EU mandatory disclosure requirements: state of play and practical insights on implementation

18 March 2019
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... with you today

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## Notes on CPE and polling questions

<table>
<thead>
<tr>
<th>Continuing professional education (CPE) credits</th>
<th>Polling questions</th>
<th>Attendee questions</th>
<th>Your feedback</th>
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</thead>
<tbody>
<tr>
<td><strong>North America</strong>&lt;br&gt;— We require that participants are registered, logged in and take part in at least four of the five polling questions and participate in at least 50 of the 60 minutes to qualify for CPE credits for today’s webcast.</td>
<td>— Polling questions will appear as we proceed through the presentation.  &lt;br&gt;— As mentioned, in order to receive the CPE credit, we require that those participants take part in at least four of the five polling questions and participate in at least 50 of the 60 minutes to qualify for CPE credits for today’s webcast.</td>
<td>— You may submit questions in the <em>Ask a question</em> button on the left. We will answer as many questions as we can during Q&amp;A. If we are unable to answer your question, someone from KPMG may reply via phone or email.</td>
<td>— When the webcast is over, the webcast player will automatically refresh to display an exit survey. Feel free to complete the survey, as your comments are very valuable to us.</td>
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<tr>
<td><strong>Outside North America</strong>&lt;br&gt;— We encourage you to participate in the questions, as you may be eligible for continuing education credits in your local jurisdiction.</td>
<td></td>
<td>— For technical issues, please use the <em>Question Mark</em> button in the upper-right hand corner of the media player.</td>
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When the webcast is over, the webcast player will automatically refresh to display an exit survey. Feel free to complete the survey, as your comments are very valuable to us.
EU mandatory disclosure requirements

Agenda

1. Big picture implications
2. Background and basics
3. Local implementation: state of play
4. Practical considerations in complying with MDR
5. How can KPMG help?
I. Big picture implications for you
Mandatory disclosure requirements for intermediaries and relevant taxpayers

Critical implications for you

**Mandatory**
- Compliance with new disclosure obligations in the EU is mandatory for EU-based entities.
- EU taxpayers required to report if no EU intermediary or intermediary is exempt.

**Local variations**
- EU-wide rule, but implementation left to each EU country
  - some countries go beyond DAC 6
  - you must consult each jurisdiction.

**Penalties**
- There are penalties for non-compliance.
- Some countries may apply severe (penal) sanctions.

**Governance**
- Taxpayers will need to have in place a system to understand and report selected transactions.
- Taxpayers may want to know and catalog what is being reported and where — consider changes to contractual arrangements with your advisers.
II. DAC 6: background and basics
Timeline

**Mandatory disclosure requirements for intermediaries and relevant taxpayers**

- **13 March 2018**: Political agreement in ECOFIN
- **25 May 2018**: Formal adoption by ECOFIN
- **25 June 2018**: MDR directive comes into force
- **25 May 2018**: Formal adoption by ECOFIN
- **31 August 2020**: Deadline to file retroactive information
- **31 October 2020**: First exchange of information
- **1 July 2020**: MDR becomes applicable
- **31 December 2019**: Deadline to implement MDR locally
Mandatory disclosure requirements for intermediaries and relevant taxpayers

DAC 6 in a nutshell

**Background**
- the latest in a series of EU initiatives in the field of automatic exchange of information in tax matters (DAC 1–5)

**Introduces**
- an obligation to disclose “potentially aggressive tax planning arrangements”
- the means for tax administrations to exchange the information

**Scope**
- all taxes of any kind with the exception of: VAT; customs duties; excise duties and compulsory social contributions

**Reporting of**
- cross-border arrangements
- that fall within a set of so-called ‘hallmarks’ (potentially together with a main benefit test)
- within 30 days
Mandatory disclosure requirements for intermediaries and relevant taxpayers

Hallmarks with main benefit test

**General hallmarks (A)**

A.1 The taxpayer undertakes to comply with a confidentiality condition

A.2 Contingent fee

A.3 Standardized documentation (including standard forms) is used

**Specific hallmarks (B)**

B.1 Acquisition of loss making company, discontinuation of main activity and using losses

B.2 Conversion of income into a category taxed at a lower level/exempt

B.3 Circular transactions resulting in the round-tripping of funds

**Cross-border transactions (C1)**

Deductible payments to a related party:

b) If the recipient is tax resident in a jurisdiction with no CIT, or 0% (or almost 0%) CIT rate

c) If the payment benefits from a full exemption from tax

d) If the payment benefits from a preferential tax regime

**Main benefit test:** 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**.
Mandatory disclosure requirements for intermediaries and relevant taxpayers

Hallmarks with no main benefit test

**Cross-border transactions (C)**

C.1 Deductible payments to a related party which is:

a) not tax resident in any jurisdiction

b) resident in a black-listed country (EU/OECD)

C.2 Deduction of the same depreciation on asset in multiple jurisdictions

C.3 Double tax relief claimed in multiple jurisdictions

C.4 Transfer of assets with significant differences in valuation

**Automatic exchange of information and BO (D)**

D.1 Circumvention of reporting obligation on automatic exchange of financial account information

D.2 Legal structure lacking substantive economic activity where beneficial owners are unidentifiable

**Transfer pricing (E)**

E.1 Unilateral safe harbor rules

E.2 Transfer of hard-to-value intangibles

E.3 Transfer of functions/risks/assets resulting in EBIT decrease >50% during the next 3 years
Mandatory disclosure requirements for intermediaries and relevant taxpayers

Some considerations for entities based outside the EU

No legal obligation on non-EU intermediaries and taxpayers, but consider impact on EU operations

💡

— **Taxpayer**: Any person to whom a reportable cross-border arrangement is made available for implementation. EU taxpayers **required to report** if no EU intermediary or intermediary is exempt.

— Do you implement **cross-border arrangements** involving EU-based affiliates?

— Some countries apply the EU rules even if benefit of the arrangements is a tax advantage in a non-EU jurisdiction.
III. DAC 6 local implementation: state of play
Mandatory disclosure requirements for intermediaries and relevant taxpayers

EU-wide developments

European Commission:
— working on implementation regulation
— unique identification number to be assigned to each reported arrangement
— no further interpretation guidelines.

TAX3 Committee:
— several MEPs have called on all Member States to extend the reporting obligation to purely domestic cases.
Mandatory disclosure requirements for intermediaries and relevant taxpayers
Local implementation — highlights

- **Austria**: draft legislation expected in April–June 2019. Limited to cross-border and direct taxes. Legal professional privileges upheld, however, advisors may still file information on reportable cross-border arrangements if they are authorized by their clients. Penalty could be up to 50,000 euros (EUR).

- **France**: first draft recently circulated for comments – deadline March 29, 2019. The major part of the draft mirrors the Directive.

- **Germany**: official legislative process has not started, but two unofficial drafts were under discussion. A revised draft bill was presented by the German legislator on 30 January 2019. This third draft bill includes a reporting obligation for domestic arrangements. Penalty up to EUR25,000 for incomplete or late reporting is being considered.

- **Italy**: legislative decree expected by end of March, followed by a second decree on hallmarks and guidelines (expected June 2019). Administrative penalty ranging from EUR2,000 to EUR21,000. The cross-border arrangement is to be considered as reportable even when the tax benefit arises in a third state — if effective exchange of information with Italy, provided that at least one of the participants is resident in Italy.

- **Lithuania**: draft law published end of November 2018.

- **Netherlands**: public consultation on draft law January 2019 — bill expected end of June. Up to intermediary to decide on ‘potential’ aggressive arrangements (avoidance of double taxation not reportable). The firm, not the individual advisor, has reporting obligation.

- **Poland**: MDRs apply as of 1 January 2019. Significantly broader scope (includes domestic arrangements and VAT). Criminal penalty for failure to report or inform the taxpayer of up to approx. EUR4.6 million. Discussions on implementation guidelines ongoing.

- **Slovakia**: draft MDR implementation bill subject to comments. Expected to be approved by Government in March 2019. Legal professional privilege upheld.

- **Slovenia**: draft MDR implementation bill subject to public consultation by 20 January 2019.

- **Sweden**: the Swedish MDR Committee has presented its draft proposal to the Swedish government on 15 January 2019. Certain domestic arrangements may be included.
Mandatory disclosure requirements for intermediaries and relevant taxpayers
Local implementation — spotlight on Germany

**Scope**

**Cross-border arrangements as per DAC6**

**Domestic arrangements:**

- qualifying users
- based on DAC6 hallmarks that apply with the main benefit test (A, B and selection of C), plus
- an additional hallmark: where same facts are attributed to multiple users or multiple times to one user of the tax arrangement or one taxpayer.

**Intermediary**

**Legal professional privilege upheld. However:**

- intermediaries are required to submit data on the general scope of the arrangement on a 'no name' basis
- legal professionals (auditors, lawyers and tax advisors): obligation can partly shift to the 'user' — submits data to the user that is then charged with reporting.

**Penalties**

- An intentional or careless violation of the obligation to report will trigger a penalty of up to EUR25,000 if the first step is implemented after 30 June 2020.
### Mandatory disclosure requirements for intermediaries and relevant taxpayers

#### Local implementation — spotlight on Italy

<table>
<thead>
<tr>
<th>Status</th>
<th>Interpretation</th>
<th>Sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>— Draft Italian text mirrors DAC 6.</td>
<td>— Qualifying arrangements reportable even where tax advantage arises outside</td>
<td>— Administrative penalties for failure to comply with the reporting obligation.</td>
</tr>
<tr>
<td>— Public consultation ended in September 2018.</td>
<td>of the EU (provided exchange of information agreement in place).</td>
<td>— Range between EUR2,000 to EUR21,000.</td>
</tr>
<tr>
<td>— Meeting with Italian Ministry of Economy and Finance on 29 January 2019.</td>
<td>— An opinion on an arrangement already in place is out of scope.</td>
<td>— Penalties may vary depending on the cause of the failure i.e. they will be higher where information was omitted, and lower in all other cases.</td>
</tr>
<tr>
<td>— Legislative decree expected by end of March to be followed by second decree (expected end of June) on hallmarks and additional clarifications.</td>
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Local implementation spotlight on the Netherlands

Mandatory disclosure requirements for intermediaries and relevant taxpayers


Highlights of points clarified:

**Intermediaries:**
- it is the firm — not individual advisors, that has a reporting obligation
- do not have a due diligence obligation and will only be required to report based on the information that is available to them
- required to decide whether an arrangement is 'potentially' aggressive.

**The main benefit test:**
- should be interpreted to mean that structures set up to avoid double taxation should not be reportable
- refers also to tax advantage in non-EU Member States.
Mandatory disclosure requirements for intermediaries and relevant taxpayers
Local implementation — spotlight on Poland

Basics

— Cross-border arrangements within the meaning of DAC6, but also:
  — domestic arrangements, including those related to VAT and excise duties — subject to ‘qualifying taxpayer’ test.
  — Legal professional privilege may apply.
  — ‘Promoters’ based outside of the EU also targeted.

Penalties

— Non-fulfilment of reporting obligation in the correct manner will constitute a criminal offence and will be subject to a fine of up to approx. EUR4.6 million.
  — Administrative fine of up to EUR2.3 million for qualifying promoters that fail to implement an internal MDR procedure.

Timeline

— Entered into force on 1 January 2019 — transitional period for 2018 arrangements.
Mandatory disclosure requirements for intermediaries and relevant taxpayers

Local implementation — spotlight on Sweden

<table>
<thead>
<tr>
<th><strong>Scope</strong></th>
<th><strong>Intermediary</strong></th>
<th><strong>Penalties</strong></th>
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<tbody>
<tr>
<td>— Extended to include <strong>domestic arrangements</strong> that concern income taxes and tax yields on pension funds.</td>
<td>— <strong>Only Swedish intermediaries</strong> will be required to report in Sweden.</td>
<td>— <strong>Initial penalty</strong> for non-compliance is 15,000 Swedish krona (SEK) (approx. EUR1,500) for intermediaries and SEK7,500 (approx. EUR750) for users</td>
</tr>
<tr>
<td>— An <strong>exemption</strong> proposed for domestic arrangements where the effects “are a direct and foreseen effect of tax legislation”. Further exemptions may be allowed for arrangements that are well-known.</td>
<td>— Proposed for members of the Swedish Bar Association to only report insofar as applicable attorney-client privilege rules allow.</td>
<td>— <strong>Second tier</strong> penalty if not reported within 60 days (at least SEK50,000 for advisers and SEK25,000 for users).</td>
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<td></td>
<td></td>
<td>— <strong>Higher penalties</strong> may apply (max. SEK500,000 for advisers and SEK250,000 for users).</td>
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<td></td>
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<td>— <strong>No penalties</strong> for pre-30 June 2020 arrangements.</td>
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IV. Practical considerations in complying with MDR
Mandatory disclosure requirements for intermediaries and relevant taxpayers

The challenge

- The scope might vary across jurisdictions, i.e. an arrangement may not be reportable in one Member State but qualify in another.
- Legal professional privilege might apply, therefore switching the reporting obligation onto the taxpayer.
- Penalties for non-compliance vary but can be very high (see Polish example).
- Timeline for implementation might vary; DAC6 only sets a minimum standard and latest implementation date.
Mandatory disclosure requirements for intermediaries and relevant taxpayers

What you should consider doing now

Assess your situation

— Perform an analysis of known business or corporate functions to identify potential transactions that may be reportable.
— Assess the impact on potential products and services offered by each business area.
— Determine whether changes to contractual arrangements (e.g., with external providers) needed.

Anticipate and organise for compliance

— Leverage existing governance frameworks.
— Design and implement specific policy framework (incl. controls and training) across the business.
— Consider who will have review and sign-off capabilities and whether they have the right skills, or require training.
— Consider merits of using technology solutions for MDR compliance, including to help catalog potentially reportable arrangements entered into from 25 June 2018.

Monitor local implementation and adapt accordingly

— Monitor implementation into local tax legislation in relevant EU jurisdictions. Re-asses catalogued arrangements before the reporting deadline.
— Assess whether proposed internal governance and compliance framework meets local requirements.
V. How can KPMG help?
Mandatory disclosure requirements for intermediaries and relevant taxpayers

How can KPMG help?

Phase 1 — the provision of training
- targeted training and briefing materials

Phase 2 — evaluation workshops/initial risk assessment
- risk assess the various business functions

Phase 3 — detailed review
- review reports of potentially reportable transactions

Phase 4 — governance structure assistance

Phase 5 — gap analysis for local implementation
- subsequent analysis of how each Member State has implemented MDRs

service enabled by technology
KPMG is developing an EUMDR/DAC6 technology solution which is being designed to assist intermediaries and taxpayers determine whether their organization has any reporting obligations under these regimes, and can track the decision making process and then assist with reporting for in-scope transactions.

Why use a tool and not simply an excel spreadsheet?

There are a number of advantages to using a technology based solution:

— the solution is being designed to provide a ‘smart questionnaire’ which will include bespoke or jurisdiction specific questions including any domestic requirements, helping determine whether an arrangement should be reported (or where further information is required to determine this)

— a secure audit trail will show who did what and when and allow the decision making process to be evidenced

— management will have a centralised view of the global status that can be filtered by tax, jurisdiction, year, proximity to the reporting deadline (with clear RAG status to manage those transactions reaching their reporting deadline)

— management information reporting and drill down analytics will help provide the ability to view or compare different data sets to identify trends or risks associated with the reporting, including assessment by:

  — arrangements reported

  — arrangements per tax, per jurisdiction, per hallmark

— KPMG is developing a technology solution to help support member firm clients which is expected to be available later in 2019.
Schematic of user journey

The tool is being designed to guide the user through the legislation, dipping in and out of it, just inputting data to be validated whilst tracking the progress to the relevant deadline. There is also a means to test ‘what if’ scenarios to see if in scope of MDR:
Mandatory disclosure requirements for intermediaries and relevant taxpayers

KPMG resources

- Dedicated website accessible from kpmg.com/eutax
- Summary and observations
- Recorded WebEx sessions
- Euro Tax Flashes
- Guidance from your local KPMG advisor
- Frequent contacts with regulators in EU member states

KPMG: working together with our network of EU tax law specialists throughout the European Union.
Questions?
Thank you
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Mandatory disclosure requirements for intermediaries and relevant taxpayers
Local implementation — Other EU jurisdictions (B-G)

<table>
<thead>
<tr>
<th>Country</th>
<th>Status and Notes</th>
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<tbody>
<tr>
<td>Belgium</td>
<td>Draft law expected during the course of 2019 — most likely after October elections. Professional privilege being considered, but a final decision has not been made yet.</td>
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<tr>
<td>Bulgaria</td>
<td>Draft law expected during the course of 2019.</td>
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<tr>
<td>Croatia</td>
<td>Implementation process expected to start during the course of 2019.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>The Ministry of Finance will have draft legislation ready for consultation shortly (was expected February 2019, but likely first weeks of March) and will start working on the implementation guidelines. MDR sub-committee created (chaired by KPMG).</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Draft legislation expected in late March 2019. Based on informal discussion, expectation is that: — Czech implementation will generally be in line with DAC6. — Legal professional privilege will be upheld. Where waiver applies, tax advisers will be required to inform the taxpayer of reporting obligation. — Fines: EUR 20k penalty on intermediaries for failure to inform taxpayer, EUR 50k for taxpayers that fail to report.</td>
</tr>
<tr>
<td>Denmark</td>
<td>Timeline of implementation process not yet known. First draft will most likely be published after June elections.</td>
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<tr>
<td>Estonia</td>
<td>Draft law expected during the course of 2019.</td>
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<tr>
<td>Finland</td>
<td>The Ministry of Finance has announced it is preparing for the implementation process. Draft law expected during summer 2019. May follow Swedish implementation.</td>
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<tr>
<td>Greece</td>
<td>Discussions with Ministry of Finance, however timeline of implementation process not yet known yet.</td>
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<tr>
<td>Country</td>
<td>Implementation Status</td>
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<tr>
<td>Hungary</td>
<td>Timeline of implementation process not yet known.</td>
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<tr>
<td>Ireland</td>
<td>Draft law expected during the course of 2019, most likely towards the end of the year.</td>
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<tr>
<td>Latvia</td>
<td>Draft Law expected during the course of 2019.</td>
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<tr>
<td>Lithuania</td>
<td>Currently only draft legislation transposing the core provisions of the DAC6 directive (2018/822/ES) into the Lithuanian Law on Tax Administration is available as one single article with the clauses authorizing the Lithuanian tax authorities to set the implementation rules. These provisions are general ones which would only establish the requirement for intermediaries/taxpayers to report certain cross-border arrangements. Based on the draft, they would generally mirror the text of the directive. The detailed reporting rules (timelines, the right of intermediaries to a waiver due to legal professional privilege, hallmarks applicable, volume of information etc.) are yet to be prepared by the tax authorities. No officially published draft is currently available.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Draft law expected during the course of 2019.</td>
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<tr>
<td>Malta</td>
<td>Interested constituted bodies have provided comments to the Revenue authorities. Draft legislation expected during the course of 2019.</td>
</tr>
<tr>
<td>Portugal</td>
<td>Draft law expected during the course of 2019.</td>
</tr>
<tr>
<td>Romania</td>
<td>Draft legislation expected in the summer of 2019 and discussion during autumn Parliament session.</td>
</tr>
<tr>
<td>Spain</td>
<td>December 11, 2018: the Spanish Tax Authorities launched a public consultation for the transposition of the DAC6 into national legislation, without publishing draft legislation. Unclear whether professional privilege for lawyers will be upheld.</td>
</tr>
<tr>
<td>UK</td>
<td>Draft law and guidance for public consultation expected in the first half of 2019.</td>
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