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Disclosure Requirements for Cross-border Tax Arrangements

Information for intermediaries

October 2019

New disclosure requirements under DAC 6

On 25 June 2018, the sixth amendment to the EU Directive on Administrative Cooperation (2011/16/EU) on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("DAC 6" for short) entered into force.

DAC 6 primarily requires intermediaries to report certain cross-border tax arrangements to the competent tax authorities.

The main objective of these Europe-wide disclosure requirements is to identify possible tax evasion and profit transfers promptly and combat "aggressive tax planning" through greater transparency.

The scope of the Directive is very wide-ranging. It covers not only arrangements that are obviously aggressive, but also legal and common cross-border tax arrangements.

Intermediaries would be well advised to take appropriate precautions now and prepare for the upcoming disclosure requirements.

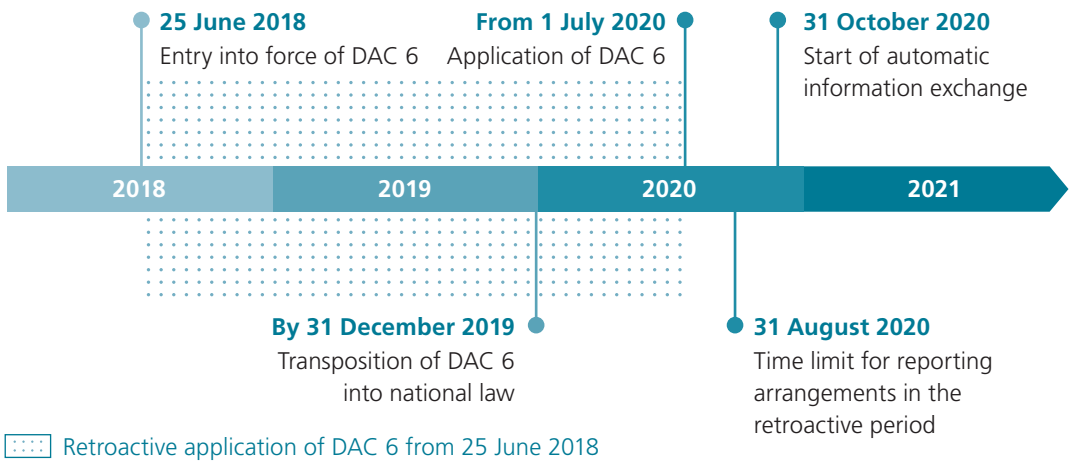
EU Member States must transpose DAC 6 into national law by 31 December 2019. German lawmakers have already initiated the legislative process, drawing up a government draft bill in October 2019 for transposition of DAC 6. At present, only Poland has transposed DAC 6 ahead of the deadline, with the new rules taking effect from 1 January 2019.

The German legislative process currently under way suggests that DAC 6 will largely be transposed using the existing wording. In addition, lawmakers are discussing the introduction of disclosure requirements for purely domestic tax arrangements. However, as things currently stand in the legislative process such arrangements will not be included in the transposition law.

Although the disclosure requirements only apply from 1 July 2020, certain arrangements implemented before such date must be reported retroactively by 31 August 2020. This retroactive obligation applies to all reportable arrangements whose first implementation step was taken in the period from entry into force of DAC 6 on 25 June 2018 to 30 June 2020.

Intermediaries face considerable practical challenges with regard to retroactive and future application of the disclosure requirements.

Schedule for application of disclosure requirements



Who must make disclosures?

Intermediaries in particular are subject to the disclosure requirements for cross-border tax arrangements. A person does not have to be a member of a particular professional group in order to be classified as an intermediary. The broad definition in DAC 6 covers any person who designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border tax arrangement. The disclosure requirement is linked to involvement in the various stages of tax planning, from its origin through to implementation. DAC 6 further stipulates that under certain conditions assistance and support services will also be covered.

Intermediaries could therefore include, in particular,

— financial services providers and financial advisors (e.g. banks, insurance companies, fund initiators),
— asset and investment managers (e.g. family offices, investment management companies, custodians),
— legal and tax advice professionals, and
— other advisors.

Due to the very broad definition of the term, group functions (e.g. financing companies or settlement and clearing centres) and salaried employees may also be included in some EU Member States.

If multiple intermediaries are involved, each intermediary is subject to its own disclosure requirement. There are no plans for double reporting, but this approach requires proof that another intermediary has already fulfilled the disclosure requirement. The same applies to an intermediary's disclosure requirements in relation to the same tax arrangement in more than one EU Member State.

The taxpayer (user) can only be required to disclose information as a secondary option. In particular, this is the case if there is no intermediary subject to disclosure requirements (e.g. in the case of "in-house arrangements").

What must be disclosed?

Under DAC 6, there is a disclosure requirement for cross-border tax arrangements which have certain hallmarks of possible tax avoidance. In some cases, a requirement is that the arrangement is aimed at obtaining a tax advantage ("main benefit" test). In other scenarios, arrangements are subject to disclosure even where there is no intention of obtaining a tax advantage.

Reportable hallmarks mainly include those involving

— Confidentiality clauses regarding taxes
— Fees contingent on tax advantages
— Standardised documentation or structure
— Acquisition of loss-making companies
— Conversion from higher to lower-taxed income
— Circular transactions
— Cross-border payments between associated enterprises
— Cross-border classification conflicts
— Undermining the automatic exchange of information on financial accounts
— Non-transparent legal or beneficial ownership chains
— Specific transfer pricing arrangements.

With regard to the disclosure requirement in Germany, it is irrelevant whether Germany itself is affected by the cross-border tax arrangement or whether the effects occur solely outside the country.

In Germany, the disclosure requirement is limited primarily to income tax, corporation tax, trade tax, inheritance tax, gift tax and real estate transfer tax. In particular, it does not cover customs duties, VAT, harmonised excise duties and social security contributions.

How does the reporting procedure work?

If an intermediary is required to report a cross-border tax arrangement, it must do so electronically to the Federal Tax Office within 30 days of the occurrence of the reportable event, using the officially prescribed data record.

As part of the automatic exchange of information, the German Federal Tax Office then enters the data into the secure central directory set up by the EU Commission. This enables the tax authorities in other Member States to access the information. The first exchange of information will take place on 31 October 2020.

What data must be sent?

In addition to abstract information about the intermediary, the relevant hallmarks and the content of the arrangement, the data record must also contain individual information about the user and the other persons concerned, as well as the date of arrangement's implementation.

A particular practical challenge for intermediaries is the requirement to provide details of the relevant legislation of all EU Member States involved and information on the (projected) value of the cross-border arrangement.

Only in the event that the intermediary is subject to a statutory (i.e. not a contractual) obligation to maintain confidentiality, without having been released from this obligation by the user, can intermediaries be exempted from disclosure requirements, on condition that the intermediary informs the user of this in advance. In Germany, however, the current state of discussions suggests that this will only be implemented in part.

Every reported tax arrangement is given a registration number („ArrangementID"), and the report itself is assigned a disclosure number („DisclosureID"). The intermediary must inform the user and any other intermediaries of these numbers. The user must include the registration number and disclosure number in their tax return.

Retroactive application

Arrangement with first implementation step from 25 June 2018 onwards

Recording and documentation according to DAC 6

Transposition law by 31 December 2019; **current status:** draft bill of 9 October 2019

Ongoing application

Start date for application of DAC 6 – expected application of national transposition rules from 1 July 2020 onwards

Late reporting until 31 August 2020!

Within 30 days after the arrangement is made available for implementation, is ready for implementation or when the first step in the implementation has been made

In the case of **marketable arrangements** (those without individual customisation): quarterly update of new circumstances (by the 10th of each quarter)

Electronic reporting to the German Federal Tax Office

German Federal Tax Office – Data setting into the secure central directory set up by the EU Commission

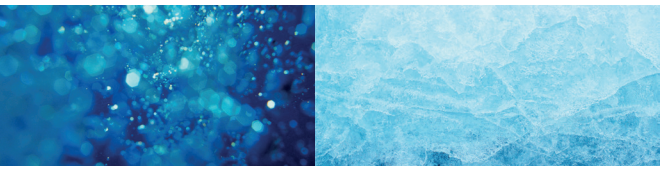
What are the penalties for breaching the disclosure requirement?

If a reportable cross-border arrangement is not reported, incorrectly reported, incompletely reported or reported too late, fines of up to EUR 25,000 may be imposed for each single breach, according to the current plans of the German legislature. It is not possible to tell at this stage whether the size of the fine will be changed during the course of the legislative process and waived with regard to the retroactive period.

In other EU Member States, penalties are likely to be considerably tougher in some cases. In Poland, for example, there is already the threat of payments that far exceed the German fines.

In addition to disputes with the tax authorities, professional advisors could easily also suffer reputational damage.

Even given full compliance with the disclosure requirements, there is a strong case for intermediaries to have an agreed communication strategy in place as part of a commitment to corporate social responsibility.



What are your duties?

Intermediaries face extremely challenging duties due to the (retroactive) disclosure requirements. These include:

— Identification of all potentially reportable arrangements in which you are involved as an intermediary. This also applies to arrangements implemented in the retrospective period from 25 June 2018 to 30 June 2020.
— Collection of relevant data on potentially reportable arrangements.
— Identification of the specific disclosure requirement on the basis of the DAC 6 hallmarks and, if applicable, the "main benefit" test, as well as documenting the results of both reportable and non-reportable arrangements.
— Identification of and coordination with other intermediaries involved, including determining whether the disclosure by the other intermediary has actually been made (requirement of proof of exemption from disclosure requirement for the arrangement).
— Making the disclosure and informing the taxpayer (user) that disclosure has taken place.
— Establishment of efficient internal processes for identification, analysis and documentation of reportable arrangements as part of a functioning compliance management system. This requires the definition of clear lines of responsibility and communication. It should be noted that setting up and configuring an IT-supported reporting system may take several months in some cases.
— Provision of key information (kick-off event) and regular training courses for responsible employees on all matters relating to disclosure obligations.

How can we support you?

We are always on hand to provide expert assistance with developing individual solutions to meet your disclosure obligations, both in Germany and across the international CMS organisation. Our services are carefully tailored to your requirements and include coverage of the following areas:

- Assessing the impact of the disclosure requirements for tax arrangements on your company, including analysis of your business models
- Specific analysis of individual arrangements and products with regard to any disclosure requirement
- Systematic support for identifying, assessing, documenting and notifying reportable tax arrangements by means of guidelines and checklists
- Training employees on their disclosure duties and assessing disclosure responsibilities
- Advice around designing and introducing compliance management systems that meet MDR criteria and protect against penalties in the event that disclosure requirements are breached
- Coordination with international CMS offices in the case of disclosure requirements in other EU Member States
- Local representation in disputes with tax authorities, including in other EU Member States.

Please don't hesitate to contact us.

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