New EU mandatory disclosure requirements for reportable cross-border arrangements

New EU mandatory disclosure requirements, commonly known as “DAC6”, have been introduced to require intermediaries and taxpayers to disclose reportable cross-border arrangements to the relevant national tax authority, which will then be automatically exchanged with tax authorities in other EU member states.

New reporting requirements

Starting from 25 June 2018, intermediaries and taxpayers resident in an EU member state are required to disclose reportable cross-border arrangements to tax authorities. The Directive applies to cross-border arrangements that involve a member state and either another member state or a third country. One of the five hallmarks set out below will also need to be met for the cross-border arrangement to be reportable. The rules apply to direct taxation so are mainly focused on corporate taxes and income taxes.

Member states must transpose the Directive into their national laws and regulations by 31 December 2019. Reportable cross-border arrangements that take place from 25 June 2018 to 30 June 2020 will need to be disclosed by 31 August 2020 to tax authorities of the relevant member state(s). The information will be automatically exchanged by each member state within one month of the end of the quarter in which the information was filed.

The Irish regulations were published in Finance Act 2019 on 17 October 2019 and passed into law at the end of 2019.

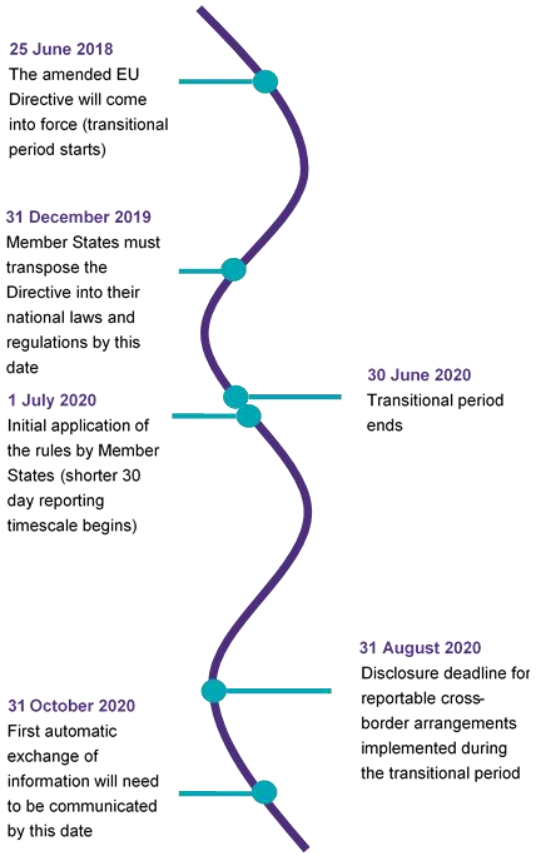
There are differences in approach by different EU member states. Therefore, it is important that intermediaries and taxpayers understand how they may be affected and put in place procedures to identify whether their cross-border transactions fall within one of the hallmarks.

Who needs to make the disclosure

- When there is an intermediary based in an EU member state, that intermediary will be required to make the disclosure.
- Where there are multiple intermediaries, all intermediaries are required to report unless they have evidence that the same information has been filed in another member state.
- Where an intermediary is subject to legal professional privilege, the reporting obligation lies with other intermediaries, or, if there are no such intermediaries, with the relevant taxpayer.
- If there is no intermediary to the arrangement or legal professional privilege applies to the intermediaries, then the obligation to report will lie with the taxpayer.

An ‘intermediary’ for reporting purposes is broadly defined and includes any person who designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement. ‘Arrangement’ is defined as any scheme, transaction or series of transactions. It also includes service providers who know or could reasonably be expected to know that they have undertaken to provide assistance with respect to a reportable cross-border arrangement.

Financial institutions may also fall within the definition of intermediary for some parts of their business. The first step will be to undertake an initial impact assessment to determine the scope of the disclosure requirements for your business.



Time limits

The first set of reporting will be required by 31 August 2020 for transactions entered into from 25 June 2018 up to 30 June 2020. Thereafter where the intermediary or taxpayer is subject to a reporting obligation, they will need to disclose the information to tax authorities within 30 days beginning on the day after the arrangement is made available, or is ready for implementation to the taxpayer, or when the first step of the arrangement has been implemented, whichever occurs first.

Hallmarks

Part I - Main benefit test

Generic hallmarks under Category A, specific hallmarks under Category B and some under Category C may only be taken into account where they fulfil the "main benefit test". The test will be satisfied if it can be established that the main benefit or one of the main benefits, which a person may reasonably expect to derive from an arrangement, is the obtaining of a tax advantage.

Part II - Categories of hallmarks

Category A – Generic hallmarks linked to the main benefit test

Arrangements that include confidentiality conditions, fees geared to tax savings and arrangements that have standardised documentation and/or structure

Category B – Specific hallmarks linked to the main benefit test

Arrangements that include acquiring a loss-making company to utilise its losses and reduce the purchaser's tax liability, converting taxable income into capital gains or exempt income, and transactions resulting in the circular flow of funds

Category C – Specific hallmarks related to cross-border transactions

Subject to the main benefit test
Arrangements between associated enterprises that involve deductible cross-border payments, where the recipient is resident in a state whose corporation tax rate is zero (or almost zero), or the payment benefits from a full exemption or preferential tax regime

Not subject to the main benefit test
Arrangements between associated enterprises that involve deductible cross-border payments, where the recipient is not tax resident in any jurisdiction or is resident in a jurisdiction which is included in the EU or OECD list of non-cooperative jurisdictions, deductions for depreciation on the same asset are claimed in more than one jurisdiction, double tax relief is claimed in more than one jurisdiction, or there is a transfer of assets and there is a material difference between the consideration payable and receivable in those jurisdictions

Category D – Specific hallmarks concerning automatic exchange of information and beneficial ownership

Arrangements that attempt to undermine the EU's Common Reporting Standards (CRS) and other tax reporting regimes; or involve a non-transparent legal or beneficial ownership chain where the beneficial owners lack economic substance and are made unidentifiable

Category E – Specific hallmarks concerning transfer pricing

Arrangements that involve the use of unilateral safe harbour rules, the transfer of hard-to-value intangibles, and intra-group cross-border transfer of functions and/or risks and/or assets, which result in the Earnings Before Interest and Taxes (EBIT) of the transferor to fall, during the three-year period after the transfer, to less than 50% of the projected EBIT if the transfer had not been made

Information to be disclosed

Individual member states will set the state-specific content to be disclosed but the reports will have to include the following:

- identification of intermediaries, relevant taxpayers and, where appropriate, associated enterprises to the relevant taxpayer;
- details of the relevant hallmarks;
- details of the national provisions that form the basis of the reportable cross-border arrangement;
- description and value of the reportable cross-border arrangement; and
- identification of the member state of the relevant taxpayer(s) and any other member states which are likely to be affected by the reportable cross-border arrangement.

Penalties for non-compliance

The penalties for failure to comply start at €5,000 plus €500 per day for additional delays in compliance.

How Grant Thornton can help

We can assist you in undertaking a risk assessment during the transitional period, designing and implementing procedures to identify transactions that contain one of the hallmarks, as well as meeting your future reporting obligations. If you would like to discuss further, please contact your usual partner or any of the contacts below:

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