



# Euro Tax Flash from KPMG's EU Tax Centre



[Background](#)

[Implementation into domestic legislation](#)

[News from the EU institutions](#)

[EU Tax Centre comment](#)

## **EU Mandatory Disclosure Requirements – update**

[European Union – Directive on Administrative Cooperation – Mandatory Disclosure Requirements – Implementation – Member States – Updates](#)

As previously reported in [Euro Tax Flash 369](#), mandatory disclosure requirements (MDR) for intermediaries and relevant taxpayers entered into force in the European Union on June 25, 2018 and must be implemented by Member States before December 31, 2019, to be applied as of July 1, 2020. Intermediaries are also required to track reportable transactions as of June 25, 2018 and disclose this information to the tax authorities by August 31, 2020.

This third Special Edition Euro Tax Flash summarizes the implementation of the new rules into Member States' domestic legislation to date and the state of play at the level of the EU institutions.

### **Background**

Following a proposal put forward by the European Commission, the new mandatory disclosure requirements were introduced as an amendment to the Directive on Administrative Cooperation in the Field of Taxation (“DAC6”) and will apply from July 1, 2020.

DAC6 introduces an obligation on intermediaries to disclose information on cross-border arrangements that meet certain criteria to their domestic tax authorities and rules for the subsequent exchange of this information between tax administrations. According to the final text, as of July 1, 2020 all disclosures must be made within 30 days of implementation.

Intermediaries and relevant taxpayers will also be required to disclose information on reportable cross-border arrangements, the first step of which is to be implemented between June 25, 2018 and July 1, 2020. This information should be filed by August 31, 2020.

Please refer to the [KPMG Summary and Observations memorandum](#) for further details and to the [first](#) and [second](#) special addition tax flashes for our previous updates on implementation of DAC6 into domestic legislation.

## Implementation into domestic legislation

Although EU Member States have until the end of 2019 to implement DAC6 into domestic legislation, several jurisdictions have already published or are discussing draft legislation or have introduced mandatory disclosure rules.

### Portugal

On May 28, 2019 the Portuguese Government published draft legislation for public scrutiny. This is subject to a formal legislative process and may be amended before implementation. Once approved, DAC6 implementation law is expected to produce effects as from July 1, 2020 with initial reporting taking place on October 31, 2020. It is expected that the new law will replace an existing disclosure regime adopted by Portugal in 2008, which is somewhat similar to the DAC6 but only focuses on specific types of transaction, rather than a hallmark-based approach. The new law will be applicable to both domestic and cross-border transactions.

For non-domestic arrangements the scope will mirror the DAC6. However, for domestic arrangements and cross-border arrangements that apply or produce effects – entirely or partially – in Portugal, the legislation extends the scope of taxes covered to include VAT and also refers specifically to property taxes and stamp duties.

The draft bill also includes hallmarks in addition to those introduced by DAC6 and expands the scope of several of the Directive hallmarks:

- An additional hallmark under category A (generic hallmarks linked to the main benefit test), on arrangements that exclude or limit the responsibility of one of the participants in the arrangement;
- An additional hallmark under category B (specific hallmarks linked to the main benefit test), on arrangements where one of the participants is a person or an entity without legal personality (not subject to tax) or fully or partially exempt from tax or subject to a favorable tax regime;
- An extension of hallmark B2 (an arrangement that has the effect of converting income into categories of revenue which are taxed at a lower level or exempt from tax) to cover arrangements, where the aim is to obtain a deduction of payments that are not taxed or taxed more favorably at the level of the recipient, or a deduction related to the depreciation of an asset by more than one entity;
- An extension of the list of non-cooperative jurisdictions for the purposes of applying hallmark C1(b)(ii) (deductible cross-border payments to an associated entity resident in a non-cooperative jurisdiction), to include all countries and territories blacklisted by Portugal.

The application of two of the DAC6 hallmarks has also been clarified further:

- The phrase “almost zero” within the meaning of hallmark C1(b)(i) (deductible cross-border payments to an associated entity resident in a jurisdiction that does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero) is to be interpreted as meaning a tax rate lower than 1% or effective taxation equal to or lower than 60% of the tax that would have been due in Portugal;
- Unilateral safe harbour rules for the purposes of applying hallmark E2 (specific hallmarks related to transfer pricing regarding arrangements which involve the use of unilateral safe harbour rules) are those not included in the OECD transfer pricing rules.

Whether a waiver for legal professional privilege will be available to lawyers is being discussed and remains to be clarified as part of the consultation process.

Penalties will apply for failure to report or delays in reporting by intermediaries/relevant taxpayers (including proof that the arrangement was reported in another EU Member State or by another intermediary/relevant taxpayer) from EUR 6,000 to EUR 80,000. Omissions or inaccuracies in the reported information from EUR 2,000 to EUR 60,000. Failure to provide or delay in providing additional information from EUR 3,000 to EUR 80,000. Payment of penalties would not discharge those liable for the reporting obligations.

Please note that the above information is based on preliminary discussions and is therefore subject to change.

## **Finland**

On June 19, 2019 the Finnish Ministry of Finance launched a public consultation on draft legislation. The consultation is due to close on August 16, 2019. The draft follows the text of the Directive, with the same hallmarks and application to cross-border arrangements only. The maximum penalty would be EUR 15,000, depending on the seriousness of the breach.

Legal professional privilege would only apply to licensed attorneys, public legal aid attorneys and lawyers licensed to represent or assist clients in courts, to the extent the privilege covers any reportable information. According to the draft, this information is only that which concerns the client's affairs - but not general details of the arrangement which the attorney or lawyer have designed and must report. To the extent the professional privilege applies, the intermediary needs to notify the other intermediaries or taxpayer that the arrangement is reportable.

## **Spain**

On June 20, 2019, the Spanish Government published draft DAC6 implementation legislation. Based on the draft bill, there will be no extension to domestic transactions or to taxes excluded by the Directive. Hallmarks are those included in the Directive, although some interpretive comments have been included, applicable also to the main benefit test.

The law will incorporate a waiver of professional privilege applicable to all intermediaries, irrespective of their economic activity, and therefore without drawing distinctions between tax advisors, lawyers, banks, auditors, etc. Legal Professional Privilege would also apply to persons acting in unregulated professions in Spain (i.e. tax advisors). The scope of legal

professional privilege will be in accordance with the confidentiality rules generally applicable for tax reporting in Spain, which has been very narrow when it has been claimed in Courts.

In turn, intermediaries may be released from the duty of professional secrecy by serving a duly authenticated notification of such circumstance by the relevant taxpayer. Where such waiver is applied, the intermediary must notify the other intermediaries and the relevant taxpayers of this state of affairs within a maximum of five days, for which a purpose of notification form will be provided by the Spanish tax authorities. In such cases, the time period for the other intermediaries and relevant taxpayers to file information will start to run “upon timely receipt of the notification”.

Apart from the recognized cases of professional privilege, there is no duty to disclose: (i) private non-asset related data, the disclosure of which would be detrimental to honor or personal privacy (ii) confidential data leading to the disclosure of a commercial, industrial or professional secret or a commercial procedure; (iii) information, the disclosure of which would run contrary to the public interest. In such cases, a disclosure obligation exists but excludes this specific area of information.

Alongside the main obligation on intermediaries or, failing that (and only in such case), on the relevant taxpayers, to report cross-border arrangements, an additional two obligations have been provided for:

- Quarterly update by intermediaries of marketable arrangements reported previously.
- Annual reporting of the use of “planning arrangements that should have been previously reported”. Only required of the relevant taxpayer, with the Spanish state making use of the prerogative afforded by the Directive.

Penalties will apply for failure to report or inaccuracies in the amount of EUR 1,000 for each item of data or “data set” (as defined in the Regulation: each reportable arrangement can include up to eight data set) incompletely, falsely or inaccurately reported subject to a minimum of EUR 3,000 and a maximum of the fees (intermediaries) or the value of the tax savings (taxpayers). These amounts are reduced to 50% in the case of late reporting.

For a breach of the duty to timely notify the rest of the intermediaries and relevant taxpayers of a waiver on the grounds of professional privilege a penalty of EUR 600 will apply. The same penalty will apply in the case of a breach by intermediaries or relevant taxpayers of their duty to inform others who are exonerated from the reporting obligation as a result of prior reporting by the former.

Please note that this is draft legislation. A consultation period is open until July 12, 2019. The final legislation could therefore differ from the position as summarized above.

## **Cyprus**

A draft DAC6 implementation bill is under discussion in the DAC6 sub-committee appointed by the National Tax Committee within the Cypriot Ministry of Finance. The draft does not deviate from or go beyond the provisions of DAC6.

Implementation of DAC6 will be in the form of an amendment to existing legislation implementing provisions of the Directive on Administrative Cooperation. A specific reference to the term “intermediary” as defined in DAC6 has been included in the proposed amendment.

The reporting obligation will only apply in respect of cross-border arrangements (i.e. scope not broadened to include domestic arrangements) that produce an impact (as per the hallmarks prescribed) on the tax base of an EU Member State.

“Protection if acting in good faith”, which is a provision that exists in other (non-tax) laws of Cyprus, has been proposed. This provision aims to give intermediaries the opportunity to prove to the tax authorities that – based on the information available to them at the time, the decision not to report the tax arrangement was reasonably expected. Penalties (that will be applied progressively) with a maximum EUR 20,000 per transaction or arrangement are anticipated.

Please note that the legislative process in Cyprus is on-going and therefore the above provisions may be subject to further changes.

### **Czech Republic**

The Czech Ministry of Finance issued the second version of a bill for the implementation of DAC6 into Czech legislation in May 2019. The proposal follows the principles set out in the text of the Directive and is limited to cross-border reportable arrangements.

It has been clarified that an arrangement meets the main benefit test if at least one of the main benefits that its user can reasonably expect from all relevant facts and circumstances is to obtain a tax advantage. The five categories of hallmarks have been transposed from the Directive, although the exact wording may differ.

It is proposed that tax advisors and advocates will be granted a waiver for legal professional privilege to the extent the arrangement relates directly to their clients – the waiver would not apply to marketable arrangements that are widely available. Intermediaries that are exempt from the reporting obligation by virtue of legal professional privilege are required to inform the taxpayer about their reporting obligation. The fine for an intermediary that does not meet this information duty could be up to the equivalent of approximately EUR 20,000. The fine for a taxpayer that does not meet their reporting duty can also be up to EUR 20,000.

### **France**

The draft DAC6 implementation bill submitted for consultation in France in March of this year mirrors the text of the Directive.

As regards the waiver for legal professional privilege, it is envisaged that intermediaries benefiting from such privilege under the French Penal Code will be required to report on qualifying arrangements but not to disclose client-specific information. Exempt intermediaries must notify other intermediaries participating in the arrangement or the taxpayers of their obligation to report. Such intermediaries may also file the disclosure report on behalf of the taxpayers concerned. An annual update from the taxpayers will be required.

The proposed fine for failure to file the MDR declaration is up to EUR 10,000.

As with the other jurisdictions referred to above, the legislative process in France is on-going and the above draft may therefore be subject to further changes.

## News from the EU institutions

The European Commission has published the DAC6 Implementation Regulations amending Implementing Regulation (EU) 2015/2378 as regards the standard forms, including linguistic arrangements, for the mandatory automatic exchange of information on reportable cross-border arrangements. The Regulations are generally in line with arrangements that are currently in place with respect to previous versions of DAC and define the Automatic Exchange of information form and the language arrangements.

The form includes the information listed in DAC6 (Article 8ab (14)), while the details of the hallmarks that make the cross-border arrangement reportable, the summary of the content of the reportable cross-border arrangement and details of the national provisions that form the basis of the reportable cross-border arrangement, should be exchanged in English.

Additionally, to ensure that tax authorities can identify all the information pertaining to a single arrangement, specifically with regard to arrangements reported multiple times across multiple jurisdictions, an additional field containing a unique identification reference number of the reportable cross-border arrangement is now included in annex XIII to this Regulation. The Regulation will apply from July 1, 2020.

On June 21, 2019, the European Commission held a meeting with representatives of Member States' tax authorities to further discuss the reporting schema and related technology requirements. The Commission is required to develop by – December 31, 2019 – a secure central directory on administrative cooperation in the field of taxation that Member States can use to communicate information within the framework of DAC6.

## EU Tax Centre comment

As at the date of this publication, Poland is the only EU Member State that has already implemented mandatory disclosure rules based on the provisions of DAC6, with the first important reporting deadline being June 30, 2019. To date, we understand that over one thousand reports have been submitted to the Polish tax authorities under the new reporting rules – a figure that may suggest a conservative approach to cases of uncertainty by intermediaries and taxpayers alike.

Fourteen countries (Austria, Cyprus, the Czech Republic, Finland, France, Germany, Italy, Lithuania, the Netherlands, Portugal, Slovakia, Slovenia, Spain and Sweden) have published draft legislation for consultation or are discussing proposals within their Ministries of Finance. The remaining thirteen Member States are expected to publish draft bills later in the course of this year, most likely after the summer recess or the conclusion of local elections.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



**Robert van der Jagt**

Chairman, KPMG's EU Tax Centre and  
Partner,  
Meijburg & Co

---

[kpmg.com/socialmedia](https://kpmg.com/socialmedia)



[Privacy](#) | [Legal](#)

You have received this message from KPMG's EU Tax Centre. If you wish to unsubscribe, please send an Email to [eutax@kpmg.com](mailto:eutax@kpmg.com).

If you have any questions, please send an email to [eutax@kpmg.com](mailto:eutax@kpmg.com)

You have received this message from KPMG International Cooperative in collaboration with the EU Tax Centre. Its content should be viewed only as a general guide and should not be relied on without consulting your local KPMG tax adviser for the specific application of a country's tax rules to your own situation. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

To unsubscribe from the Euro Tax Flash mailing list, please e-mail KPMG's EU Tax Centre mailbox ([eutax@kpmg.com](mailto:eutax@kpmg.com)) with "Unsubscribe Euro Tax Flash" as the subject line. For non-KPMG parties – please indicate in the message field your name, company and country, as well as the name of your local KPMG contact.

KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands

© 2019 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved. The KPMG name and logo are registered trademarks or trademarks of KPMG International.