

# GMS Flash Alert



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## European Union – Mandatory Disclosure of Tax Arrangements

The EU Directive for Administrative Cooperation, No 6 (DAC6)<sup>1</sup> outlines a range of rules for mandatory disclosure of certain types of cross-border tax “arrangements” to relevant tax administrations. The information about the reported tax arrangements will be automatically exchanged between tax authorities.

The concept of an “arrangement” is not clearly defined. This means that in the context of global mobility, common situations – e.g., international assignments, contracts with cross-border elements for executives, arrangements around severance payments – can potentially lead to a reporting obligation.<sup>2</sup>

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### WHY THIS MATTERS

Failure to report a tax arrangement to the relevant tax administration may result in significant financial fines that vary between member states, and can present a high reputational risk. Moreover, cross-border tax arrangements assessed as “non-reportable” should be properly documented internally in the organisation. In case of an audit by the tax authorities, this documentation can serve as a so-called “defense file” to help explain how and why the organisation has found the arrangements in question to be non-reportable.

Employers need to understand the impact of DAC6, assess their activities, policies, documentation, and cooperation with external advisers and vendors, and determine how to handle reportable and non-reportable tax arrangements internally, as well as with their external advisers if they have them.

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# Selected Highlights from DAC6

## What Must Be Reported?

The following conditions must be considered when a cross-border tax arrangement is assessed:

- **Cross-border element:** an arrangement must include at least one EU member state and at least one other country or territory. The other country or territory can be an EU member state or a non-EU member state.<sup>3</sup>
- **Features in an arrangement:** an arrangement must include certain features in order to fall in the scope of DAC6. These features are referred to as “hallmarks.” In global mobility, the following hallmarks are considered to be of particular relevance:
  - **Hallmark A3:** a tax arrangement has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.
  - **Hallmark B2:** an arrangement has the effect of converting income into capital. Gifts or other categories of revenue which are taxed at a lower level or entirely exempt from taxation.
  - **Hallmark C3:** a relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

When triggered, hallmarks A3 and B2 must then also meet the so-called **Main Benefit Test (MBT)**. The MBT is an assessment of whether the main or one of the main benefits which a person may reasonably expect to derive from an arrangement is a tax advantage. If the hallmark and the MBT are met, the arrangement must be reported.<sup>4</sup>

Hallmark C3 is not dependent on the MBT. If hallmark C3 is triggered, the arrangement is reportable.

## When Is Reporting Due?

DAC6 applies to all cross-border tax arrangements enacted from 25 June 2018. Poland already implemented DAC6 from January 2019, even though the reporting was supposed to begin from 1 July 2020.

Due to the COVID-19 pandemic, only Germany and Finland have implemented DAC 6 from 1 July 2020. Austria implemented DAC 6 on 1 October 2020, and the rest of the EU member states are expected to implement DAC6 from 1 January 2021.

Deadlines for reporting of past arrangements and future arrangements are different. The deadlines for reporting in EU member states where the reporting begins from 1 January 2021, are the following:

- The reportable cross-border tax arrangements that date from 25 June 2018 until 1 July 2020, must be reported by 28 February 2021.
- The reportable cross-border tax arrangements that date from 1 July 2020 until 31 December 2020, must be reported by 31 January 2021. Please note that the exact reporting deadline varies between member states.
- The reportable cross-border tax arrangements that are made available or implemented after 1 January 2021, must be reported within 30 days.

- The so-called “market-ready” arrangements (that do not require any essential adjustments prior to implementation and are available for more than one taxpayer) must be reported every three months after 1 January 2021.

## Who Must Report?

The reporting must be done by an intermediary or the taxpayer. The primary obligation to assess and report an arrangement lies with an intermediary if it is involved in the arrangement.

An “intermediary” is a person that provides aid, assistance, or advice with respect to designing, marketing, organising, and making available for implementation or managing the implementation of a reportable cross-border tax arrangement.

For example, if an external tax adviser is involved in an arrangement, that external tax adviser would likely be an intermediary. This would depend on the role and the involvement of such adviser in an arrangement.<sup>5</sup>

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## KPMG NOTE

One of the intentions with DAC6 is to create more transparency in direct taxation and to disclose potentially aggressive tax planning. However, the rules are framed in such way that in certain circumstances they may also impact ordinary arrangements that would not be characterised as aggressive.

The volume of reportable arrangements in global mobility might be limited. However, arrangements such as different types of severance payments relating to executives are among those in the global mobility arena that will likely require a closer look/in-depth analysis in the context of DAC6.

However, the interpretation of DAC6 is local to each jurisdiction. This means that different tax authorities may take different views on whether a particular arrangement is reportable. Accordingly, an arrangement might be considered reportable in one jurisdiction but not in another.

As DAC6 rests on an assessment of different features, it is possible that one’s own conclusion to regard certain arrangements as non-reportable will not be the same conclusion that the relevant tax authorities would reach. It is, therefore, considered important to prepare “defense files” internally in these cases. A defense file would contain an analysis and reasoning as to how one has reached a conclusion that a certain arrangement is not reportable. This can serve as evidence to the tax authorities that one has done “due diligence” for DAC6.

Irrespective of the expected volume of reportable arrangements in terms of global mobility, DAC6 means that an assessment of the reportability of cross-border tax arrangements should now be standard practice in relation to tax matters.

Global mobility professionals should engage internal stakeholders, including finance, payroll, and tax in order to implement DAC6 consistently throughout the organisation. Moreover, if the organisation is using external professional service providers, the organisation should open a dialogue about DAC6 with all external advisers in order to map out the reporting responsibility between all involved parties and adjust the framework for future cooperation.

It should be clearly agreed who has the liability for DAC6 assessment and reporting in different situations. Otherwise, there is a risk that no assessment or reporting takes place, or double work is performed if more than one of the involved parties conducts an assessment.

A brochure has been prepared that can be used to take the discussion on DAC6 and global mobility forward.<sup>6</sup>

## FOOTNOTES:

1 See: [Council Directive \(EU\) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.](#)

2 Please see GMS [Flash Alert 2020-017](#) (24 January 2020).

3 For DAC6 purposes, the U.K. will be treated as though it were an EU member state at least until the end of the transition period.

4 DAC6 is an EU Directive which means that all EU member states will transpose the Directive into national legislation. This process often leads to a country by country interpretation of the rules. Therefore, different EU member states could take a different view on what constitutes a 'tax advantage' in particular circumstances and whether it is a main benefit derived from an arrangement. Accordingly, it is possible that an arrangement that meets the MBT in one EU member state may not necessarily do so in another.

5 In a few EU member states, KPMG is subject to the professional legal privilege, which means that KPMG would not be considered an intermediary and the liability to report an arrangement would therefore lie with the taxpayer. In such case, the party involved in an arrangement but subject to the professional legal privilege must inform the taxpayer about potential liability under DAC6.

6 See the brochure (a publication of KPMG International): "[Mandatory Disclosure Rules for Global Mobility](#)" (12 August 2020).

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