even decide to "go further" than what the directive requires, Biebel told conference attendees.

Olivia Long, a professional support lawyer for the tax department at the Irish law firm Matheson, said that given "quirks" at the national level, special hallmarks are often hard to draft on a pan-European basis.

The multilateral approach taken by Europe is really what is necessary for implementation, and EU member states looking for guidance can consult OECD recommendations as they study how to implement mandatory disclosure requirements, said John Peterson, head of the OECD's aggressive tax planning unit.

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