



DAC 6 – EU Mandatory Disclosure Regime: An Irish Perspective

8 June 2020

What is DAC6?

Directive 2018/822 (the “Directive” and “DAC6”) is an EU Directive that amends Directive 2011/16, and is in the process of being implemented across the EU, and which requires the disclosure of information relating to certain cross-border arrangements to the tax authorities of EU Member States.

Although DAC6 has been introduced to increase tax transparency across the EU and to fight certain aggressive tax planning arrangements, in some cases, it may also require disclosure where a tax advantage is not a main benefit of the arrangement in question. The Finance Act 2019 contains the Irish implementing provisions.

Does DAC6 apply to your business?

DAC6 reporting obligations apply to “reportable cross border arrangements”. For an arrangement to be cross-border, it must concern either more than one Member State or a Member State and a third country – this means that while DAC6 is primarily an issue for EU-based taxpayers, it is also potentially relevant to non-EU taxpayers where they are party to an arrangement with an EU nexus. For a cross-border arrangement to be reportable, it must fall within one of the “hallmarks” outlined in the Directive.

Who is required to report?

The new reporting obligations apply primarily to intermediaries, with secondary obligations falling on the taxpayers themselves in cases where there is no intermediary (or no EU intermediary) or the intermediary is exempted from reporting due to legal professional privilege.

An intermediary is:

- someone with an EU connection who designs, markets, or organises, facilitates or manages the implementation of a reportable cross- border arrangement; or
- anyone who provides aid, assistance or advice in respect of a reportable cross-border arrangement, or anyone who could be reasonably expected to know that such aid, assistance or advice relates to a reportable cross-border arrangement.

Broadly, intermediaries are likely to include professional advisors such as legal advisors (including in-house counsel), accountants, tax advisors, banks and financial advisors. An intermediary is not required to report information over which a claim of legal professional privilege could be maintained by them in legal proceedings. If this is the case, the obligation to report will shift to another intermediary, or the relevant taxpayer if there are no other intermediaries. However, an intermediary relying on legal professional privilege must, without delay, notify the relevant parties to whom the obligation to report now rests. Where arrangements involve multiple intermediaries, an intermediary will be exempt from reporting where they receive written confirmation from another intermediary that the necessary reporting has been completed as well as the reference number assigned to the arrangement by Irish Revenue, for example when reported in Ireland.

What is a reportable cross-border arrangement?

Although not defined in the Directive, the term "arrangement" is broadly defined in Irish legislation and could include all types of arrangements, agreements, payments, undertakings, schemes, and structures, whether express or implied, or legally enforceable. An arrangement will be "cross-border" if it concerns an EU Member State and any other jurisdiction, and where at least one of the following conditions is met:

- not all the participants are tax resident in the same jurisdiction
- a participant is tax resident in more than one jurisdiction
- a participant has a permanent establishment ("PE") in another jurisdiction which is involved in the arrangement
- a participant carries on an activity in another jurisdiction without being tax resident or creating a PE in that jurisdiction
- the arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

A cross-border arrangement will be reportable if it falls within any one of the five main categories of "hallmarks", as outlined below. For some of the hallmarks, an arrangement will only become reportable if the arrangement also satisfies a "tax benefit" requirement. The hallmarks are as follows:

Category A - Generic hallmarks linked to the tax benefit requirement: arrangements that give rise to performance or contingency fees or, involve mass-marketed standardised schemes.

Category B - Specific hallmarks linked to the tax benefit requirement: this includes certain tax planning features, such as buying a loss-making company to exploit its losses in order to reduce tax liability, arrangements aimed at converting income into other categories of revenue in order to obtain a tax benefit or, the round tripping of funds.

Category C - Specific hallmarks related to cross border transactions; some of these hallmarks are also subject to the tax benefit requirement: for example, deductible cross-border payments between associated enterprises where the recipient is essentially subject to no tax or almost zero tax. In addition, deductions for the same depreciation on a specific asset claimed in more than one jurisdiction.

Category D - Specific hallmarks concerning automatic exchange of information and beneficial ownership: if an arrangement has the effect of undermining the rules, or absences of, on beneficial ownership, Directive 2014/107/EU (mandatory automatic exchange of tax information) or, any other equivalent agreement on automatic exchange of financial account information.

Category E - Specific hallmarks concerning to transfer pricing: the use of unilateral safe harbours, the transfer of hard-to-value intangible assets where no reliable comparables exist and the projection of future cash flows or income are highly uncertain and, business re-organisations that lead to a significant impact on the projected annual earnings before interest and taxes.

When is reporting due to take place?

The first reports were due to be submitted during July / August 2020, with the various tax authorities due to exchange information reports on 31 October 2020. Due to the severe disruption caused by the COVID-19 pandemic, the European Commission has proposed to defer the DAC6 reporting timelines for a period of three months as follows:

Reporting Obligation	Original Date	Proposed Deferred Date
Reporting of the 'historical' cross-border arrangements (ie arrangements that became reportable from 25 June 2018 to 30 June 2020).	31 August 2020	30 November 2020

Post 1 July 2020 arrangements*	30 day reporting timeframe beginning 1 July 2020	30 day reporting timeframe beginning 1 October 2020
First exchange of information by tax authorities on reportable cross-border arrangements.	31 October 2020	31 January 2021

*As noted, post 1 July 2020 arrangements are subject to a 30 day reporting timeframe and must be reported to Irish Revenue within 30 days of the earliest of the following:

- the arrangement being made available for implementation
- the arrangement being ready for implementation, or
- the first step in implementation of the arrangement being taken.

In proposing an initial three month deferral to the reporting deadline, the European Commission has also proposed that a further three month deferral may be implemented if exceptional circumstances persist and COVID-19 restrictions remain in place in EU Member States. These proposals will be welcomed by intermediaries and taxpayers, many of whom have extensive work to do in collecting information and coordinating reporting.

Failure to comply with DAC6

DAC6 did not specify the penalties for non-compliance by intermediaries or taxpayers, leaving these to be defined by the domestic legislation of each EU Member State. In Ireland, the level of penalties depends on the type of breach involved.

In respect of both intermediaries and taxpayers, Finance Act 2019 provides that in certain cases a penalty of up to €4,000 may apply with a further penalty of up to €500 per day for each day on which the failure continues.

Furthermore, the mere failure by the taxpayer to include the reference number assigned to a reportable cross-border arrangement in a return made by a taxpayer under the new rules exposes such person to a penalty of up to €5,000.

If you would like further information on the Irish implementation of DAC6, [please contact a member of our tax team.](#)

For further information, please contact:



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