Bird & Bird & DAC6 Briefings: Aircraft Finance Transactions

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DAC6 in a nutshell

Cross-border arrangement...

- any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event
- involving one EU Member State and another EU or third state (*but local implementation may include pure domestic arrangements, e.g. Portugal and Poland*)

&

... of (potentially) aggressive tax planning

Measured through "hallmarks" as indicators

A	B	C	D	E
Generic hallmarks	Specific hallmarks	Hallmarks related to cross-border transactions	Hallmarks related to automatic exchange of information and UBO	Hallmarks related to transfer pricing

With "main benefits test" | Without "main benefits test"

&

... involving intermediaries and taxpayers (clients)

Intermediary (*promotor or service provider*)

AND

Taxpayer

Territorial link with EU

=

Reportable cross-border arrangement (RCBA)

"DAC6" or the 6th Directive on the Administrative Cooperation between EU Member States aims at improving the functioning of the internal market by discouraging the use of aggressive cross-border tax planning arrangements.

In a nutshell, the directive requires intermediaries (such as financial institutions) – or in certain circumstances the taxpayers themselves (such as the leasing companies) – to report any advice and/or implementation of a cross-border arrangement of potentially aggressive tax planning to the local tax authorities. The presence of such aggressive tax planning is evaluated on the basis of certain objective indicators (called "hallmarks"). Some of these hallmarks only become relevant if one of the arrangement's primary motives is to obtain a tax advantage. Others will just be reportable based on specific indications that a party is (supposed to be) aware of.

For further general information, please consult the first issue of our DAC6 Briefings ("Introduction of a Mandatory Disclosure Obligation") or visit the DAC6 In Focus page on our website. This Briefing builds on the general knowledge of previous issues, with a focus on what these rules mean for aircraft finance transactions.

Key hallmarks for aircraft finance transactions

A.3. Standardized documents/ structures	C.1. Cross-border payments (low/no tax, ..)	C.2. Double dip	D.2. Non-transparent beneficial ownership	E.2. Transfer of substantial functions/assets

Hallmark A.3. targets arrangements with **standardised documentation** or on the basis of a **standardised structure**.

Hallmark C.1. targets a number of **cross-border payments** to associated recipients that are resident in **tax favourable jurisdictions**, **not resident for tax purposes in any tax jurisdiction**, or resident in a **non-cooperative jurisdiction** (according to EU or OECD).

Hallmark C.2. targets arrangements whereby a deduction for the amortisation of the same asset is claimed in more than one country: the so-called **double-dip**.

For instance, in the hands of the legal owner or lessor, and of the beneficial owner or lessee; or both by the head office and by its permanent establishment).

Hallmark D.2. targets arrangements involving **non-transparent legal or beneficial ownership** chains.

There are three main conditions:

- the use of persons/structures not carrying on substantive economic activity;
- they are established in another jurisdiction than that of the UBO; and
- the UBO is made unidentifiable

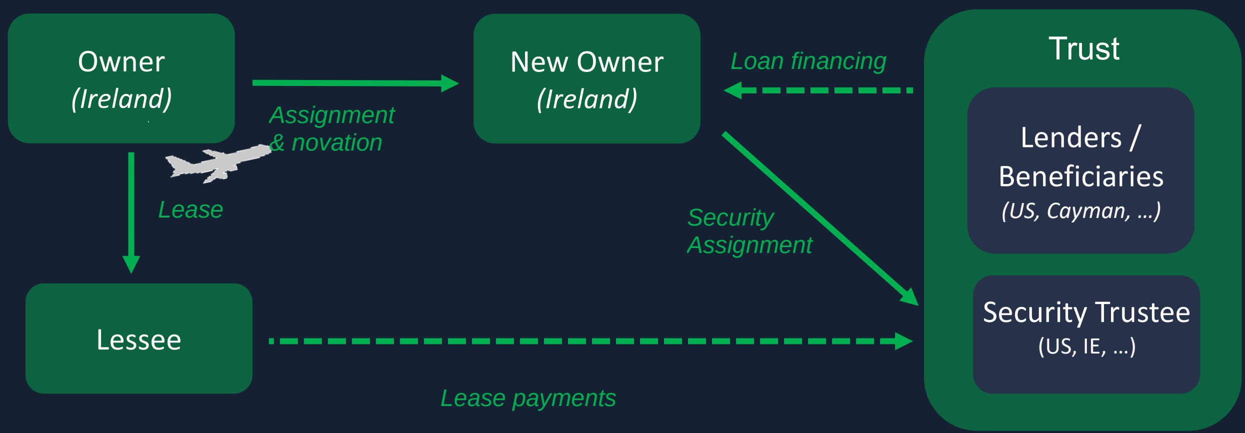
Even though standard practice and not motived by tax reasons, these conditions are quite often met when using trusts in a jurisdiction which has not implemented a UBO register for such type of entities.

Hallmark E.3. targets arrangements, again intra-group, involving the **transfer of functions, risks or assets** as a consequence of which the transferor's projected EBIT over a period of 3 years is going to be less than 50%, had he not transferred those functions, risks or assets.

Note: *The above list is certainly not exhaustive for aircraft finance transactions, but rather a list of what are likely the most common hallmarks that will have to be monitored.*

How does this translate to aircraft finance activities?

When looking at a typical aircraft finance transaction involving the assignment and novation of an existing lease, as well as the granting a new security, a number of hallmarks could be triggered. Some of these hallmarks also require there to be a tax advantage motive, so an intermediary would need to consider each of these factors to determine whether a report is required.



By way of example, the assignment of an aircraft or engine to an SPV for ring-fencing purposes is set up in a standardized structure, and should therefore be considered for DAC6 purposes if the SPV 's residence is chosen primarily for the favourable tax treatment of the SPV in that jurisdiction (*e.g.* low income taxation and very short depreciation of aircraft).

If the aircraft or engine is transferred between (associated) single asset SPVs for refinancing purposes, the hallmark regarding the transfer of substantial assets could be triggered. Such transfer would result in 50% decline of EBIT and would therefore fall within the rules. There is no requirement for a tax avoidance motive where this hallmark applies.

Structures which result in an aircraft being eligible for amortisation in two jurisdictions at the same time (for instance in the lessor-lessee relationship), *i.e.* so called "double dip" arrangements may require disclosure.

Finally, parties should also keep an eye out for trusts located in jurisdictions that do not have a UBO register obligation and any payments which are deductible in one jurisdiction and made to an associated recipient who either pays little or no tax on the receipt.

How can Bird & Bird assist?

- Our international tax team advises clients on whether they have disclosure obligations, and whether or not certain activities contain hallmarks.
- We advise clients on how to manage and coordinate the reporting, if multiple intermediaries (whether or not in various countries) are involved, through DAC6 frameworks. We advise clients on how to manage and coordinate their reporting obligations, especially where multiple intermediaries (across a variety of countries) are involved.
- Please get in touch to find out more about how we can help.

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