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NEWSLETTER

TAX INFORMATION EXCHANGE: DAC 6 AND THE NEW MODEL 58 FORM

SUMÁRIO

Council Directive (EU) 2018/822, of May 25th, 2018, known as “DAC 6”, has been transposed into the Portuguese legislation through Law no. 26/2020, of July 21st (subsequently altered by Decree no. 53/2020, of August 11th), foresees new communication rules for information exchange regarding internal and cross-border mechanisms. Under the terms of the new law, the Portuguese government has approved, through *Portaria* no. 304/2020, of December 29th, the Model 58 form, designed for compliance with the new rule.

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Legal 500 – Band 1 Tax “Portuguese Law Firm”/ Band 1 Tax “RFF Leading Individual” and highlighted in “Hall of Fame”, 2013, 2014, 2015, 2016, 2017, 2018, 2019

Chambers & Partners – Band 1 Tax “RFF Ranked Lawyer”, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020 and Band 1 “Private Wealth Law” - HNW “RFF Ranked Lawyer”, 2018, 2019, 2020

International Tax Review – “Best European Newcomer” (shortlisted) 2013 / “Tax Controversy Leaders”, 2014, 2015, 2016, 2017, 2018, 2019, 2020 / “Indirect Tax Leaders”, 2015, 2016, 2017, 2018, 2019, 2020 / “Women in Tax Leaders Guide”, 2015, 2016, 2017, 2018, 2019, 2020 / “European Best Newcomer”, 2016 / “Tax Firm of the Year”, “European Tax Disputes of the Year” and “European Indirect Tax Firm of the Year”, (shortlisted) 2017

Best Lawyers – “RFF Tax Lawyer of the Year”, 2014 / “Recommended Lawyers”, 2015, 2016, 2017, 2018, 2019

Who’s Who Legal – “RFF Corporate Tax Adviser of the Year”, 2013, 2015, 2016 / “RFF Corporate Tax Controversy Thought Leader”, 2017 “Corporate Tax: Advisory and Controversy”, 2017, 2018, 2019

Legal Week – RFF was the only Portuguese in the “Private Client Global Elite Lawyers” 2018, 2019

STEP Private Clients Awards - RFF “Advocate of the Year 2019” (shortlisted)

IBFD Tax Correspondent Angola, Mozambique and East-Timor, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020

Bloomberg Tax and Accounting Author, 2020



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BACKGROUND

In 2018, the European Commission put out a statement regarding a political agreement that the member-states had reached in an ECOFIN summit on tax transparency and the struggle against abusive tax planning and held in the context of Council Directive (EU) 2011/16.

This agreement, which also stemmed from the G20/OECD summit held in the context of the Base Erosion and Profit Shifting (“BEPS”) project, namely Action 12, came together in the form of Council Directive (EU) 2018/822 – known as DAC 6 – which foresaw a cross-border regime for the exchange of information between tax administrations.

As such, Law no. 26/2020 was approved in Portugal (revoking Decree no. 20/2008), establishing the obligation to inform the Tax administration of certain fiscally relevant internal or external mechanisms, which falls on intermediaries as well as the taxpayers themselves. Compliance requisites were also foreseen.

The deadlines foreseen in this Law were subsequently deferred by Decree no. 53/2020, and on December 29th, 2020,

Portaria no. 304/2020 was published, which approved the Model 58 form, meant for compliance with the new rules brought forth by the DAC 6.

REPORTABLE OPERATIONS

The applicable legislation states that any mechanisms that fulfil a certain set of key characteristics must be reported. When present, these key characteristics are indicators of possible tax evasion or other abusive tax practices.

In certain situations, the verification of these characteristics is enough to trigger the reporting obligation, while in others, a main benefit test (MBT) should be carried out to determine if a certain operation is subject to report.

Through this test it is possible to determine, without any reasonable doubt, that a certain operation was carried out solely for tax purposes, and that the resulting benefit for the relevant taxpayer was the main reason for a mechanism’s implementation.

As for the concept of “mechanism” under DAC 6 rules, the law states that any plan, project, proposal, advice, instruction, or recommendation, whether tacit or directly stated, may fall in this category, whether or not it has been made

official through an agreement or transaction. The mechanism may also be made up of several layers or stages or even of a series of operations, which may or may not have a commercial purpose.

As for the intermediary, it can be any person who conceives or makes a mechanism available. This does not include the mere description of existing legal regimes, any advice regarding a previously existing tax situation, or legal representation in the context of tax litigation.

The applicable legislation foresees different rules for internal or cross-border mechanisms.

CROSS-BORDER MECHANISMS

Cross-border mechanisms are operations that involve more than one EU member-state, or an EU member-state and a non-EU country.

The relevant Portuguese taxes to consider when reporting these mechanisms are PIT (IRS), CIT (IRC), VAT, real estate tax, transaction tax and stamp duty.

As for the key characteristics which trigger the reporting obligation of

cross-border mechanisms, we highlight the following:

- a) Situations in which the taxpayer promises not to reveal to any third parties the way a mechanism may provide a tax advantage;
- b) Mechanisms in which the success of the tax advantage is a variable when determining the intermediary's fees;
- c) Mechanisms that include the normalization of any documents and/or operations that become available to more than one relevant taxpayer;
- d) Mechanisms in which a participant acquires a failing company to make use of tax losses, among other objectives;
- e) Mechanisms intended to convert income into capital, donations or any other income categories that may be subject to a more favourable or exempt tax framework;
- f) Mechanisms that include circular operations that result in a fund "carrousel", through entities that have no other primary commercial purpose;
- g) Mechanisms that involve the deductibility of cross-border payments between two or more related entities;

- h) Mechanisms that allow for the circumvention of reporting obligations;
- i) Mechanisms that include a non-transparent chain of ownership through individuals or entities;
- j) Mechanisms that involve hard-to-evaluate intangible asset transfers.

Regarding the key characteristics mentioned from a) through f), and sometimes g) as well, the triggering of the reporting obligation is subject to the MBT.

INTERNAL MECHANISMS

Internal mechanisms are the ones whose effects are felt, partially or totally, within Portuguese territory.

The relevant taxes to consider when reporting internal mechanisms are the same as for cross-border mechanisms (please see above).

For internal mechanisms, the reporting obligation is triggered when the key characteristics mentioned in d) through j) and sometimes g) above are present, while also being subject to the MBT.

CONFIDENTIALITY

The applicable legislation clarifies that the reporting obligations for intermediaries, including lawyers, prevail over any professional confidentiality that they may be bound to by either law or contract.

As such, when intermediaries are bound to professional confidentiality by either law or contract, that obligation will primarily fall on the taxpayer (i.e., their client), and they will only be obligated to comply in case the taxpayer fails to do so.

RELEVANT DEADLINES

As for the relevant deadlines for lawyers, they are the following:

- Cross-border mechanisms created between June 25th, 2018, and June 30th, 2020:
 - The lawyer must have notified the taxpayer before January 15th, 2021, so that he may fulfil the reporting obligation;
 - Taxpayer must report the mechanism to the Tax administration within 30 days after being notified by the lawyer, who in turn must be notified of compliance (i.e., until February 14th, 2021)

- If the lawyer does not receive proof that the taxpayer reported the mechanism to the Tax administration within 30 days, he must report the mechanism to the Tax administration himself, before February 28th, 2021.
- Cross-border mechanisms created between July 1st, 2020 and December 31st, 2020
 - The lawyer must have notified the taxpayer before January 6th, 2021, so that he may fulfil the reporting obligation;
 - Taxpayers must report the mechanism to the Tax administration within 30 days after being notified by the lawyer, who in turn must be notified of compliance (i.e., until February 5th, 2021)
 - If the lawyer does not receive proof that the taxpayer reported the mechanism to the Tax administration within 30 days, he must report the mechanism to the Tax administration himself, before February 15th, 2021.
- Cross-border mechanisms created after January 1st, 2021:
 - Lawyer must notify the taxpayer within 5 days of a mechanism being made available (the lawyer

must have participated in the mechanism's creation, whether through direct or indirect assistance or mere advice or counselling);

- Taxpayer must report the mechanism to the Tax administration within 30 days of the lawyer's notification;
- If the lawyer does not receive proof that the taxpayer reported the mechanism to the Tax administration within those 30 days, he must report the mechanism to the Tax administration himself, within the following 10 days.

MISDEMEANOURS

If these rules are not complied with, the applicable legislation foresees the following fines:

- Failure to report within the legal deadline is punishable by a fine between € 6,000 – € 80,000;
- Omissions or imprecisions in reporting are punishable by a fine between € 2,000 – € 60,000; and
- Late delivery or failure to deliver any clarifications or documents requested by the Tax administration is punishable by a fine between € 3,000 – € 80,000.

Misdemeanours committed with regards to the transitional regime (i.e., the reporting of past mechanisms) may have their fines reduced to a fifth of the applicable amount.

THE MODEL 58 FORM

As foreseen in Law no. 26/2020, the Model 58 form, meant for compliance of DAC 6 obligations, was recently approved through Portaria no. 304/2020, along with filing instructions.

This form was conceived to be compatible with the communication rules that the Tax administration must follow when exchanging information with the other EU member-states.

The Model 58 form was a product of the DAC 6 Forum, held to monitor the implementation of Law no. 26/2020, in which the Portuguese Bar Association, Certified Public Accountants Association, Banking Association, Insurance Association and Tax Consultant's Association were all consulted, along with many accounting and consulting firms.

According to the Portaria, the Model 58 form must be digitally filed and submitted.

Lisbon, February 01st, 2021

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