



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 (please refer to [previous updates](#) on this topic), 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 fourth 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](#) and [third](#) special addition 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.

The United Kingdom

On Monday July 22, 2019 Her Majesty's Revenue and Customs (HMRC) issued draft regulations implementing the DAC6 Mandatory Disclosure rules alongside a consultation document. The documents provide further details for intermediaries and taxpayers who, as of July 1, 2020 may be required to disclose to HMRC details of certain types of cross-border arrangements and structures. Through the draft regulations and consultation document, HMRC has signaled various clarifications. These are important developments given that DAC6 is already in play. The consultation also states that Brexit is not expected to affect the process of implementation of these rules (or lead to their later repeal).

The draft regulations do not expand the scope of the Directive and pull in DAC6 definitions in many places (for example for the definition of 'hallmarks'). In line with the text of DAC6, for the rules to apply, a cross border arrangement must exhibit at least one of a number of hallmarks. Some, but not all, of these require a tax advantage to arise before the hallmark can apply, i.e. the main benefit test. As expected, the consultation confirms that tax advantages are not limited to those arising in the EU. The reporting intermediary or taxpayer must identify tax advantages in all relevant jurisdictions.

However, HMRC have taken the view that a 'tax advantage' will only be considered to arise where the obtaining of the advantage "cannot reasonably be regarded as consistent with the principles on which the relevant provisions that are relevant to the reportable cross-border arrangement are based and the policy objectives of those provisions".

One of the most useful confirmations in the consultation is in relation to Hallmark E on transfer pricing. Here the document confirms that it is intended to seek disclosure of arrangements that are contrary to the OECD's Transfer Pricing Guidelines. This may help limit the application of this hallmark somewhat given that the main benefit filter does not apply to this hallmark.

Further, the draft regulations anticipate that reference numbers will be issued for disclosed arrangements. It also anticipates that UK taxpayers will be required to report use of an arrangement by disclosing the reference number to the authorities - in most cases this will be via a white space disclosure on the tax return.

With respect to penalties, the draft regulations bring in an approach in line with the existing domestic regime for Disclosure of Tax Avoidance Schemes (DoTAS), the highlight of which is that penalties for missed or late disclosures is up to a maximum of GBP 600 per day. The

penalty is imposed by a Tribunal and can be increased or reduced at the Tribunal's discretion subject to a maximum penalty of GBP 1 million (and a minimum of GBP 0).

Please note that this is draft legislation. The final legislation could therefore differ from the position summarized above.

Additional information on the UK draft is available [here](#).

Denmark

On July 8, 2019 the Danish Government launched a public consultation on draft legislation implementing DAC6 legislation. Based on the draft bill, there will be no extension to domestic transactions or to taxes excluded by the Directive. Additionally, intermediaries will only be required to report on information already in their possession. As such, there will not be an obligation to obtain additional information, such as additional identification information from taxpayers, in order to satisfy their reporting requirement.

The draft further details the scenarios in which an intermediary would be required to report in Denmark. According to the draft, a reporting obligation is triggered if an intermediary is Danish by virtue of residence, permanent establishment, incorporation, or registration with a professional association. An intermediary that does not meet one of the four criteria should not be required to report in Denmark.

The draft 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 have information in addition to what has already been disclosed are only required to report the incremental details.

As regards legal professional privilege, it is envisaged that a waiver will be granted to lawyers in respect of confidential client information.

Progressive penalties, based on turnover, will apply in line with fines imposed for violating the Danish Anti-Money Laundering Act. The draft sets a guiding minimum for each category of approximately EUR 6,700 for the lowest bracket and approximately EUR 54,000 for the top bracket. Additionally, it limits the maximum percentage that the fine can be increased by to 50% for the first bracket and 700% for the top bracket. Ultimately, it will be up to the Danish courts to determine fines and penalties, taking into account the suggested minimum and maximum, but also by reference to the value of the tax advantage, the circumstances of the case and any aggravating or mitigating circumstances.

The same rules on penalties apply to intermediaries that benefit from legal professional privilege, but fail to inform the other parties of the waiver.

More detailed clarifications are anticipated in the administrative regulations that have not yet been prepared by the Danish tax authorities, but the draft provides some clarification on certain terms in DAC6. For example, it is clarified that the value of an arrangement which is to be reported to the tax authorities refers to the value of the transaction and not to the value of the

tax benefit. With regards to the interpretation of the terms, arrangement and tax benefit, the draft law refers to the European Commission Recommendation of December 6, 2012 on aggressive tax planning (2012/772/EU) for guidance. The Recommendation defines an arrangement as any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event and notes that an arrangement may involve more than one step or part.

As required under the Directive, it is envisaged that – once approved, the DAC6 implementation law will enter into force in Denmark on July 1, 2020 and the first reporting deadline will be August 31, 2020.

The law specifically states that the absence of a response from the tax authorities regarding a specific reported arrangement does not constitute implicit approval.

Please note that the Act does not apply to the Faroe Islands or Greenland and is draft legislation with a consultation period open until August 22, 2019. The final legislation could therefore differ from the position summarized above.

The Netherlands

On July 12, 2019, the bill to implement DAC6 into Dutch law was presented to the Lower House, following a public consultation that ended earlier this year.

On the basis of the bill before the Lower House and the accompanying explanatory notes, the Dutch implementation seems to mirror the text of the Directive and does not expand the scope of the directive by including additional hallmarks or taxes.

The explanatory notes submitted along with the draft legislation further clarify the Dutch interpretation of key obligations and terms. To highlight a few points:

- An intermediary can be relieved from its reporting obligation if a reportable cross-border arrangement has already been reported by another intermediary. To document that an arrangement has already been reported, intermediaries should refer to the reference number received from the reporting intermediary.
- An intermediary will not be subject to a penalty if it concludes, based on a tenable tax position, that a cross border arrangement is not reportable.
- Contrary to what was argued in the consultation stage, an arrangement that was set up to avoid double taxation may meet the main benefit test.
- Clarification is also provided in the case of multiple hallmarks.

Penalties of up to EUR 830,000 may be imposed if gross negligence or deliberate actions of an intermediary result in missed, late or inaccurate reporting.

The bill will take effect as of July 1, 2020 in accordance with DAC6. As of the effective date, reportable cross-border arrangements must, in principle, be reported within 30 days of their having been made available for implementation, being ready for implementation or the first step in their implementation was taken (whichever occurs first).

Please note that this is draft legislation. The final legislation could therefore differ from the position summarized above.

Additional information on the Netherlands draft is available [here](#).

Luxembourg

On July 26, 2019, the Luxembourg government approved the transposition bill for DAC6 implementation. The bill must now be submitted to the parliament and follow the legislative process before entering into force. It is anticipated that the full text will be made publicly available no later than September 2019.

Additional information on the Luxembourg draft is available [here](#).

Status of Implementation across Member States

At the date of this publication, Poland is the only EU Member State that has implemented mandatory disclosure rules based on the provisions of DAC6, with the first important reporting deadline being June 30, 2019

Seventeen countries (Austria, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom) have approved or published draft legislation for consultation or are discussing proposals within their Ministries of Finance. The remaining ten Member States are expected to publish draft bills later in the course of this year, most likely after the summer recess or the conclusion of local elections.

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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