



SOCIEDADE DE ADVOGADOS, SP,RL
ROGÉRIO FERNANDES FERREIRA
& ASSOCIADOS



Nº07/18

NEWSLETTER

TRANSPARENCY AND FISCAL PLANNING: OBLIGATIONS ON THE INTERMEDIARIES AND NEXT STEPS

This Information is intended for general distribution to clients and colleagues and the information contained herein is provided as a general and abstract overview. It should not be used as a basis on which to make decisions and professional legal advice should be sought for specific cases. The contents of this information may not be reproduced, in whole or in part, without the express consent of the author. If you should require further information on this topic, please contact contact@rfflawyers.com.

*

This Information is sent in compliance with articles 22 and 23 of Decree-Law no. 7/2004, of 7 January, regarding unsolicited e-mails. If you wish to be removed from our mailing list and avoid similar future communications, please send an email with "Remove" to the email address newsletter@rffadvogados.com.

Legal 500 – Band 1 Tax "Portuguese Law Firm" and Band 1 Tax "RFF Leading Individual" 2013/2014/2015/2016
Chambers & Partners – Band 1 "RFF Leading Individual" 2013/2014/2015/2016
International Tax Review – "Best European Newcomer" (shortlisted) 2013 / "Tax Firm of the Year" (shortlisted) 2014/
"Tax Controversy Leaders" 2014/2015 / "Indirect Tax Leaders 2015" / "Women in Tax Leaders Guide 2015" / "European
Best Newcomer" 2016/ "Portugal Tax Firm of the Year" (shortlisted) 2017/ "European tax Disputes of the Year"
(shortlisted) 2017/ "European Indirect Tax Firm of the Year" (shortlisted) 2017
Best Lawyers – "RFF Tax Lawyer of the Year" 2014 / "Recommended Lawyers" 2015/2016
Who's Who Legal – "RFF Corporate Tax Adviser of the Year" 2013/2015 / "Corporate Tax – Controversy" 2016 /
"Corporate Tax section of WWL - Thought Leaders" 2017
IBFD – Tax Correspondent Angola, Mozambique and East-Timor 2013/2014/2015/2016

ABSTRACT

Following the work carried out by the G20 / OECD under the Base Erosion and Profit Shifting (BEPS) project, namely Action 12 on mandatory reporting rules, and the implementation of the Common Reporting Standard ("CRS"), the OECD published a Mandatory Disclosure Rules Model for Schemes that Avoid CRS and Opaque Offshore Structures. Within a broader framework, at recent ECOFIN meeting, the European Union approved the extension of administrative cooperation and exchange of information for tax purposes through the new directive against abusive tax planning, mainly through the disclosure of tax schemes by intermediaries ("DAC 6").



www.rfflawyers.com
Praça Marquês de Pombal, 16 – 5th (Reception)/6th
1250-163 Lisboa • Portugal
T: +351 215 915 220 • F: +351 215 915 244
contact@rfflawyers.com



BACKGROUND

The Organization for Economic Co-operation and Development ("OECD"), with the support of the G20, published on 13 February 2014 the Common Communication Standard ("CRS"), an implementation instrument of a global model for obtaining and automatically exchanging financial information. To promote the adoption of the CRS within the European Union ("EU"), Council Directive 2014/107/EU of 9 December 2014, on Administrative Co-operation ("DAC 2"), has been revised already several times, in view of the increased rules and the spectrum of information exchange and fiscal transparency.

In this context, Decree-Law No 64/2016 of 11 October, transposed into national law the rules on CRS, introducing, on the one hand, the obligation to comply with reporting standards and due diligence on financial information and, on the other hand, mechanisms for the automatic and reciprocal exchange of such financial information, namely for tax purposes, and the underlying practical issues are governed by Ordinances 302-A/2016, 302-B/2016, 302-C/2016, 302-E/2016, all from December 2, as well as by Ordinance

no. 302-D / 2016, of December 2, as amended by Ordinances no. 255/2017, of August 14 and no. 58/2018, of 27 February.

OECD MODEL OF RULES OF MANDATORY DISCLOSURE FOR SCHEMES AVOIDING CRS AND OFFSHORE STRUCTURES

On this path, and following the provisions of Section IX of the CRS Comments on the effective implementation of the CRS, the OECD published on 9 March 2018 a Mandatory Disclosure Rules Model for Schemes Avoiding CRS and Offshore Structures ("Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures").

The purpose of these new guidelines, the adoption of which by the jurisdictions participating in the CRS is not mandatory and which must be incorporated into national law in order to become binding, is to provide tax Administrations with information on arrangements that intend, or it is reasonable to conclude that they intend, to circumvent or frustrate CRS's own mandatory reporting rules, as well as opaque structures that hide the actual

beneficiaries of assets held directly or indirectly in offshore structures.

The information to be disclosed to Tax Administrations includes the identification of taxable persons who use such structures and of those who are also involved in their design and implementation.

The obligation to provide information lies primarily with the "intermediaries", understood as such any person who conceives and promotes schemes aimed at circumventing the CRS rules system and also service providers who comply with the "reasonably expected to know", which, in our understanding, will include credit institutions, wealth managers, accountants and lawyers, among others.

The Mandatory Disclosure Rules Model for Schemes that Avoid CRS and Opaque Offshore Structures is also accompanied by the corresponding Commentary to the Model, which contains relevant clarifications regarding the text of the model rules and which may also have an interpretative value.

The information transmitted under this Model, if and once the rules are implemented, will provide Tax

Administrations with additional information to address their tax compliance and compliance obligations under the CRS, as well as to outline their future fiscal policy.

It is also hoped that the rules will have a deterrent effect on the construction, promotion and use of these schemes and reinforce the overall integrity of the CRS.

DAC 6: FISCAL TRANSPARENCY THROUGH INTERMEDIARIES

In parallel with this publication by the OECD, the European Commission issued a communiqué on 13 March on the political agreement reached by the Member States ("MS") at an ECOFIN meeting in proposal for a new Directive (known as "DAC 6"), which will amend Directive 2011/16/ EU on administrative cooperation in the field of taxation, the main objectives of which are fiscal transparency and the fight against abusive tax planning.

This Directive derives from the work carried out by the G20/OECD in the framework of the Base Erosion and Profit Shifting ("BEPS") project, namely Action 12 on compulsory communication rules and the adoption, within the framework of the European

Union, of the so-called promoter-based approach, since it is only exceptionally that the beneficiary is required to make communications in this area.

Drawing on the experience of a number of countries, such as the United States, Ireland, the United Kingdom and Portugal (which has been at the forefront in this respect), Action 12 has considered the possibility of adopting a system of "hallmarks "(Understood as markedly distinctive features or traits) of abusive tax planning. The final texts of the Directives, in each of the languages, are still being worked on.

A scheme will be regarded as "aggressive" when it meets at least one of the hallmarks listed in the DAC 6.

There are indications of a generic nature, such as the fact that the intermediary is entitled to a variable fee associated with tax savings obtained through the scheme, and of a specific nature, such as the fact that the scheme has the effect of converting an income into another that is taxed more favorably.

Among the list of schemes covered are, in particular, the granting of standard tax advice and without the need for customization; the promotion of

schemes with confidentiality clauses; the use of tax havens or jurisdictions on the list of EU tax havens; the use of companies whose head office is located in a country or jurisdiction without an information exchange agreement; or the transformation of the classification of the income and also the transfer of bank and financial accounts in order to avoid the automatic exchange of information.

This DAC 6 will require intermediaries - including tax advisers, accountants, banks and lawyers - that devise cross-border schemes for potentially aggressive tax planning to disclose them to their national authorities. For their part, MSs, in particular their tax administrations, should exchange this information among themselves in order to increase the scrutiny of fiscal planning activities designed or implemented by intermediaries.

The obligation to report is passed on to the taxpayers themselves if the intermediaries cannot disclose the information due to professional secrecy or if the scheme has been designed by in-house consultants or lawyers, that is, "company" consultants or lawyers.

Thus, the burden of reporting cross-border tax planning schemes will primarily fall on the intermediary, on

who designs, promotes, organizes, makes available or manages the implementation of such schemes.

DAC 6 further provides that the reported information, automatically exchanged, will be collected and maintained in a central database managed by the European Commission, a mechanism that has already been put in place in the collection and exchange of information, in other areas, for tax purposes.

Once DAC 6 is adopted, the MS will have until 31 July 2019 to transpose it. The information should begin to be reported by the intermediaries to the national authorities as from 1 July 2020 and the MS will be obliged to exchange it between them every three months, so the first exchange will, therefore, complete by 31 October 2020.

REGARDING THE PORTUGUESE DECREE-LAW RELATING TO FISCAL PLANNING: NEXT LEGISLATIVE STEPS

Decree-Law no. 29/2008, of 25 February, established the duties of communication, information and clarification to the Tax Administration, in order to prevent and combat abusive tax planning.

The regime in force in Portugal concerns situations which involves:

- i. the participation of an entity subject to a privileged fiscal regime;
- ii. the participation of a totally or partially exempt entity;
- iii. financial or insurance operations that are likely to determine the requalification of the income or the change of the beneficiary; or
- iv. that imply the use of tax losses.

Given this narrow objective scope vis-à-vis DAC 6, it will be expected that Decree-Law no. 29/2008 will be amended or even completely replaced in view of the necessary alignment and transposition of DAC 6 until July 31 of 2019.

Regarding the possible mimicking of the Model Rules proposed by the OECD, regarding schemes that aim to circumvent the CRS. At this stage, it is still not clear, the international commitment with this Model Rules, and the adhesion to them, by the approximately 100 States and jurisdictions participating in the international framework is fundamental to prevent the existence and the use of such schemes.

Given that the Model Rules are not binding, it will be necessary to wait for possible developments, which are nevertheless to be expected given the recent international trend towards broad political consensus regarding transparency and exchange of information for tax purposes, whether or not such consensus is reached by genuine agreement, by peer pressure or by the spectrum of international sanctions, as is the case with the list of "tax havens" of the European Union.

Lisbon, May, 3rd, 2018

Rogério M. Fernandes Ferreira
Jorge S. Lopes de Sousa
Filipa Gomes Teixeira