Deloitte. 德勤

Tax
Issue P330/2021 – 11 January 2021

Tax Analysis

European Union - Mandatory Tax Reporting (DAC6) implemented

Authors:

Claus Schuermann
Partner
Tel: +852 2238 7884
Email: clschuermann@deloitte.com.hk

Vicky Wang
Partner
Tel: +86 21 6141 1035
Email: vicwang@deloitte.com.cn

Jessie Gu
Director
Tel: + 86 10 8512 4131
Email: yuzhangbj@deloitte.com.cn

Zenker Merten
Manager
Tel: + 852 2740 8816
Email: mezenker@deloitte.com

Jessica Shi
Manager
Tel: + 86 10 8512 5577
Email: jessshi@deloitte.com.cn

1. Application of DAC6

The mandatory tax reporting ("DAC6", referring to the 6th EU Directive for Administrative Cooperation in (Direct) Taxation) in the European Union (EU) has been introduced and come into effect in in all EU Member States.

This Directive has been introduced in order to increase the level of transparency surrounding potentially harmful tax practices. It requires intermediaries and taxpayers to report certain cross-border arrangements in accordance with defined hallmarks, if the arrangements involve at least one EU member state.[1] An EU Directive does not constitute domestic law for the member states, however, a directive shall be binding, meaning that the directive needs to be implemented into domestic law by each member state, leaving discretion to the member state with regard to the exact implementation and interpretation of the directive[2].

Actual reporting was introduced in two groups: the first countries namely Austria, Finland and Germany introduced DAC6 with effect from 1 July 2020. The remaining EU member states made use of an optional deferral with reporting starting from 1 January 2021 for arrangements where a reporting requirement is triggered between 1 July 2020 and 31 December 2020 as well as arrangements triggering

[1] For details please see our previous Tax Analysis dated 27 July 2020
[2] Per Article 288 of the Treaty On The Functioning Of The European Union

a reporting obligation after 1 January 2021. Latest at 28 February 2021 the reporting for the arrangements that became reportable between 25 June 2018 and 30 June 2020 has to be done for the countries which made use of the deferral.

With effect from 1 January 2021 the United Kingdom is no longer an EU Member State and therefore, DAC6 generally ceases to apply in the UK, except for hallmark D which shall continue to apply. It is planned to narrow the scope of reporting requirements and to align with OECD rules.

In the following we will provide an overview of the regulations in the first three countries and share some first experience.

2. Germany

In Germany, DAC6 was implemented into national law on 21 December 2019. Further to the legal implementation act, guidelines are generally issued to clarify further details on how the act is to be applied.

Guidance by tax authorities

There is currently no final guidance by the German tax authorities with regard to the interpretation of the DAC 6 rules in Germany, with the latest draft version of the tax authorities' guidance dated July 2020, resulting in uncertainty in the application of the rules. Despite the lack of clear guidance reporting has started.

Reporting scheme and platform

The DAC 6 reporting needs to be made with the German Federal Tax Office ("Bundeszentralamt für Steuern"), instead of the local tax office. Germany opted for an electronic DAC 6 filing via an electronic platform. A specific XML-scheme needs to be applied for the reporting.

Covered taxes

Germany applies the DAC 6 reporting obligation for the following taxes: Personal Income Tax, Corporate Income Tax, Trade Tax, Real Estate Transfer Tax, Motor Vehicle Tax, Insurance Tax, Property Tax, Inheritance Tax, Gift Tax, Air Transport Tax, Non-Harmonized Excise Duties (e.g. Coffee Tax). The German definition of the covered taxes is broader than what will be implemented by other EU member states, as Germany considers transfer taxes (in particular real estate transfer tax) as part of the covered taxes whereas other EU member states generally do not impose the DAC 6 reporting for transfer taxes.

Deviations from directive or implementation by other member states

Germany opted for a softer definition of the term "intermediary" (which bears the primary reporting obligation). Whereas the EU directive considers "promoters" as well as "service providers" as intermediaries, Germany only implemented the promoter

For more information, please contact:

Global Corporate Tax Services
National Leader
Ryan Chang
Partner
Tel：+852 2852 6768
Email：ryanchang@DELOITTE.COM

International Tax and
Merger & Acquisition Tax Services
National Leader
Vicky Wang
Partner
Tel：+86 21 6141 1035
Email：vicwang@deloitte.com.cn

Transfer Pricing Services
National Leader
Liantang He
Partner
Tel：+86 10 8520 7666
Email：lhe@deloitte.com.cn

Client and Markets
National Leader
Jennifer Zhang
Partner
Tel: +86 10 85207638
Email: jenzhang@deloitte.com.cn

intermediary. This could result in situations, where in Germany certain arrangements are not reported and other member states assume that the arrangement was already reported in Germany (due to their broader understanding of intermediary), potentially leading to non-reporting and penalties.

In Germany, certain professions are subject to professional secrecy (e.g. lawyers or tax advisors), whereas in other EU member states e.g. tax advisors are often not bound by professional secrecy. As those professions are generally subject to DAC 6 reporting, due to the intermediary status, a conflict between the professional secrecy and filing obligation may occur. In these instances the conflicted intermediary needs to notify the user of the arrangement (the taxpayer), that he is conflicted and therefore the user has the option to 1) relieve the intermediary from the professional secrecy or 2) the user of the arrangement (the taxpayer) does the DAC 6 filing himself.

Based on the current draft guidance by the German tax authorities, the German interpretation for an "almost zero tax rate" is less than 4%, which is higher than the interpretation by other EU member states. Germany also considers tax benefits arising in third countries, i.e. outside the EU, as a potential tax advantage under the main benefit test. These two examples demonstrate that the respective implementation and interpretation of the DAC 6 rules need to be analyzed as one might come to the conclusion that based on the wording of the EU directive or implementation of other EU member states the arrangement is not reportable, even though in fact it would be reportable in Germany (e.g. a 3% tax rate which is not seen as "almost zero" based on the implementation of other EU member states).

3. Austria

In Austria, DAC6 was implemented with effect from 1 July 2020 and therefore the reporting obligation became effective by 1 July 2020. However, penalties for late filing were postponed.

Guidance by tax authorities
At this time, no formal guidance has been published yet, neither in draft nor final.

Reporting scheme and platform
The DAC6 filing can be made in German and English, but certain information must be submitted in English (e.g. details of the hallmarks, a summary of the content of the reportable arrangement, etc.). The reporting will be done with XML-Schema via the portal of the Austrian tax authorities. The reporting can also be submitted via an official form, if the electronic transmission is unreasonable.

Covered taxes
Austria applies the DAC 6 reporting obligation for the following tax areas: Income Tax (especially corporate income tax and withholding tax), real estate transfer tax, statutory fees under the Austrian Fees and Duties Act, vehicle tax, standardized consumption tax.

4. Finland

In Finland, DAC6 was implemented into national law on 30 December 2019. As stated above Finland did not make use of the optional deferral granted by the European Union. Thus, the reporting obligation became effective by 1 July 2020.

Guidance by tax authorities
General guidance by the Finnish tax authorities is available and was published 30 April 2020. There is also technical reporting guidance available which was published 5 June 2020.

Reporting scheme and platform

The DAC6 filings may be submitted in Finnish, Swedish or English. The tax authorities recommend that at least the summary of the arrangement and the relevant sections of law are provided in English. Electronic filing is required for corporations while individuals may submit the report in a paper format. The electronic reports are submitted in the portal which is designed for all electronic tax filings.

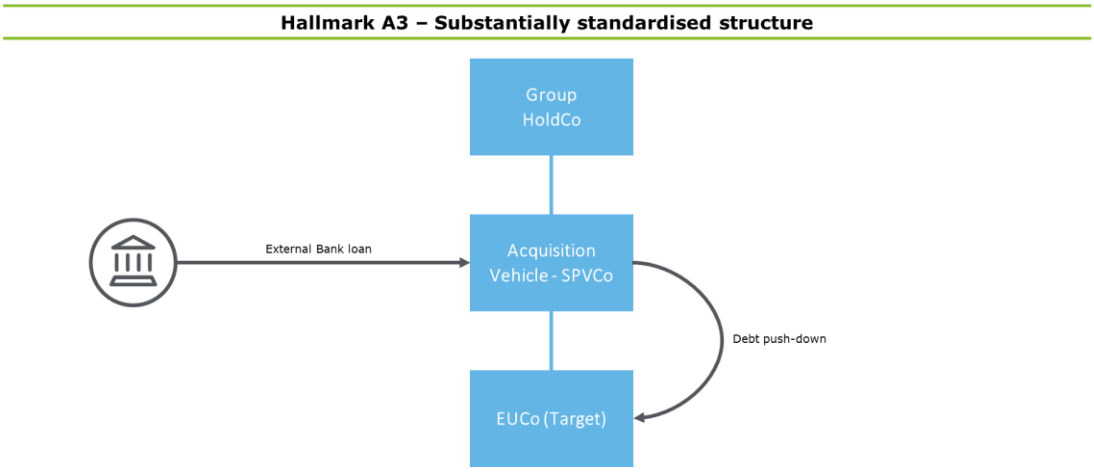
Covered taxes

Finnish implementing legislation applies primarily to direct taxes. Value added taxes, customs duties and excise taxes are out of scope of the law and have no relevance when considering the tax benefit. Tax benefit referred to in the law on reportable arrangements may for example relate to benefitting from lower tax rate, exempted income, deductions, tax loss, avoidance of withholding tax, deduction relating to foreign tax or any other economic benefit to be gained in taxation.

5. Practical cases

We have assembled two common arrangements for Chinese investors to Europe. We have selected those cases and provide a tendency of how they could be judged whether or not to be reportable. It has to be emphasised, though, that in each and every concrete case, all relevant details have to be assessed in order to come to a conclusion whether or not the arrangement is actually reportable. So the cases mentioned can only be considered as examples and in a concrete case the outcome may be different due to further circumstances.

a) Debt-push down



Fact pattern

EUCo Target (located in the EU) is acquired by a multinational group. For the financing of the acquisition an external loan was obtained from a third party bank. After the acquisition of the EUCo Target by the Acquisition Vehicle SPVCo (located not in the same country as EUCo) a debt push-down is conducted, i.e. an intercompany loan is issued from SPVCo to EUCo. Debt will create deductible interest expenses on the level of EUCo and income for Acquisition Vehicle – SPVCo.

Comments

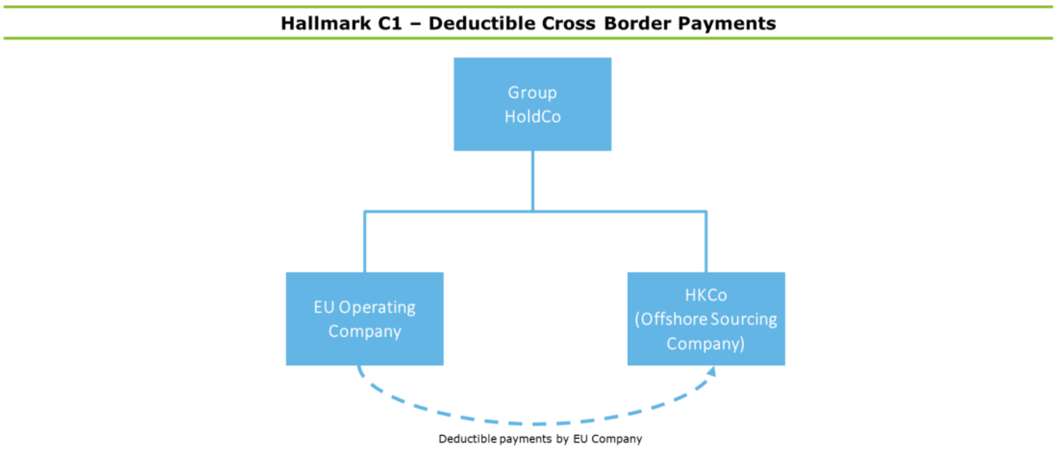
According to the EU Directive, the potentially relevant hallmark for a debt push-down would be hallmark A3, referring to a rather standardised arrangement without much customisation. A reporting requires, that the or one of the main benefits of the arrangement would be to obtain a tax advantage.

For Germany, based on the current status of the guidance from the German tax authorities, it is likely that this kind of structure would fall under Hallmark A3 – Substantially standardised structure. Furthermore, in order to trigger a reporting obligation the main benefit test needs to be fulfilled. As it appears that Germany applies a very broad interpretation of the main benefit test, it seems likely that this arrangement would trigger a DAC 6 reporting obligation in Germany.

For Finland, based on guidance existing at this stage, the main benefit test seems to be defined more narrowly compared to Germany. And considering guidance does contain various cases but not a debt push-down case which is a rather common scenario, it can be assumed that this would unlikely to be a reportable transaction.

Austria would arrive at the same result as Germany, the standardised structure with a broader MBT would likely result in a reporting requirement.

b) Payment to offshore company



Fact pattern

In this case, a OpCo located in the EU makes deductible payments to HKCo located in Hong Kong. However, due to the Hong Kong offshore regime, the income is not taxed in Hong Kong.

Comments

The potentially relevant hallmark would be C1(b)(i), an arrangement that involves cross border payments to an associated enterprise, that are deductible for the EUCo, but at the level of the receiving associated enterprise the income is taxed at zero or almost zero.

Based on the current status of the guidance from the German tax authorities, it seems likely that this structure would trigger a reporting obligation for this hallmark, if also the criteria of main benefit test is fulfilled. As it appears that Germany applies a very broad interpretation of the main benefit test, it seems likely that this arrangement, would trigger a DAC 6 reporting obligation in Germany. For Austria and Finland this arrangement should likely be reportable as well. Other countries (e.g. UK) may not consider this a reportable transaction though.

6. Summary

It is important to understand that an EU Directive provides only a framework, under which EU member states have to implement regulations with a degree of freedom. For the foreign investors this means that an understanding of each individual country is required and it is not sufficient to understand EU regulation alone. As can be seen from above explanations there are deviations in the rules between different states, leading to different outcomes, as can be seen from the cases. As more EU member states will release their implementation guidelines, further differences are expected to occur.

Differences may as well occur based on different regulatory environments. For example in Germany, a tax consultant underlies professional secrecy which is not the case in most other EU member states. Thus, a German tax advisor may not be permitted to report in the way his colleague in another state. This may create a reporting requirement for the investor. Therefore, processes need to be put in place to monitor and track what is being reported where and by whom.

Finally, the further developments in the United Kingdom need to be closely monitored. After leaving the EU, DAC6 no longer applies, but may be replaced by new reporting rules.

Tax Analysis is published for the clients and professionals of the Hong Kong and Chinese Mainland offices of Deloitte China. The contents are of a general nature only. Readers are advised to consult their tax advisors before acting on any information contained in this newsletter. For more information or advice on the above subject or analysis of other tax issues, please contact:

Country Leader of Tax and Business Advisory services, Deloitte China
Eunice Kuo
Partner
Tel: +86 21 6141 1308
Fax: +86 21 6335 0003
Email: eunicekuo@deloitte.com.cn

Northern China
Andrew Zhu
Partner
Tel: +86 10 8520 7508
Fax: +86 10 8518 7326
Email: andzhu@deloitte.com.cn

Eastern China
Maria Liang
Partner
Tel: +86 21 6141 1059
Fax: +86 21 6335 0003
Email: mliang@deloitte.com.cn

Southern China
Victor Li
Partner
Tel: +86 755 3353 8113
Fax: +86 755 8246 3222
Email: vicli@deloitte.com.cn

Western China
Frank Tang
Partner
Tel: +86 28 6789 8188
Fax: +86 28 6500 5161
Email: ftang@deloitte.com.cn

About the Deloitte China National Tax Technical Centre

The Deloitte China National Tax Technical Centre ("NTC") was established in 2006 to continuously improve the quality of Deloitte China's tax services and help Deloitte China's tax team better serve the clients. The Deloitte China NTC issues "Tax Analysis" which are commentaries on newly issued tax laws, regulations and circulars from technical perspectives. The Deloitte China NTC also conducts research and analysis and provides professional opinions on ambiguous and complex issues. For more information, please contact:

National Tax Technical Centre
Email: ntc@deloitte.com.cn

National Leader/Northern China
Julie Zhang
Partner
Tel：+86 10 8520 7511
Fax：+86 10 8518 1326
Email：juliezhang@deloitte.com.cn

Western China
Tony Zhang
Partner
Tel：+86 28 6789 8008
Fax：+86 28 6317 3500
Email：tonzhang@deloitte.com.cn

Eastern China
Kevin Zhu
Partner
Tel：+86 21 6141 1262
Fax：+86 21 6335 0003
Email：kzhu@deloitte.com.cn

Southern China (Mainland)
German Cheung
Director
Tel：+86 20 2831 1369
Fax：+86 20 3888 0121
Email：gercheung@deloitte.com.cn

Southern China (Hong Kong)
Doris Chik
Director
Tel：+852 2852 6608
Fax：+852 2851 8005
Email：dchik@deloitte.com.hk

If you prefer to receive future issues by soft copy or update us with your new correspondence details, please notify national marketing team of Deloitte China by email at cimchina@deloitte.com.hk.

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited ("DTTL"), its global network of member firms, and their related entities (collectively, the "Deloitte organization"). DTTL (also referred to as "Deloitte Global") and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

Deloitte is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax and related services. Our global network of member firms and related entities in more than 150 countries and territories (collectively, the "Deloitte organization") serves four out of five Fortune Global 500® companies. Learn how Deloitte's approximately 330,000 people make an impact that matters at www.deloitte.com.

Deloitte Asia Pacific Limited is a company limited by guarantee and a member firm of DTTL. Members of Deloitte Asia Pacific Limited and their related entities, each of which are separate and independent legal entities, provide services from more than 100 cities across the region, including Auckland, Bangkok, Beijing, Hanoi, Hong Kong, Jakarta, Kuala Lumpur, Manila, Melbourne, Osaka, Seoul, Shanghai, Singapore, Sydney, Taipei and Tokyo.

The Deloitte brand entered the China market in 1917 with the opening of an office in Shanghai. Today, Deloitte China delivers a comprehensive range of audit & assurance, consulting, financial advisory, risk advisory and tax services to local, multinational and growth enterprise clients in China. Deloitte China has also made—and continues to make—substantial contributions to the development of China's accounting standards, taxation system and professional expertise. Deloitte China is a locally incorporated professional services organization, owned by its partners in China. To learn more about how Deloitte makes an Impact that Matters in China, please connect with our social media platforms at www2.deloitte.com/cn/en/social-media.