



In Focus – DAC6 and the Mandatory Disclosure of Cross Border Arrangements

The new EU Directive on Administrative Cooperation (DAC6) introduces a host of provisions aimed at increasing tax efficacy and transparency. In this In Focus piece, we take a deep dive on the key elements of DAC6 and offer a perspective on what you should be doing now.

Introduction

The new EU Directive on Administrative Cooperation (commonly referred to as DAC6 or the Directive) imposes obligations on “intermediaries” (and taxpayers in certain situations) to disclose any “cross-border arrangements” involving two EU member states or a member state and a third country. The transaction must be disclosed if it meets at least one of the Directive’s specified “hallmarks.”

The disclosure will be made by the intermediary (or the taxpayer) to its member state’s tax authority. There will be a mandatory automatic exchange of information on such reportable cross-border arrangements via a centralized network established by the EU.

The new rules are borne out of the continuing worldwide focus on aggressive tax planning. The purpose of these new provisions is to increase transparency and to ensure EU tax authorities have early access to information regarding tax planning. In addition, the provisions are meant to deter taxpayers from implementing abusive tax schemes.

This In Focus piece provides a deep dive to answer your questions on how we got here, who is obligated to report,

what is a cross-border arrangement, what are the hallmarks, what needs to be reported, what is the timeline, and what is the current state of legislation. We also offer our BBH perspective on what you should be doing now.

How did we get here?

A decade ago, the introduction of the Foreign Account Tax Compliance Act (FATCA) began a new era of tax transparency in the US. To satisfy the FATCA objective of combating tax evasion, non-US financial institutions holding financial accounts including cash, custody accounts, and investments in equities and bonds were required to identify and report on US or deemed US persons. Failure to comply with FATCA, brought potential withholding at the full 30 percent withholding rate on US source payments (e.g. dividends and interest) as well as the introduction of withholding on gross proceeds derived from the sale of instruments generating dividend, interest, and similar income. Fear of this withholding and the development of a global network of bilateral agreements legislatively mandating reporting in the non-US financial institution’s jurisdiction of residence, saw FATCA’s successful adoption and implementation.

FATCA's ability to obtain information about US persons led the governments of several countries to call upon the Organization for Economic Cooperation and Development (OECD), a forum that addresses a wide-range of economic issues, to spearhead an initiative to replicate FATCA's objective to combat tax evasion through greater tax transparency, into a global initiative. The OECD's efforts resulted in the Common Reporting Standard (CRS) framework, requiring financial institutions to report on individuals and certain entity types with tax residency in a jurisdiction other than that of the financial institution to the individual or entity's jurisdiction of tax residence. Countries adopted the OECD's CRS framework into local law, and it went into effect in 2016. The first exchange of information occurred between 49 countries in 2017, and this year over 100 countries will exchange information.

“These tenets of transparency and tax fairness espoused through initiatives like the CRS and BEPS are central to the European Union's tax policy.”

In addition to spearheading the CRS, in 2012 the OECD began addressing the international tax community's concerns around Base Erosion and Profit Shifting (BEPS) by reviewing international tax planning structures used to exploit gaps and mismatches in tax rules to avoid paying tax. In an effort to reassert integrity back into the international tax system, the OECD issued a series of reports identifying 15 Actions: detailed reports recommending measures governments could adopt to attain this goal.

One of these reports, Action 12, proposed the introduction of mandatory disclosure rules for taxpayers and advisors utilizing aggressive tax planning arrangements. After the introduction of the CRS, the OECD incorporated many of the proposals from Action 12 into its “Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures” (Mandatory Disclosure Rules or MDR). Here, the OECD set out rules to encourage countries to implement measures designed to prevent taxpayers avoiding reporting obligations under the CRS to ensure that the transparency objectives of CRS are met. Governments can then endorse this framework through local legislation.

These tenets of transparency and tax fairness espoused through initiatives like the CRS and BEPS are central to the European Union's (EU) tax policy. To counteract aggressive tax planning, the Economic and Financial Affairs Council (ECOFIN) modified EU Directive 2011/16/EU in Directive 2018/822/EU

Directive on Administrative Cooperation, requiring EU member states to enact local legislation requiring specified parties to disclose certain tax arrangements to their local tax authority. The local tax authority will then exchange this information with the tax authority of other impacted EU member state or states. The requirements of DAC6 extend beyond that required under the OECD's Mandatory Disclosure Rules.

To meet the Directive's objectives of improving transparency and both deterring and preventing the use of aggressive tax planning, financial institutions, advisors, and taxpayers will need to undertake an analysis of existing and future cross-border arrangements to determine whether such arrangements are reportable.

Who is Obligated to Report?

Financial institutions, advisors, and taxpayers may be obligated to report under DAC6. Financial institutions, advisors, and taxpayers with a nexus to the EU, through residency, permanent establishment, or through registration with a professional association based in the EU and who are either an intermediary or the taxpayer must report.

DAC6 broadly defines an intermediary as those who are involved in the design, marketing, organization or availability for implementation or manages the implementation of a reportable cross-border arrangement (the primary intermediary or promoter), including any person who provides aid, assistance or advice relating to the arrangement (the secondary intermediary or service provider or supporter).

Where there is more than one intermediary involved, all intermediaries must report on the transaction, unless the intermediary has proof that the required information reporting to the relevant EU member state tax authority has occurred. EU member state tax authorities are currently working to define what will constitute acceptable proof (e.g. issuance of a reference number), and questions remain as to reliance and liability for non-reporting intermediaries.

In certain instances, the reporting obligation shifts to the taxpayer. Generally, this happens when the intermediary/intermediaries in the chain cannot report due to legal professional privilege, lack of reason to know, an intermediary is not involved in the transaction, or the intermediary/intermediaries lack sufficient nexus to the EU.

Identifying Reportable Arrangements

DAC6 does not define arrangement. Rather, DAC6 stipulates reporting on cross-border arrangements which are arrangements that facilitate avoidance or evasion with participants in an EU member state engaging in a transaction with another EU member state or third country. The Directive sets out certain characteristics that represent potential risk of tax avoidance or evasion in a series of hallmarks.

The Hallmarks:

The Directive has five categories that broadly define how to achieve its objective of improved transparency and a reduction in the use of aggressive and evasive tax planning structures.

| | | |
|---|---|--|
| <p>Category A: Addresses commercial characteristics often seen in marketed tax avoidance and evasion schemes, where such characteristics often include one or more of the following:</p> | <ul style="list-style-type: none"> • The use of confidentiality clauses to prevent disclosure on how a taxpayer achieves a tax benefit. • Fees charged are in reference to the proposed tax benefit. • Standardized documentation, making it available to multiple clients without requiring substantial customization. | <p>Main Benefit Test</p> |
| <p>Category B: Focuses on particular tax planning considerations and structures used to avoid tax through the:</p> | <ul style="list-style-type: none"> • Utilization of loss-making companies to artificially reduce a tax liability. • Conversion of revenue into lower taxed/no taxed jurisdictions. • Use of circular transactions that cancel each other out or largely cancel each other out. | <p>Main Benefit Test</p> |
| <p>Category C: Tries to prevent innovative tax payments concentrating on cross-border payments and transfer transactions:</p> | <ul style="list-style-type: none"> • A relationship exists between associated parties and either: <ul style="list-style-type: none"> – The jurisdiction of tax residence does not impose a corporation tax or imposes a rate of close to zero percent. – The payment benefits from full exemption from tax. – The payment benefits from a preferential tax regime. • A relationship exists between associated parties and the recipient lacks a place of tax residence. • Multiple depreciation deductions are taken on the same item of income. • Multiple exemptions from double taxation are claimed. • There is a transfer of assets with a material difference in the amount being treated as payable in each jurisdiction. | <p>Main Benefit Test applies to hallmarks on deductible payments and jurisdictions with a zero percent withholding tax rate.</p> |
| <p>Category D: Considers arrangements that weaken tax transparency initiatives and information reporting by ensuring the reporting of arrangements that:</p> | <ul style="list-style-type: none"> • Undermine exchange of information reporting like that required under the CRS. • Involve a non-transparent legal or beneficial ownership chain and interpose entities that lack economic substance that make it so beneficial owners are not identifiable. <p><i>The hallmarks under this category align to the recommendations set out by the OECD in the "Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures." The Directive's inclusion of these hallmarks incorporates the OECD's recommendations into law.</i></p> | <p>No Main Benefit Test</p> |
| <p>Category E: Analyzes transfer pricing arrangements for:</p> | <ul style="list-style-type: none"> • The use of unilateral safe harbor rules. • Transfers of hard-to-value intangibles. • The transfer of functions, risks, or assets where the projected annual earnings for following three-year period will be a decrease of more than 50 percent of the earnings before interest and tax. | <p>No Main Benefit Test</p> |

The Main Benefit Test

Not all hallmarks automatically result in a reporting obligation. Cross-border arrangements that meet the hallmarks under Categories A, B, and the hallmarks for deductible payments made between associated persons located in a preferential tax regime or a regime with a zero or near zero percent tax rate under Category C are only reportable if they also meet the “Main Benefit Test.”

The Main Benefit Test contemplates the taxpayer’s motivation in entering into a cross-border arrangement. Where the taxpayer could reasonably expect to obtain a tax advantage, a tax benefit not intended under the applicable law, and gaining that advantage encouraged the taxpayer’s participation in that arrangement the Main Benefit Test applies, the cross-border arrangement is reportable under DAC6.

“The Main Benefit Test contemplates the taxpayer’s motivation in entering into a cross-border arrangement.”

Taxes Subject to Reporting

Generally, direct taxes such as income, capital gains, and corporation tax are in-scope, while indirect taxes such as Value-Added Tax (VAT), sales tax, social security contributions, and excise duty are out-of-scope for purposes of DAC6.

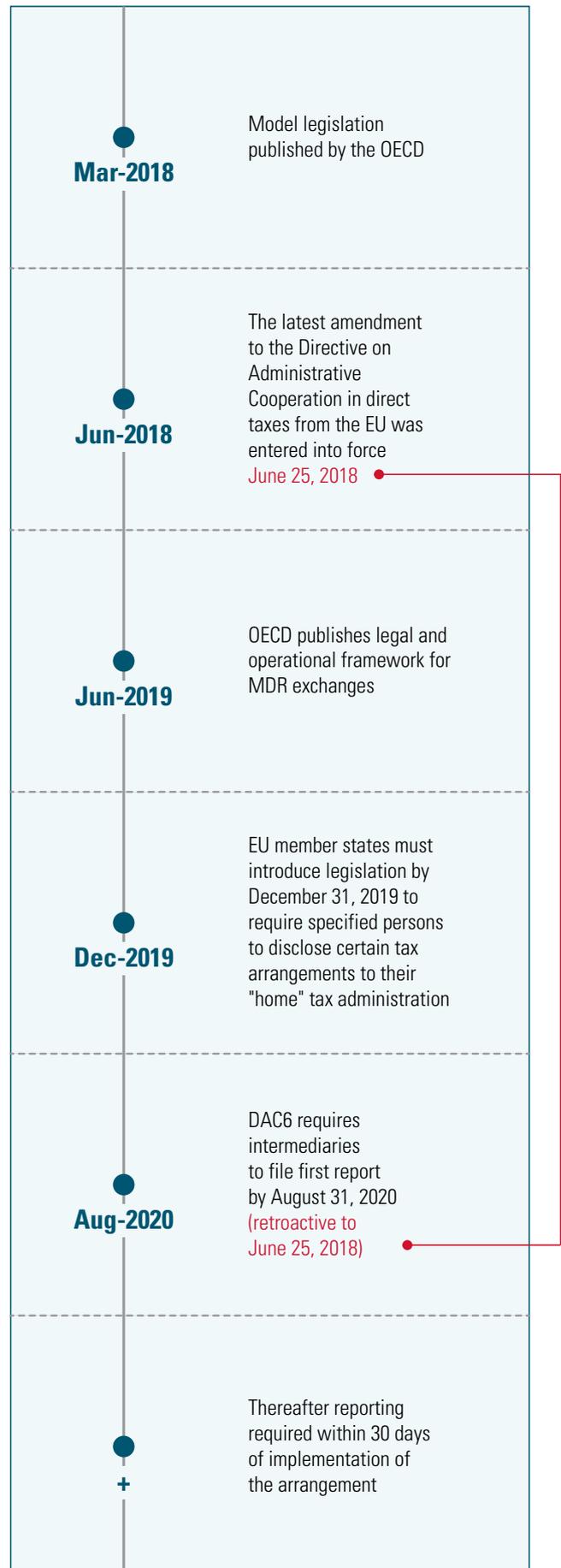
What Needs to be Reported?

Intermediaries and taxpayers must file information that is within their “knowledge, possession, or control” and provide details on:

- All involved intermediaries and taxpayers, including the name(s), tax residence(s), tax identification number(s), associated enterprises, and for individuals date(s) and place(s) of birth.
- The arrangement and the hallmark(s) representing potential risk of tax avoidance or evasion, including an implementation timeline and the value of the arrangement.
- All EU member states concerned and the applicable tax law the cross-border arrangement is subject.
- Identification of all other persons affected by the cross-border arrangement.

It is intended that the tax authorities of the involved EU member states will share this information through a database. Local tax authorities should provide specific details on reporting, including the method for transmission, additional information requirements or filing obligations via legislation or guidance.

Timeline



While DAC6 goes into effect on July 1, 2020 reporting for identified cross-border reportable arrangements for the June 25, 2018 through July 1, 2020 period (the “catch-up” period) will be due on August 31, 2020. Subsequent reporting is due to the tax authority 30 days after the earliest of the following: the finalized arrangement is made available, the arrangement is ready for implementation, the first step of the arrangement is implemented, or aid, assistance, or advice is rendered in progressing the transaction.

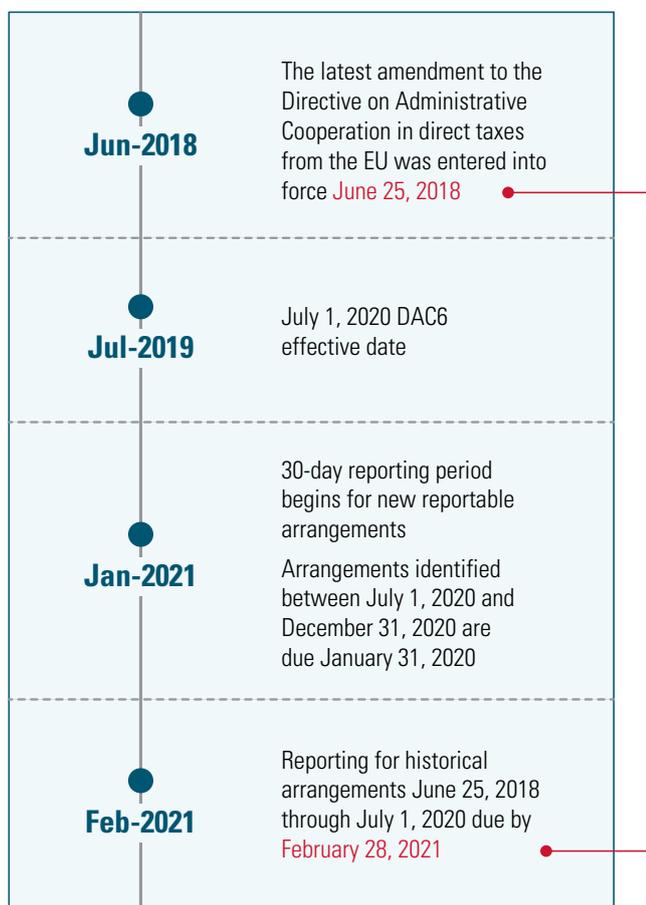
Revised Timeline Adopted Due to COVID-19

The European Council amended DAC6 adopting the EU member state representatives on the Permanent Representatives Committee’s proposal to delay the start of DAC6 reporting obligations for six months due to the additional administrative requirements and logistical challenges the COVID-19 pandemic placed on the governments of most EU member states.

In its amendment the European Council provides for the possibility of an additional delay of up to three months if the pandemic continues to prevent compliance by stakeholders. In providing a further delay, the European Council will strictly consider whether the difficulties created by the pandemic frustrate DAC6 reporting.

The delay is optional and EU member states are not obligated to adopt legislation to allow for the proposed deferral date of January 1, 2021.

The Revised Timeline:



The BBH Perspective

What should you think about doing?

Market participants with a nexus to the EU should consider whether they will have any obligations under the Directive. Despite the uncertainty around the mechanics, potential delays due to COVID-19, and lack of guidance, market participants should consider action now.

A first key step is to understand if you have any obligations under DAC6 by asking:

- Do you have a nexus to the EU?
- What type of business activities did the entity perform for the June 25, 2018 through July 1, 2020?
- Would any of those activities result in the entity being treated as an intermediary under DAC6?

Once these questions have been answered, look at those answers through a DAC6 lens: do any of the activities satisfy one of the hallmarks? Does that hallmark require the Main Benefit Test to be satisfied?

Once analyzed, clients should document conclusions reached, making sure to include:

- Whether any of its entities with EU nexus serve as an intermediary, taxpayer, or both with respect to any of its activities?
- Whether there are any cross-border arrangements that meet the Directive’s hallmarks?
- Does a reporting obligation arise?

Consideration into establishing policies and procedures for identifying reporting obligations in the future due to the entity’s provision of new services or the addition of new hallmarks, increase to scope, or new reporting requirements.

Clients who identify potential reporting obligations should establish a process for ensuring timely reporting in the correct manner. Depending on the size and scope of your EU operations, consider developing a communication and education plan to assist your employees and counterparties in understanding DAC6 and your response.

What BBH is doing?

BBH established a comprehensive program to address its obligations under DAC6 to ensure full compliance. In addition to undertaking an assessment to determine our reporting obligation, we are evaluating how BBH can best support our clients with their DAC6 obligations.

Implementing Legislation

EU Member State Legislation

EU member states must transpose the Directive’s requirements in order to comply with its objectives. The Directive sets out the minimum standard, however, EU

member states can expand the scope (for example, by expanding applicable taxes, increasing the required information to be reported, requiring annual reporting of an arrangement for each year it is in use, applying to domestic arrangements, etc.), set the penalties, and provide bespoke guidance.

Non-EU Member State Developments

A number of non-EU member states also enacted or are considering enacting similar legislation to that under the EU's DAC6 or the OECD's proposed Mandatory Disclosure Rules as set out in Category D of the Directive.

Detailed Information About Legislative Developments EU Member States¹

Below sets out the status of each EU member state's legislation and considerations about scope and compliance for local implementation of the Directive.

Austria

Legislation: Enacted – EU-Meldepflichtgesetz – finalized on October 22, 2019 as part of Austria's annual tax package.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: Reporting will be performed through the Ministry of Finance's online portal via a web-based form and must be made in either English or German. Where reporting cannot be completed online, a paper report will be accepted. Where an arrangement was already reported in another EU Member State, a copy of the filed report must be submitted.

Where the arrangement has already been reported in Austria, only the reference number needs to be reported.

Legal Professional Privilege: Where an intermediary does not report due to legal professional privilege it must notify other intermediaries, and where there are no other intermediaries with a reporting obligation, the taxpayer. The taxpayer may waive privilege, allowing the intermediary with legal professional privilege to submit the necessary reporting.

Non-Compliance Penalties: Penalties for not reporting are EUR 50,000 where there is intention to avoid reporting and EUR 25,000 where there is gross negligence.

Other Considerations for DAC6 Implementation Austria:

- **Guidance:** The Austrian Ministry of Finance is expected to issue a decree with explanatory examples.

Belgium

Legislation: Enacted – The Belgian Official Gazette published the adopted bill on December 30, 2019.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: The draft law lacks robust details into how reporting will transpire in Belgium. We understand the Belgian Tax Authority intends to assign a unique reference number that intermediaries and taxpayers can use to identify the arrangements in all EU member states; the intermediary initiating the report should provide this number with a summary of the reportable arrangement to all intermediaries and the relevant taxpayer(s) affected.

Legal Professional Privilege: The legal professional privilege intends to apply in limited cases and may not apply where the intermediary had a part in the design or implementation of an aggressive tax arrangement.

Where an intermediary cannot report due to legal professional privilege, it must notify other intermediaries, and where there are no other intermediaries, the taxpayer. The taxpayer may waive privilege, allowing the intermediary with legal professional privilege to provide the necessary reporting.

Non-Compliance Penalties: The legislation sets out two categories of penalties. The first category, incomplete reporting, will impose penalties of EUR 1,250 to 12,500 for gross negligence and EUR 2,500 to 25,000 where intentional. The second category, failure or delayed reporting, will impose penalties of EUR 2,500 to 25,000 for gross negligence and EUR 12,500 to 100,000 where intentional. The Belgian Tax Authority will impose penalties at the higher end of these ranges on intermediaries with multiple infractions.

Other Considerations for DAC6 Implementation in Belgium:

- **Guidance:** An explanatory memo accompanied the draft bill, providing some further clarification on the definition of intermediary, examples of what does not constitute an arrangement, and a non-exhaustive list providing examples of what constitutes a tax advantage.
- **Proposed Deferral:** Belgium communicated its intent to apply the proposed six-month reporting deferral.
- **European Commission Non-Compliance Letter:** Belgium was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Bulgaria

Legislation: Enacted – The Official Gazette (no. 102) published amendments to the Tax and Social Security Procedure Code, which included Bulgaria's transposition of DAC6 on December 31, 2019.

¹ The below is current as of June 15, 2020.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: Intermediaries (referred to in the legislation as “consultants”) and taxpayers will submit reports electronically. The Bulgarian Tax Authority will issue an order detailing the reporting requirements which it will make available on its website.

The Bulgarian Tax Authority will assign a unique number to identify the reportable arrangement to other EU member states as well as a disclosure number to evidence the information was reported.

Legal Professional Privilege: When invoked, the intermediary must advise the other intermediaries and relevant taxpayer in the arrangement within 14 days. Further, the intermediary is obligated to disclose to the Bulgarian Tax Authority that another intermediary or the relevant taxpayer now has the reporting obligation. Failure to do so will result in penalties of EUR 250 to 750.

Non-Compliance Penalties: Legal entities that fail to report a reportable cross-border arrangement will be subject to penalties between EUR 2,500 to 5,000. Additionally, Bulgaria will impose penalties of EUR 250 to 750 where the unique number to identify the reportable arrangement is not provided to other intermediaries/ relevant taxpayers involved in the arrangement in a timely manner. Intermediaries and taxpayers with multiple infractions will see penalties doubled.

Other Considerations for DAC6 Implementation in Bulgaria: None.

Croatia

Legislation: Enacted – On November 29, 2019, the Croatian Parliament approved a bill enacting the Directive through the Act on Administrative Cooperation in the Field of Taxation and the Rulebook on the Automatic Exchange of Information, published in the Official Gazette on January 1, 2020. The Croatian Minister of Finance executed associated Bylaws, incorporating the DAC6 hallmarks on January 3, 2020.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive but does provide detail on the application of certain hallmarks in Croatia (e.g. a related party is one with a 25 percent ownership relationship).

Reporting: The legislation sets out how reporting should proceed where an arrangement requires reporting in multiple EU member states. Further, the legislation requires an annual filing by relevant taxpayers participating in a reportable arrangement each year they participate in a reportable arrangement.

We understand reporting will be through an electronic/ XML file, but it remains unclear if Croatia will allow

reporting in languages other than Croatian, if a unique number will be used to identify the arrangement, whether or not that number should be provided to intermediaries and relevant taxpayers, and what evidence Croatian intermediaries can rely to prove another intermediary made the required reporting.

Legal Professional Privilege: Where lawyers and tax advisors cannot report due to the application of legal professional privilege, they must notify any other intermediary, or where no other intermediaries, the taxpayer, of their reporting obligations within three days.

Non-Compliance Penalties: Penalties range from EUR 270 to 27,200 where an intermediary fails to report an arrangement, delays reporting an arrangement, or fails to notify other intermediaries or relevant taxpayers about the exemption from filing due to legal professional privilege. A taxpayer is subject to the same penalties for failing to submit an annual report.

Additionally, Croatia imposes individual liability on the person within an organization, the entity’s authorized representative, who had the reporting obligation with penalties ranging from EUR 270 to 2,720.

Other Considerations for DAC6 Implementation in Croatia:

- **Proposed Deferral:** Croatia is considering applying the six-month reporting deferral.

Cyprus

Legislation: Draft – Cyprus held a public consultation on the draft bill to implement DAC6 into local law, this consultation closed on November 12, 2019. It is expected that the Cypriot Parliament will vote and the bill will enter law prior to July 1, 2020.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive. The draft bill does provide clarification on the term tax advantage, an advantage related to EU taxes such as a tax relief, tax refund, avoidance or reduction of a tax charge, deferral of a tax payment, an expedited tax refund, or the avoidance of withholding tax.

Reporting: The Cypriot draft legislation timelines align to those set out in the Directive. Based on the draft legislation, Cyprus will not require annual reporting. Intermediaries should submit reports through an electronic/XML file and can submit the reports in any official language of the EU. The draft legislation sets out how reporting should proceed where an arrangement requires reporting in multiple EU member states. It further sets out details on taxpayers reporting obligations where multiple taxpayers are involved in a reportable arrangement.

Reporting is not required if there is evidence the arrangement has been reported, but the draft legislation is silent on what evidence intermediaries/taxpayers can rely on to prove prior reporting.

Legal Professional Privilege: Legal professional privilege applies to lawyers admitted to the Cyprus Bar Association. Where a lawyer invokes legal professional privilege, it must notify, "without delay," other intermediaries or the taxpayer of the associated reporting obligation. The draft legislation does not define "without delay."

Non-Compliance Penalties: The draft legislation contemplates gradual penalties for the failure to submit a report, incomplete, inaccurate, or delayed reporting up to EUR 20,000. Penalties also apply to intermediaries invoking the legal professional privilege who fail to notify other intermediaries or the relevant taxpayers. Further, failure to respond to additional documentation requests from the Cypriot Tax Authority within 14 days will result in an administrative fine up to EUR 10,000.

Other Considerations for DAC6 Implementation in Cyprus:

- **Guidance:** Once legislation is finalized the Cypriot Tax Authority should issue guidance on the application of DAC6 in Cyprus.
- **Good Faith:** In instances where an intermediary reports an arrangement that is later identified as not requiring reporting, if the intermediary in good faith believed it needed to report based on information available to the intermediary at the time it made the report, the intermediary will not be subject to liability associated with breach of contract, law, or regulation.
- **Proposed Deferral:** Cyprus is considering applying the six-month reporting deferral.
- **European Commission Non-Compliance Letter:** Cyprus was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Czech Republic

Legislation: Draft – The Czech Parliament initiated the approval process on November 29, 2019, the process is expected to take several months.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive. The explanatory memorandum accompanying the draft legislation sets out the reason to know standard necessitating reporting. The explanatory memorandum also defines a tax advantage as a benefit arising from the avoidance of a tax liability (for example benefiting from a lower tax rate being applied in a jurisdiction).

Reporting: Reporting should be completed through an electronic/XML file. Reporting is not required if there is

evidence the arrangement has been reported, but the draft legislation is silent on what evidence intermediaries/taxpayers can rely on to prove prior reporting. When reporting, the market value, not the tax value, should be reported to denote the value of the arrangement. Intermediaries must maintain information pertaining to reportable arrangements for a 10-year period from the reporting deadline.

Legal Professional Privilege: Czech tax advisors, lawyers, notaries, and auditors may obtain a reporting waiver due to legal professional privilege, provided the transaction is not a marketable arrangement. Where obtained, the intermediary with legal professional privilege must inform other intermediaries/taxpayers in the arrangement of their obligation to report and evidence of this notification should be retained for a 10-year period.

The Czech draft legislation will respect the legal professional privilege of other EU member state intermediaries.

Non-Compliance Penalties: Intermediaries that do not satisfy their reporting obligations or fail to maintain information pertaining to the reportable arrangement for the 10-year retention period, will be fined EUR 20,000. Intermediaries that do not report due to the legal professional privilege must inform other intermediaries/taxpayers of their obligation to report will also be subject to fines of EUR 20,000.

Other Considerations for DAC6 Implementation in the Czech Republic:

- **Guidance:** An explanatory memorandum accompanied the draft legislation; it is unknown if further guidance will be issued.
- **European Commission Non-Compliance Letter:** The Czech Republic was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Denmark

Legislation: Enacted – The Danish government enacted legislation in law no. 1573, authorizing the Danish Minister of Taxation to issue detailed regulations (Regulation no. 1634) enacting DAC6 in Denmark.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: An intermediary should electronically report information as set out in the Directive. The Danish government will develop the standardized form for DAC6 filings. Reporting is not required if there is evidence the arrangement has been reported, but the draft legislation is silent on what evidence intermediaries/taxpayers can rely on to prove prior reporting.

In addition to the reporting required under the Directive, the reporting intermediary will be required to summarize

the cross-border arrangement and provide the value of the entire transaction (as opposed to the value of the tax benefit). Reports can be made in Danish or English, but details of the hallmarks requiring reporting must be reported in English.

Taxpayers must make an annual filing where they use a reportable arrangement.

Legal Professional Privilege: Lawyers, as defined under Danish law, qualify for the legal professional privilege. Where an intermediary does not report due to legal professional privilege, it must notify other intermediaries, and where there are no other intermediaries, the taxpayer. The legislation does not clarify the notification timeline.

Non-Compliance Penalties: Intermediaries who fail to provide correct and accurate information, fulfill the reporting obligation, satisfy notification, and registration requirements will be subject to graduated penalties based on turnover that correspond to penalties proscribed under the Danish Anti-Money Laundering Act ranging from EUR 6,700 to 54,000. Taxpayers will be subject to 50 percent of the penalties proscribed for intermediaries. Danish Courts will consider the appropriate penalty, consulting the suggested penalty range and applicable circumstances.

Other Considerations for DAC6 Implementation in Denmark:

- **In-scope jurisdictions:** The DAC6 legislation does not apply to the Faroe Islands or Greenland.
- **Registration Requirement:** Denmark requires intermediaries or taxpayers with a reporting obligation to register, via an electronic form, with the Danish Tax Authority within eight days of identifying the reportable arrangement.

Estonia

Legislation: Enacted – The Estonian government implemented Law No538, which transposed the Directive and entered into force on January 1, 2020.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive, but the legislation includes additional hallmarks in Category D, on the exchange of information on financial accounts.

Due to existing references in Estonian legislation to “intermediaries,” the Estonia legislation follows the DAC6 definition of an intermediary replacing the term with “informants” or “information source.”

Reporting: The Estonian legislation contemplates primary reporting by the intermediary who provides tax advisory, accounting, financial investment advice, and lawyers.

The Estonian Tax Authority developed an online reporting portal, the E-Tax portal for filing reports, which must be

made in Estonian. The Estonian Tax Authority will issue a unique reference number to identify the arrangement in all EU member states and the issued intermediary should provide the number to all other intermediaries and the taxpayer.

Legal Professional Privilege: Estonian lawyers and sworn auditors (“taebeandja”) who cannot report without breaching legal professional privilege, are exempt from reporting but must inform “without delay” other intermediaries or the relevant taxpayer of the obligation to report. The Estonian legislation does not define “without delay.” Lawyers and auditors with legal professional privilege can assist a taxpayer in meeting its reporting obligation or alternatively, through written consent, obtain a waiver from legal professional privilege to report the arrangement.

Non-Compliance Penalties: Failure to comply with DAC6 reporting obligations will result in fines up to EUR 3,200.

Other Considerations for DAC6 Implementation in Estonia:

- **Guidance:** An explanatory memo was issued with the legislation but did not provide details on how to apply the hallmarks in Estonia. A ministerial decree may be issued providing further details.
- **European Commission Non-Compliance Letter:** Estonia was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Finland

Legislation: Enacted – The Finnish Parliament approved the legislative proposal submitted on October 31, 2019 and the legislation entered into force on January 1, 2020.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive. The proposal clarified that non-EU tax advantages are in scope.

Reporting: The Finnish Tax Authority will issue a reference number, which should be issued to other intermediaries and the relevant taxpayer without “undue delay,” the legislation does not define “undue delay.”

Additionally, Finland will require quarterly reporting and intermediaries should update the original report with any additional information that becomes available during that quarter.

Intermediaries are generally exempt from reporting where a transaction has been reported, but the intermediary needs to obtain a certificate with the assigned reference number to evidence prior reporting. Nonetheless, if the arrangement was reported in another EU member state and the Finnish Tax Authority requires additional details, they may require additional reporting to obtain all required information.

Legal Professional Privilege: Law professionals regulated by the Finnish Advocate Act will need to report information on the arrangement to the Finnish Tax Authority, but should omit client-specific information. Where a law professional files such a report, it must notify other intermediaries and the relevant taxpayer without “undue delay,” which is not defined, and those intermediaries and/or taxpayers should supplement the original report with the relevant details.

Non-Compliance Penalties: Penalties range from EUR 2,000 to 15,000 depending on the type of violation, minor omissions will result in the lower end of the penalty range while deliberate or gross negligence will incur the higher penalties.

Other Considerations for DAC6 Implementation in Finland:

- **Guidance:** Detailed guidance to aid in application and provide details on the reporting procedures are expected prior to July 1, 2020.
- **Proposed Deferral:** Finland is not adopting the proposed deferral. The original reporting deadlines apply.

France

Legislation: Enacted, but subject to Parliamentary Approval – Ministerial Order #2019-1068 published in the French Legal Gazette on October 22, 2019 implemented DAC6 in France, parliamentary approval is required for the legislation to effectuate DAC6 requirements.

Expands the Scope of the Directive? No – The legislation as currently drafted follows the scope outlined in the Directive. While the legislation is silent on the taxes covered, it is believed that France intends to align the taxes to those set out in the Directive.

Reporting: France will require electronic filing via a web-based form. In addition to the 30-day timeline, intermediaries will also need to supplement reports on a quarterly basis. Taxpayers will need to annually declare the use of a reportable cross-border arrangement. Details on the electronic system and the associated filing obligations are expected to be provided via a Decree.

Where a French intermediary has proof that all required information has been reported by another intermediary in France or another EU member state it does not need to report, however what constitutes sufficient evidence remains unclear.

Permanent establishments located in other jurisdictions of French intermediaries are not required to report on their activities in France.

Legal Professional Privilege: Intermediaries with legal professional privilege can report where clients consent to such disclosure. Where consent is not granted, the intermediary must notify all other intermediaries of their

obligation to report or notify the taxpayer where there are no other intermediaries. When a taxpayer must report due to the intermediary’s legal professional privilege, the intermediary should ensure the taxpayer has all relevant information to satisfy the reporting obligation.

Non-Compliance Penalties: For the first offense in a calendar year, a maximum penalty of EUR 5,000 applies for failure to meet notification or reporting obligations. Subsequent offenses are subject to EUR 10,000 subject to a EUR 100,000 cap per calendar year.

Other Considerations for DAC6 Implementation in France:

- **Guidance:** On March 9, 2020 the French Tax Authority (FTA) published guidance on DAC6 for public consultation. The guidance, which is binding, but subject to amendment, provides details on the scope and enforcement of DAC6 in France. On April 29, 2020 the FTA published guidance providing examples on the application of the Directive’s hallmarks.
- **Proposed Deferral:** France is considering applying the six-month reporting deferral.
- **European Commission Non-Compliance Letter:** France was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Germany:

Legislation: Enacted – The Official Gazette published the German law on the obligation to notify cross-border tax structures on December 30, 2019.

Expands the Scope of the Directive? No – While the legislation largely follows the scope outlined in the Directive, the guidance does extend reporting to some indirect taxes such as: trade tax, real estate transfer tax, vehicle tax, insurance tax, real estate tax, inheritance and gift tax, air traffic tax, and non-harmonized excise taxes.

The German legislation replaces the term user when referring to the relevant taxpayer, but the definitions align under both the Directive and German legislation for the term taxpayer/user.

During the consultation process, Germany contemplated including domestic arrangements in the legislation’s scope. It is possible that prospective legislation could include reporting on domestic arrangements.

Reporting: Where an intermediary or taxpayer in Germany has a reporting obligation, they must electronically report information to the Federal Central Tax Office using the DAC.xml schema with a prescribed data set and submissions must be in German. Alternatively, filings can be made via a web-based form.

The German Tax Authority will issue both a registration number (“Arrangement ID”) and a disclosure number to

evidence the German Tax Authority's receipt of the report. Upon receipt, the intermediary must provide both numbers to the taxpayer(s) involved in the arrangement. Initial guidance issued by Germany indicates the reference number issued by Germany or another EU member state evidencing that the required reporting took place and is not required of another intermediary/taxpayer involved in the arrangement.

German taxpayers must report the registration number(s) received on their annual tax return.

Legal Professional Privilege: Auditors, attorneys, and tax advisors with legal professional privilege can obtain a waiver from the taxpayer and fully report, or if no waiver is obtained, they must provide an abstract of the information to the German Tax Authority omitting the personal details. The reporting obligation of the personal details is shifted to the taxpayer or another intermediary and the intermediary must inform the other intermediaries or taxpayer immediately of its reporting obligation.

Non-Compliance Penalties: Penalties will only apply to arrangements implemented after June 30, 2020 and will impose a EUR 25,000 fine on an intermediary who fails to make a timely report or notification to intermediaries/taxpayers or who fail to submit a report or that report is incomplete (e.g. required information, including reference to the cross-border arrangement is omitted).

Other Considerations for DAC6 Implementation in Germany:

- **Guidance:** Germany issued explanatory notes with its legislation that provided clarification and examples. On March 2, 2020, the Federal Ministry of Finance issued draft guidance on the application of DAC6 in Germany. Final guidance is expected this summer.

The draft guidance provides a step-by-step approach German intermediaries and taxpayers can follow to determine if a cross-border arrangement is reportable.

- **White List:** The German Ministry of Finance provides a "white list" of arrangements in an Annex to the draft legislation that intermediaries can rely upon as not giving rise to a tax advantage.
- **Proposed Deferral:** Germany communicated its intent to apply the proposed six-month reporting deferral.

Greece

Legislation: Discussions with Stakeholders – Greece has not released draft legislation or any other details regarding the implementation of DAC6.

Expands the Scope of the Directive? Unknown

Reporting: Unknown.

Legal Professional Privilege: Unknown.

Non-Compliance Penalties: Unknown.

Other Considerations for DAC6 Implementation in Greece:

- **European Commission Non-Compliance Letter:** Greece was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Hungary

Legislation: Enacted – Published in the Official Gazette no.128, the Hungarian legislation to transpose DAC6 entered into force on July 24, 2019.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: Little is known about the specific reporting requirements in Hungary.

Legal Professional Privilege: The reporting obligation will shift to other intermediaries or the taxpayer if the reporting intermediary has legal professional privilege. It is unknown if a taxpayer can waive the privilege to allow the intermediary to report. It is further unknown if there are any notification requirements.

Non-Compliance Penalties: Penalties ranging from EUR 1,500 to 15,000 will apply for failure to report, incorrect, false, incomplete, or late reporting.

Other Considerations for DAC6 Implementation in Hungary:

- **Proposed Deferral:** Hungary is considering applying the six-month reporting deferral.

Ireland

Legislation: Enacted – The Irish President signed the Finance Act 2019 – Part 6 into law on December 22, 2019, enacting the DAC6 legislation in Ireland.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive. The Irish legislation provides definitions for arrangement and tax advantage.

In 2011, Ireland began requiring disclosure of domestic arrangements similar to those that require disclosure under DAC6. Ireland intends for separate operation of the two reporting regimes, domestic and cross-border (DAC6).

Reporting: Reporting aligns with the Directive and intermediaries have the primary reporting obligation, unless legal professional privilege applies or the intermediary has received written confirmation that the reporting obligation for an arrangement has been completed and the confirmation includes the EU Tax Authority assigned reference number for the transaction. For EU member states that do not issue a reference number, it is unknown if the intermediary

will also need to report the arrangement to Irish Revenue. Intermediaries will need to update original reports with additional information on a quarterly basis.

Irish Revenue will assign all reportable arrangements a reference number. Intermediaries or taxpayers upon receipt of the unique reference number should provide all relevant parties to the arrangement with the reference number within five working days. Taxpayers participating in a reportable arrangement must reference this number in their annual return for each year the reportable arrangement is in use.

In addition to the information required to be reported under the Directive, Ireland will also require the identification of any marketable arrangements. A marketable arrangement is an arrangement designed, marketed, and ready for implementation without a need to be substantially customized.

Legal Professional Privilege: Intermediaries with legal professional privilege, which applies if such privilege could be maintained in legal proceedings in Ireland, do not need to report, but must notify, "without delay," other intermediaries or the taxpayer of their reporting obligation. The draft legislation does not define "without delay."

Non-Compliance Penalties: Ireland has four categories of penalties.

The first category applies a EUR 100 penalty per day, capped at EUR 4,000 for failure to provide the reference number to other intermediaries and taxpayers, report arrangements for the June 25, 2018 through June 30, 2020 period, identify a marketable arrangement in its filing, and failure to notify other intermediaries where legal professional privilege prevents reporting by the primary intermediary.

The second category will apply a EUR 500 penalty per day, for the failure to report an arrangement after July 1, 2020 the failure to notify other intermediaries and taxpayers of the reference number assigned by Irish Revenue.

The third category applies a EUR 5,000 penalty to taxpayers who fail to include the reference number of reportable arrangements in their tax return filing.

Finally, where legal proceedings are made against an intermediary or taxpayer with respect to its DAC6 obligations, the Court can apply a penalty that references fees earned by the intermediary or tax advantage gained or sought by the arrangement.

Other Considerations for DAC6 Implementation in Ireland:

- **Guidance:** Explanatory notes accompanied the draft legislation. Irish Revenue also published an update to the Revenue Tax & Duty Manual Part 33-01-01 to reflect the Main Benefit Test under DAC6, which references applicable Irish case law.

Revenue is expected to provide more detailed guidance notes prior to July 1, 2020 DAC6's effective date.

- **Proposed Deferral:** Ireland communicated its intent to delay reporting under DAC6.

Italy

Legislation: Legislation passed to allow DAC6

implementation – The Official Gazette published Law No. 117, the European Delegation Law 2018 that will allow the Italian Government to issue decrees to implement DAC6 without further parliamentary approval. The government has not yet issued these decrees and in March 2020, the Italian government announced a three-month delay to all decrees, as such the decree is not expected until August 2020 at the earliest.

Expands the Scope of the Directive? No – We understand based on the public consultation issued for comments that Italy will follow the Directive and not expand its scope to domestic transactions or other taxes. It should be noted, that the initial public consultation would require retroactive reporting to October 29, 2014 for arrangements that would require reporting under the Category D hallmarks on automatic exchange of information reporting.

Reporting: Unknown. Due to the delay of the implementing decree in Italy, reporting deadlines may not align with those set out in the Directive.

Legal Professional Privilege: Unknown.

Non-Compliance Penalties: Unknown.

Other Considerations for DAC6 Implementation in Italy:

- **European Commission Non-Compliance Letter:** Italy was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Latvia

Legislation: Enacted – The Directive was implemented into law on March 5, 2020 upon publication in the Official Gazette.

Expands the Scope of the Directive? No – The draft legislation largely follows the scope outlined in the Directive.

Reporting: Reporting obligations align to the Directive. Latvia will require reporting through an electronic/XML file.

Legal Professional Privilege: As Latvia does not provide for legal professional privilege, intermediaries cannot rely on the privilege to exempt themselves from a reporting obligation.

Non-Compliance Penalties: Failure to satisfy DAC6's reporting requirements will result in fines of EUR 3,200.

Other Considerations for DAC6 Implementation in Latvia:

- **Proposed Deferral:** Latvia is considering applying the six-month reporting deferral.
- **European Commission Non-Compliance Letter:** Latvia was one of 15 EU member states to receive

a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Lithuania

Legislation: Enacted – The bill transposing DAC6 was signed into law on July 30, 2019.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: The Lithuanian Tax Authority will issue detailed reporting rules but will accept filings electronically via an XML file or through a web-based form. It is understood that reporting will follow the requirements of the Directive.

Legal Professional Privilege: The Lithuanian bill is silent on whether intermediaries can invoke legal professional privilege and, if so, what notification and reporting obligations will apply. Legal privilege does not generally extend to tax advisors in Lithuania.

Non-Compliance Penalties: Unknown.

Other Considerations for DAC6 Implementation in Lithuania:

- **Proposed Deferral:** Lithuania is considering applying the six-month reporting deferral.
-

Luxembourg

Legislation: Enacted – Bill of Law No. 7465 was put before the Luxembourg Parliament in August 2019 and passed on March 21, 2020.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: In addition to the reporting required under the Directive, taxpayers will also need to provide information on their annual corporate return for each year they use a reportable arrangement. Luxembourg has not issued a template for reporting.

Legal Professional Privilege: Legal professional privilege applies to lawyers registered with the Luxembourg state bar. Lawyers claiming such privilege have 10 days to notify other intermediaries and/or taxpayer(s) of their reporting obligation.

Non-Compliance Penalties: The bill aligns its penalty regime to that under FATCA and CRS law, applying penalties on a case-by-case basis up to EUR 250,000 for failure to comply with the legislation's reporting or notification requirements.

Other Considerations for DAC6 Implementation in Luxembourg:

- **Proposed Deferral:** Luxembourg communicated its intent to apply the proposed six-month reporting deferral.
-

• **European Commission Non-Compliance Letter:**

Luxembourg was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Malta

Legislation: Enacted – Published in the Gazette on December 17, 2019, Legal Notice 342 of 2019 implements DAC6 in Malta.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: In addition to the reporting required under the Directive, the legislation sets out an annual reporting requirement by the taxpayer using a reportable arrangement for each year the arrangement is in use.

All documentation and information obtained to satisfy reporting obligations under DAC6 should be retained for five years.

Legal Professional Privilege: An intermediary can waive its reporting obligation under Article 3 of the Maltese Professional Secrecy Act. Where waived the intermediary must notify other intermediaries and/or the taxpayer within seven working days. Additionally, an intermediary waiving its reporting obligation must prepare an annual report to the Maltese Commissioner for Revenue listing out all reportable arrangements where the reporting obligation was waived and therefore shifted to another intermediary or the taxpayer.

Non-Compliance Penalties: Where an intermediary and/or taxpayer defaults on its obligations under DAC6 it will be subject to a one-time penalty of EUR 200 and an additional EUR 100 per day for each day of the default (capped at EUR 20,000). If the Maltese Commissioner for Revenue requests information that the intermediary and/or taxpayer fails to respond a one-time penalty of EUR 1,000 and an additional EUR 100 per day penalty for each day the requested information remains outstanding (capped at EUR 30,000). A penalty of EUR 2,500 applies where documentation is not retained as required under the legislation.

Other Considerations for DAC6 Implementation in Malta: None.

Netherlands

Legislation: Enacted – The Dutch Parliament approved the bill to transpose DAC6 into Dutch law.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive. An explanatory memorandum that accompanied the proposed legislation provided additional details on when a taxpayer may obtain a tax advantage providing the following non-exhaustive list of examples: an amount is not included in the tax base, the taxpayer benefits

from a deduction, a loss for tax purposes is incurred, no withholding tax is due, or foreign tax is offset. Additionally, further guidance set out that an intermediary is not providing tax work in reference to certain activities (for example tax audits or tax due diligence).

Reporting: Reporting in the Netherlands should be done via an electronic/XML file or via a web-based form. Intermediaries and taxpayers will need to register in advance to access the web portal to make the required filings.

Guidance notes clarify that professional service firms and not the employees of those firms are the intermediary. Reporting is not required where previously reported and evidenced by a reference number.

The Dutch legislation indicates that where a cross-border arrangement is designed, but not implemented, it is not subject to reporting.

Legal Professional Privilege: Intermediaries who can rely on legal professional privilege do not need to report but must “without delay” inform other intermediaries and or taxpayer(s). The legislation does not define “without delay.”

Non-Compliance Penalties: Penalties up to EUR 870,000 apply where an arrangement is reported incorrectly, incompletely, or late. Penalties will generally not apply for reporting required during the “catch-up” period. Penalties may apply to intermediaries who over-report on arrangements that are not reportable under DAC6.

Other Considerations for DAC6 Implementation in the Netherlands:

- **Guidance:** An explanatory memorandum accompanied the draft legislation providing additional details on the application of the main benefit test and hallmarks in the Netherlands.

The Dutch Tax Authority posted a Frequently Asked Question document to assist taxpayers in understanding their obligations under DAC6 in the Netherlands.

- **Proposed Deferral:** The Netherlands is considering applying the six-month reporting deferral.
- **Specialized Team:** The Dutch Tax Authority established a dedicated MDR team to draft guidance, assist intermediaries and taxpayers, work with other EU member states and the European Commission, and review the expected 20,000 filings.

Poland

Legislation: Implemented, but subject to amendments – In October 2018, Poland published in the Journal of Laws of 2018 item 2193 amending the Polish tax code to enact DAC6. The legislation became effective on January 1, 2019.

Amendments to Poland’s in-effect DAC6 legislation were submitted to the Polish parliament which, if enacted,

require duplicative reporting and introduce procedural modifications to the existing legislation.

Expands the Scope of the Directive? Yes – The DAC6 legislation in Poland significantly expands on the scope and reporting required under the Directive. Under the Polish legislation, domestic arrangements that meet the hallmarks are also reportable. Poland also extended the taxes covered to include indirect taxes, such as Value Added Tax. Additionally, Poland introduced four “other specific hallmarks” not subject to the Main Benefit Test.

The Polish legislation identifies the two types of intermediary by classifying them as either a “promoter” or “supporter” with each intermediary type having different reporting obligations and deadlines. Additionally, certain promoters need to enact specified internal procedures to comply with the Polish legislation.

In addition to expanding the scope, Poland began requiring reporting under its DAC6 legislation in 2019, well in advance of the Directive’s reporting requirement of August 2020.

Reporting: The legislation intends for promoters to provide reporting in the first instance, unless legal professional privilege applies, or the arrangement has been reported. Under the legislation, initial reports on cross-border arrangements in place between June 25, 2018 and January 1, 2019 were due by March 31, 2019 with a grace period (subject to fines) of April 30, 2019. Intermediaries characterized as service providers were not obligated to report under this timeline for cross-border transactions.

Domestic arrangements in place from November 1, 2018 to January 1, 2019 were first due on February 28, 2019. Arrangements entered on or after January 1, 2019 were reportable following the 30-day timeline.

The information required largely aligns to the Directive, but also requires a description of the business activities the arrangement applied, the value of the transactions, any assumptions and a chronology of the activities performed, and the identification of other entities obligated to provide additional information on the arrangement.

As a new obligation, there is no significant business practice or approach established to assist in interpreting and applying the reporting requirements.

Intermediaries characterized as promoters should make the filing via the Polish Ministry of Finance’s DAC6 portal using Form MDR-1. Intermediaries characterized as supporters will file Form MDR-2. Taxpayers should use Form MDR-3 to represent that a tax advantage was obtained, and this form must be signed by all members of the management board of corporate taxpayers. The taxpayer(s) should file the Form MDR-3 annually with the income tax return filing.

Upon filing an arrangement, the Ministry of Finance will issue the arrangement with a reference number.

February 2020 Proposed Amendments

Duplicative Reporting Requirement

As part of the proposed amendments to the DAC6 legislation, the Polish Ministry of Finance will require promoters and taxpayers to resubmit reportable cross-border arrangements (domestic arrangements do not need to be resubmitted) for the June 25, 2018 through March 31, 2020 period. Additionally, supporters, who previously did not have a filing obligation will also need to report for the June 25, 2018 through March 31, 2020 period. This will invalidate previously issued tax reference numbers and, upon resubmission, the Ministry of Finance will issue a new tax reference number, in a new format. Deadlines for resubmission are:

- May 31, 2020 for the promoter.
- July 30, 2020 for the taxpayer.

Under the draft legislation, supporters will make an initial filing for the retroactive period on August 31, 2020. This aligns with the requirement under the Directive, but for the April 1, 2020 through July 1, 2020 period, if a reportable arrangement arises that the supporter is obligated to report, it should be reported within 30 days requiring earlier reporting for arrangements identified during the April through July 2020 period.

It is unclear if the proposed deferral will impact the above timelines.

Change to Form MDR-3 Requirements

The draft legislation may remove the signature requirement of all board members/corporate taxpayers and allow for the provision of the form via proxy.

Legal Professional Privilege: Tax and legal advisors can invoke legal professional privilege provided the arrangement is not a “marketable arrangement.” Marketable arrangements must be reported on a no-name basis. For non-marketable arrangements, the intermediary must inform the taxpayer that the arrangement is reportable, and the taxpayer can either withdraw the confidentiality provision to allow for reporting or disclose the arrangement themselves. Poland is considering removing the availability of the legal professional privilege in the future.

Non-Compliance Penalties: Poland will apply criminal financial sanctions for non-compliance or false reporting up to EUR 5 million. Additionally, promoters required to implement internal procedures that fail to do so will also be subject to penalties.

Other Considerations for DAC6 Implementation in Poland:

- **Guidance:** The Polish Ministry of Finance issued guidelines in January 2019 to assist in the interpretation of DAC6 in Poland.

- **Judicial Challenge:** The National Council of Tax Advisors in Poland filed a legislative appeal against the law implementing DAC6 in Poland with the Polish Constitutional Court, arguing that the law’s ambiguity will raise problems in its application and violate professional secrecy. The appeal also criticized Poland’s early application and broad scope.
- **European Commission Non-Compliance Letter:** Poland was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Portugal

Legislation: Draft – The Finance Ministry issued a revised draft law on January 31, 2020 taking into consideration comments received from the public consultation on the earlier draft. The draft legislation must undergo the formal legislative process and remains subject to amendment.

Expands the Scope of the Directive? Yes – The draft law expands the scope and hallmarks B to E of the Directive to apply to domestic arrangements. Indirect taxes remain out-of-scope for purposes of reportable cross-border arrangements, but Value Added Tax, property, and stamp duty are in-scope when considering domestic arrangements.

Additionally, the Main Benefit Test only applies to situations “beyond a reasonable doubt” that a tax advantage was the primary driver for entering into an arrangement. The draft legislation defines a tax advantage as any reduction, elimination or tax deferral, including the use of tax losses or the granting of tax benefits that would not be granted fully or partially, without the use of the arrangement.

Reporting: Taxpayers who participate in reportable arrangements must annually inform the Portuguese Tax Authority of their use. Forms, technical specifications, instructions, and procedures are expected prior to July 1, 2020 to facilitate reporting.

Legal Professional Privilege: The earlier draft of the legislation did not contemplate legal professional privilege, but the most recent draft provides an exemption from reporting provided the intermediary notifies the taxpayer within five days of the taxpayer’s obligation to report. Where the taxpayer fails to report within 30 days, the obligation to report reverts to the intermediary who needs to report within 10 days.

Non-Compliance Penalties: Penalties ranging from EUR 2,000 to 80,000 will apply for failing to report, notifying others of their reporting obligation, or providing proof of a reportable arrangement. In addition, inaccuracies, omissions, or delays in response to requests for additional information will also result in penalties.

Other Considerations for DAC6 Implementation in Portugal:

- **Additional Requests for Information:** The Portuguese Tax Administration can request additional information, which should be provided within 10 to 20 days; failure to provide could result in penalties.
- **European Commission Non-Compliance Letter:** Portugal was one of 15 EU member States to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Romania

Legislation: Enacted – The Official Gazette published the ordinance amending and supplementing Law 207/2015 and implemented DAC6 in Romania on January 31, 2020.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive. The legislation does not refer to what taxes are in-scope, it assumes that indirect taxes are out-of-scope.

Reporting: In addition to the reporting required under the Directive, Taxpayers engaged in a reportable arrangement must report annually for the years in which they use a reportable arrangement.

Legal Professional Privilege: Intermediaries exempt from reporting due to legal professional privilege must notify “without delay” other intermediaries and or the taxpayer of their obligation, “without delay” is not defined in the legislation. Taxpayers may waive the privilege to allow the intermediary with legal professional privilege to report.

Non-Compliance Penalties: Penalties ranging from EUR 1,000 to 20,000 apply where an intermediary fails to notify a taxpayer or other intermediaries of its legal professional privilege, fails disclose relevant information, or fails to meet the timeline for reporting.

Other Considerations for DAC6 Implementation in Romania:

- **Guidance:** The Romanian Tax Authority indicated it will issue guidance to assist in implementing DAC6 in Romania.
- **Proposed Deferral:** Romania is considering applying the six-month reporting deferral.
- **European Commission Non-Compliance Letter:** Romania was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Slovakia

Legislation: Enacted – DAC6 was gazette into law on October 14, 2019.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: Where there are multiple intermediaries/ taxpayers with a reporting obligation in Slovakia, a joint electronic statement can be filed indicating the required information has been previously reported. Where the information is reported in another EU member state, an intermediary in Slovakia can file a statement electronically confirming the required information has been reported. Taxpayers that file a joint statement are held jointly and severally liable.

The Slovak Financial Directorate website will provide the required forms for submitting these declarations and making DAC6 filings.

Legal Professional Privilege: Tax advisors, auditors, banks, and attorneys-at-law can claim legal professional privilege in Slovakia. When claimed, they must notify “without delay” any other intermediary or the taxpayer of their reporting obligation the legislation does not define “without delay.” If the taxpayer is obligated to report, the legislation requires that the intermediary provides the necessary information for the taxpayer to meet its reporting obligation.

Non-Compliance Penalties: Penalties up to EUR 30,000 will apply for failing to meet reporting obligations, including confirmation that reporting has been made by another intermediary or taxpayer.

Other Considerations for DAC6 Implementation in Slovakia: None.

Slovenia

Legislation: Enacted – The Slovenian Official Gazette published amendments to the Tax Procedure Act (ZDavP-2L) enacting DAC6 into Slovenian law on June 7, 2019.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive.

Reporting: Taxpayers engaging in a reportable arrangement must notify the Slovenian Tax Authority of such engagement on an annual basis for each year the arrangement is in use.

Legal Professional Privilege: If a lawyer were to report and such reporting would breach professional privilege under Slovenian legislation, they must “immediately” inform any other intermediaries or the taxpayer in writing of their inability to report and transfer the reporting obligation.

Non-Compliance Penalties: Penalties of EUR 30,000 apply to medium and large companies when failing to notify or report information in a timely manner. Additionally, individuals responsible within a legal entity can also be fined up to EUR 4,000. The legislation also contemplates increased penalties to apply for serious offenses, imposing a monetary penalty of EUR 150,000 for medium and large companies and EUR 20,000 for responsible individuals where a serious offense occurred.

Other Considerations for DAC6 Implementation in Slovenia:

- **Guidance:** To date the Slovenian Ministry has not issued guidance, however the legislation stipulates that the Slovenian Ministry can issue detailed guidance for applying the DAC6 rules and it is expected such guidance will be issued.

Spain

Legislation: Draft – The Finance Ministry issued a draft bill to implement DAC6 in Spain. Additionally, the Finance Ministry published draft regulations detailing reporting requirements for reportable arrangements.

The draft DAC6 bill, revised after public consultation, was submitted to Parliament for approval.

Expands the Scope of the Directive? No – The draft legislation largely follows the scope outlined in the Directive. The legislation as drafted provides some clarifications on the Directive’s hallmarks and provides a definition for cross-border arrangement.

Reporting: Reporting is required through a web-based form. Intermediaries should, on a quarterly basis, update details regarding marketable arrangements. Additionally, taxpayers engaging in a reportable arrangement deriving a benefit with a connection to Spain must make an annual filing detailing the transaction for each year the arrangement is in effect.

Legal Professional Privilege: The draft legislation would allow the application of legal professional privilege to a broad range of intermediaries. Taxpayers could waive the privilege to allow intermediaries to report in full.

Intermediaries invoking legal professional privilege must notify other intermediaries and the taxpayer.

Non-Compliance Penalties: The draft legislation imposes a minimum penalty of EUR 4,000 for failure to report with a maximum penalty up to the value of the fees or tax advantage received due to engaging in the reportable transaction. The legislation would impose a EUR 600 penalty for failure to notify intermediaries/taxpayers of the application of the legal professional privilege. Additionally, returns not filed electronically would also be subject to fines up to EUR 1,500.

Other Considerations for DAC6 Implementation in Spain:

- **Guidance:** Detailed draft guidance was issued in June 2020 and published to Spain’s website.
- **European Commission Non-Compliance Letter:** Spain was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Sweden

Legislation: Draft – Sweden published a draft of its DAC6 implementation legislation on December 6, 2019. This draft legislation needs to undergo the legislative process, including a review by The Council on Legislation (Lagrådet).

Expands the Scope of the Directive? No – The legislation as currently drafted largely follows the scope outlined in the Directive.

Sweden is contemplating the inclusion of domestic arrangements in prospective legislation. Further details on the implementation date, taxes subject to reporting, and potential retroactive applicability is unknown, but is not anticipated that domestic arrangements will be reportable beginning July 1, 2020.

Reporting: It is unknown if Sweden will require additional reporting from intermediaries or taxpayers. Sweden will allow filings via an electronic/XML file or through a web-based form.

Legal Professional Privilege: Only members of the Swedish Bar Association can employ the legal professional privilege for an exemption from reporting, but a taxpayer can waive the privilege to allow the intermediary to report. Additional details regarding the notification period for notifying other intermediaries and the taxpayer is unknown.

Non-Compliance Penalties: Penalties for not reporting are subject to a maximum of EUR 30,000, which may be reduced for voluntary corrections. The penalties will begin to apply for transactions post-July 1, 2020.

Other Considerations for DAC6 Implementation in Sweden:

- **Guidance:** Although the draft legislation includes examples and provide some notes to clarify the Directive’s hallmarks Sweden has not issued formal guidance.
- **Proposed Deferral:** Sweden is considering applying the six-month reporting deferral.
- **European Commission Non-Compliance Letter:** Sweden was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

United Kingdom (UK)

Legislation: Enacted – The International Tax Enforcement (Disclosable Arrangements) Regulations 2020, Statutory Instrument 2020 No. 25 were laid before the House of Commons on January 13, 2020.

Expands the Scope of the Directive? No – The legislation largely follows the scope outlined in the Directive. The legislation and explanatory memorandum provide additional

details on the hallmarks and provide definitions to assist in implementing DAC6 in the UK.

In 2006, the UK began requiring disclosure of certain domestic arrangements, in 2016 it expanded those rules and many of the Directive's hallmarks are already in place from a domestic perspective in the UK. The UK intends for the separate operation of the two reporting regimes, domestic and cross-border (DAC6).

Reporting: Her Majesty's Revenue and Customs (HMRC the UK Tax Authority) indicated that where a secondary intermediary can evidence prior reporting by a primary intermediary, it can rely on the primary intermediary having reported all required information. Intermediaries and taxpayers relying on prior reports bear the evidential burden for illustrating a report was filed. HMRC will issue reference numbers that it expects intermediaries and taxpayers to distribute to the other intermediaries and taxpayers involved.

UK resident taxpayers engaged in reportable cross-border arrangements must annually report on or before the company's tax return due date (generally January 31) for the first year the taxpayer partakes in a cross-border arrangement and for each year a tax advantage is obtained.

HMRC may request additional supporting information or detail on the cross-border transaction, in which intermediaries and or taxpayers should provide within 30 days.

Legal Professional Privilege: Legal professional privilege may exempt an intermediary from reporting and in such cases the obligation transfers to other intermediaries with EU nexus or the taxpayer.

Non-Compliance Penalties: HMRC will impose a GBP 5,000 penalty for failure to comply in the first instance. HMRC can refer cases to tribunal to increase this penalty in situations where the tax advantage gained, fees paid, or intentions behind the compliance breach deserve additional scrutiny and possibly increased penalties. Where referred to tribunal penalties can go up to GBP 1 million.

Other Considerations for DAC6 Implementation in the UK:

- **Guidance:** HMRC published an explanatory memorandum when it issued its regulations. HMRC met with key stakeholders to develop detailed guidance that it intends to issue in final form prior to July 1, 2020, DAC6's effective date.
- **Reporting Schema:** HMRC released the XML reporting schema for consultation. Taxpayers can also report arrangements manually to HMRC through its website.
- **EU Membership Status:** As of January 31, 2020, the UK is no longer a member of the EU, however it must continue to abide by EU law through the transition period which runs from February 1, 2020 through

December 31, 2020. Based on the objectives of DAC6, it is expected the UK will continue to require reporting on DAC6 cross-border arrangements.

- **European Commission Non-Compliance Letter:** The United Kingdom was one of 15 EU member states to receive a letter from the European Commission for failure to transpose the Directive on January 24, 2020.

Detailed Information about Legislative Developments in Non-EU Countries²

Countries outside the EU are considering applying Mandatory Disclosure Rules either following the OECD's lead or applying something more substantive by following the lead of the EU's DAC6. Mexico, Norway, South Africa, and the UK Crown Dependencies and Gibraltar have begun the process of introducing legislation. In addition to these countries, there is an expectation that EU partners, such as Switzerland, may also cede to pressure and implement a version of DAC6.

Mexico

Legislation: Enacted – Approved as part of the wider 2020 economic package the legislation requires reporting for transactions beginning in 2020, with the first reporting to take place in 2021.

Reporting: Will require tax advisors to prepare informational returns on an annual basis for "reportable schemes" that directly or indirectly create a tax benefit in Mexico. For example, through treaty shopping, circumventing the exchange of information, loss planning, or obscuring income. If the tax advisor fails to make the required return, the obligation to report falls to the taxpayer.

Penalties: Penalties for noncompliance can be as high as 25 million Mexican Pesos (approximately EUR 1 million).

Norway

Legislation: Proposal – The Norwegian Official Report issued a proposal to introduce rules that largely align with DAC6. Public comments were welcomed until December 2, 2019. Further information on the proposed timeline is currently unknown.

Reporting: Aligns to the Directive's requirements for intermediaries to report, unless they cannot in which case the obligation would shift to the taxpayer. Exchange of information would rely on existing agreements with EU member states.

Penalties: Penalties for noncompliance are unknown.

South Africa

Legislation: Proposal – The 2019/2020 budget included proposals aligned with the OECD’s Mandatory Disclosure Rules to crack down on offshore structures circumventing information reporting.

Reporting: Aligns to the requirements for intermediaries to report under the OECD’s Mandatory Disclosure Rules.

Penalties: Penalties for noncompliance are unknown.

Crown Dependencies of the UK and the UK Overseas Territory of Gibraltar

Crown Dependencies:

The Crown Dependencies of Guernsey, the Isle of Man, and Jersey in 2019 committed to implementing legislation that aligns to the OECD’s Mandatory Disclosure Rules.

The Isle of Man:

The Isle of Man passed legislation in December 2019 to implement the OECD’s Mandatory Disclosure Rules. The first report is due six months following the regulations entry into force. The first report will include arrangements and structures entered into on October 29, 2014 through the date the regulations enter into force for arrangements where the value exceeds USD 1 million.

Jersey:

Jersey launched a public consultation. Jersey has yet to issue legislation.

Guernsey:

On March 13, 2020 Guernsey implemented The Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations, 2020 requiring an intermediary to disclose information on CRS avoidance arrangements and opaque offshore structures as a means to avoid reporting obligations under CRS. Failure to report results in a GBP 5,000 penalty. If this is the second or third incidence of failure to report the fines increase to GBP 7,500 and GBP 10,000.

Gibraltar:

Gibraltar implemented DAC6 on January 30, 2020 through publication of the Income Tax (Amendment) Regulations 2020. The legislation follows the Directive, no guidance or other information on the application has been provided. Gibraltar communicated its intent to apply the proposed six-month reporting deferral. Penalties for administrative errors will be GBP 300 and for inaccurate or non-reporting, up to GBP 3,000.

For more insights visit:



NEWYORK BEIJING BOSTON CHARLOTTE CHICAGO DENVER DUBLIN GRAND CAYMAN HONG KONG JERSEY CITY
KRAKÓW LONDON LUXEMBOURG NASHVILLE PHILADELPHIA TOKYO WILMINGTON ZÜRICH WWW.BBH.COM

Brown Brothers Harriman & Co. (“BBH”) may be used as a generic term to reference the company as a whole and/or its various subsidiaries generally. This material and any products or services may be issued or provided in multiple jurisdictions by duly authorized and regulated subsidiaries. This material is for general information and reference purposes only and does not constitute legal, tax or investment advice and is not intended as an offer to sell, or a solicitation to buy securities, services or investment products. Any reference to tax matters is not intended to be used, and may not be used, for purposes of avoiding penalties under the U.S. Internal Revenue Code, or other applicable tax regimes, or for promotion, marketing or recommendation to third parties. All information has been obtained from sources believed to be reliable, but accuracy is not guaranteed, and reliance should not be placed on the information presented. This material may not be reproduced, copied or transmitted, or any of the content disclosed to third parties, without the permission of BBH. Pursuant to information regarding the provision of applicable services or products by BBH, please note the following: Brown Brothers Harriman Fund Administration Services (Ireland) Limited and Brown Brothers Harriman Trustee Services (Ireland) Limited are regulated by the Central Bank of Ireland, Brown Brothers Harriman Investor Services Limited is authorised and regulated by the Financial Conduct Authority, Brown Brothers Harriman (Luxembourg) S.C.A. is regulated by the Commission de Surveillance du Secteur Financier. All trademarks and service marks included are the property of BBH or their respective owners. © Brown Brothers Harriman & Co. 2020. All rights reserved. IS-06334-2020-06-24 0925_20