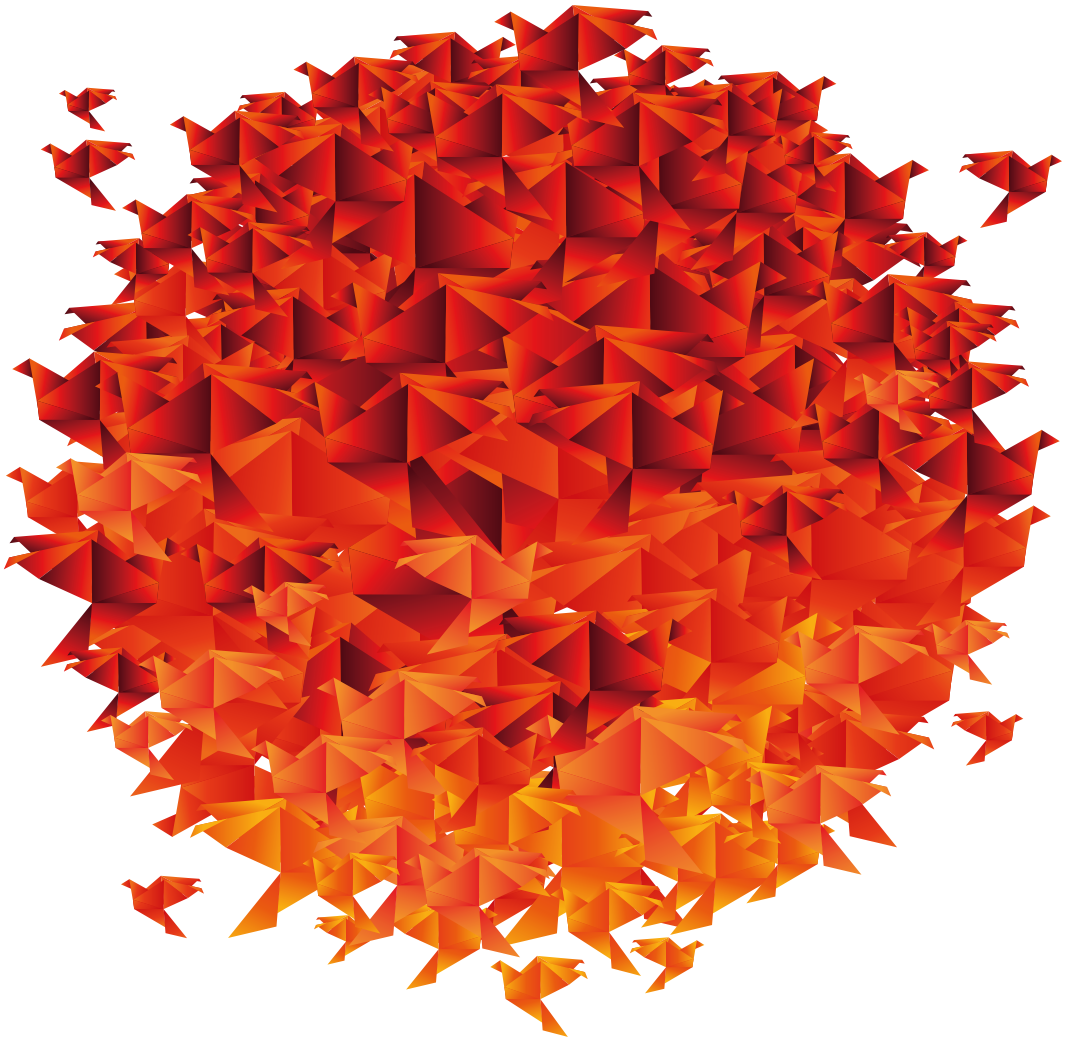


EU Mandatory Disclosure Rules (DAC6)

Introduction to the EU Mandatory Disclosure Rules

Background

On 25 May 2018, the EU member states adopted the EU Council Directive 2018/822 regarding a reporting obligation for reportable cross-border tax arrangements (EU Mandatory Disclosure Rules or DAC6). The EU Directive had to be implemented into domestic law of the respective EU member states until 31 December 2019. The EU Directive aims at providing tax authorities with information on tax plannings by tax payers and to enable tax authorities to counteract harmful tax practices. While generally the obligation to comply with reporting obligations under DAC6 lies with the Intermediaries such as tax advisors, also the tax payer itself may face reporting obligations. Deadlines are rather tight and need to be closely monitored and observed. Non-compliance with DAC6 obligations may result in assessment of severe penalties. In the following key aspects of the EU Mandatory Disclosure Rules and the German implementation are summarized.

General information

The EU Council Directive 2018/822 (DAC6) entered into force on 25 May 2018 and had be transposed into domestic law until 31 December 2019. DAC6 is closely linked to OECD/G20 BEPS Action Item 12 from 2015.

The goal of DAC6 is to provide tax authorities of EU member states with information to enable them to promptly react against harmful tax practices and to close loopholes through enacting legislation or by undertaking adequate risk assessments and carrying out tax audits.

A deterrent effect shall be achieved through the disclosure of potentially aggressive cross-border tax planning at an early stage.

DAC6 imposes the obligation to disclose reportable cross-border arrangements (herein after referred to as "RCBA") on tax payers and/or on EU Intermediaries (see below for details).

DAC6 generally applies to all kind of taxes except for value added tax (note though that some EU member states may require disclosure of VAT arrangements).

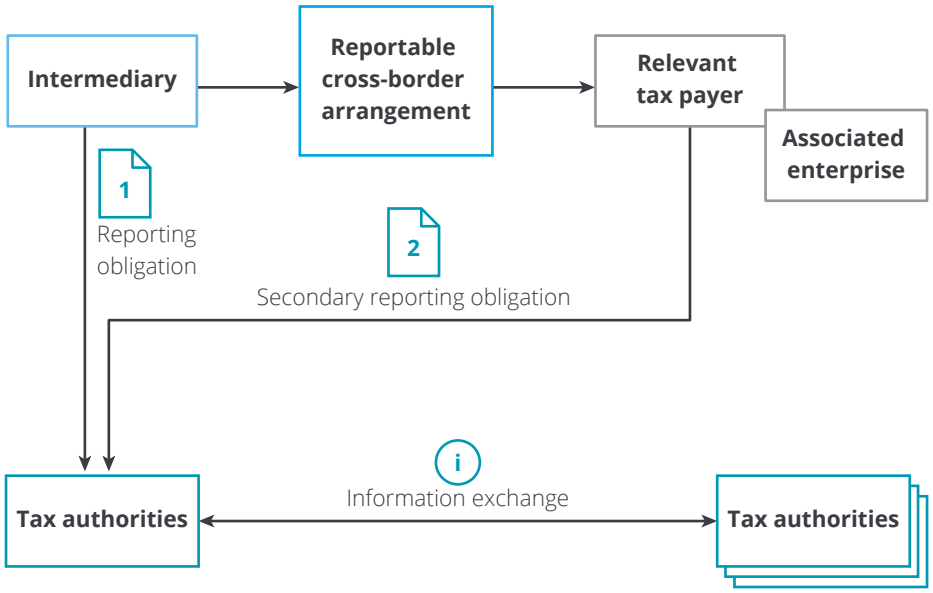
Principles of DAC6

Generally, an Intermediary that designs, markets, organizes, makes available for implementation or manages the implementation of a RCBA for a relevant tax payer, has an obligation to report the arrangement to the local tax authorities who will then exchange this data with other EU tax authorities.

In case no Intermediary is involved or is not required to accomplish the reporting of the RCBA (e.g. due to confidentiality obligations/legal privilege), a secondary reporting obligation exists for the relevant tax payer.

An Intermediary is within the scope of DAC6 if it acts as a promoter or service provider of a RCBA towards relevant EU tax payers (see further details in the following). A tax payer is within the scope of DAC6 if it benefits from an RCBA (see further details in the following).

Fig. 1 – Overview on DAC6 process



Reportable cross-border arrangements (RCBA)

The term "cross-border arrangement" means an arrangement concerning either more than one EU member state or an EU member state and a third country where at least one of the following conditions is met:

- Not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction.
- One or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction.
- One or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment.
- One or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction.
- Such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

Furthermore, at least one of the hallmarks (see definition and details in the following) has to be met.

Definition of Intermediary

The term "Intermediary" means any person that either designs, markets, organizes or makes available the implementation of a RCBA ("promoter") or knows or could be reasonably expected to know what they have undertaken to provide aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a RCBA ("service provider").

Non-conclusive examples of an Intermediary in the meaning of DAC6 could be wealth planners, lawyers, tax advisors, accountants, corporate service providers, asset managers, trust companies.

In order to qualify as an Intermediary in the meaning of DAC6, a person must be linked to an EU member state by meeting at least one of the following conditions:

- Is tax resident in an EU member state
- Has permanent establishment in an EU member state through which the services with respect to the RCBA are provided
- Is incorporated in, or governed by the laws of an EU member state
- Is registered with a professional association related to legal, taxation or consultancy services in an EU member state

Non-EU intermediaries are not subject to the requirements under DAC6 for the time being, however, if they provide relevant services to relevant EU tax payers, those tax payers may have a secondary reporting obligation.

Definition of relevant tax payer

The term "relevant tax payer" means any person to whom an RCBA is made available for implementation, who is ready to implement an RCBA or who has implemented the first step of a RCBA.

Relevant tax payers are subject to reporting obligation under DAC6 resp. its local implementation in the EU member states and may have a secondary reporting obligation in certain scenarios.

Non-EU tax payers are currently not in scope of DAC6, however, their non-EU status may still need to be documented. Further, they may become in scope in the future if the regime is expanded to non-EU jurisdictions.

Definition of associated enterprise

The term "associated enterprise" means every person who is related to another person in at least one of the following ways:

- Participation in the management of another person by being in a position to exercise a significant influence over the other person
- Participation in the control of another person through a holding that exceeds 25 percent of the voting rights
- Participation in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 percent of the capital
- Entitlement to 25 percent or more of the profits of another person

Associated enterprises must be reported "where appropriate". Given the definition of the hallmarks (see details in the following), one could potentially take the position that associated enterprises should only be relevant for RCBA's based on the specific hallmarks related to cross-border transactions or concerning transfer pricing.

Reporting deadlines

The notification on RCBA to the tax authorities has to be submitted in accordance with the officially prescribed data record (currently in preparation).

Timing-wise, the notification on RCBA for which the first step is implemented between 25 June 2018 and 30 June 2020 has to be filed until 31 August 2020.

The notification regarding RCBA that are made available, are ready for implementation or where the first step is implemented after 1 July 2020 should be submitted within 30 days beginning on the day after the RCBA is made available for implementation, on the day after the RCBA is ready for implementation or when the first step in the implementation of the RCBA has been made.

For an overview on reporting deadlines please also refer to Fig. 2 below.

Deviating deadlines apply for "marketable arrangements".

Non-compliance with the reporting obligations may result in severe penalties being assessed against the tax payer resp. the Intermediary who failed to comply.

What to report

The following information must be reported by an Intermediary or a relevant tax payer (if within their knowledge, possession or control):

- The identification of Intermediaries and relevant tax payers
- Details of the hallmarks that make the arrangement reportable (please see below)
- A summary of the content of the RCBA
- The date on which the first step in implementing the RCBA has been made or will be made
- Details of the national provisions that form the basis of the RCBA
- The value of the RCBA
- The identification of the EU member state of the relevant tax payer(s) and any other EU member states which are likely to be concerned by the RCBA
- The identification of any other person in an EU member state likely to be affected by the RCBA

Fig. 2 – Overview on reporting deadlines

Hallmarks

A "hallmark" means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance.

These hallmarks can be distinguished into those which lead to a reporting obligation only in connection with the existence of the so-called "main-benefit test" and those that by themselves trigger a reporting obligation without being subject to the main benefit test:

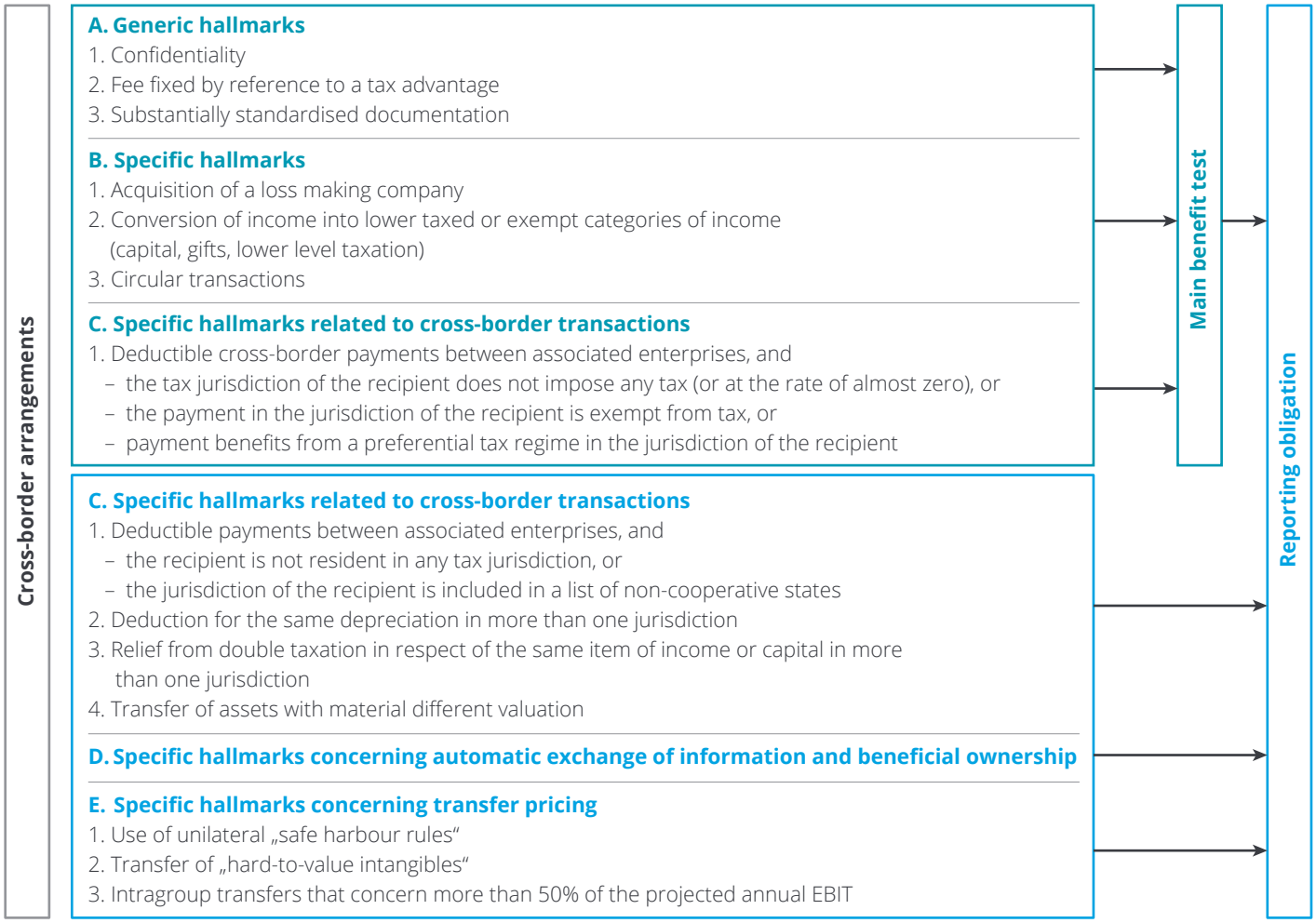
A. Generic hallmarks linked to the main benefit test
B. Specific hallmarks linked to the main benefit test
C. Specific hallmarks related to cross-border transactions
D. Specific hallmarks concerning automatic exchange of information and beneficial ownership
E. Specific hallmarks concerning transfer pricing

For more information on the hallmarks please refer to Fig. 3.

Main benefit test

The main benefit test is fulfilled, if it can be established that the main benefit or one of the main benefits, considering all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, is to obtain a tax advantage.

Fig. 3 – Overview on hallmarks



German implementation of DAC6

In December 2019, both the Lower House and the Upper House of German Parliament approved the law implementing DAC6 into German domestic law. The law was published in the Federal Law Gazette and entered into force on 30 December 2019.

The German implementation of DAC6 is essentially in line with the EU Directive.

In terms of penalties in case of non-compliance with reporting obligations, German tax law stipulates the assessment of penalties of up to EUR 25.000 for each case. However, during the period of retroactivity, no penalties should apply.

Tax plannings or structures within Germany (i.e., intracountry ones) are currently – and as opposed to what was initially and is still contemplated – not subject to reporting obligations similar to DAC6.

Contacts

Do you have any more questions?
We are looking forward to your call or email to discuss opportunities and requirements in more detail tailored to your needs and your expectations.

Japanese Business Tax Team Germany

Thomas Welz
Partner
Tel: +49 (0)211 8772 3522
twelz@deloitte.de

Iris Sabine Mönnich
Senior Manager
Tel: +49 (0)211 8772 3572
imoennich@deloitte.de

Shinichi Ishida
Japanese Coordinator
Tel: + 49 (0)211 8772 2099
sishida@deloitte.de

Deloitte.

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