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DAC 6 IS A NEW EU DISCLOSURE REGIME THAT IMPOSES MANDATORY REPORTING OF CERTAIN CROSS-BORDER ARRANGEMENTS

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SUMMARY

What is DAC6?

- DAC6 is a new regime under which intermediaries and/or taxpayers must report to an EU tax authority information about cross-border arrangements with a view to the information being exchanged with other tax authorities.
- The new regime will go fully live on 1 July 2020, but it will be back-dated to include cross-border arrangements in which the first step was taken after 25 June 2018. **There are indications that the EU may allow member states to delay implementation until 2021**.
- Essentially, a cross-border arrangement must concern at least two EU member states or one EU member state and a third country.
- The arrangement is reportable if it bears one or more of the designated hallmarks summarised below. It is very important to emphasise that not all the hallmarks require a tax advantage to be a main benefit of the arrangement. For a number of the hallmarks, tax benefits are irrelevant.
- There are significant financial penalties which may apply for failure to report.

Reporting and penalties

- The burden of reporting will fall primarily on intermediaries with an EU connection (described below) involved with the arrangement or, in the absence of an intermediary reporting the arrangement, the relevant taxpayer.

- In principle, an intermediary is a person who designs, markets, organises or makes available for implementation or manages the implementation of the reportable cross-border arrangement. This also includes a person providing aid, assistance or advice with respect to any of these activities.
- This clearly includes lawyers, accountants and other professionals as well as banks. A lawyer may not be obliged to report if this would breach legal professional privilege' There is a limited 'lack of knowledge' defence for some intermediaries.
- A person qualifies as an intermediary with an EU connection if they are resident in an EU member state or have a PE in a member state through which the relevant services are provided or they are incorporated in or governed by the laws of a member state or registered with professional association.
- There are rules to facilitate a single report by one intermediary and prevent multiple reporting by different intermediaries of the same cross-border arrangement but it is unclear how these rules will be introduced into each member state's national laws or how the rules will operate effectively in practice. It is considered there is likely to be multiple reporting for various reasons.
- There are complex rules governing the timing of when reports must be made. Generally, a report must be made within 30 days of the arrangement being available for implementation (or ready for implementation) or when the first step of the arrangement occurs.
- There are potentially significant penalties for non-compliance by the intermediaries and relevant taxpayers. The detail of how this applies in each member state will vary.

It has been reported that should any postponements be made they will "be of a limited duration and will not affect the start of application of the directive [on July 1, 2020]".

Hallmarks

Hallmarks: a summary	
1.	The main benefit (or a main benefit) reasonably expected from the arrangement is the obtaining of a tax advantage: and also the arrangement involves any of the following features – ▪ confidentiality undertakings being given which could prevent how arrangement secures tax advantage; or ▪ fees are tax based or contingent on or refundable by reference to a tax advantage; or

- substantially standardised documents or structure; or
- contrived steps involving acquiring a lossmaking company and using or transferring its losses; or
- converting income into capital or other revenues taxed at a lower rate or exempt from tax; or
- circular transactions resulting in round tripping of funds; or
- deductible cross-border payments between two or more associated enterprises where – → recipient is resident in a jurisdiction which does not impose any corporate tax or rate of such tax is zero or almost zero; or → payment benefits from full tax exemption or preferential tax regime in recipient's tax jurisdiction.

2. Deductible cross-border payments between two or more associated enterprises[1] where –

- recipient not tax resident in any tax jurisdiction; or
- recipient resident in a jurisdiction regarded as non-cooperative by EU or OECD.

[1] The test is based on 25+% or significant influence on management.

3. Deductions are claimed from the same depreciation on an asset in more than one jurisdiction.

4. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

5. Transfer of assets where there is a material difference in the amount being treated as consideration[2] in the jurisdictions involved.

[2] In the UK it is proposed this will be the amount treated as consideration for tax purposes but other member states may opt for this to be the amount treated as such for accounting purposes.

6\. An arrangement –

- which *may* have the effect of undermining automatic exchange of financial account information[3]; or
- involving non-transparent legal or beneficial ownership chain.

[3] It appears this applies whether or not the person involved – who may be moving assets from a financial account in a territory that exchanges information with others to another territory which does not exchange information - has the purpose of avoiding financial account reporting.

7\. An arrangement (concerning transfer pricing) involving –

- use of unilateral safe harbour rules; or
- transfer of hard to value intangibles; or

intragroup cross border transfer of functions, risks or assets if transferor's EBIT reduces by 50% as a result.

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