

DAC 6: Mandatory Disclosure Rules for Cross-Border Tax Planning Arrangements

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Tax

The European Union directive known as DAC 6 requires EU “intermediaries” (including advisors, banks and businesses) to disclose to EU tax authorities details of any cross-border arrangements which feature a reportable “hallmark”. Although DAC 6 is designed to combat aggressive tax planning, depending on how it is implemented by each Member State, its scope may catch non-tax motivated arrangements and enterprises may find they are obliged to report a wide range of matters. Enterprises should start reviewing any arrangements they have been involved with since 25 June 2018 so that they are ready to make their initial DAC 6 disclosures by the first deadline of 31 August 2020.

What needs to be reported under DAC 6?

DAC 6 requires intermediaries to report the details of any reportable cross-border arrangement the first step of which took place on or after 25 June 2018. Many EU Member States are still in the process of transposing the DAC 6 rules into their national legislation, but the following elements will be common throughout the EU:

- an intermediary;
- a cross-border arrangement; and
- a hallmark which makes the arrangement reportable.

Intermediary

The DAC 6 definition of an intermediary is very broad and covers anyone with an EU connection who:

- i) designs, markets, organises, or makes available for implementation or manages the implementation of a reportable cross-border arrangement; or
- ii) knows or could reasonably be expected to know that they have undertaken to provide (directly or indirectly) aid, assistance, or advice with respect to designing, marketing, organising, making available for implementation, or managing the implementation of a reportable cross-border arrangement.

An intermediary will have an EU connection where they are resident, have a permanent establishment, are incorporated, or are registered with certain professional bodies in an EU Member State.

It will be necessary to confirm the intermediary's status under the law of the relevant Member State. For example, the draft UK legislation splits intermediaries into "promoters" and "service providers", with the latter potentially benefitting from a defence where they did not know and could not reasonably be expected to know the arrangement was reportable. However, what is clear so far is that a wide range of organisations and individuals may be intermediaries under DAC 6, including lawyers, financial advisors, accountants, and businesses themselves.

Cross-border arrangement

A cross-border arrangement is an arrangement which concerns more than one EU Member State or a Member State and a third country.

As such, there will generally be no obligation to report domestic arrangements or arrangements with no link to the EU. However, care should be taken to ensure that there are no connections to the EU which could bring the arrangement into the scope of DAC 6. It will also be important to consider which elements of a matter constitute the "arrangement", especially where the matter is completed in multiple steps.

Reportable hallmarks

The [DAC 6 hallmarks](#) are split into two categories: those that require the arrangement to have a "main benefit" of obtaining a tax advantage before it is reportable; and those which can be reportable even in the absence of a tax motive. The DAC 6 directive does not specify whether "tax advantage" is limited to EU taxes and so it will be necessary to consult the local legislation of the relevant Member State in this respect. The draft UK legislation, for example, places no geographical restriction on where the tax advantage is obtained.

Intermediaries should make specific reference to the hallmarks when they assess whether an arrangement is reportable. However, they can be broadly characterised as:

- Category A: Generic hallmarks of marketed or standardised tax avoidance schemes (e.g., standardised documentation or confidentiality conditions). Category A hallmarks require the "main benefit" to be satisfied.
- Category B: Specific hallmarks of artificial tax planning structures (e.g., loss buying or circular transactions). Category B hallmarks require the "main benefit" to be satisfied.
- Category C: Specific hallmarks related to cross-border transactions (e.g., depreciation deductions or double tax relief claimed in more than one jurisdiction). Category C hallmarks in general do not require the "main benefit" test to be satisfied. Category C hallmarks could apply to purely commercial transactions (e.g., an asset sale where the consideration is treated differently in the jurisdictions involved for tax or accounting purposes).
- Category D: Specific hallmarks concerning arrangements which undermine the automatic exchange of information or obscure beneficial ownership. Category D hallmarks do not require the "main benefit" to be satisfied.

- Category E: Specific hallmarks concerning transfer pricing and intra-group arrangements (including the use of unilateral safe harbour rules, transfer of hard-to-value intangibles, or a cross-border transfer which results in a 50% reduction in EBIT over the next three years). Category E hallmarks do not require the “main benefit” to be satisfied.

How should a reportable arrangement be reported?

The first DAC 6 disclosure is due by 31 August 2020 in the form of a single report detailing all reportable arrangements where the first step was taken between 25 June 2018 and 1 July 2020. Thereafter, disclosure is due on a continuing basis within 30 days of the earlier of the arrangement being made available for implementation or the first step being taken in its implementation.

The report requires the disclosure of a significant amount of information, including taxpayer and intermediary identification information, details of hallmarks that make the scheme reportable and a description of the arrangement and relevant business activities. Enterprises should ensure they both have access to this information and that they do not risk breaking confidentiality obligations by disclosing it. Where the latter is a concern, it may be possible to make use of a “lawful compliance” carve out in the relevant confidentiality agreement.

Disclosure is only required once in respect of an arrangement regardless of how many intermediaries are involved. This includes where disclosure has been made in another EU Member State. An intermediary will have to be certain that full disclosure has been made by another intermediary before it decides not to report. In practice, this will require a high degree of cooperation between the intermediaries involved in a transaction and the “disclosing” intermediary will need to produce evidence not just that a disclosure was made but also of what was disclosed.

Penalties

DAC 6 obliges EU Member States to set the penalties for failing to comply with the reporting rules. The penalties must be effective, proportionate and dissuasive.

The UK proposal contains significant financial penalties including a daily penalty of GBP 600 (roughly USD 740) per arrangement for failure to report and the possibility of a fine up to GBP 1 million (roughly USD 1,230,000) imposed by the tax courts.

Brexit

The UK government has announced its intention to implement DAC 6 regardless of the outcome of the Brexit negotiations. UK intermediaries should therefore ensure they continue to plan for the implementation of DAC 6 compliance in their enterprises.

Next steps

Enterprises should act now to ensure they are prepared for DAC 6.

1. Review past arrangements to identify any matters which must be disclosed by the first deadline of 31 August 2020. Diligence should cover any reportable arrangement where the first step took place on or after 25 June 2018. Enterprises should try to identify the internal and external groups involved, their roles, the jurisdictions involved, the commercial background to the matter, and the steps taken as part of it.
2. Contact advisors and other potential intermediaries in respect of past arrangements to understand whether they intend to make any disclosures. It will be important to understand what they intend to disclose. Enterprises should also discuss with their advisors whether it will be possible to coordinate any disclosures.
3. Establish appropriate compliance procedures for identifying reportable arrangements and managing disclosure on an ongoing basis, including training for key personnel. A successful compliance program will likely require involvement from the wider business.

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