



Euro Tax Flash from KPMG's EU Tax Centre



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EU Mandatory Disclosure Requirements – update

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As previously reported in [Euro Tax Flash 369](#), 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 second Special Edition Euro Tax Flash summarizes the implementation of the new rules into Member States' domestic legislation to date and the state of play at the level of the EU institutions.

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 (“DAC 6”) and will apply from July 1, 2020.

DAC 6 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 memo](#) for further details and to the [first Special Edition Euro Tax Flash](#) for our previous updates on implementation of DAC 6 into domestic legislation.

Implementation into domestic legislation

Although EU Member States have until the end of 2019 to implement DAC 6 into domestic legislation, several jurisdictions have already published draft legislation or introduced mandatory disclosure rules.

Austria

Although no official documents are available yet, it is likely that DAC 6 will be implemented in Austria as follows:

- **Scope:** Only direct taxes will be covered by the reporting obligations. Austria will not implement reporting obligations for domestic arrangements.
- **Intermediaries** who are subject to legal professional privilege in Austria will not be subject to the reporting obligation under DAC 6. This includes tax advisors and lawyers; it is, however, not yet clear whether banks will also be exempted from the reporting obligation. Intermediaries that benefit from the reporting waiver may still file information on reportable cross-border arrangements if they are authorized to do so by their clients.

Please note that the waiver for intermediaries subject to legal professional privilege does not apply to marketable arrangements, which will have to be reported by intermediaries irrespective of the status of the intermediary and even where a taxpayer is not yet involved.

- The current status of discussions on the level of **penalties** for failure to report is that these will take the form of a financial criminal offense – similar to the penalty for failure to file Country-by-Country reports (currently up to EUR 50,000).
- The Austrian Ministry of Finance plans to provide further **guidance** through comments on the DAC 6 legislation or via subsequent ministerial decrees.

Draft DAC 6 implementation legislation is expected between April and June 2019.

Please note that the above information is based on preliminary discussions and is therefore subject to change.

Germany

The German Ministry of Finance has drafted a bill for the implementation of DAC 6. The text, which is not official at this time, implements DAC 6 into domestic legislation and also introduces an obligation to report specific domestic tax planning arrangements.

Cross-border tax arrangements

The draft bill mirrors the text of DAC 6. An intermediary is required to report cross-border tax arrangements that contain specific hallmarks laid down in the draft. These hallmarks are in line with those laid down in DAC 6. The main benefit test must be satisfied if certain hallmarks are met.

All intermediaries are required to submit data regarding the general scope of the tax planning arrangement on a “no name” basis to the Federal Central Tax Office. For intermediaries who are legal professionals such as auditors, lawyers and tax advisors, the reporting obligation regarding the implementation of the tax planning arrangement can partly shift to the “user” of the tax arrangement due to professional confidentiality obligations, if applicable. This is generally the case if the legal professional is not discharged of their professional confidentiality obligation by the user of the tax arrangement under specific prerequisites. Such professionals are required to submit the data they hold on the implementation of the arrangement to the user of the tax arrangement that is then charged with providing the data to the Federal Central Tax Office. If there is no intermediary involved in the reportable arrangement, the user must regularly report all data to the Federal Central Tax Office.

Reported data will automatically be exchanged with the tax authorities of the other Member States. In line with the requirements of DAC 6, information on arrangements the first step of which was/is implemented between June 25, 2018 and July 1, 2020 is to be submitted within two months of June 30, 2020. As from July 1, 2020, arrangements must be reported to the Federal Central Tax Office within 30 days of the day when the arrangement is made available for implementation, is ready for implementation, or when the first step in its implementation has been made, whichever occurs first.

An intentional or careless violation of the obligation to report qualifying cross-border arrangements will incur a penalty of up to EUR 25,000 if the first step is implemented after June 30, 2020.

Domestic tax planning arrangements

The parameters of DAC 6 are also used with regard to domestic arrangements. The hallmarks that trigger the obligation to report are similar to the DAC 6 hallmarks that apply together with the main benefit test. However, an additional hallmark is being introduced, which applies if the same facts relevant to taxes are attributed to multiple users of the tax arrangement or other taxpayers or multiple times to one user of the tax arrangement or one taxpayer (for example, double depreciation of the same asset). For all hallmarks the main benefit test applies. The scope of the reporting rules only includes taxes on income or net worth, trade tax, inheritance or gift tax and real estate transfer tax.

Domestic tax arrangements only need to be reported if at least one user of the tax arrangement meets the following criteria:

- For individuals: the positive earnings of the user exceed EUR 500,000 in one calendar year (in the case of a joint assessment the earnings of each spouse are crucial);
- For corporates:
 - o The user belongs to a group of companies within the meaning of the German Stock Corporation Act; or
 - o The user is, together with other domestic companies, governed or uniformly managed by a foreign individual or legal entity, a majority of persons, a foundation or other special purpose fund or is economically linked to a foreign company, or
 - o The user is subject to subsequent tax audits.

All intermediaries are required to submit data regarding the general scope of the tax planning arrangement on a “no name” basis to the Federal Central Tax Office.

The rules related to reporting of domestic arrangements will apply as of July 1, 2020, where the first step of the arrangement is implemented after June 30, 2020. An intentional or careless violation of the obligation to report domestic tax planning arrangements will incur a penalty of up to EUR 25,000, if the first step is implemented after June 30, 2020.

Italy

Public consultation on the Italian text, which mirrors DAC 6, ended in September 2018. Parties that made submissions during the consultation process were invited by the Italian Ministry of Economy and Finance to a meeting that was held in Rome on January 29, 2019. Below is a high-level summary of the main topics discussed during that meeting:

- It was clarified that **intermediaries** will be subject to a reporting obligation under DAC 6 when designing or autonomously managing the implementation of a reportable cross-border arrangement. Intermediaries that provide assistance or advice on a reportable cross-border arrangement are subject to reporting obligations only with respect to information that is within their possession.
- Cross-border arrangements may be reportable even when the tax benefit arises in a **non-EU state** that allows an effective exchange of information with Italy, provided that at least one of the participants is resident in Italy. Therefore, even when a taxpayer that participates in the reportable cross-border arrangements is not resident in Italy, the Italian intermediary is nevertheless subject to the reporting obligations. It appears there may be an exception to this rule if the participant is an Italian permanent establishment (PE) of a foreign entity. In such cases, the cross-border arrangement should be reportable only when the tax benefit arises at the level of the Italian PE of the foreign entity.
- The Italian tax authorities do not intend to automatically exchange certain categories of sensitive **information** (e.g. information regarding intellectual or industrial property rights, trade secrets etc.) with other EU tax authorities.
- **Administrative penalties** ranging from EUR 2,000 to EUR 21,000 will apply for failure to comply with the reporting obligation. However, 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.

Please note that the above information is based on high-level discussions with the Italian Ministry of Economy and Finance and may be subject to amendments. The final version of the Legislative Decree implementing DAC is expected shortly. The Ministry will also publish a non-regulatory decree to set out the technical rules for interpreting the hallmarks and also the criteria for verifying when the qualifying arrangements are aimed at obtaining a tax advantage. Further public discussions on the decree are being considered by the Ministry.

The Netherlands

On December 19, 2018, the Dutch government launched an internet consultation offering interested parties the opportunity to respond to the bill to implement DAC 6 into Dutch law. The proposal that was subject to public consultation is very much aligned with the text of DAC 6. The Dutch government has, however, clarified a number of points:

- **Intermediaries** do not have a due diligence obligation and will only be required to report based on the information that is available to them, without having to investigate further.
- It is up to the intermediary 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. A tax advantage in the main benefit test includes taxes imposed by non-EU Member States.
- It is the firm (intermediary), and not individual advisors, that has a reporting obligation.

Click [here](#) for a summary of the proposal published by KPMG Meijburg & Co.

Poland

As previously reported, mandatory disclosure rules that go beyond the text of DAC 6 apply in Poland as of January 1, 2019. On January 31, 2019, the Polish Ministry of Finance published guidelines for the application of the new reporting rules, which contain a list of arrangements that should generally not be treated as reportable. The list includes activities such as compliance, litigation and transfer pricing services provided by intermediaries in the ordinary course of business. However, the exception does not apply where any recommendation provided by the intermediary with respect to the taxpayer’s activities may lead to the creation of a tax benefit.

Polish legislation defines two categories of intermediaries: promoters and supporters, which largely correspond to the primary and secondary definitions of an intermediary under DAC 6. The distinction is generally made based on the scope and extent of the advice provided and the role of a particular advisor in the reportable arrangement. The scope of the reporting obligation and the reporting deadline is different for the two types of intermediaries.

It has also been clarified that individual employees of entities that qualify as intermediaries will not in general be treated as intermediaries themselves. However, this rule does not apply to key decision-making individuals (e.g. partners, directors, shareholders), or to self-employed individuals. In-house advisors / lawyers, i.e. employed by qualifying taxpayers, should not generally be treated as intermediaries. However, a reporting obligation may arise where such individuals provide advice to other entities within the group. In such cases their employer – or,

in some instances, even the individuals – may qualify as a promoter. Furthermore, key decision-making individuals (for example executives), who provide advice to several group entities may be treated as intermediaries.

Intermediaries (that exceed the revenue threshold) are required to set up internal procedures to ensure compliance with the mandatory reporting rules. This obligation also applies to taxpayers that e.g. act as service providers for other group entities and therefore qualify as intermediaries themselves.

The Guidelines also introduce four types of reporting forms for MDR purposes. With the exception of the form containing information on the use of an arrangement by a particular taxpayer (which must be signed by all members of the management board of corporate taxpayers), the forms may be filed and signed by a proxy.

It has also been clarified that the main benefit test may be met when the tax benefit arises outside of Poland. In addition, it has been confirmed that non-Polish intermediaries may also be subject to a reporting obligation in Poland.

Several of the DAC 6 hallmarks are likely to have a broader application in Poland, for example:

- Hallmark D2 – related to the circumvention of beneficial ownership disclosure rules, lists three conditions that must be cumulatively met for the hallmark to apply. Under the Polish MDR Guidelines, it is sufficient for an arrangement to meet one of the listed conditions. It remains to be clarified how this hallmark will be applied in practice.
- Hallmark B2 – conversion of income into a category taxed at a lower level, has been extended to arrangements that lead to a “change of taxation rules”. This wording has not yet been sufficiently clarified.

Polish legislation also introduces “other specific hallmarks” in addition to those listed in DAC 6. The application of these additional hallmarks has not yet been sufficiently clarified; it has, however, been confirmed that payments in excess of the value thresholds provided by these hallmarks should generally not trigger a reporting obligation, unless made as part of a reportable arrangement.

As regards the previously announced transitional period for arrangements the first step of which was implemented in 2018 (i.e. after June 25 for arrangements as defined under DAC 6 and November 1 for other arrangements as defined under Polish legislation), the following information has been clarified:

- There is no reporting obligation for arrangements initiated before the above dates, even if the tax benefit is realized in 2019 or later;
- There is no reporting obligation for arrangements initiated before the above dates even if their implementation continues in 2019 or later. Please note, however, that arrangements should be analyzed on a case-by-case basis in order to determine whether activities performed in 2019 or later should be treated as separate arrangements and therefore separately subject to reporting.

The following penalties apply for failure to meet the reporting deadline:

- Up to February 28: no penalties for late reporting;
- Up to April 30: reduced (or no) penalties for late reporting.

It remains to be seen how these rules apply in practice, as there is no precedent for such a “grace period” in terms of procedural mechanism.

Please note that even though the text published on January 31 is the final version of the Guidelines, Polish procedural law allows for future amendments.

Slovakia

Draft legislation for the implementation of DAC 6 into Slovak law was published on January 30, 2019 and submitted for public comment. Based on a high-level review of the draft, it appears that mandatory disclosure requirements in Slovakia will not go beyond the minimum standard set in DAC 6.

The Slovak government intends to uphold **legal professional privilege**, although the relevant section of the draft law is somewhat unclear. The waiver for legal professional privilege will apply to tax advisors, auditors and banks. Lawyers/advocates are not explicitly mentioned in the law, but noted in the explanatory report.

The draft legislation is expected to be submitted to the government for approval once the public consultation process has been completed, by the end of March. The law may then be approved by the government in April 2019, followed by the approval of the Slovak Parliament in September or October of this year.

Slovenia

The Slovenian Ministry of Finance submitted the draft bill implementing DAC 6 to the public for comments by January 20, 2019. Highlights of the draft bill include:

- **Definitions** of terms and **hallmarks** are in line with the text of DAC 6.
- It has been clarified that the **main benefit** or one of the main benefits of the arrangement is considered to be obtaining a tax advantage where it is unlikely the arrangement would have been implemented were it not for the expectation of obtaining such a tax advantage.

When considering whether the main benefit of the arrangement is obtaining a tax advantage, the expected tax advantage should be compared with other non-tax related (business) advantages of the arrangement (i.e. expansion of the business, reduction of production costs, etc.). The tax advantage is to be considered essential where any other purpose that is or could be attributed to the arrangement or series of arrangements appears to be negligible.

- When deciding whether to report an amendment to an **existing arrangement**, it should be determined whether the original arrangement contained the respective hallmark. If this is the case, the amended arrangement should, in principle not be subject to reporting.
- **Penalties** of up to EUR 30,000 are being considered. The amount would increase to up to EUR 150,000 if non-reporting qualifies as a serious tax offense.

Sweden

On January 15, 2019, the Swedish MDR Committee presented its draft proposal to the Swedish government. Highlights of the draft proposal include:

- It is proposed that the scope of the reporting obligation be extended to include **domestic arrangements** that concern income taxes and tax yields on pension funds.
- An **exemption** is proposed for domestic arrangements where the effects “are a direct and foreseen effect of tax legislation”. This exception has not yet been clarified, but might suggest that when an arrangement leads to the outcome envisaged by the legislator, it would not have to be reported. Further exemptions may be allowed via subsequent regulations for arrangements that are already well-known to the tax authorities.
- Only Swedish **intermediaries** will be required to report in Sweden. It is proposed that members of the Swedish Bar Association will only report insofar as applicable attorney-client privilege rules allow.
- It has been confirmed that **users** of reportable arrangements will be required to report when an arrangement is (i) designed in-house, (ii) the intermediary does not have a link to the EU, or (iii) the intermediary is unable to submit a full report due to attorney-client privilege rules.
- The proposed **initial penalty** for non-compliance is SEK 15,000 (approx. EUR 1,500) for intermediaries and SEK 7,500 (approx. EUR 750) for users, followed by a second reporting charge if the obligation has not been met within 60 days (at least SEK 50,000 for advisers and SEK 25,000 for users). Higher penalties may apply if the breach occurs in the business activities of the person required to report (a maximum of SEK 500,000 for advisers and SEK 250,000 for users). The determination of the amount of the penalties therefore means penalties at the minimum rate will be imposed on individuals who breach the reporting requirement in their own capacity, regardless of wealth, whereas penalties will be imposed on enterprises and advisors in proportion to their turnover. The penalties do not apply to failure to report arrangements the first step of which was taken between June 25, 2018 and June 30, 2020.

Please note that this is a draft proposal from the appointed MDR committee and not the official position of the Swedish government. The final legislation could therefore differ from the Committee’s proposal as summarized above.

Most of the remaining Member States are in the process of drafting DAC 6 implementation legislation and are expected to make this legislation public in 2019.

News from the EU institutions

The European Commission has launched a public consultation on the draft DAC 6 Implementation Regulation – Practical arrangements for Member States for implementing administrative cooperation in the field of taxation, which will close on February 14, 2019. The draft Regulation is an amendment to Regulation EU 2015/2378 and is generally in line with arrangements for the automatic exchange of information among tax authorities that are

currently in place with respect to previous versions of DAC. Items defined under points (b) and (c) of Article 8ab (14) of DAC 6 will be listed in English in the automatic exchange of information form:

- (b) details of the hallmarks that make the cross-border arrangement reportable;
- (c) a summary of the content of the reportable cross-border arrangement.

Please note that the form will also include an additional field for a unique reference number to be assigned to each reportable cross-border arrangement by the tax authorities to which an arrangement is first reported. The practical arrangements for the process of allocating the reference number and for those with whom the reporting obligation lies to inform the other parties of this number have not yet been set out.

EU Tax Centre comment

The European Commission's intention to introduce a unique identification number should help tax authorities identify all the information pertaining to an arrangement that is reported multiple times. However, it remains to be seen how the system will work in practice and whether it will add another facet to an already complex piece of legislation.

It is also worth noting that a number of Members of the European Parliament have called on all Member States to extend the reporting obligation to purely domestic cases. This was done through a proposed amendment to the draft Report on Financial Crimes, Tax Evasion and Tax Avoidance of the European Parliament's TAX3 Committee. It remains to be seen whether this proposal will be adopted in the final version of the report and formally embraced by the European Commission. Given that several Member States have expressed their intention to apply the MDRs to domestic arrangements as well, we cannot exclude a future amendment in this respect to the text of DAC 6.

KPMG's EU Tax Centre is working together with member firms of the KPMG network to develop an MDR technology solution that will assist interested organizations in assessing, tracking and reporting potentially reportable cross-border arrangements. For further details, please refer to your local KPMG tax advisor.

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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