

Directive on reporting cross-border arrangements (3/39/18)

A new EU directive that lays down an obligation to report cross-border arrangements came into force on 25 July 2018. This article explores the new rules.

Governments, international organisations and the EU have been working on a set of rules to minimise and prevent tax fraud and evasion. For this purpose, an action plan for dealing with base erosion and profit shifting (BEPS) has been prepared. The plan mainly aims to ensure that a company's profits are taxed in the country where they are actually derived and to make it impossible to legally shift profits to other jurisdictions possibly offering lower tax rates.

A key BEPS tool for fighting cross-border tax fraud is the directive adopted on 25 June 2018 (DAC6).

DAC6

An obligation to report aggressive tax planning arrangements is imposed by DAC6 on persons involved in preparing them. This requirement applies only to cross-border arrangements, i.e. those set up in two or more member states or in a member state and a third country. The national tax authorities will be sharing this information as part of the information exchange process.

DAC6 prescribes a number of hallmarks indicating that a taxpayer is planning to implement or has already implemented an aggressive tax arrangement covered by the disclosure requirement. However, those hallmarks are formulated quite broadly and generally. To understand what each member state will treat as an aggressive arrangement, it is important to wait for rules that member states will pass into their national legislation. Member states are to adopt DAC6 rules by 31 December 2019.

In general, aggressive tax planning should be detected where a taxpayer gains a tax advantage by using discrepancies between tax systems in various countries, and where gaining such an advantage is the only reason for setting up an aggressive arrangement.

Who is required to report?

An obligation to report to the tax authority falls on –

1. an intermediary (every person involved in any stage of setting up and implementing an aggressive arrangement, such as lawyers and consultants);
2. the taxpayer (every person that plans or implements an aggressive arrangement).

Time limits

Early reports should be filed as from 1 July 2020, and the national tax authorities will be sharing relevant details as part of the information exchange process by 31 October 2020. From the effective date, DAC6 will also operate retrospectively.

What are the hallmarks of aggressive tax planning?

Hallmarks that trigger the reporting requirement are listed in Annex 4 to DAC6 and divided into five classes (A-E).

It is important to note that the hallmarks in classes A and B as well as some of the class C hallmarks should be taken into account only if the main benefit test is satisfied, i.e. it can be established that a tax advantage is the main benefit or one of the main benefits the person can reasonably expect from the arrangement. Here are a few examples:

Class	Hallmark	Example
A	Generic hallmarks linked to the main benefit test	The provision of services for setting up an arrangement where an intermediary is entitled to a fee depending on the level of a tax advantage created by that arrangement or on whether such a tax advantage is created.
B	Specific hallmarks linked to the main benefit test	An arrangement that involves acquiring a loss-making entity, ceasing its operations and utilising losses for the purpose of reducing tax liabilities, including shifting those losses to another jurisdiction. An arrangement that involves circular transactions where assets are sold and later bought back, or similar assets are bought instead for the same price, i.e. the arrangement is used without any other primary commercial function.
C	Specific hallmarks related to cross-border transactions	More than one taxpayer can claim relief from double taxation on the same income in different jurisdictions.
D	Specific hallmarks concerning automatic information exchange and actual ownership	An arrangement that involves an opaque chain of legal or actual ownership with persons, entities or arrangements that do not carry out any real economic activity.
E	Specific hallmarks related to transfer pricing	An arrangement that involves using unilateral simplified transfer pricing conditions (the so-called safe harbour).

Details to be included in the report

The following details should be given:

- a) identification of the intermediary and the taxpayer(s) concerned;
- b) information on one or more identified hallmarks described in Annex 4;
- c) a summary of the substance of the reportable arrangement;
- d) the date on which the first stage of implementation began or will begin;
- e) information on national rules that make it possible to set up the arrangement etc.

DAC6 provides that member states are competent to prescribe a wider set of details to be reported.

Reporting time limits

Intermediaries will be required to provide information on reportable cross-border arrangements within 30 days -

- a) of the next day after the arrangement becomes available for implementation, or

- b) of the next day after the arrangement is ready for implementation, or
- c) of the date on which the first stage of implementation began, whichever occurs first.

DAC6 requires member states to prescribe penalties for missing the reporting deadline. The directive merely provides that such a penalty should be effective, proportionate and dissuasive, but does not lay down a minimum or maximum level of penalty.