

# EU Mandatory Disclosure Rules – DAC6



## How are corporate groups affected?

On 25 June 2018, the most recent amendments to the Directive on administrative cooperation in the field of taxation (Directive 2018/822 of 25 May 2018, i.e. “DAC6”), which introduced mandatory disclosure rules, entered into force. These rules target all kinds of cross-border arrangements that fall under a hallmark of the Directive, irrespective of whether an advisor is involved or not. Therefore, the Directive does not only apply to tax advisors, fiduciaries, banks and the likes, but also to corporate groups, even if no intermediary is involved (“in-house arrangements”).

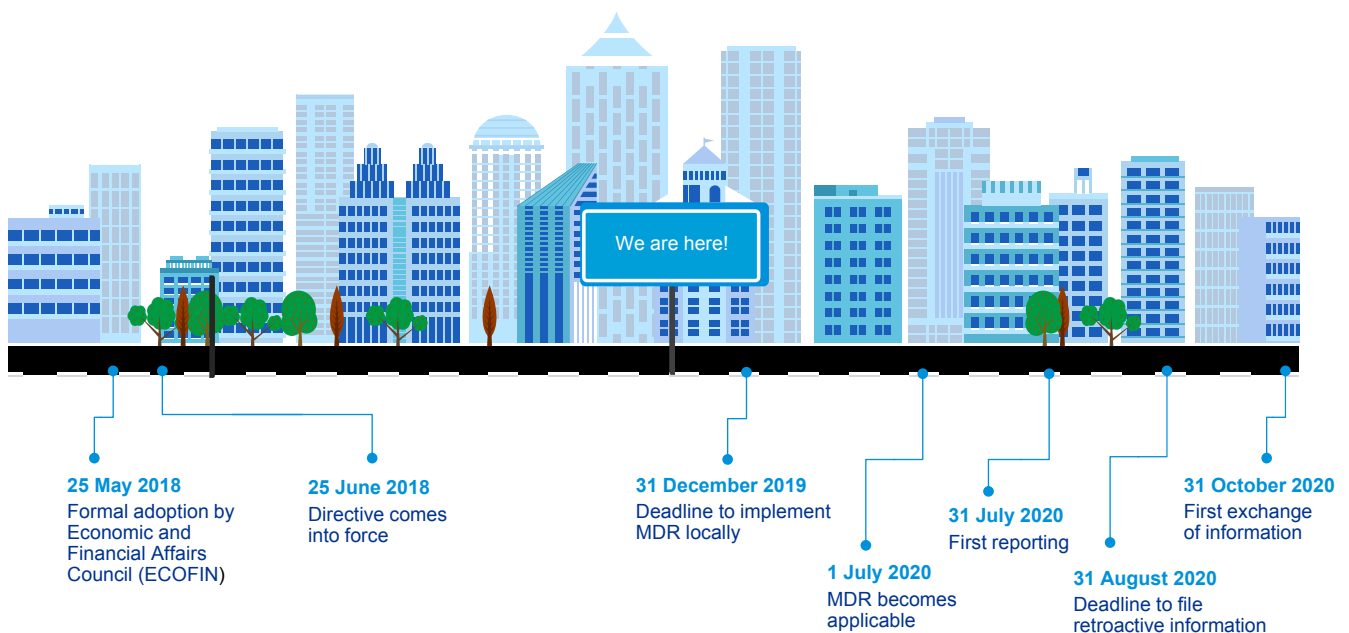
### 1. When will the rules enter into force?

EU Member States have until 31 December 2019 to implement the new rules, which will be applicable from 1 July 2020.

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.

However, intermediaries and relevant taxpayers will also be required to disclose information by 31 August 2020 on reportable cross-border arrangements, the first step of which was implemented as of 25 June 2018.



## 2. Which transactions will be affected by DAC6?

For a reporting obligation under DAC6, it is required that:

- The arrangement has a cross-border dimension, i.e. involves participants resident in either more than one EU member state or a member state and a third country;
- the arrangement falls under a hallmark; and
- in case of certain hallmarks, the **main benefit test** is given.

### Main benefit test

That test will be satisfied if it can be established that the main benefit or **one of the main benefits** which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the **obtaining of a tax advantage**.

Whilst all EU countries must implement the EU Directive, some countries even exceed the scope of the Directive and provide for example also for a reporting of domestic arrangements.

## 3. The hallmarks

The Directive provides for the following hallmarks:

### A) Generic hallmarks linked to the main benefit test

- 1) The taxpayer undertakes to comply with a confidentiality condition (in relation to other intermediaries or the tax authorities).
- 2) The intermediary is entitled to a fee contingent on either the amount of tax advantage derived from the arrangement or on the advantage being obtained.
- 3) Standardized documentation (incl. standard forms) is used.

### B) Specific hallmarks linked to the main benefit test

- 1) A participant in the arrangement takes contrived steps which consist in acquiring a lossmaking company, discontinuing the main activity of such company and using its losses.
- 2) An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.

### Example – Spanish IT company

- An IT company domiciled in Spain establishes a branch in Switzerland to which certain sales activities are transferred. As a consequence, profits currently taxable in Spain will be exempt from taxation in Spain and become taxable in Switzerland.
- This transaction generally falls under hallmark B.2 of the Directive, as profits currently taxable in Spain become taxable in Switzerland at lower rates.
- If the main benefit test is given, depends on the specific circumstances. However, it might be difficult to argue that a tax benefit was not one of the main benefits of this arrangement.
- If the main benefit test is given too, this transaction is reportable by the Spanish company under DAC6, as no intermediary is involved.

- 3) An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function.

### C) Specific hallmarks related to cross-border transactions (only the hallmarks b(i), c and d are subject to the main benefit test)

- 1) An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
  - a) the recipient is not resident for tax purposes in any tax jurisdiction;
  - b) the recipient is resident for tax purposes in a jurisdiction that:
    - i. does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or
    - ii. has been black listed by the EU or OECD.
  - c) The payment benefits from a full exemption from tax in the recipient's jurisdiction;
  - d) The payment benefits from a preferential tax regime.

### Example – Swiss headquarters of pharmaceutical group

- The Swiss HQ of an international pharmaceutical group receives royalties from its German subsidiary that are preferentially taxed in Switzerland (e.g. patent box income under the corporate tax reform).
- This transaction generally falls under hallmark C.1(d) of the Directive.
- The main benefit test should be given, as one of the main benefits of this transaction is a tax advantage in Germany.
- This transaction is generally reportable by the German subsidiary under DAC6, as no intermediary is involved.

- 2) The same asset is subject to depreciation in two or more jurisdictions.
- 3) Relief from double taxation is claimed in different jurisdictions in respect of the same item of income or capital.
- 4) An arrangement that includes transfers of assets and there is a material difference in the amount of consideration paid.

### D) Specific hallmarks concerning automatic exchange of information and beneficial ownership (not subject to the main benefit test)

- 1) An arrangement which may have the effect of undermining the Automatic Exchange of Information (AEOI, CRS) reporting obligations.
- 2) An arrangement involving a non-transparent legal or beneficial ownership chain.

E) Specific hallmarks concerning transfer pricing (not subject to the main benefit test)

1) Arrangements which involve the use of unilateral safe harbor rules.

### Example – French manufacturing company held by Swiss company

- The finance company granted several loans to the French group company.
- The interest rate was determined according to the safe harbor interest rates published by the Swiss Federal Tax Administration.
- This transaction could be caught by hallmark E.1 of the Directive.
- It is not required that the main benefit test is given.
- Whilst this transaction generally falls under the hallmark E.1, there is not yet any practical guidance available on whether such standard transactions are reportable under DAC6.
- If such arrangements are reportable, the arrangement needs to be reported by the French company, as no intermediary is involved.

2) Arrangements involving the transfer of hard-to-value intangibles.

### Example – Swiss luxury goods company

- A Swiss luxury goods company acquires newly developed trademarks from a group company domiciled in Ireland.
- With respect to the trademarks, there are no reliable comparables and the future cash flows are highly uncertain.
- This transaction is generally caught by hallmark E.2 of the Directive.
- It is not required that the main benefit test is given.
- This transaction is generally reportable by the Irish company, as no intermediary is involved.

3) Arrangements involving an intra-group cross-border transfer of functions, and/or risks, and/or assets, where the transfer results in a decline of 50% or more of the projected EBIT in the transferring jurisdiction, over a period of three years.

### Example – Restructuring of distribution activities

- An Italian company acquires products from group companies and sells them at own risk. It has for example its own warehouse and is responsible for the marketing activities. The EBIT margin amounts to 5%.
- The group decided to centralize most of these activities conducted by the Italian company in Switzerland, i.e. the Italian company becomes a limited risk distributor. It is expected that the EBIT margin drops to 2%.

- This transaction could be caught by hallmark E.3 of the Directive. However, according to the hallmark, the predicted EBIT over a period of three years after the transfer is relevant, so depending on the expectations, the hallmark is given or not.
- It is not required that the main benefit test is given.
- This transaction is generally reportable by the Italian company, as no intermediary is involved.

## 4. Who is required to report?

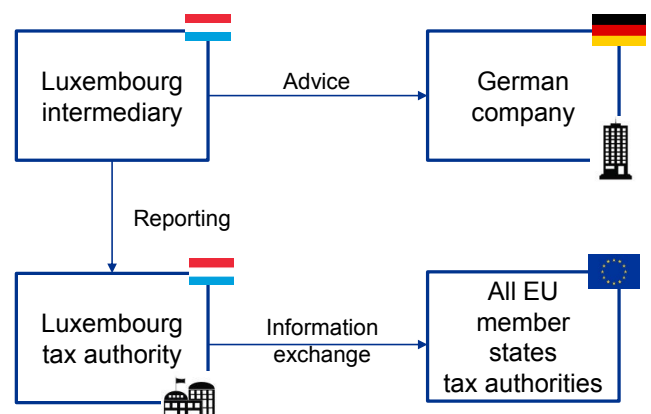
The primary reporting obligation under DAC6 lies with the **intermediary**.

### Intermediary

“Intermediary” means any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

It also means any person that (...), knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement.

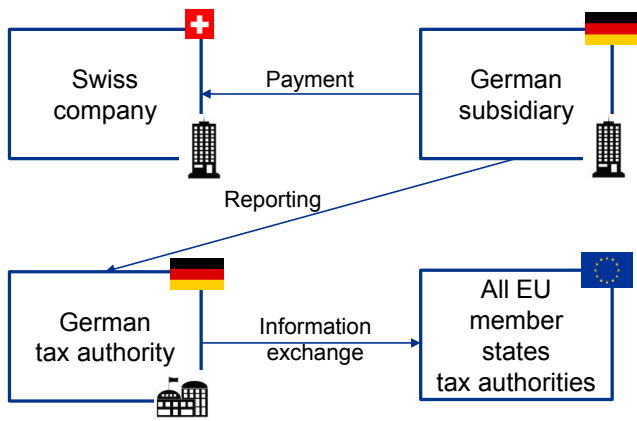
In order to qualify as an intermediary, the person must also have a connection to an EU Member State (e.g. being resident or having a permanent establishment through which the relevant services are provided).



If there is an EU intermediary involved, the reporting obligations are with the EU intermediary.

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

- The intermediary is exempt by virtue of legal professional privilege or
- There is no EU intermediary



If there is no intermediary involved, in particular in case of in-house arrangements, the reporting obligations are with the EU taxpayer.

### 5. What information is reportable?

The following information will need to be reported under DAC6:

- Identification of the taxpayers and intermediaries involved
- Details of the hallmarks that triggered the reporting obligation
- A summary of the arrangement
- The date of the first step in implementing the reportable arrangement
- Details of the relevant domestic tax rules
- The value of the arrangement
- 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
- 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. Why is DAC6 relevant for corporate groups?

The new rules do not only affect intermediaries providing aggressive tax advice, but also a number of intra-group

transactions that fall under a hallmark. As mentioned above, the hallmarks are very broadly drafted and do not only catch aggressive tax planning schemes, but also many ordinary transactions between related companies.

Additionally, all EU countries must levy penalties for non-compliance with these rules. In some countries, these penalties may exceed several hundred thousand euros. Subject to penalty is the non-compliance with the mandatory disclosure rules, i.e. a penalty may be levied even if the respective EU company fully complies with the local tax obligations.

### 7. How we can support you

We 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 transactions and services 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, setting up processes accordingly and implementing the required mechanisms for ongoing monitoring and potential reporting.

#### KPMG MDR Processor

KPMG has developed the KPMG MDR Processor to optimize MDR processes. With reporting features for all EU countries, this tool supports efficient workflow management to identify your reportable arrangements.

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