

Bird & Bird & DAC6 Briefings: Introduction of a Mandatory Disclosure Obligation

DAC 6

Updated January 2021

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 ([2018/822/EU](#)) 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 lawyers, consultants, financial institutions and other service providers) – or in certain circumstances the taxpayers themselves – 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 on the basis of specific indications that the financial institution is (supposed to be) aware of.

While the mandatory reporting obligation is applicable as of July 2020, reporting is required on arrangements that happened during the transition period, namely between 25 June 2018 until 30 June 2020. The Covid-19 pandemic, however, delayed the actual reporting in most countries.

What is an intermediary?

An intermediary is broadly defined as a person who designs, markets, organises or makes available or implements a reportable arrangement (“*promotor*” or “*type 1 intermediary*”), or anyone who directly or indirectly provides aid, assistance or advice with regard thereto and knows or could reasonably be expected to know that he or she is providing such assistance (“*service provider*” or “*type 2 intermediary*”).

The broad scope of the definition means that a large number of those involved are potentially “intermediaries”. It could include:

- consultants, accountants, financial advisers, lawyers (including in-house counsel).
- banks, trust companies, insurance intermediaries, etc.

Additionally, intermediaries must be:

- a resident for tax purposes in an EU Member State (*); or
- b have a permanent establishment in an EU Member State through which the services with respect to the arrangement are provided; or
- c be incorporated in or governed by the laws of an EU Member State; or
- d be registered with a professional association related to legal, taxation or consultancy services in an EU Member State.

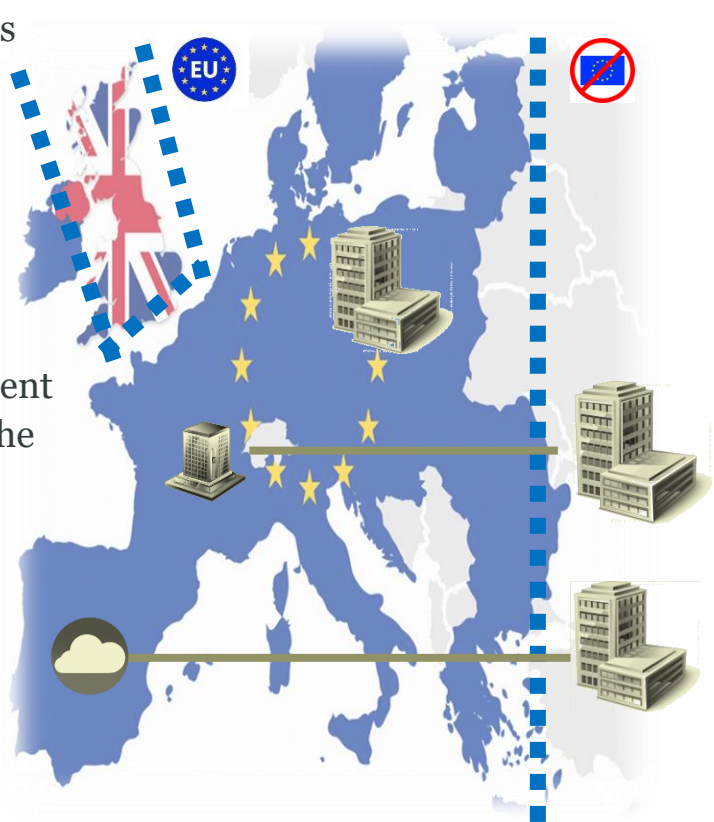
() Pursuant to Brexit and the Free Trade Agreement concluded between the UK and the EU, the DAC6 Directive has been revoked (with a temporary survival of category D hallmarks) and the introduction of a new set of Mandatory Disclosure Rules in line with the OECD minimum standards, likely to occur in the course of 2021. The UK can therefore no longer be considered part of the EU for DAC6 purposes.*

What is a relevant taxpayer?

A relevant taxpayer is broadly defined as a any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

Additionally, 'relevant' also requires the taxpayer to have a link with an **EU Member State**. For instance, by

- (i) being a tax resident in an EU Member State;
- (ii) having a permanent establishment in an EU Member State (to which the arrangement is related); or
- (iii) conducting a business in an EU Member State without actually having a branch or permanent establishment in the EU.



Where companies are implementing an arrangement, particularly to optimize their tax base, they are likely to qualify as a relevant taxpayer and thus get caught by the DAC6 rules. In most of such cases, the reporting will already occur by other intermediaries (such as lawyers or consultants) helping to implement the arrangement. However, even in the absence of a particular tax motive, the mere presence of certain hallmarks could trigger reporting obligations.

Reportable transactions

The reporting requirement applies to “**cross-border arrangements**” that meet at least one of the “**hallmarks**”.

A cross-border arrangement is:

- any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event,
- involving one EU Member State and another EU or third state.

Purely domestic arrangements which do not impact tax in another jurisdiction are not targeted (except in Poland and Portugal).

These cross-border arrangements become reportable if they exhibit one or more of the “hallmarks”: broad categories setting out particular characteristics identified as potentially indicative of aggressive tax planning.

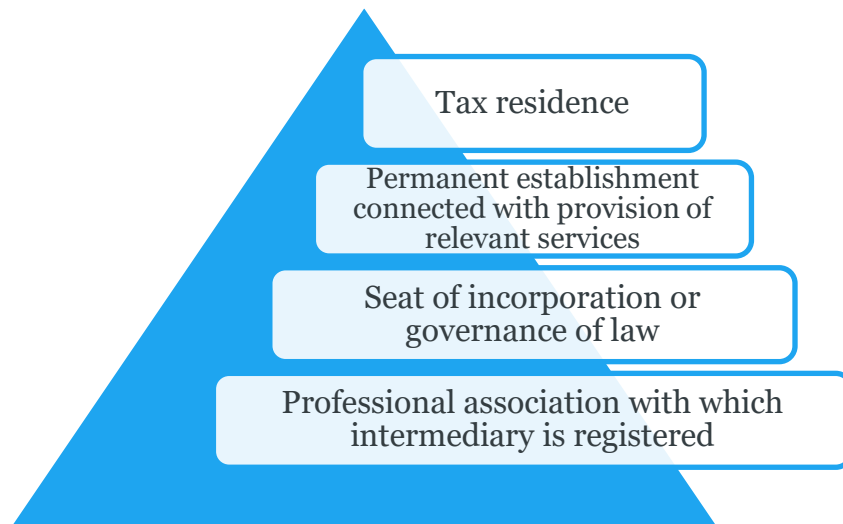
Some hallmarks are subject to an overriding “main benefit test”, whereby the main benefit or one of the main benefits a person may reasonably expect to derive from the arrangement is the obtaining of a tax advantage. Generally, if the tax outcome is of significance in the way one decides to structure an arrangement, disclosure should be the default course of action.

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
<div data-bbox="92 1496 293 1599">Condition of confidentiality on taxpayer or participant relating to tax advantage</div> <div data-bbox="92 1608 293 1711">Intermediary receives fee contingent on tax advantage</div> <div data-bbox="92 1720 293 1805">Use of substantially standardized documentation or structure</div>	<div data-bbox="395 1496 596 1581">Combined steps to access losses of an acquired company</div> <div data-bbox="395 1590 596 1693">Conversion of income into an item which is taxed less (or not)</div> <div data-bbox="395 1702 596 1805">Circular transactions resulting in the round-tripping of funds</div>	<div data-bbox="655 1496 793 1599">Deductible cross-border payment to (related) recipient in (close to) zero tax jurisdictions</div> <div data-bbox="655 1608 793 1711">Deductible cross-border payment with preferential tax regime on receipt (related recipient)</div> <div data-bbox="655 1720 793 1805">Deductible cross-border payment which is exempt on receipt to related recipient</div> <div data-bbox="805 1496 943 1599">Deductible cross-border payment to (related) recipient not tax resident in any jurisdiction</div> <div data-bbox="805 1608 943 1711">Deductible cross-border payment to (related) recipient tax resident in non-cooperative jurisdiction</div> <div data-bbox="805 1720 943 1805">Double dip (deduction of asset depreciation in more than one jurisdiction)</div> <div data-bbox="805 1814 943 1917">Double credit (relief from tax on same income / capital in more than 1 jurisdiction)</div> <div data-bbox="805 1926 943 2029">Consideration mismatch (different price consideration in regards to the transfer of assets)</div>	<div data-bbox="979 1496 1214 1599">Arrangements to circumvent automatic exchange of financial accounts</div> <div data-bbox="979 1608 1214 1711">Arrangements involving non-transparent legal or beneficial ownership chains</div>	<div data-bbox="1284 1496 1519 1599">Use of unilateral safe harbor rules</div> <div data-bbox="1284 1608 1519 1711">Transfer of hard-to-value intangibles</div> <div data-bbox="1284 1720 1519 1805">Transfer (intra-group) of functions/risks/ assets resulting in 50% decline of projected 3y EBIT in transferring state</div>
With "main benefits test"			Without "main benefits test"	

Compliance

Where to report

Reporting is required where the intermediary / taxpayer has a nexus in the first Member State in descending order:



What to report?

- The identification of all taxpayers and intermediaries involved, including:
 - a Tax residence
 - b Name, date and place of birth (if an individual)
 - c Tax Identification Number (TIN)
 - d Where appropriate (mainly for category C), the persons associated to the relevant taxpayer
- Identification of all relevant hallmarks
- A summary of the arrangement, including (in abstract terms to observe safekeeping of trade secrets) a summary of relevant business activities
- The date on which the first step in implementation was or will be made
- Details of the relevant local law
- The value of the reportable cross-border arrangement
- The identification of relevant taxpayers or any other person in any EU Member State likely to be affected by the arrangement

When to report?

The DAC6 reporting would normally have kicked in as of 1 July 2020, with different reporting deadlines for the transition period (from 25 June 2018 to 30 June 2020), the regular reporting and the period reporting for marketable arrangements. However, the Covid-19 pandemic posed a challenge to meet those deadlines, not the least for Member States themselves to implement a reporting platform.

In light of these challenges, and upon proposal by the European Commission, the Council voted an amending Directive on 24 June 2020 allowing Member States to defer the deadlines for filing and exchanging information on cross-border arrangements. These deadlines only impact the reporting dates, and not the entry into force as of 1 July 2020.

Reporting Period	Reporting Deadline
Transition Reporting (25 June 2018 – 30 June 2020)	In principle, by 31 August 2020 Amending Directive (option): by 29 February 2021
Regular Reporting (as of 1 July 2020)	Within 30 days of advice / first implementation Amending Directive (option): as of 1 January 2021
Periodic Reporting for Marketable Arrangements	Quarterly reporting Amending Directive (option): for the first time by 30 April 2021

The "Covid-19" deadline deferral could be extended another three months by a unanimous council vote on a commission proposal, which should be held one month before the relevant reporting deadlines expire.

These new deadlines are optional. Although most Member States have taken up this option, certain others (currently Finland, Austria and Germany) have stated to be ready and have therefore not allowed such deferrals.

Sanctions

Effective, proportionate and dissuasive

The determination of the DAC6 penalties is left to the Member States. They should be "effective, proportionate and dissuasive". As expected, each Member State has a different view on this, resulting in sanctions around EUR 25,000 in one country to several millions in others.

Intermediates and taxpayers should particularly verify local guidance from the relevant tax authorities, since sanctions may also be imposed on different levels: some countries may only target companies or consulting firms, others may also address their respective employees (*e.g.* the in-house tax counsel) or the self-employed consultants acting in name and on behalf of the companies or consulting firms.



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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