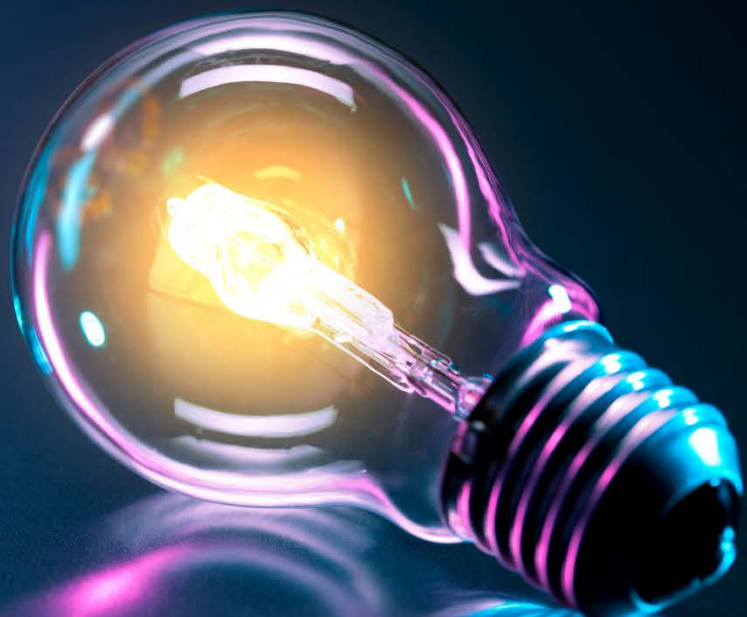




DAC6/ EU MDR

**Overview and implications
for Swiss banks**

April 2019



EU mandatory disclosure rules for intermediaries (“DAC6”)

On 25 June 2018, the Council of the European Union formally adopted new mandatory disclosure rules (“MDRs”) for qualifying intermediaries and relevant taxpayers. The latest in a series of EU initiatives in the field of automatic exchange of information in tax matters, the new rules (“DAC6”) will require financial intermediaries (incl. banks) and, in certain circumstances, relevant taxpayers, to disclose certain information on reportable cross-border tax arrangements. Arrangements are considered reportable if they meet one or more so-called hallmarks, i.e. defined criteria that are seen to present an indication of a potential risk of tax avoidance. Although the rules will only apply in the EU, there are various ways in which Swiss banks may be affected, too. Swiss banks need to carefully analyze the potential impact of the new rules on their organization and determine appropriate steps to meet their potential obligations.

1. Overview

As of 1 July 2020, qualifying intermediaries (or, in certain cases, the relevant taxpayer) will be required to disclose information on reportable cross-border tax arrangements to their authorities within 30 days of the earlier of when the arrangement is made available for implementation, ready for implementation or actually implemented.

Arrangements entered into after DAC6 has entered into force on 25 June 2018 will also have to be disclosed as part of a delayed reporting requirement by 31 August 2020.

2. Which taxes will be covered by DAC6?

The scope of DAC6 includes all taxes levied by (or on behalf of) a Member State, with the exception of VAT, customs duties, excise duties and compulsory social contributions. It therefore includes corporate and personal income taxes, inheritance and gift taxes, financial transaction taxes, stamp duties and insurance taxes. DAC6 further requires reporting of cross-border arrangements which may have the effect of undermining the reporting of financial account information and those that aim to make beneficial owners unidentifiable.

3. Which transactions will be affected by DAC6?

DAC6 will cover all arrangements that are cross-border, i.e. that involve participants resident in either more than one EU member state or a member state and a third country. The arrangement must further meet one or more of a set of “hallmarks”. These are certain features that are considered to present an indication of a potential risk of tax avoidance. Some hallmarks further require that the so-called main benefit test is satisfied, i.e. that one of the main objectives of the arrangement is to obtain a tax advantage.

The hallmarks are structured by category as follows:

- Category A – Generic hallmarks linked to the main benefit test: arrangements that give rise to performance fees linked to a tax advantage or involve mass-marketed tax optimization schemes.
- Category B – Specific hallmarks linked to the main benefit test: this includes certain tax planning features, such as buying a loss-making company to exploit its losses in order to reduce tax liability. Another example would involve arrangements aimed at converting income into capital in order to obtain a tax benefit.
- Category C – Specific hallmarks related to cross-border transactions: some of these hallmarks are also subject to the main benefit test: for example, deductible cross-border payments between associated enterprises where the recipient is essentially subject to no tax, zero or almost zero tax. Another hallmark is about deductions for the same depreciation on an asset claimed in more than one jurisdiction.
- Category D – Specific hallmarks concerning the automatic exchange of information and beneficial ownership: an arrangement is reportable if it has the effect of undermining the rules on anti-money-laundering, transparency of beneficial ownership or the automatic exchange of information.
- Category E – Specific hallmarks concerning transfer pricing: these include the use of unilateral safe harbors, and the transfer of hard-to-value intangible assets when no reliable comparable assets exist and the projection of future cash flows or income are highly uncertain.

EU mandatory disclosure rules for intermediaries ("DAC6")

4. Who is required to report?

The primary reporting obligation under DAC6 lies with the intermediary. An intermediary is defined as any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement. The term also includes any person undertaking to provide, directly or by means of other persons, aid, assistance or advice in relation to the above.

In the following cases the reporting obligation shifts to the taxpayer:

- The intermediary is exempt by virtue of legal professional privilege
- There is no intermediary, or
- The intermediary is located outside of the EU.

5. What information will need to be reported?

The following information will need to be reported under DAC6:

- a) Identification of the taxpayers and intermediaries involved
- b) Details of the hallmarks that generated the reporting obligation
- c) A summary of the arrangement
- d) The date of the first step in implementing the reportable arrangement
- e) Details of the relevant domestic tax rules
- f) The value of the arrangement
- g) The identification of the member state of the relevant taxpayer(s) and any other member states which are likely to be concerned by the reportable cross-border arrangement
- h) The identification of any other person in a member state likely to be affected by the reportable cross-border arrangement, indicating the corresponding member state.

6. How will Swiss banks be affected?

While DAC6 will only apply within the EU, it is nevertheless important for Swiss banks to analyze how they may be affected by the rules. Swiss intermediaries should in particular examine implications in the following areas:

- Swiss banks with EU-resident clients will, at a minimum, need to inform their EU-resident clients about their potential reporting obligations. Given the wide definition of the term "intermediary", this will comprise cross-border arrangements offered by Swiss banks themselves as well as situations where a Swiss bank acts as an advisor with regards to arrangements offered by third parties.
- Swiss banks with related entities in the EU will need to analyze whether the services offered to clients by those entities are potentially reportable;
- Swiss banks with related entities in the EU will further need to analyze potential reporting obligations resulting from transactions within the group.

7. How KPMG can assist you

KPMG can offer you a variety of services to help your organization navigate through the DAC6 requirements.

Training

We can provide training sessions on the DAC6 requirements, tailored to the specific requirements of your organization.

Impact assessment

We can perform a detailed assessment of the potential impact of DAC6 on your organization. This includes an in-depth analysis of the products and transactions (both in-house and with regards to clients) that could be in scope, as well as a comparison of the detailed requirements across affected jurisdictions.

Policies and processes

Once the impact of DAC6 on your organization has been determined, we can assist you in establishing appropriate policies, amending processes accordingly and implementing required mechanisms for ongoing monitoring and potential reporting.



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