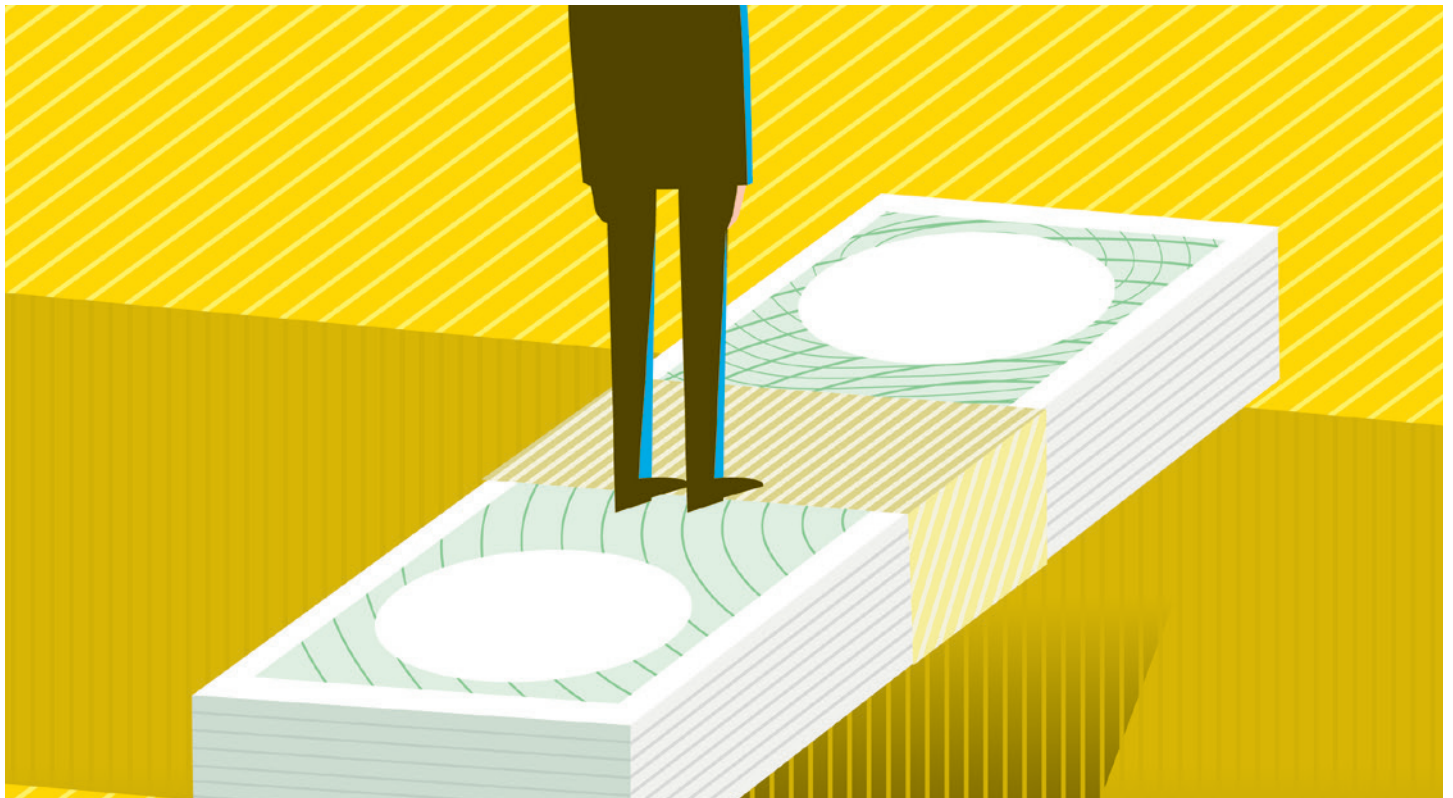




■ TALKINGPOINT April 2020

DAC6 international tax compliance and enforcement

FW discusses DAC6 international tax compliance and enforcement with Romain Tiffon at ATOZ Tax Advisers.



THE RESPONDENT



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A tax professional since 2006, Romain Tiffon has experience in structuring pan-European alternative investment funds across all asset classes, as well as coordinating tax structuring advice and implementation for a wide range of institutional investors. He also has extensive experience in structured finance, M&A transactions and sovereign wealth funds, and is currently responsible for ATOZ's DAC6 initiatives, working closely with Taxand and ATOZ Digital Solutions.

FW: Could you provide an overview of the key aims of DAC6? What type of cross-border tax arrangements fall within the Directive's scope?

Tiffon: DAC6 is a European Directive which, as of 25 June 2018, requires tax intermediaries to report, on a mandatory basis, specific cross-border arrangements that contain defined characteristics or features, and that were implemented after 25 June 2018. In order for an arrangement to fall within the scope of the Directive, it has to be cross-border, understood as being an arrangement that involves at least two different states, of which one has to be an EU Member State – although some countries have implemented rules for domestic arrangements. An arrangement also has to satisfy at least one of the hallmarks of the Directive – some of which are subject to a main benefit test, notwithstanding the presence of the hallmark – with reporting only required to the extent it is reasonable to assume that the main or one of the main benefits of the arrangement was to obtain a tax advantage.

FW: How important is it that businesses, individuals and intermediaries understand the importance and implications of the Directive? What might a failure to comply with DAC6 entail?

Tiffon: First of all, failure to report may lead to fines and penalties ranging from a few thousand euros to up to €5m,

with potential criminal charges in some countries. Beyond the monetary aspect, there is also a reputational dimension. One critical angle for businesses is the centralisation of information. A non-coordinated approach will likely result in all intermediaries acting, and therefore reporting, on a standalone basis. This will potentially lead to disclosure of more information than that which is legally required, or even inconsistent information given the various degrees of the involved intermediaries' information access. Finally, it is important for taxpayers to understand that adopting an approach where all transactions are automatically disclosed without having a thorough analysis of the hallmarks may lead to substantial collateral damage. It may be perceived by tax authorities as an invitation to launch an audit. It may change the nature of a product that an investor was historically comfortable investing into from, say, a private equity asset to a tax product, assuming it is concluded that the main benefit test is satisfied.

FW: What steps should businesses be taking to ensure they achieve compliance by the Directive's full implementation deadline of 1 July 2020? How would you characterise general preparedness to date?

Tiffon: First reporting is due on 31 August 2020 and will cover all the reportable cross-border arrangements that were implemented or amended since 25 June

2018. Immediate actions that must be carried out to ensure intermediaries and taxpayers are compliant with their DAC6 obligations on time include screening all transactions that will have taken place over this two-year period, liaising with all tax intermediaries that have been involved, assessing which transactions may be reportable, then allocating the reporting responsibility. In terms of preparedness, most taxpayers are starting to really look into the practicalities of reporting, especially as legal professional privilege, and its broader application, may cause the reporting obligation to be shifted onto taxpayers, although intermediaries protected by legal professional privilege will nonetheless have to assess the reportability nature of the arrangement.

FW: What are the consequences of the Directive for a business's reporting function? To what extent can new technologies help a business fulfil multiple reporting requirements?

Tiffon: A business's reporting function will need to have more control over who is involved in any of its transactions, with the aim of ensuring appropriate disclosure when required, but only to the extent of what is legally required. The spirit of the Directive is that there be only one report filed within the EU for any reportable cross-border arrangement. Where intermediaries are not properly coordinated, there is a genuine risk that this will result in over-

reporting, overlapping reporting or even failure to report. To address these risks, besides having internal processes in place, I am convinced that technology will play a significant role. An IT solution can allow stakeholders, for any given transaction, to perform a DAC6-country specific analysis and then, thanks to a collaborative feature, have all the involved intermediaries sit around a virtual roundtable where the reporting responsibility will be allocated. Seamless coordination and communication among taxpayers and intermediaries is the key to managing DAC6 obligations successfully.

FW: Given that DAC (unlike the Foreign Account Tax Compliance Act (FATCA)) is not governed by rules so much as principles with broad hallmarks, to what extent is there potential for confusion and a lack of clarity?

Tiffon: While most EU countries have so far transposed DAC6, including the hallmarks *ad verbum*, actual local interpretation is likely to diverge across countries. Besides, the difficulty will also reside in the interconnection between various EU Member States. For example, under the Directive as implemented in most EU countries, the very fact that a reportable cross-border arrangement has been duly reported by one EU intermediary suffices to discharge the other EU intermediaries from their reporting obligations. Nevertheless, we cannot exclude that another tax authority may consider that the reporting in another jurisdiction is not sufficient on the ground that, for example, it does not contain the same information that should have been disclosed had the reporting been done in this first jurisdiction. Another

interesting question is how the main benefit test will be construed in each jurisdiction. As of today, there is no guidance on how to measure the economic impact of an arrangement. How do we factor the duration of the arrangement? How do we price the non-monetary impacts that may be important to the structure?

FW: What essential advice would you offer to businesses, individuals and intermediaries in terms of meeting their DAC6 compliance obligations?

Tiffon: Complying with DAC6 obligations going forward will rely heavily on well-oiled internal processes and project management, which will result in the genuine requirement of clear and transparent coordination and communication among taxpayers and intermediaries. To that end, we recommend including DAC6 language in engagement letter terms. From a transactional perspective, a DAC6 analysis will become a compulsory part of the approval process, in the same way as we have witnessed with environmental, social and governance (ESG) standards. There needs to be a good understanding of who the intermediaries are, given the varying scope of the definition across different EU jurisdictions. It should also be understood which of these intermediaries may rely on legal professional privilege, possibly waiving it should clients want to designate them as reporting intermediaries. Finally, I would recommend a DAC6 analysis when intermediaries issue a structuring note.

FW: How smooth, or otherwise, do you anticipate the DAC6 implementation process will be? What transitional measures are available to aid compliance?

Tiffon: Given the current lack of guidance by most, if not all, jurisdictions, I suspect the initial implementation will be far from perfect, but will likely perfect itself overtime. In order to aid compliance, I cannot stress enough that beyond the technical legal analysis, a lot of what DAC6 implies is process and organisation. It is therefore key for taxpayers and intermediaries to set up processes to be adhered to so that DAC6 obligations are properly dealt with. To that point, I believe that having a collaborative-enabled IT solution will be fundamental to achieving the desired result, as all intermediaries will be able to share their reporting conclusions on a transaction and decide, if it is reportable, who among them should make the report so that only one reporting is filed. ■

COMPLYING WITH DAC6 OBLIGATIONS GOING FORWARD WILL RELY HEAVILY ON WELL-OILED INTERNAL PROCESSES AND PROJECT MANAGEMENT.

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