



# Euro Tax Flash from KPMG's EU Tax Centre



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## **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 sixth Special Edition Euro Tax Flash summarizes the most recent implementation updates of the new rules into Member States' domestic legislation, as at November 8, 2019.

### **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 to introduce 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](#), [fourth](#) and [fifth](#) special edition tax flashes for our previous updates on implementation of DAC6 into domestic legislation.

## Implementation into domestic legislation

EU Member States have until the end of 2019 to implement DAC6 into domestic legislation. At the date of this publication, seven EU Member States (Austria, France, Hungary, Lithuania, Poland, Slovakia and Slovenia) have finalized the internal legislative process for implementation of DAC6. A broader set of mandatory disclosure rules has applied in Poland since January 1, 2019, while the other six countries will follow the July 1, 2020 application date set out in 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.

Greece, Latvia, Malta and Romania are yet to make public the text of their respective DAC6 implementation bills.

### Denmark

On November 6, 2019 the Danish Minister for Taxation presented a bill to the Danish Parliament to transpose the terms of DAC6 into Danish law. The terms of the bill are broadly in line with the draft legislation that was previously published as part of a public consultation process in Denmark. Please refer to our [fourth](#) special edition tax flash for further details.

The bill submitted to the Danish Parliament does however contain two amendments to the previous draft. While the revised bill does include a form of legal professional privilege, the scope of the exemption is very limited meaning that, in most cases, lawyers will still be required to report arrangements despite the fact that attorney-client privilege would otherwise apply.

A penalty regime has been introduced for individuals who fail to comply with their obligations under the Danish mandatory disclosure legislation and is half the level of the penalties that apply to companies. Where an individual taxpayer fails to report or reports incorrect information, the bill proposes the application of graduated penalties ranging from DKK 25,000 (approximately EUR 3,300) up to a maximum of DKK 200,000 (approximately EUR 27,000).

### Estonia

On October 3, 2019, the Estonian Government approved a DAC6 implementation bill, following the conclusion of a public consultation process. The bill has been submitted to the Estonian Parliament where it is subject to three readings (the first of which took place on November 4) before entering into law.

The main provisions of the bill align with the text of the Directive, including the descriptions of the hallmarks. The term “teabeandja” or “information source” replaces the DAC6 term “intermediary”, which we understand is primarily due to the fact that the concept of an intermediary is used elsewhere in Estonian domestic law.

Under the terms of the bill, attorneys and sworn auditors would be entitled to a waiver for legal professional privilege. However, to the extent that legal professional privilege applies, the “teabeandja” is required to notify any other intermediaries or relevant taxpayers that the waiver applies. The Estonian Bar Association Act will also allow a client, by written consent, to exempt an attorney from the obligation to maintain professional secrecy which, in turn, would enable the attorney to report the arrangement.

Penalties of up to EUR 3,300 will apply where a “teabeandja” fails to submit information correctly. The penalty will be capped at a maximum of EUR 1,300 for a first time offense and EUR 2,000 thereafter. Fines of up to EUR 3,200 would apply where the offense relates to a failure to comply with obligations set out in the Estonian Tax Information Exchange Act.

## Finland

On October 31, 2019, the Finnish Government presented a bill to the Finnish Parliament for the implementation of DAC6 into Finnish legislation.

The bill does not contain any significant changes compared to the earlier discussion draft circulated in June 2019 (please refer to the [third](#) special edition tax flash), i.e. the draft bill generally mirrors the text of DAC6. Alongside the draft legislation, guidance was also published which clarifies the interpretation of key obligations and terms by the Finnish authorities.

The draft legislation contains definitions for an “intermediary” and a “Finnish intermediary”. The guidance notes that the term “intermediary” could include lawyers, auditors, financial advisors and consultants who, as part of their business, provide services related to reportable arrangements.

The requirement to report arrangements in Finland only applies to intermediaries with a local nexus in Finland and to “Finnish taxable persons”, with a nexus in Finland.

The guidance accompanying the bill clarifies that the main benefit test will also apply to non-EU tax advantages. The main benefit test would be objective and not dependent on whether the tax benefit was in fact realized. Guidance further clarifies that, where the arrangement has been approved previously by case law and tax practice and the arrangement does not conflict with applicable law or procedures, the main benefit test would not be considered to be met.

Additional guidance on the application of the hallmarks accompanies the draft bill. In particular, the guidance clarifies that, in relation to:

- *Hallmark A.1 (confidentiality clauses)*, the main benefit test would not be met where a confidentiality clause is included solely for competitive reasons.
- *Hallmark A.3 (standardized contracts)*, the main benefit test would only be satisfied where the tax benefit was the principle or one of the principle benefits of the arrangement. An example of a mortgage from a financial institution not satisfying the main benefit test is provided.

- *Hallmark B.1 (loss-making company acquisition)*, an indicator would be a transaction of an artificial nature, the purpose of which would be exclusively or almost exclusively to obtain a tax advantage.
- *Hallmark B.2 (income conversion to achieve a reduction in tax)*, the fact that one option is treated more favorably from a tax perspective than an alternative option should not, by itself, give rise to a reporting obligation.
- *Hallmark B.3 (circular arrangements)*, the hallmark could apply to situations where funds are circulated through another jurisdiction in order to qualify for preferential tax treatment for foreign investment.
- *Hallmark C.1(d) (preferential tax regime)*, the term “preferential tax regime” could be interpreted in a similar manner to the analysis of a preferential tax regime in the OECD BEPS Action Plan (Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance).
- *Hallmark C.3 (double taxation relief)*, an example is provided of a company being eligible for multiple withholding tax credits due to tax treatment in third countries.

The law is expected to enter into force on January 1, 2020 and would apply to arrangements made available for implementation on or after July 1, 2020, in line with the provisions of DAC6.

## Ireland

On October 17, 2019, proposed legislation to implement DAC6 was included in the Irish Finance Bill 2019. The scope of the proposed legislation is closely aligned with the text of DAC6. In particular, a number of definitions in the Irish legislation cross-references the text of DAC6, while reporting timelines follow the requirements set out in the Directive. The hallmarks for reportable transactions also are linked to Annex I of the Directive.

The proposed legislation includes definitions for terms “tax advantage” and “arrangement”. The definition of “arrangement” mirrors the definition in Ireland’s controlled foreign corporation (CFC) rules while the definition of “tax advantage” mirrors the equivalent definition in Ireland’s existing mandatory disclosure [legislation](#) for domestic transactions.

The bill includes a waiver of reporting requirements for cases where an intermediary relies on legal professional privilege. Where a cross-border arrangement is reported, the Irish Revenue Commissioners will assign a unique reference number. An intermediary is required to disclose this reference number to other intermediaries and relevant taxpayers within five days. The number must also be included in the tax return of each relevant taxpayer.

In terms of penalties, the legislation provides for fixed penalties of up to EUR 5,000 as well as daily penalties of EUR 100 / EUR 500 where certain obligations are not satisfied, with no cap applying. In addition, the Irish Courts (upon request from the Irish Revenue Commissioners) determine the penalty that applies having regard to any tax advantage obtained or the fees received by an intermediary.

The legislation will need to be approved by the Dáil (lower house of the Irish Parliament) and Seanad Éireann (the upper house of the Irish Parliament) before being signed into law by the

Irish President. It is expected that this process will be completed in December 2019. Further detailed guidance on the application of the mandatory disclosure rules is expected to be published by the Irish Revenue Commissioners in Q2 of 2020.

## The Netherlands

As previously reported in [Euro Tax Flash issue 409](#), the DAC6 implementation bill was submitted to the Dutch Parliament in July 2019.

Since then, the Deputy Minister of Finance has released an explanatory memorandum clarifying various terms and hallmarks addressed in the bill. Following questions submitted by various members of the Dutch Parliament, the Deputy Minister provided further guidance in October 2019. In particular, the guidance clarifies that:

- The Deputy Minister has taken the position that a Netherlands head office does not qualify as an intermediary if the services with respect to the reportable cross-border arrangement are provided by a permanent establishment (PE) of that office in a non-EU country. However, if the head office is involved, the head office could qualify as intermediary.
- The preparation of a tax return does not alone result in the person qualifying as an intermediary and should therefore, by itself, not give rise to a reporting obligation. Similarly, the Deputy Minister has taken the position that an auditor's audit activities, work on a due diligence project or drawing up a tax fact book should not create a reporting obligation. However, analyzing the financial reporting consequences of a reportable arrangement would make an accounting firm an assistant intermediary.
- The Deputy Minister also provides guidance on the application of a number of the specific hallmarks. In particular, the guidance notes that commercial EBIT (as opposed to EBIT for tax purposes) should be used when considering hallmark E.3. When assessing payments made to transparent entities, one should look at the participants of the transparent entity.
- In applying the main benefit test, the Deputy Minister clarified that the test will also apply to non-EU tax advantages. He links the definition of a "tax advantage" to the definition contained in the European Commission Recommendations of December 6, 2012 but notes that this definition should not be considered to be exhaustive.
- With respect to the reporting deadline, it has been clarified that a secondary intermediary should never have to report earlier than the primary intermediary (if there is one in the Netherlands).

In the recent responses provided to written questions from members of the Dutch Parliament, the Deputy Minister also announced that a dedicated MDR team had been established by the Dutch tax authorities and that it is anticipated that 20,000 reports would be filed annually in the Netherlands.

## Other implementation updates

On October 11, 2019, the Belgian Council of Ministers approved the MDR implementation draft law. The draft law is not yet public, but is expected to be released before year-end. It is expected that the implementing legislation will broadly follow the terms of DAC6.

On October 31, 2019, the Croatian Government published a bill to transpose DAC6 into Croatian domestic law.

On October 18, 2019, legislation which allows the Italian government to implement DAC6 into Italian domestic legislation by way of decree (with only a consultative role for the Parliament) was published in the Italian Official Gazette. The Legislative Decree and the accompanying Non-regulatory Decree necessary to set out the technical implementation rules are expected before the end of the year. For further information, please refer to our [third](#) special edition tax flash.

As reported in our [third](#) special edition tax flash, the Portuguese Government published draft legislation for public consultation on May 28, 2019. A revised text is expected to be published in the coming weeks.

On October 25, 2019, the Swedish tax authorities published guidance stating that the reports must be filed electronically. The exact format will be published later once the legislative process has been finalized. Parliament is expected to adopt the bill transposing the Directive into Swedish law in December 2019 (for further information, please refer to our [second](#) special edition tax flash).

### EU Tax Centre comment

Considering the broad definitions and terms included in the text of DAC6, the publication of interpretative guidance by several Member States is a very welcome development. With the finalization of implementation legislation and related guidance it is becoming evident that there will be – in some instances significant – differences in interpretation among EU jurisdictions. This appears to be the case, in particular, for the interpretation of the main benefit test (including what qualifies as a tax advantage and whether non-EU tax advantages are relevant), the delineation of a nexus for reporting parties, the clarification of the term “without delay” in the context of the notification requirement for intermediaries who benefit from a waiver from the reporting obligation. Such differences will likely lead to an increased level of complexity in practice, with potentially different outcomes when assessing the same arrangement in different jurisdictions. Intermediaries and taxpayers should therefore closely monitor implementation in relevant jurisdictions in order to identify and prepare for such differences.

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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