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DAC 6 Deadline Nears: What Does the Mandatory Disclosure Regime Mean for Taxpayers and Advisers?

The 31 December deadline for EU Member States to adopt implementing legislation for DAC 6 is fast approaching. Intermediaries and taxpayers must be ready for compliance.

By the end of 2019, each Member State of the European Union must enact domestic legislation to implement DAC 6, an EU Directive on Administrative Cooperation aimed at combating aggressive cross-border tax-planning structures. The Directive introduces an obligation on intermediaries with EU connections (such as lawyers, accountants, and tax advisers) — and, in some cases, on taxpayers with EU connections — to disclose reportable cross-border arrangements to relevant local tax authorities, which will subsequently exchange this information with other EU tax authorities. The language of the Directive is broad in scope, both in respect of what constitutes a reportable cross-border arrangement and who is considered to be an intermediary. In certain cases, ordinary course commercial transactions with no particular tax objective may be covered by the regime.

The first submissions of reports under DAC 6 are due by August 2020 — including disclosure of reportable transactions going back to 25 June 2018. This retroactive reporting obligation for qualifying transactions means that taxpayers and their advisers must act now to become conversant with the regime and plan for compliance.

This *Client Alert* summarises the key aspects of the regime pursuant to the Directive. The actual implementation of DAC 6, however, depends on local law in each EU Member State, and final domestic provisions implementing DAC 6 may differ from one EU Member State to another. To date, despite the impending year-end deadline, many EU Member States have not yet passed final legislation implementing DAC 6.¹ As a result, significant uncertainty remains as to the Directive's actual scope and application.

Below are eight key questions concerning the reporting regime pursuant to the Directive.

1. What is the reporting regime under DAC 6?

DAC 6 imposes mandatory reporting:

- By intermediaries (or, in certain circumstances, by relevant taxpayers)
- Of cross-border arrangements
- Meeting certain hallmarks

- Within 30 days (beginning with availability or implementation of the arrangement)

2. Who is an intermediary?

An intermediary is anyone who designs, markets, organises, makes available, implements, or manages the implementation of a reportable arrangement, or anyone who helps with reportable arrangements and knows or could reasonably be expected to know that they are doing so. Given the broad scope of the definition, an intermediary potentially includes accountants, financial advisers, lawyers, banks, and other advisers on a taxpayer's transaction. This may also include sponsors and managers of a private equity fund, an investment fund, or other type of investment vehicle.

To fall within the disclosure regime, however, the intermediary must have a connection with the EU, which any of the following criteria may establish:

- The intermediary is tax resident in an EU Member State.
- It is incorporated in, or governed by, the laws of an EU Member State.
- It has a permanent establishment or branch in an EU Member State that is connected with the provision of the relevant services.
- It is registered with a tax, consultancy, or legal professional association in an EU Member State.

Disclosure to an EU Member State may be required even if none of the intermediaries has a connection with that EU Member State.

3. What is reportable?

The reporting obligations apply in respect of cross-border arrangements that meet certain hallmarks listed in the Directive.

The Directive does not define the term "arrangement." Therefore, an arrangement may comprise any kind of transaction. A "cross-border arrangement" is any arrangement that concerns either more than one EU Member State or one EU Member State and a third country.

A cross-border arrangement is reportable if it contains one or more hallmarks set out in the Directive. The hallmarks set out in the Directive are intended to identify aggressive tax planning and cover an array of arrangements.

The Directive includes five categories of hallmarks, the details of which are potentially quite complex. A simplified summary is set out in the table below. Some, but not all, of the hallmarks require that the arrangement fulfil the "main benefit test" (MBT). The MBT will be considered met if the main benefit or one of the main benefits expected from an arrangement is a tax advantage.

Category	Description	MBT
A: Generic hallmarks linked to the MBT	Taxpayer or participant undertakes to comply with a condition of confidentiality	✓
	Remuneration of intermediary related to tax advantage	✓
	Arrangement has standardised documentation and/or structure	✓
B: Specific hallmarks linked to the MBT	Loss buying	✓
	Converting income into capital	✓
	Circular transactions	✓
C: Specific hallmarks related to cross-border transactions	Certain deductible cross-border payments	In certain cases
	Double deductions for depreciation	✗
	Relief from double taxation in more than one jurisdiction	✗
	Transfer of assets and difference in amount treated as consideration	✗
D: Specific hallmarks concerning automatic exchange of information and beneficial ownership	Arrangements which undermine tax reporting or obscure beneficial ownership	✗
E: Specific hallmarks concerning transfer pricing	Transfer pricing: non-arm's length or hard to value intangibles or base erosive transfers	✗

4. Who is obliged to report?

The primary reporting obligation under the Directive is with the intermediary. An intermediary may be exempt from full reporting if it can demonstrate that another intermediary has reported the arrangement and complied with the necessary formalities set out in the relevant domestic legislation.

In the following two situations, the obligation to report lies with the relevant taxpayer:

- There is no intermediary (e.g., an in-house arrangement).
- The taxpayer is informed that the intermediary has exercised its waiver due to a legal professional privilege (in which case the intermediary is exempted from its reporting obligation), and there is no other intermediary that is obliged to report.

5. What about legal professional privilege?

As noted above, an intermediary's obligation to file a report may not apply in the case of legal professional privilege. The Directive permits EU Member States to allow for an exception to the duty to report if such reporting obligation would breach the legal professional privilege under the national law of that Member State. In such cases, the relevant intermediary is obliged to notify other intermediaries or, in lack thereof, the relevant taxpayer of their reporting duties under the Directive.

The scope of the legal professional privilege will vary across the EU Member States in accordance with different national professional rules. In addition, legal professional privilege, even if applicable, may not completely exempt lawyers from making any reports under DAC 6. Even if some of the information is subject to the legal professional privilege, other information relating to the arrangement, such as information that is factual in nature, may still need to be reported to the tax authority.

6. What information must be reported, and by when?

The Directive requires that the following information be exchanged by EU Member States in respect of reportable cross-border arrangements:

- Identification of intermediaries and relevant taxpayers
- Description of the cross-border arrangement and its value
- Timing of implementation of the cross-border arrangement
- Other information regarding the applicable hallmarks, details of the national provisions forming the basis of the reportable cross-border arrangement, and the EU Member States involved

The national provisions implementing DAC 6 will likely provide for the disclosure of the above information.

The requisite information must be filed with the relevant tax authorities within 30 days after the earliest of the arrangement being made available for implementation, the arrangement being ready for implementation, or when the first step in the implementation of the arrangement is taken. An arrangement may be considered to be "made available for implementation" under the Directive if it is developed and offered to a client, even if the client chooses not to implement it.

7. When does DAC 6 come into effect?

EU Member States have until 31 December 2019 to transpose the provisions of the Directive into national laws and must apply those provisions by 1 July 2020. The first reports are due by 31 August 2020, and the first automatic exchange of information between authorities must be completed by 31 October 2020.

8. What practical steps should advisers and taxpayers take?

- Review all transactions entered into from 25 June 2018 to determine which matters fall within the scope of the Directive. One approach is to draw up a list of transactions potentially in scope and request that the relevant personnel involved analyse each transaction to determine what is reportable.
- Establish systems to collect relevant information on, and maintain records of, reportable arrangements going forward. A number of software providers offer programs to help capture data required to be reported under the Directive.
- Taxpayers may wish to confirm each adviser's approach to disclosure under DAC 6 at the outset of a transaction and, when there are multiple intermediaries, confirm which of them plans to report a reportable arrangement. Notably, if there are multiple intermediaries, each intermediary — absent a legal professional privilege waiver — retains its general obligation to file.
- For multiple disclosures of the same arrangement, the scope and content of the disclosures should be harmonised in order to avoid inconsistent disclosures, including the timing of the disclosure. (Whether disclosures will be required within 30 days after closing or after signing a transaction, or even earlier, is not yet clear.) Relevant parties may wish to file shortly after signing (or earlier) and, if necessary, to file again shortly after closing if additional arrangements are made after signing (e.g., entering into debt financing arrangements that may be reportable). Multiple disclosures may also be required when a transaction involves post-closing steps (e.g., transfer pricing arrangements entered into following a transaction).
- Intermediaries should confirm that they have the necessary permissions from taxpayers to disclose reportable arrangements, to ensure there is no breach of client confidentiality or unintentional waiver of legal privilege.
- Monitor how each EU Member State implements DAC 6, and be mindful of differences in each jurisdiction.
- Adopt an expansive view of the Directive, given the lack of clear guidance and final legislation in many EU Member States. Once final legislation is enacted in each EU Member State, analyse potentially in-scope arrangements for purposes of actual reporting.
- Taxpayers and intermediaries involved in reportable arrangements should consider training their personnel, to raise awareness of the Directive. Transactions may fall within the scope of the Directive even if there is no discussion of any tax benefits being obtained from the arrangement and no tax personnel are involved, since not all of the Directive's hallmarks require the MBT to be met.

Latham & Watkins will continue to monitor and report on developments in this area.

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Endnotes

¹ The UK tax authority has emphasised that the UK is committed to tackling international tax avoidance and that leaving the EU will not reduce its commitment. Therefore, the UK is expected to apply DAC 6 notwithstanding Brexit.