



DAC6 – New Reporting of Cross- Border Transactions

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Agenda

- Overview
- Timelines for Implementation
- Reportable Transactions
- Responsibility for Reporting
- Penalties
- Administration issues & next steps

What is DAC6?



- **Council Directive 2011/16/EU (“the DAC”)** provides for the sharing of taxpayer information between the tax administrations of EU Member States – this is mainly in relation to money laundering
- The DAC was amended by **Council Directive (EU) 2018/822 (the “DAC6”)** to introduce a mandatory disclosure regime for certain cross-border transactions that could potentially be used for aggressive tax planning
- Requires “**intermediaries**” and, in certain circumstances, “**relevant taxpayers**”, to report to Irish Revenue detailed information on a broad range of “**cross-border arrangements**” that meet certain “**hallmarks**” listed in Annex IV of the Directive
- This information is automatically shared between Member States
- Transposed into Irish legislation in Finance Act 2019: New Chapter 3A in Part 33 TCA 1997 – **Sections 817RA – 817RH** (as amended by Finance Act 2020)

DAC6 Implementation Timelines (Ireland)

25 May 2018

DAC6
adopted

1 July 2020

“Look-back”
period ends.
Mainstream
reporting period
commences

**31 January
2021**

Deadline for
reporting for
period 1 July
2020 to 31
December
2020

**25 June
2018**

DAC6
entered into
force

**1 January
2021**

Portal live on
ROS. 30 day
period for
reporting
commences

**28 February
2021**

Deadline for
lookback
reporting
period (25
June 2018 to
30 June
2020)

Note:

Originally due to apply from 1 July 2020. Ireland availed of the option (owing to Covid-19) to extend reporting deadlines by six months.

DAC6 – Who is an Intermediary?



Intermediaries

To be regarded as an intermediary, at least one of the following conditions must be present:

1. The person is resident for tax purposes in an EU Member State;
2. The person has a permanent establishment in an EU member State through which the services are provided;
3. The person is incorporated in, or governed by the laws of, an EU Member State;
4. The person is registered with a professional association related to legal, taxation or consultancy services in an EU Member State.

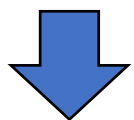
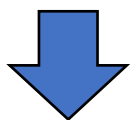
DAC6 – Who is Responsible for Reporting?



Intermediaries are primarily responsible except:

1. **Where Legal professional privilege applies in relation to the transaction** – in such case, the intermediary will only report the name of the client and some basic information and the obligation to report will then fall on the taxpayer participant;
2. **Where There is no intermediary present in the EU** – whilst this may be unlikely given the wide definition of 'Intermediary', where it does arise, the taxpayer participant must report the transaction

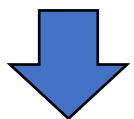
Main Intermediary



Designs | Markets | Organises

Makes available for implementation

Manages the implementation of

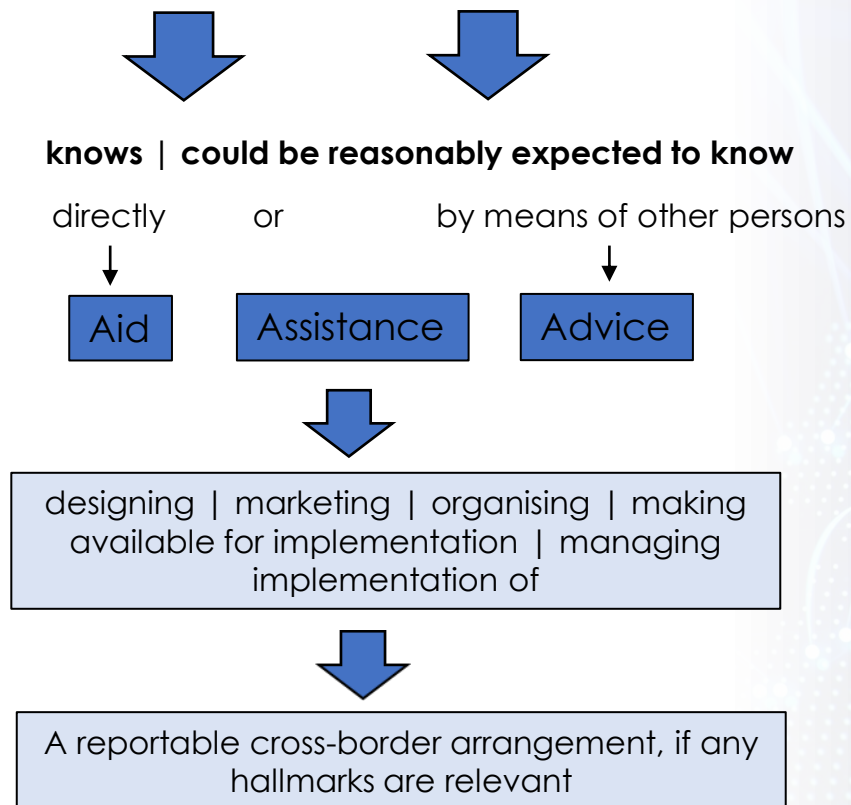


a reportable cross-border arrangement, if any hallmarks are relevant

Can include professional tax advisers, lawyers specialising in tax law and in-house experts within corporate groups.

"Person" can be an individual, legal entity or a non-legal entity such as a partnership.

Expanded Intermediary



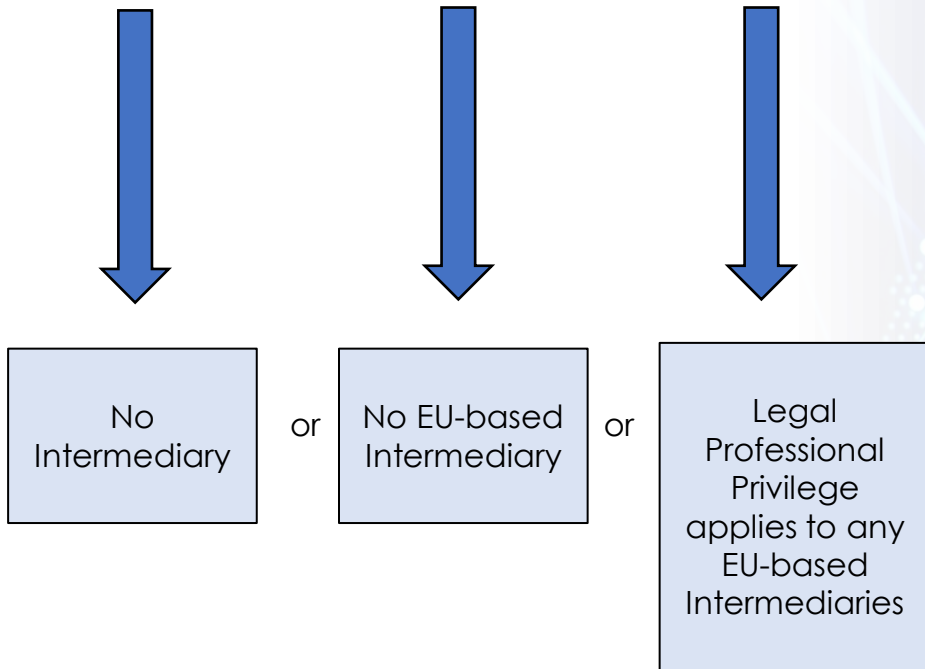
Wider range of professionals, including banks, trust companies, insurance intermediaries, asset managers, financial advisers, consultants etc.

An 'expanded' intermediary can provide evidence that they did not know and could not be reasonably expected to know of involvement in reportable arrangement.

No onus on service providers to carry out additional due diligence or checks beyond what would normally be undertaken.

Relevant Taxpayer

Reporting obligations rests with Relevant Taxpayer where:



DAC6 – What are ‘Cross-border Arrangements’?



Section 817RA(1) ‘Cross-border arrangement’ means –

an arrangement concerning at least one Member State and another country where at least **one** of the following conditions is met:

- a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
- b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
- c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;
- d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;
- e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership

DAC6 – What are ‘Cross-border Arrangements?’



Examples of ‘Cross-border Arrangements:

- **Where a participant is resident for tax purposes in Ireland and the other participant in the arrangement is resident in Singapore** – this will be within scope as one participant is resident in an EU member state;
- **Where a participant is tax resident in both Ireland and the US and it participates in a transaction with an Irish resident company** – this will be within scope as one of the participants is simultaneously resident for tax in more than one jurisdiction;
- **Where a company tax resident in the UK appoints a dependent agent in Ireland, which results in the dependent agent being a ‘permanent establishment’ of the UK company** – transactions between the agent and the UK company will be within scope as the UK company is operating through a ‘PE’ and these transactions are part of the ‘PE’'s business;
- **Where a company tax resident in the US appoints a dependent agent in Ireland but this does not amount to a ‘PE’ and where it carries out transactions with that entity** – this may be within scope as although no ‘PE’ it is participating in transactions in Ireland – ***what if the agent is independent?***

DAC6 – What Cross-border arrangements are reportable?



Section 817RA(1) 'Reportable Cross-border arrangement' means –

Any cross-border arrangement that contains **at least one** of the hallmarks set out in Annex IV of the Directive

DAC6 – Hallmarks

Hallmark linked to a Main Benefit Test

A. Generic hallmarks

1. Confidentiality clause that would prevent disclosure of how the arrangement could secure a tax advantage
2. Contingency fees/success fees fixed by reference to the amount of tax advantage derived from the arrangement
3. Standardised documentation and/or structure

B. Specific hallmarks

1. Acquisition of loss-making company, discontinuation of its main activity and use of its losses in order to reduce tax liability
2. Conversion of income into capital, gifts or other categories of revenue taxed at a lower level or exempt from tax
3. Circular transactions resulting in the round-tripping of funds

C. Specific hallmarks of cross-border transactions

1. Deductible cross-border payments made between associated enterprises, where in the jurisdiction of tax residency of the recipient:
 - no or almost no corporate tax is imposed
 - the payment benefits from a full exemption from tax, or
 - the payment benefits from a preferential tax regime

The Main Benefit Test will be satisfied “if it can be established that a Tax advantage is the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement” (Revenue)

Hallmarks not linked to a Main Benefit Test

C. Specific hallmarks of cross-border transactions

1. Deductible cross-border payments made between associated enterprises, if the recipient:
 - is not resident for tax purposes in any tax jurisdiction, or
 - is tax resident in a country which the EU or OECD have assessed as non-cooperative
2. Deductions for same depreciation claimed on asset in multiple jurisdictions
3. Relief from double taxation on same income/capital claimed in multiple jurisdictions
4. Asset transfers where there is a material difference in the amount treated payable in consideration for the asset in the jurisdictions involved

D. Specific hallmarks for AEol and beneficial ownership

1. Arrangements which may have the effect of undermining CRS reporting obligations
2. Arrangements involving a non-transparent legal or beneficial ownership chain

E. Specific hallmarks for transfer pricing

1. Use of unilateral safe harbour rules
2. Transfer of hard-to-value intangibles between associated enterprises
3. Intragroup cross-border transfers of assets/functions/risks where the projected annual EBIT of the transferor(s) for the three years following the transfer falls by more than 50% as a result of the transfer

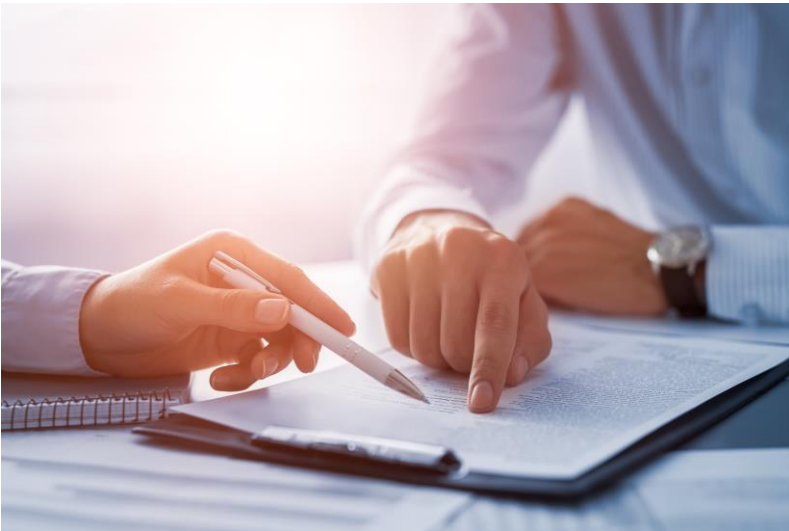
Main Benefit Test



Main Benefit Test - Discussion

- a) Applies only to hallmarks under category A, category B and parts of category C – see foregoing slide;
- b) Main benefit test is an objective test and requires a comparison between the value of the 'tax advantage' and the other benefits from the transaction;
- c) If it is determined that the 'tax advantage' is the main benefit or one of the main benefits from the arrangements, then the test will be met;
- d) Test will be difficult to assess for practitioners (intermediaries), particularly where the practitioner is an 'Expanded Intermediary' and may not have information on the overall transaction – **does the 'Expanded Intermediary' need to inquire into the arrangements?**
- e) Many commercially driven transactions should not satisfy the main benefit test – significant case law on this area

Hallmarks likely to be encountered...



C.1: Deductible payments where made between associated enterprises and where corporate tax is imposed at 0% or almost 0% on recipient or payment received into jurisdiction that exempts receipt or applies a preferential regime or where recipient not resident anywhere or in 'black-listed' jurisdictions

- a) Main benefit test of 'tax advantage' does not need to be met where recipient is not resident anywhere or in a 'black-listed' jurisdiction;
- b) Can catch interest payments, royalty payments, payments for services;
- c) What does 'almost' 0% mean – is 5% sufficient?
- d) What is a preferential regime – e.g. Malta remittance basis for resident companies? Non-dom regime under Irish law?

C.4: Asset transfers where there is a material difference in the amount treated payable in consideration for the asset in the jurisdictions involved

- a) No main benefit test to be satisfied so where asset transfers involved, an assessment of tax treatment between jurisdictions is required;
- b) Migration of companies – with rebasing of asset values – does it apply?
- c) Does a transfer include a 'novation' or 'redemption'?

Hallmarks likely to be encountered...



E.2: Arrangements that involve the transfer of certain hard-to-value intangibles between associated enterprises

- a) Covers intangibles or rights for which (i) no reliable comparables exist and (ii) difficult to predict the level of ultimate success of the intangible at the time of transfer;
- b) Does a 'transfer' include a licence of IP? What if it is non-exclusive?
- c) Refer to OECD "Guidance for Tax administrations on the Application of the Approach to Hard-to-Value Intangibles" (June 2018);
- d) Objective test: documentation to be retained to support a decision not to report

E.3: Cross-border transactions

- a) Intragroup cross-border transfers of assets/functions/risks where the projected annual EBIT of the transferor(s) for the three years following the transfer falls by more than 50% as a result of the transfer
- b) Potentially broad application to group reorganisations, liquidations of group companies etc.
- c) Difficulties in measurement

DAC6 – LPP Issues



- Main reporting obligations fall on Intermediaries;
- Directive recognises issues arise in EU for intermediaries subject to '**professional secrecy**' rules (civil law jurisdictions where such rules apply to legal and tax professionals) and '**legal professional privilege**' ("**LPP**") in Ireland (and formerly the UK);
- Irish legislation implements protections for clients of intermediaries where LPP applies – no professional secrecy rules;
- Intermediary in such cases only files a report with information that is not subject to LPP (NB. Names of taxpayer is not subject to LPP so limited benefit for taxpayer in LPP) and must notify the taxpayer of obligation to report;
- Where LPP applies, the reporting obligations must be met by the taxpayer participant within 14 days of being informed of the reference number by the intermediary;
- Taxpayers may have to consider issues on LPP as reporting obligations will fall on them where LPP is not 'waived'

DAC6 – Trigger Dates for Reporting



- **‘Main’ Intermediary and Relevant Taxpayer** – earliest of following dates:
 - a) day after arrangement is made available for implementation,
 - b) day after the arrangement is ready for implementation, or
 - c) when the first step in the implementation of the arrangement is taken
- **‘Expanded’ Intermediary** – date on which the relevant aid, assistance or advice is provided

DAC6 – Trigger Dates for Reporting Transitional



- Transitional reporting deadlines apply for transactions made available for implementation up to 31 December 2020
- Where arrangements were made available or ready for implementation, or implemented (or aid or assistance provided) between 1 July 2020 and 31 December 2020, the reporting requirements must be met by **30 January 2021**;
- For the look-back period between 25 June 2018 and 30 June 2020, where the first step of the arrangement was first implemented, the reporting requirements must be met by **28 February 2021**;

DAC6 - Compliance and Administration



- Electronic reporting of “**specified information**” required within 30-day timeframe (outside of transitional timeframe)
- Revenue assigns a **reference number** to a cross-border arrangement
- Five-day window for:
 - a) Intermediary to share reference number with taxpayer/any other intermediaries
 - b) Taxpayer to share reference number with other taxpayers involved in same arrangement
- Relevant Taxpayer must disclose reference number on tax return for any chargeable period in which they enter into arrangement or obtain/seek to obtain a tax advantage from the arrangement
- Exemptions from reporting available where Intermediary/Taxpayer holds the requisite evidence that the same information has been reported by another person

DAC6 – Penalties (Section 817RH)



Revenue Tax and Duty Manual (6.1 & 6.2)

- Penalty of **up to €4,000** for failure by intermediary/taxpayer to report obligations in relation to the “lookback” period. Penalty of **€100 for each day** the failure continues after a penalty is imposed
- Post “lookback” period:
 - penalty of **up to €500 per day** for failure by intermediary/taxpayer to report within 30 days
 - penalty of **up to €500 per day** for failure by intermediary to share reference number within five days
- Penalties to be determined by the Courts having regard to:
 - in the case of an **intermediary, the amount of any fees received or likely to have been received** in connection with the arrangement
 - If the person is a relevant taxpayer, **the amount of any tax advantage gained or sought to be gained** from the arrangement

DAC6 - Penalties



Revenue Tax and Duty Manual (4.11)

“Where a decision is taken that an arrangement is not disclosable but it subsequently transpires that the decision was incorrect, there will not be a failure to comply with a disclosure obligation if it can be established to the satisfaction of Revenue that the decision was arrived at in an objective way, taking into account all relevant facts and circumstances and based on available information. Where, on the other hand, Revenue forms the view that there is a failure to comply with a disclosure obligation, a penalty or penalties for non-compliance may apply”

Relevant taxpayers and intermediaries will need to retain evidence of the decision making process to protect their positions

DAC6 assessment will need to be incorporated into overall compliance actions!

DAC6 – Next Steps



- All intermediaries and relevant taxpayers must assess whether any arrangements they have been involved in since June 2018 are reportable in January/February 2021
- Narrow reporting timelines apply for new arrangements post 1 January 2021

Practical Advice



- Update Letters of Engagement so as to reflect a firm's obligation to report the details of a relevant transaction under DAC6
- Develop and implement a procedure for the look-back exercise in order to ensure that transactions that took place since 25 June 2018 are reported upon
- Establish a tax panel to oversee the implementation (and compliance) with DAC6 obligations and to increase awareness of DAC6 obligations within practices

DAC6 – Revenue Guidance



- **Tax and Duty Manual: Part 33-03-03**

EU Mandatory Disclosure of Reportable Cross-Border Arrangements (Guidance Notes)

- **Tax and Duty Manual: Part 33-03-04**

Filing Guidelines for DAC6 (116 pages)

Questions?

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