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Combating Aggressive Tax Planning Through Disclosure: A Comparison of U.S. and EU Rules Applicable to Tax Advisors

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We are amidst a major change in the world of taxation, focused in substantial part on deterring tax abuse in both the developed and developing world. Governments are now automatically exchanging financial account information. The International Monetary Fund, Organization for Economic Co-operation and Development (OECD), United Nations, and World Bank Group have taken aim at the disposition of assets through the use of offshore indirect transfers.[1] Moreover, the publication of the OECD/G20 Base Erosion and Profit Shifting (BEPS) reports has sparked a number of reforms. The common goal of these initiatives is "compliance," which creates the impression that everyone is paying their "fair share" of the tax burden.

Complicating these efforts is the persistent—perhaps inevitable—information gap between tax authorities and taxpayers. This information asymmetry may be quite simple. For example, the taxpayer knows that he has an unreported bank account in a bank secrecy jurisdiction and the tax collector does not. Some simple problems can be attacked through technology—the development of standardized and automated information reporting, exchange, and matching systems. This work is largely complete.[2]

More complicated is the problem of combating aggressive or abusive tax planning strategies. For these purposes abusive or aggressive tax planning strategies are those that comply with the literal requirements of the law but produce results that contradict or defeat the "purpose" or "spirit" of the law. For many years, tax authorities could only play a version of "Whac-a-Mole"—providing guidance to stop one abusive transaction only to find that the market had already moved on to the next structure. While a reporting system certainly can support the game of Whac-a-Mole by identifying which taxpayers have engaged in previously identified transactions, a more useful reporting requirement would actually help tax authorities identify abusive transactions earlier or cause taxpayers not to engage in them at all. To that end, over the past several decades, governments have sought to enlist the very people who gave taxpayers their edge—the creative advisors and intermediaries who were one step ahead of the tax authorities.

1 *See* The World Bank, The Taxation of Offshore Indirect Transfers: a toolkit—draft version 2 (July 1, 2018).
2 *See* I.R.C. §§ 1471-1474, and the regulations thereunder; *see also* OECD, Common Reporting Standard (CRS).

The Origins of a Reporting Strategy

"At the heart of every abusive tax shelter is a tax lawyer or accountant."[3] Although Senator Charles Grassley spoke these words in the wake of the explosion of abusive corporate tax shelters in the United States in the late 1990s, the statement is equally true today. In many respects the United States is a pioneer in combating aggressive tax planning strategies. U.S. courts use the "substance over form doctrine," "sham transaction doctrine," or "economic substance doctrine"[4] to demarcate the permissible from the impermissible. Other countries may apply similar tools to draw this line.[5]

Such line-drawing exercises implicate one of the fundamental roles of tax advisors — to function as gatekeepers, "ably representing their clients and faithfully working for the tax system taxpayers deserve."[6] The U.S. disclosure regime, largely adopted in response to the proliferation of corporate tax shelters in the late 1990s, built on this gatekeeper role by requiring disclosure not only by the taxpayers participating in "reportable transactions" but also by their "material advisors." This disclosure regime has been expanded and modified over the past several decades.

The United States is not alone in leaning hard on those who facilitate aggressive or abusive tax planning. The adoption of Council Directive (EU) 2018/822 (DAC6) on May 25, 2018 will result in new reporting obligations for tax advisors within the European Union (EU).[7] DAC6 places an obligation on EU Member States to implement rules in their domestic law requiring qualifying intermediaries (e.g., tax advisors) and, in certain circumstances, taxpayers to disclose information about reportable cross-border arrangements to the competent authorities of one or more EU Member States. DAC6 also requires the automatic exchange of this information among EU Member States.

The following sections describe first the U.S. system of reporting, then the outlines of the new EU obligations. The final section will set out some of the differences in how the systems are likely to operate.

Overview of U.S. Disclosure of Suspect Transactions

The U.S. disclosure regime for "reportable transactions" was "designed to provide the Service with better information about tax shelters and other tax-motivated transactions through a combination of registration and information disclosure by promoters and tax return disclosure by corporate tax payers."[8] In the United States, the disclosure regime is triggered by a taxpayer participating in a specific type of transaction identified by the IRS in regulations or notices, and by a tax advisor being classified a "material advisor."

3 Mortimer Caplin, The Tax Lawyer's Role in the Way the American Tax System Works, 24 Virginia Tax Rev. 969, 976.

4 Economic substance is now codified in section 7701(o)(1) of the Internal Revenue Code of 1986, as amended (the Code). A transaction has economic substance only if: (1) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and (2) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.

5 See, for example, the extra-statutory 'sham transaction doctrine' and 'abuse of law (fraus legis) doctrine' developed by the Supreme Court (Hoge Raad) of the Netherlands.

6 Randolph E. Paul, Taxation in the United States 774 (1954).

7 Council Directive (EU) 2018/822 of May 25, 2018 (as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements). Technically, DAC 6 is an amendment to the existing Directive on Administrative Cooperation in the Field of Taxation (Directive 2011/16/EU), which provides for information exchange obligations between EU Member States in certain situations (such as the automatic exchange of tax rulings).

8 Ann. 2000-12, 2000-1 C.B. 835 (2/29/2000).

Which Transactions Must be Disclosed

The evolution of the U.S. disclosure regime highlights the inherent tension in requiring tax advisors to disclose abusive (or potentially abusive) transactions to tax authorities and also subjecting them to penalties for failing to do so. On the one hand, setting vague standards on reportable transactions may lead to over-reporting by practitioners and, thus, less useful data for tax authorities because routine, non-abusive transactions may be reported. On the other hand, tax advisors have a penchant for creativity, so an exclusive list would do little to provide tax authorities with the information necessary to combat abuse.

The U.S. disclosure regime strikes a reasonable balance between these competing options. U.S. taxpayers participating in a reportable transaction, and their material advisors, must disclose the transaction to the IRS. "Reportable transactions" are limited to the following categories:

1. Listed transactions—A tax avoidance transaction (or one substantially similar thereto) identified by the IRS in a notice, regulation, or other form of published guidance as a listed transaction.

2. Confidential transactions—A transaction offered to a taxpayer under "conditions of confidentiality." Such conditions exist where an advisor places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction, and where the limitation on disclosure protects the confidentiality of that advisor's tax strategies.[9] The conditions of confidentiality need not be legally binding.[10] A minimum fee threshold also applies.[11]

3. Transactions with contractual protection—A transaction where the taxpayer (or a related party) has the right to a full or partial refund of fees if all or part of the intended tax consequences are not sustained, or where fees are contingent on the taxpayer's realization of the transaction's tax benefits.[12]

4. Loss transactions—A transaction resulting in a taxpayer claiming a loss that exceeds a threshold amount, either in one year or over six years, under section 165 of the Code.[13]

5. Transactions of interest—A transaction (or one substantially similar) identified by the IRS as a transaction of interest in a notice, regulation, or other form of published guidance.[14]

The reportable transaction categories provide tax advisors with an understanding of the types of transactions that interest the IRS (especially in the listed transaction and transaction of interest categories), while at the

9 Treas. Reg. § 1.6011-4(b)(3)(ii).

10 Treas. Reg. § 1.6011-4(b)(3)(ii).

11 Treas. Reg. § 1.6011-4(b)(3)(i). The minimum fee is $250,000 if the taxpayer (looking through partnerships or trusts) is a corporation, or $50,000 for all other transactions. Treas. Reg. § 1.6011-4(b)(3)(iii).

12 Treas. Reg. § 1.6011-4(b)(4).

13 Treas. Reg. § 1.6011-4(b)(5)(i). The claimed loss must be: (i) at least $10 million in a single taxable year or $20 million in any combination of taxable years for corporations or partnerships with only corporations as partners; (ii) at least $2 million in any single taxable year or $4 million in any combination of taxable years for other partnerships, individuals, S corporations, and trusts; or (iii) at least $50,000 in any single taxable year for individuals or trusts if the loss is attributable to a section 988 transaction. *Id.* The term "any combination of taxable years" means losses claimed in the taxable year in which the transaction is entered into and the five succeeding taxable years. Treas. Reg. § 1.6011-4(b)(5)(ii).

14 Treas. Reg. § 1.6011-4(b)(6).

same time incorporating a "substantially similar" standard to prevent tax advisors from circumventing the disclosure rules.[15]

Who Must Disclose

The U.S. disclosure rules apply to both taxpayers participating in "reportable transactions" and "material advisors." A material advisor is a person who both (1) provides material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and (2) receives a minimum fee. A person satisfies the first prong if he or she makes a "tax statement" to or for the benefit of a taxpayer or a material advisor required to disclose the transaction. A tax statement is any oral or written statement (including another person's statement) that relates to a tax aspect of a transaction that causes the transaction to be a reportable transaction. Being classified as a material advisor also implicates the list maintenance rules (discussed below). A tax advisor that does not make any statements relating to the U.S. federal tax aspects of the transactions cannot be a material advisor.

What Transaction-Related Information Must be Disclosed

A taxpayer participating in a reportable transaction must file Form 8886, *Reportable Transaction Disclosure Statement*, with its income tax return for each year in which it participates in the reportable transaction.[16] In the first year in which it participates in the transaction, the taxpayer must also file a copy of the form with the Office of Tax Shelter Analysis.[17]

Any material advisor to such a transaction must file Form 8918, *Material Advisor Disclosure Statement*, by the end of the month following the end of the calendar quarter in which the tax advisor becomes a material advisor with respect to the transaction.[18] A tax advisor becomes a material advisor when: (1) he or she provides material aid, assistance, or advice; (2) he or she derives gross income in excess of the threshold amount; and (3) the taxpayer (or other material advisor) to whom the tax advisor made the tax statement enters into the reportable transaction.[19] If a transaction is later identified as a listed transaction or transaction of interest, the tax advisor becomes a material advisor at that time.[20]

A material advisor is also required to maintain records relating to the transaction and keep detailed lists regarding the participants — the so-called list maintenance rules. These rules require that a material advisor: (1) maintain a list with information on the taxpayers participating in the reportable transaction (e.g., identifying information, amount invested in the reportable transaction, the tax treatment that each person is intended or expected to derive, and the name of other known material advisors);[21] (2) a detailed description describing both the tax structure and the purported tax treatment of the transaction; and (3) copies of any additional written materials, including tax analyses or opinions, relating to each reportable

15 The regulations define substantially similar as "any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy." Treas. Reg. § 1.6011-4(c)(4). They also state that it should be broadly construed in favor of disclosure. *Id.*

16 Treas. Reg. § 1.6011-4(e)(1).

17 Treas. Reg. § 1.6011-4(e)(1).

18 *See* Treas. Reg. §§ 301.6111-3(a) and (d)(1).

19 Treas. Reg. § 301.6111-3(b)(4)(i). A material advisor must make reasonable and good faith efforts to determine whether the person to whom they made a tax statement entered into the transaction. Treas. Reg. § 301.6111-3(b)(4)(ii).

20 Id.

21 Treas. Reg § 301.6112-1(b)(3)(i).

transaction.[22] A material advisor must maintain only those documents that are material to an understanding of the purported tax treatment or tax structure of the transaction that have been shown or provided to any person who acquired an interest in the transaction, or to their representatives, tax advisors, or agents, by the material advisor or any related party or agent of the material advisor.[23] A taxpayer has 30 days from the date he or she becomes a material advisor to prepare this list.[24] The IRS can request production of these documents; however, the materials may be protected by the attorney-client privilege.[25]

The regulations require a "complete" disclosure by the taxpayer and any material advisor. To be complete a disclosure must: (1) describe the expected tax treatment and all potential tax benefits expected to result from the transaction; (2) describe any tax result protection[26] with respect to the transaction; and (3) identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the reportable transaction and the identity of all parties involved in the transaction.[27] Multiple advisors can designate a single material advisor to file the disclosure statement by signing a designation agreement.[28] The material advisor will receive a reportable transaction number after filing his or her disclosure form, which he or she must provide to the taxpayer within 60 days of receipt.[29] A taxpayer must report any reportable transaction numbers received on the Form 8886 when it is filed.[30]

Ensuring Compliance

The U.S. disclosure regime has sharp teeth, imposing harsh penalties on both taxpayers and the material advisors who fail to make required disclosures. A taxpayer who fails to disclose his or her participation in a reportable transaction (other than a listed transaction) must pay a penalty equal to 75 percent of the decrease in tax resulting from participation in the transaction.[31] The penalty has a floor of $5,000 and a ceiling of $10,000 in the case of a natural person (and between $10,000 and $50,000 in all other cases).[32] If the transaction is a listed transaction, the ceiling is raised to $100,000 in the case of a natural person ($200,000 in all other cases). In the case of a material advisor who fails to comply, the penalty is $50,000.[33] If the transaction is a listed transaction, the penalty is the greater of $200,000 or 50% of the gross income received for its advice.[34]

The IRS cannot waive the penalty imposed if either the taxpayer or a material advisor fails to disclose a listed transaction.[35] In all other cases, only the Commissioner of the IRS can rescind the penalty for failure to disclose a reportable transaction, and then only if rescinding the penalty would promote compliance

22 Treas. Reg § 301.6112-1(b)(3).
23 Treas. Reg § 301.6112-1(b)(3)(iii)(B).
24 Treas. Reg § 301.6112-1(b)(1).
25 Treas. Reg § 301.6112-1(e)(2).
26 The term tax result protection includes insurance company and other third-party products commonly described as tax result insurance. Treas. Reg. § 301.6111-3(c)(12).
27 Treas. Reg § 1.6011-4(d).
28 Treas. Reg. § 301.6111-3(f).
29 Treas. Reg. § 301.6111-3(d)(2).
30 Treas. Reg. § 1.6011-4(d).
31 I.R.C. § 6707A(b)(1).
32 I.R.C. § 6707A(b)(2).
33 I.R.C. § 6707(b)(1).
34 I.R.C. § 6707(b)(2).
35 I.R.C. §§ 6707(c) and 6707A(d)(1).

and effective tax administration.[36] The failure to rescind a penalty cannot be reviewed in any judicial proceeding.[37]

A Backstop to the Reportable Transaction System

For the first decade or so after the introduction of the U.S. disclosure regime, the IRS regularly identified listed transactions and transactions of interest. The number of specifically identified transactions seems to have dropped off since taxpayers have been required to report uncertain tax positions on a Schedule UTP. Such reporting is required whenever a taxpayer records a reserve for any income tax position in an audited financial statement, or when no reserve is recorded because the taxpayer expects to litigate the position. Accordingly, the IRS receives information regarding such transactions when a company's auditors believe they are subject to challenge, without needing to identify them as listed transactions or transactions of interest in advance.

The EU Mandatory Disclosure Rules

Although the United States has operated disclosure rules for decades, the rest of the world generally followed significantly later. The OECD/G20 BEPS project recommended in 2015 that countries introduce a regime for the mandatory disclosure of aggressive tax planning arrangements. The BEPS project did not, however, define any minimum standard for compliance.

In May 2016, the ECOFIN Council invited the European Commission (EC) to consider legislative initiatives on mandatory disclosure rules inspired by the BEPS project, with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes.[38]

Subsequently, the recommendations in the BEPS project were elevated to a minimum standard within the EU through the adoption of DAC6. DAC6 places an obligation on EU Member States to implement rules in their domestic laws that require qualifying intermediaries (e.g., tax advisors) and—in certain circumstances—taxpayers to disclose information about reportable cross-border arrangements to the competent authorities of one or more EU Member States. In addition, DAC6 introduces automatic exchanges of these disclosures among EU Member States.

The necessary legislation to implement DAC6 must be enacted by EU Member States by December 31, 2019 and applied as of January 1, 2020. Despite this application date, DAC6 has retroactive effect for all reportable arrangements of which the first step was implemented on or after June 25, 2018.[39]

The European Commission has not issued guidance or clarification to the wording of DAC6, other than in the preamble. In the absence of further guidance by the EC, guidance and clarification will be required upon implementation of DAC6 into the domestic laws of the EU Member States.

36 Id.
37 Id.
38 EU Council, Council conclusions on an external taxation strategy and measures against tax treaty abuse, Press release (May 25, 2016), point 12.
39 Article 1(2) DAC6, point 12. Such arrangements must be reported ultimately by August 31, 2020.

Reportable Cross-Border Arrangements

For an arrangement to be reportable, it needs to be considered cross border and fall within the scope of one of the hallmarks detailed below. A cross-border arrangement concerns either more than one EU Member State or an EU Member State and a non-EU country, and is *inter alia* present if not all of the participants are tax resident in the same jurisdiction, one of the participants is a dual tax resident, the transaction relates to a permanent establishment (PE) of a participant, or the participant carries on an activity in another jurisdiction without being a tax resident in that jurisdiction or having a PE in that jurisdiction. A cross-border element is furthermore present if the arrangement has a potential impact on the automatic exchange of information or the identification of ultimate beneficial ownership.[40]

Purely domestic situations and situations without any link to an EU Member State therefore do not fall within the scope of DAC6. This is not surprising—EU Member States retain substantial sovereignty over their domestic laws because direct taxes are not part of the competence of the legislative institutions of the EU. Directives relating to direct taxes must be adopted unanimously by the Member States.

Although the main objective of DAC6 is to combat tax avoidance and the preamble refers to aggressive tax planning, the application of DAC6 appears to be broader than arrangements perceived as aggressive tax planning. Any cross-border arrangement that satisfies at least one of the hallmarks listed in Annex IV to DAC6 is reportable. These hallmarks are a broad range of characteristics and features that present an indication of a potential risk of tax avoidance.

Some hallmarks focus on traditional pressure points, such as the intragroup transfer of hard-to-value intangibles, the acquisition of loss-making enterprises, or the implementation of hybrid mismatch arrangements. In other cases, the hallmark does not relate to the substance of the transaction but to the circumstances in which it took place, such as whether there were confidentiality provisions in place, the arrangement involved a non-transparent legal or beneficial ownership chain, or the same product was marketed to multiple taxpayers.[41] There is no requirement that any tax benefit associated with the hallmarks (e.g., a deduction) exist within an EU Member State. DAC6 seems to take a worldwide approach in this respect. For example, a cross-border arrangement involving an EU Member State that meets one of the hallmarks by generating a tax benefit in the United States is also disclosable under DAC6.

The hallmarks are divided into generic and specific hallmarks. The generic hallmarks and some of the specific hallmarks require reporting only if an additional "main benefit test" is satisfied. This test is met if it can be established that the main benefit or one of the main benefits which a person may reasonably expect to derive from an arrangement, having regard to all relevant facts and circumstances, is the obtaining of a tax advantage.

DAC6 may be seen as complementing and supporting the substantive rules of the Anti-Tax Avoidance Directive I & II (ATAD), adopted in June 2016 and May 2017.[42] For instance, the ATAD contains a general anti-avoidance rule which obliges EU Member States to ignore, in determining the corporate tax liability of taxpayers, any non-genuine arrangements that are put in place for the main purpose (or one of the main purposes) of obtaining a tax advantage that defeats the object or purpose of the applicable tax law. The

40 Article 1(1)(b) DAC6, points 18 to 20.

41 A more extensive description of DAC6, including a complete list of the hallmarks, is provided in Loyens & Loeff, Mandatory Disclosure Directive (Oct. 2018).

42 Council Directive (EU) 2016/1164 of July 12, 2016.

wording of the general anti-avoidance rule in the ATAD is similar to the wording of the main benefit test in DAC6.

In addition, the ATAD obliges EU Member States to implement measures to counter hybrid mismatch arrangements that arise in the autonomous application of differing tax classification methods by and between EU Member States and between EU Member States and non-EU countries. In certain circumstances, application of these anti-hybrid mismatch rules may result in an arrangement not being reportable under DAC6, because it no longer satisfies one of the specific hybrid mismatch-related hallmarks.

Intermediaries Required to Report

The obligation to report a cross-border arrangement satisfying one or more of the hallmarks is primarily borne by persons classified as intermediaries. An intermediary is any person that designs, markets, organizes, makes available for implementation, or manages the implementation of a reportable cross-border arrangement.[43]

The already broad definition of intermediary is made even more comprehensive by including persons that could reasonably be expected to know that they have undertaken to provide aid, assistance, or advice with respect to designing, marketing, organizing, making available for implementation, or managing the implementation of a reportable cross-border arrangement.

The broad definition of intermediaries should include all tax advisers, accountants, lawyers and other professionals that are advising taxpayers on cross-border transactions. It may also include professionals involved in managing the implementation of transactions, such as professionals providing corporate services, financial institutions, and family offices.

Only intermediaries with a link to an EU Member State will be regarded as an intermediary for this purpose. The intermediary should either be (i) resident in an EU Member State; (ii) have a PE in an EU Member State through which the services with respect to the arrangement are provided; (iii) be incorporated in or governed by the laws of an EU Member State; or (iv) be registered with a professional association related to legal, taxation, or consultancy services in an EU Member State.

U.S. law firms may become subject to these rules if and to the extent they have offices in any EU Member States. In addition, it cannot be excluded that individual U.S.-based lawyers may have an obligation to report if they are also admitted to practice law in a certain EU Member State. Any potential reporting obligation for such individual lawyers will depend on the implementation and interpretation of DAC6 in the relevant EU Member State.

If multiple intermediaries are involved in the same arrangement, all intermediaries have the obligation to report, unless sufficient proof (in accordance with domestic laws of the relevant EU Member State) is available that information on the arrangement has already been filed by another intermediary.[44]

EU Member States may give intermediaries the right to a waiver from filing information where the reporting obligation would breach the legal professional (client-attorney) privilege under the domestic laws of that EU Member State. If an intermediary is entitled to a waiver, the intermediary has to notify any other intermediaries involved to which the obligation is passed. If no other intermediary is involved, or all intermediaries are

43 Article 1(1)(b) DAC6, point 21.
44 Article 1(2) DAC6, point 9.

entitled to a waiver (or have no link with an EU Member State), the intermediary must notify the taxpayer that the obligation to report shifts to the taxpayer.[45]

Implications for Taxpayers

The reporting obligation may not be enforceable upon an intermediary due to legal professional privilege or because the intermediary does not have a link with an EU Member State. Additionally, there may be no intermediary involved because a taxpayer designs and implements a reportable arrangement in-house. In these circumstances, the disclosure obligation should shift to the taxpayer. There does not appear to be a geographical limitation to qualify as a taxpayer to whom the reporting obligation applies.[46]

Based on the above, a U.S. taxpayer that designs an arrangement that involves an EU Member State and satisfies one of the hallmarks may have a reporting obligation in an EU Member State, provided the reporting obligation is not enforceable upon an EU intermediary. Accordingly, U.S. lawyers should become familiar with the new EU disclosure rules under DAC6, including the hallmarks, in order to be able to properly advise their U.S.-based clients who have EU activities.

Disclosed Information and Automatic Exchange

The competent authority of an EU Member State where the information is filed shall, by means of automatic exchange, communicate the information to the competent authorities of all other EU Member States quarterly through a centralized database (i.e., also to EU Member States that are not directly involved in the arrangement).[47]

A standard template for the exchange of information will be developed by the EC and will include: (a) identification of the intermediaries and relevant taxpayers; (b) details of the relevant hallmarks; (c) a summary of the content of the arrangement; (d) the date of the first step of implementation; (e) details of the national provisions forming the basis of the arrangement; (f) the value of the arrangement; (g) the EU Member States involved in the arrangement; and (h) identification of any other person in an EU Member State likely to be affected by the arrangement.[48] It is expected that at least this information should be disclosed by the relevant intermediary or taxpayer.

The database will not be made accessible to the public and the EC will have access only to the extent needed to monitor the functioning of DAC6. The EC will not have access to the identity of intermediaries, relevant taxpayers, and any other persons likely to be affected by the arrangement, nor the summary of the content of the arrangement.[49]

The automatic exchange of information will take place within one month after the end of the quarter in which the information was filed. The first information will be exchanged by October 31, 2020.[50]

45 Article 1(2) DAC6, point 5.
46 Article 1(2) DAC, points 6 to 8.
47 Article 1(2) DAC6, point 13.
48 Article 1(2) DAC6, point 14.
49 Article 1(2) DAC6, point 17.
50 Article 1(2) DAC6, point 18.

Reporting Deadlines

From July 1, 2020 onwards, the person(s) with whom the reporting obligation lies must file the information on the reportable cross-border arrangements within thirty days beginning: (i) on the day after the arrangement is made available for implementation; (ii) on the day after the arrangement is ready for implementation; or (iii) when the first step in the implementation has been made—whichever occurs first.[51]

Penalties

DAC6 leaves the decision on the applicable penalties for intermediaries and taxpayers who violate the domestic provisions of the implementation of DAC6 to the EU Member States, with the only requirement that the penalties be effective, proportionate, and dissuasive.[52]

Conclusion

Both the U.S. and EU disclosure regimes are intended to combat aggressive tax planning strategies by mandating disclosure and requiring that tax advisors function as gatekeepers. Both regimes identify specific aggressive transactions but also target transactions on the basis of the process by which they were entered into (such as confidentiality agreements or provisions related to whether the tax planning is successful).

The U.S. regime, however, benefits from the fact that it relates to one tax system, while the EU regime currently covers 28. In addition, the EU regime only applies to cross-border tax planning arrangements and takes a worldwide approach as to where the benefit of such tax planning is generated. Accordingly, the descriptions of covered transactions in the EU Directive are necessarily vague. Just as beauty is in the eye of the beholder, what one person deems permissible tax avoidance another may perceive as impermissible tax evasion. This leaves open the possibility that the guidance eventually released by the various EU Member States may have inconsistencies, or that the guidance may be so vague that intermediaries on opposite sides of a transaction may have different views on whether a transaction needs to be reported.

The U.S. advisor is more likely to know whether disclosure is necessary under the U.S. regime, either because the transaction has been identified by the IRS or by the taxpayer's auditors when the tax reserves were established. That being said, the U.S. advisor now also needs to be familiar with the new EU disclosure rules in order to be able to properly advise clients who have EU activities. ■

51 Article 1(2) DAC6, point 1.
52 Article 1(6) DAC6.