



Euro Tax Flash from KPMG's EU Tax Centre



[Background](#)

[Implementation into domestic legislation](#)

[Status of Implementation across Member States](#)

[Mandatory Disclosure Rules outside the EU](#)

[EU Tax Centre comment](#)

EU Mandatory Disclosure Requirements – update

[European Union – Directive on Administrative Cooperation – Mandatory Disclosure Requirements – Implementation – Member States – Updates](#)

As previously reported, mandatory disclosure requirements (MDR) for intermediaries and relevant taxpayers entered into force in the European Union on June 25, 2018 and must be implemented by Member States before December 31, 2019, to be applied as of July 1, 2020. Intermediaries are also required to track reportable transactions as of June 25, 2018 and disclose this information to the tax authorities by August 31, 2020.

This fifth Special Edition Euro Tax Flash summarizes the most recent implementation updates of the new rules into Member States' domestic legislation.

Background

Following a proposal put forward by the European Commission, the new mandatory disclosure requirements were introduced as an amendment to the Directive on Administrative Cooperation in the Field of Taxation ("DAC6") and will apply from July 1, 2020.

DAC6 introduces an obligation on intermediaries to disclose information on cross-border arrangements that meet certain criteria to their domestic tax authorities and rules for the subsequent exchange of this information between tax administrations. According to the final text, as of July 1, 2020 all disclosures must be made within 30 days of implementation.

Intermediaries and relevant taxpayers will also be required to disclose information on reportable cross-border arrangements, the first step of which is to be implemented between June 25, 2018 and July 1, 2020. This information should be filed by August 31, 2020.

Please refer to the [KPMG Summary and Observations memorandum](#) for further details and to the [first](#), [second](#), [third](#) and [fourth](#) special edition tax flashes for our previous updates on implementation of DAC6 into domestic legislation.

Implementation into domestic legislation

Although EU Member States have until the end of 2019 to implement DAC6 into domestic legislation, several jurisdictions have introduced or are discussing draft legislation on mandatory disclosure rules.

Bulgaria

On October 4, 2019, the Ministry of Finance published for public consultation a draft DAC6 implementation bill. The public consultation will run until November 3, 2019.

The draft bill mirrors the text of DAC6 including the same hallmarks and application solely to cross-border arrangements. In addition, the draft contains a definition of “tax advantage”. A tax advantage should be considered to arise in the case of a reduction of the tax base or amount of tax due, in cases of avoidance or deferral of tax or receipt of tax reliefs and other advantages that could improve the tax status of a taxpayer.

The draft bill also clarifies that, where there are multiple intermediaries involved in a reportable arrangement and the arrangement has already been reported by another party, intermediaries that provide aid, assistance or advice for individual parts or stages of an arrangement are required to provide information on this individual part or stage of the arrangement.

Intermediaries subject to legal professional privilege are generally exempt from the reporting obligation unless the taxpayer has discharged the intermediary from the obligation of secrecy. Exempt intermediaries must notify other intermediaries participating in the arrangement or the taxpayers of their reporting obligation within fourteen days of the reporting obligation arising. Further, the draft includes the following administrative penalties for failure to comply with the reporting obligation:

- Failure to provide information – penalties of approx. EUR 1,000 to EUR 5,000;
- Provision of incomplete or incorrect information – approx. EUR 500 to EUR 4,000;
- Failure to notify other intermediaries or taxpayers – approx. EUR 100 to EUR 750.

In cases of repeated violations of reporting obligations, the above mentioned penalties could be doubled.

Croatia

A draft law in Croatia has been published for public consultation. Once enacted, DAC6 provisions will be included as a section of the Croatian Law on Administrative Assistance in the field of Taxation.

The wording of the draft DAC6 bill does not deviate from the text of the Directive and includes relief from reporting for cases where legal professional privilege is claimed.

Further, the draft includes the following administrative penalties for failing to comply with reporting obligations:

- Failure to timely file the report in case of a legal person - approx. EUR 270 to EUR 27,200;
- For a responsible individual within that legal person - approx. EUR 270 to EUR 2,720;
- For an individual obliged to submit the report - approx. EUR 135 to EUR 13,600.

France

Law (*n° 2018-898 dated October 23, 2018*) authorized the French Government to adopt, via a Ministerial Order, rules to implement DAC6 into local French law before October 24, 2019. Following the conclusion of a consultation process with the French Council of State, the corresponding Ministerial Order was published on October 22, 2019.

The new French rules broadly reflect the terms of the Directive. In particular, the hallmarks in French local law are aligned with the Directive. The French local law includes a definition of “cross-border arrangement” to include “any arrangement in the form of an agreement, scheme or plan, whether or not enforceable, concerning France and another State, Member State of the European Union or not” provided that the arrangement has a cross-border element.

In relation to the application of the main benefit test, the French tax authorities have indicated that the legislative intention and the object of the relevant law should be taken into consideration when determining whether or not the main benefit test has been met.

Where an intermediary is covered by legal professional privilege, the intermediary is required to notify any other intermediary of the requirement to disclose the arrangement. The intermediary may also be required to notify the relevant taxpayer and to provide the taxpayer with all information necessary to all the taxpayer to report the arrangement correctly. It is also possible for taxpayers to waive privilege, in which case the intermediary should report the arrangement directly.

Failure to comply with a reporting or notification obligation will result in a penalty that is capped at a maximum of EUR 10,000. Where the offence is the intermediary or taxpayer’s first offence committed in the calendar year and three preceding years, the cap will be lowered to EUR 5,000. The maximum penalty imposed on an intermediary or taxpayer in a calendar year is limited to EUR 100,000.

It is expected that the French Tax Authorities will publish guidelines before the end of 2019. These guidelines may be issued first in a draft version with comments gathered from interested stakeholders via a public consultation.

Germany

On September 26, 2019 a revised draft for the implementation of DAC6 into German law was published by the Ministry of Finance.

It appears that there are no significant changes compared to the earlier discussion draft circulated at the end of January 2019 (please refer to the [second](#) special edition tax flash), i.e. the draft bill generally mirrors the text of DAC6 but does include some clarifications. Guidance published alongside the draft legislation further clarifies the German interpretation of key obligations and terms. To highlight a few points:

- The draft bill contains a definition of “tax advantage”. A tax advantage should be considered to arise if, through the tax arrangement, taxes are to be refunded, tax rebates granted, tax claims reduced or the crystallization of tax liabilities prevented or shifted to other tax periods.

In this regard, guidance to the draft bill notes that the relevant tax advantage shall not be limited to domestic German tax advantages. It will be sufficient if the tax advantage is obtained in another EU Member State or a non-EU third country. However, if the tax advantage of a cross-border tax arrangement only has an effect domestically, and if it is, under consideration of all circumstances of the tax arrangement, legally provided for in German law, a tax advantage should not be deemed to arise.

- The definition of “intermediary” in the draft bill remains narrowly defined as including any person who markets cross-border arrangements designed for third parties or organizes, provides for the use or manages their implementation by a third party. This definition is narrower than the Directive which includes parties that provide aid, assistance or advice with respect to a reportable cross-border arrangement. As member states are not allowed to narrow the scope of directives, this might prove to be a point of contention between Germany and the European Commission.
- For intermediaries that are protected by legal professional privilege (including auditors, attorneys and tax advisors), the reporting obligation with respect to certain personal data of the cross-border tax arrangement would partly shift to the user provided that:
 - 1) the intermediary has informed the user about the possibility to discharge the intermediary from its client confidentiality obligations;
 - 2) the user has not discharged the intermediary from the obligation of secrecy; and
 - 3) the intermediary has submitted the data they hold on the implementation of the arrangement to the user of the tax arrangement.

However, the requirement for the intermediary to submit certain information on a “no name”/“abstract” basis will continue to apply.

Legal professional privilege would not apply to “marketable” cross-border arrangements.

- The draft bill replaces the term “relevant taxpayer” with “user”. However, the definition of the term “user” mirrors the definition of the term “relevant taxpayer”.
- Any violation of the obligation to report cross-border tax arrangements shall be sanctioned with a fine of up to EUR 25,000.

It is also worth noting that the reporting obligation for domestic arrangements is no longer included in the draft legislation. Such an obligation may be implemented through a separate legislative act, however timing and scope are yet to be seen.

Hungary

The DAC6 implementation bill was published in Official Gazette no. 128 of July, 23 2019 and entered into force on July 24, 2019. It will fully be in effect from July 1, 2020 (with reporting obligation also covering previously applied cross-border tax arrangements).

The implemented law mirrors the text of the Directive and does not expand the scope of the Directive. The practical aspects are still unclear (i.e. how deeply the reporting will go into detail or how the rules will be enforced).

Any violation of the obligation to report cross-border tax arrangements shall be sanctioned with a default penalty ranging from approx. EUR 1,500 to EUR 15,000.

Lithuania

On July 16, 2019, the Lithuanian Parliament adopted a bill to transpose the core provisions of Directive 2018/822 on DAC6 into Lithuanian national law. The bill has since been signed by the Lithuanian President and the amendments will enter into force on July 1, 2020.

The provisions enacted largely reflect the core provisions of the Directive and include a definition of an intermediary and the conditions that must be satisfied to qualify as an intermediary. The provisions also impose an obligation on intermediaries and “interested concerned taxpayers” to provide information about reportable cross-border arrangements to the Lithuanian tax authorities. Penalties of EUR 1,820 to EUR 5,590 will apply for failing to comply with MDR requirements. These penalties could rise to EUR 3,770 – EUR 6,000 for repeated infringements.

The detailed reporting rules (e.g. reporting timelines, the application of the hallmarks, reporting information required and details of waivers for legal professional privilege) remain under the consideration of the Lithuanian tax authorities and are expected to be announced in advance of the December 31, 2019 deadline envisaged under the Directive. No official guidance is currently available.

Other implementation updates

On October 10, 2019, the Austrian DAC6 implementation bill entered into law. This followed the Slovakian President signing the Slovakian DAC6 implementation bill into law on October 1, 2019 and the implementation of mandatory disclosure rules into Slovenia domestic law on June 22, 2019. For further information on each jurisdiction, please refer to our [second](#) special edition tax flash.

The Cypriot tax authorities launched a public consultation on draft legislation to implement DAC6 into local Cypriot law on October 22, 2019. The consultation is due to run until November 12, 2019. In addition, a public consultation was launched on October 21, 2019 in Spain on three new models for reporting cross-border arrangements and will run until November 11, 2019. The Netherlands also published further guidance on the implementation of DAC6 reporting requirements into Dutch national law on October 18, 2019.

Status of Implementation across Member States

At the date of this publication, seven EU Member States (Austria, France, Hungary, Lithuania, Poland, Slovakia and Slovenia) have implemented mandatory disclosure rules based on the provisions of DAC6. Poland has implemented the provisions of DAC6 with effect from January 1, 2019 with the first important reporting deadline being June 30, 2019. Mandatory disclosure rules for the other six countries will enter into force on July 1, 2020 in line with the requirements of the Directive.

Seventeen countries (Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom) have approved or published draft legislation for consultation or are discussing proposals within their Ministries of Finance. A further special edition tax flash will be published shortly and will include updates on a number of these countries.

The remaining four Member States are expected to publish draft legislation later in the course of this year.

Mandatory Disclosure Rules outside the EU

Channel Islands

On October 1, 2019, a briefing note was issued by the Guernsey Revenue Service on Mandatory Disclosure Rules on Common Reporting Standard (CRS) Avoidance Arrangements and Offshore Opaque Structures. This followed the launch of a public consultation process in Jersey which is running from September 23, 2019 to November 1, 2019.

Guernsey and Jersey have committed to introducing mandatory disclosure legislation by the end of 2019.

The main focus of the proposed legislation is to ensure that Guernsey and Jersey meet their requirements under CRS. As such, a disclosure requirement for intermediaries will arise for CRS Avoidance Arrangements and Offshore Opaque Structures, both of which are key elements of Action 12 of the OECD BEPS agenda.

In both documents, the definition of an intermediary is split between (i) a "Promoter" and (ii) a "Service Provider". A Promoter is defined as any person responsible for the design or marketing of a CRS Avoidance Arrangement or Opaque Offshore Structure. A Service Provider is defined as any person that provides Relevant Services in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure in circumstances where the person providing such services could reasonably be expected to know that the Arrangement or Structure is a CRS Avoidance Arrangement or an Opaque Offshore Structure.

The briefing note and consultation document clarify that the definitions of "CRS Avoidance Arrangement" and "Opaque Offshore Structures" will align with the definitions of OECD BEPS Action 12. There are also references to further guidance (seven specific scenarios for CRS Avoidance Arrangements and five scenarios for Opaque Offshore Structures) being available under OECD BEPS Action 12.

A Service Provider will only be required to disclose an arrangement if it is "reasonable to conclude" that the intention of the arrangement is to circumvent CRS or to obscure beneficial ownership. The "reasonable to conclude" test is not anticipated to apply in the case of Promoters. It is intended that the Crown Dependencies will work together to issue joint guidance for Service Providers on the application of the "reasonable to conclude" test. Five scenarios are provided as indicative examples which could be incorporated into future guidance.

Mandatory disclosure reporting will be required within 30 days of the CRS Avoidance Arrangement or Opaque Offshore Structure being made available by a Promoter or, in the case of a Service Provider, within 30 days of the services first being provided. The briefing note indicates that a provision for legacy disclosures will also apply to Promoters in respect of CRS Avoidance Arrangements created on or after October 29, 2014. Reporting in these cases will be required within 180 days of the date on which the mandatory disclosure regime enters into force.

For additional information, the briefing note issued by the Guernsey Revenue Service is available [here](#). The Jersey public consultation document is available [here](#).

Mexico

A bill introducing a form of mandatory disclosure reporting was approved by the Mexican Chamber of Deputies on September 8, 2019 as part of a wider economic package for the year 2020. The bill was approved by the Mexican Chamber of Deputies on October 16, 2019 and is expected to be approved by the Mexican Senate before October 31, 2019. The proposed law would oblige tax advisors that are responsible for or involved in the design, organization or implementation of a reportable scheme to submit informative returns in February on an annual basis.

For more information, please refer to the following [newsletter](#).

Norway

On June 27, 2019, a Norwegian Official Report ("NOU") was published proposing to introduce mandatory disclosure rules in Norway. The NOU is currently subject to a public consultation process which will run until December 2, 2019. The proposal is largely in line with DAC6 but includes certain adjustments and exemptions. The NOU suggests that both domestic and cross-border arrangements should be included.

EU Tax Centre comment

Member States are required to implement DAC6 regulations into national law by December 31, 2019. Based on the initial drafts of the anticipated regulations there is still much to be clarified, particularly some of the more practical aspects such as how to deal with multiple disclosure obligations and how to interpret terms that are not defined in the Directive. There is neither a requirement nor a deadline to issue specific guidance or explanatory notes to guide intermediaries in the practical application of regulation. However, it is anticipated that some Member States will issue further guidance during the first six months of 2020.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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