



EU Mandatory Disclosure Regime — state of play and practical insights for financial services companies

Monday 23 March 2020

... With you today



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Administration

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Topics for discussion





Background and state of play

Raluca Enache



Background and state of play

Timeline



DAC6 is adopted

Formal adoption by ECOFIN

May 25, 2018

June 25, 2018



Local implementation

Deadline for EU Member States to implement DAC6 into local law

December 31, 2019



DAC6 becomes effective

MDRs become applicable

July 1, 2020



Automatic exchange

First exchange of information between tax authorities

August 31, 2020

October 31, 2020

Today



DAC6 enters into force

MDR directive comes into force



State of play

20 countries have implemented the rules

7 countries are discussing/in process of approving draft legislation

1 member state: bill under discussion with stakeholders



Deadline

Deadline to file retroactive information

Local implementation — progress so far

Discussions with stakeholders

1. Greece

Draft legislation published

1. Cyprus
2. Czech Republic
3. Italy
4. Luxembourg
5. Portugal
6. Spain
7. Sweden

Implementation complete — applicable as of July 1, 2020*

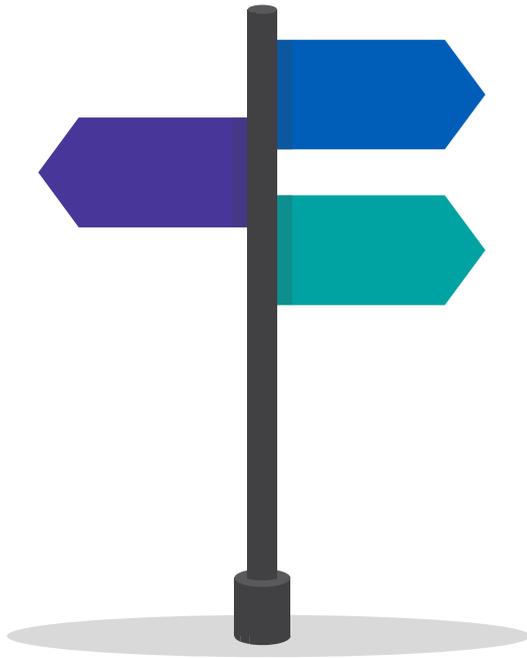
- | | |
|--|------------------------|
| 1. Poland
(already applicable) | 10. Germany |
| 2. Austria | 11. Hungary |
| 3. Belgium | 12. Ireland |
| 4. Bulgaria | 13. Latvia |
| 5. Croatia | 14. Lithuania |
| 6. Denmark | 15. Malta |
| 7. Estonia | 16. Netherlands |
| 8. Finland | 17. Romania |
| 9. France** | 18. Slovakia |
| | 19. Slovenia |
| | 20. UK |

* Unless otherwise indicated

** Parliament approval required for full legislative force.



Local implementation – coming months



- **Cyprus:** DAC6 draft law undergoing legal vetting. Subject to approval by Parliament.
- **Greece:** Bill expected shortly.
- **Italy:** DAC6 Legislative Decree subject to formal approval by the House of Representatives and the Senate. Once the Decree is in force, a further (Ministerial) decree will follow, with further implementation guidance. Possible delays due to Corona impact.
- **Latvia:** regulations of the Cabinet of Ministers expected spring 2020.
- **Portugal:** revised version of the bill subject to approval from Parliament.
- **Spain:** approach to be confirmed under the newly-formed government.
- **Sweden:** approval from Parliament pending (scheduled for April 16, 2020)

All other member states: Implementation guidance may follow later in 2020. Possible delays due to current situation in Europe.

Looking ahead – third countries



Channel Islands committed to introduce legislation before end of 2019 to implement mandatory disclosure rules aligned to international (OECD) standards (CRS avoidance).

- **Isle of Man:** legislation published December 2019.
- **Jersey:** public consultation September 2019 and draft rules lodged on 31 December 2019. Rules under debate in Parliament.
- **Guernsey:** second version of MDR briefing note published on 18 February 2020.

Hallmarks | EU blacklist

C(1)(b)(ii): Blacklisted countries

- Across Member States different blacklists are applied:
 - Local blacklist (*Portugal*)
 - EU blacklist
 - OECD blacklist
- Payments made to transparent entity may need to be assessed at level of recipients (*Netherlands*)

EU Black list 12 jurisdictions

- | | |
|-------------------|-----------------------|
| — American Samoa | — Samoa |
| — Cayman Islands* | — Seychelles* |
| — Fiji | — Trinidad and Tobago |
| — Guam | — US Virgin Islands |
| — Oman | — Vanuatu |
| — Palau* | |
| — Panama | |

EU Grey list 13 jurisdictions

- | | |
|--------------------------|---------------|
| — Anguilla | — Maldives |
| — Australia | — Mongolia |
| — Bosnia and Herzegovina | — Morocco |
| — Botswana | — Namibia |
| — Eswatini | — Saint Lucia |
| — Jordan | — Thailand |
| | — Turkey |

**Monitoring process revealed these jurisdictions did not deliver on their commitments by the agreed upon deadline*



Key issues impacting Financial Services

Main benefit test

Applying the main benefit test (I)

	France	Germany	Ireland	Lux	UK
Which taxes need to be considered?	All taxes except for value-added tax, customs duties, excise duties and compulsory social security contributions.	Those within the scope of the DAC, broadly direct taxes levied by Member States but also some relevant indirect taxes e.g. RETT and IPT are in scope.	All taxes except for value-added tax, customs duties, excise duties and compulsory social security contributions.	Corporate income tax municipal business tax Net wealth tax subscription tax withholding taxes.	Those within the scope of the DAC, broadly direct taxes levied by Member States.
Which advantages need to be considered?	Legislation does not provide a definition for the term "tax advantage" but the administrative guidelines provide for examples: repayment of tax, tax relief, reduction of a charge to tax, deferral of tax, absence of taxation.	Definition is consistent with the Directive. Domestic tax benefits are excluded to the extent that a beneficial treatment is obviously in line with legislative intent.	"Tax advantage" is broadly defined Interaction with existing routine tax reliefs being considered by Irish Revenue.	Rather looking at advantages which are derived from loopholes arising due to the different interpretation of tax law in different countries.	Any which cannot reasonably be regarded as consistent with the principles and policy objectives of the relevant legislation.

Applying the main benefit test (II)

	France	Germany	Ireland	Lux	UK
When is tax a “main” benefit?	Guidance clarifies that when the main advantage obtained in France is achieved from a tax incentive that is in accordance with French law, the main benefit test would not typically be met provided that the arrangement is also implemented in accordance with the spirit of the legislation. In this regard, the intention of French legislator should be taken care of.	It is not sufficient that for a transaction also non tax reasons exist. In case of doubt it has to be evidenced that the tax benefit is not a main reason to enter into a transaction.	Revenue guidance is awaited on this issue — which is difficult to apply to “real life” transactions (particularly in financial services). Also, there can be more than one main benefit arising from a transaction.	If there is (1) a lack of commercial benefits, (2) the parties would have not entered into the arrangement without the tax benefit, and (3) there is a tax planning component.	Likely to include scenarios where the benefit is more than “the icing on the cake”
Are the purposes of the participant relevant?	No — the test is an objective one and so the participants’ motivations or intention is irrelevant	Yes. The participant can evidence that non-tax reasons were most relevant/tax benefits were ancillary for the structuring.	The test is an objective one. A comparison of the expected tax advantage vis-à-vis any other commercial/financial benefits arising from a transaction is likely to be necessary.	No — the test should be based on benchmarking the tax advantages versus other reasons of entering into the arrangement.	No — the test is an objective one and so the participants’ purposes may be informative but are not determinative



Key issues impacting Financial Services

Intermediary concept

Intermediary concept — country observations

France

- An advisor would not be deemed to be an intermediary where the services provided solely relate to an arrangement that has already been implemented. Examples provided in the guidance include a custodian that assists a taxpayer to claim the refund of overpaid withholding tax, an advisor that provides an analysis on whether a cross-border arrangement is reportable from a French MDR perspective, an auditor that becomes aware of a cross-border arrangement as part of its audit activities and a depository bank that assists a taxpayer in its efforts to reclaim an overpayment of withholding tax.
- As a result of lobbying by French banks, foreign branches are not required to report in France (meaning the same principles as per FATCA/CRS apply).

Germany

- Did not implement the ancillary intermediary concept.
- Expects the German head office to report all branch activities.
- May cause implementation issues in case a foreign country expects the German head office to report (e.g. for branch activities) but German head office does not effectively report due to the narrow intermediary concept.

Ireland

- Practical challenge of understanding just what an organization knows. An intermediary is not expected to undertake additional due diligence (solely for MDR purposes).

Lux

- The intermediary needs to have a Luxembourg nexus in order to report in Luxembourg.

UK

- UK has imported intermediary definitions from the directive.
- Individuals as well as organizations can be intermediaries, but carve out for employees of intermediaries — although leaves problems for 'quasi employees' (partners, contractors, etc.) which may still have a reporting obligation.
- No significant extra due diligence expected when applying the 'knowledge test' but artificially restricting the information available is unlikely to be acceptable.



Key issues impacting Financial Services

Hallmarks

Hallmarks — country observations (I)

France

- The French administrative guidelines relating to Hallmarks have not been published yet so there is currently only limited information available (the Ordonnance is mostly a copy paste from the Directive).

Germany

- A3: Standardization.
Germany takes a broad concept and intends to include transactions that are documented in a standardized form in the first instance (i.e. almost all transactions in the FS industry). However, it seems that the MBT can be applied for certain transaction types in an abstract way. Based on this a number of transactions can be considered as not DAC6 relevant, provided they are not used/combined with other elements in an arrangement to generate tax benefits (an administrative draft guideline includes a soft “white list”).

Ireland

- Standardization often driven by regulatory requirements — complex and difficult to apply.
- Practical challenge in drafting guidance dealing with such real-life examples.

Luxembourg

- Intends to transpose the hallmarks into Luxembourg law by using the wording of the directive.
- No additional clarifications with regard to the hallmarks have been given in the current version of the draft law.

Hallmarks — country observations (II)

UK

- UK tax authorities are not expecting high volumes of reporting — key debate is (and has been for some time) how that is to be achieved in a pragmatic way without risking non-reporting of arrangements within the policy intention of the directive
- Published statements from the UK tax authorities continue to suggest a broad reading of standardized documentation with reliance on the MBT, but a general impression across the banking sector is that there is a shifting of position here to take account of that. For example, the use of an ISDA master agreement should not cause a particular derivative to automatically trigger the hallmark if in reality there has been genuine commercial negotiation between the parties.
- Unclear as of yet what position is likely to be taken in final guidance issued by tax authorities with many FS businesses instead looking to industry bodies to provide guidance on an agreed market approach and drive consistency in interpretation across the EU.
- Whatever the source of guidance, there will be a need for businesses to ensure they have adequate governance in place to capture transactions which this doesn't exempt.



Sector focus

Heiko Podeyn

Olivier Schneider

Paul Freeman

Asset Management — Olivier Schneider

- There are many intermediaries in the asset management sector: fund promoter, management company, fund (especially if self-managed), general partner, transfer agent, custodian etc.
- Many asset managers have started to perform an impact assessment with a limited number of findings.
- This especially relates to the fact that a fund set-up is not mainly tax driven.
- These findings are mainly related to securities lending, swaps and certain instruments used in alternative investment structures.
- Asset servicers seem to feel less concerned by DAC6 as they claim not to know if a given arrangement generates a tax advantage.
- The asset management industry is concerned by the broad application of the directive and industry specific lack of guidance.

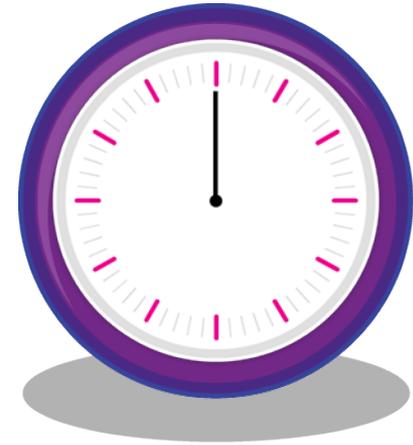
Banking — Heiko Podeyn

- Almost all banks and financial services providers initiated projects to analyze the impact of DAC6 though with different emphasis.
- Whilst the general expectation is still that the number of arrangement to be actually reported is not huge the focus is to establish sufficient evidence for “grey areas” and to identify the reportable arrangements.
- Grey areas include: asset finance, debt advisory, M&A, private wealth management.
- Implementation focus is on training concept, processes including responsibilities, escalation and supporting technology.
- Main concerns are lack of administrative implementation guidance, implementation differences across the EU, data availability and multi-intermediary situations.

Insurance — Paul Freeman

- Many insurers have now either completed or are in the process of undertaking a DAC 6 risk assessment.
- Three key recurring risk areas typically seen in the insurance sector:
 - Reinsurance and captive insurance arrangements
 - W&I insurance
 - Life assurance.
- Some key technical points where there is an ongoing lack of clarity (e.g. status of Bermuda for catch up reporting) but in most areas insurance groups can and should now be moving to designing and implementing appropriate solutions.

Looking forward ...



- Shades of grey
- Countdown almost over — less than 100 days until rules apply
- Retroactive reporting in 161 days
- Penalty and reputational protection

Thank you for joining us ...



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Annex I – EU transposition state of play

March 2020

DAC 6 Local Implementation — Country updates (EU)

Overview on the current implementation status | 1

Austria	DAC6 implementation complete — rules to be applicable as of July 1, 2020. Limited to cross-border and direct taxes. Legal professional privileges upheld, however, advisors may still file information on reportable cross-border arrangements if they are authorized by their clients. Penalty could be up to 50,000 euros (EUR).
Belgium	On December 30, 2019, legislation to transpose DAC6 into Belgian domestic law was published in the official Belgian gazette.
Bulgaria	On December 31, 2019, amendments to the Tax and Security Procedure Code (including amendments to transpose DAC6 into domestic law) were published in the Bulgarian State Gazette.
Croatia	DAC6 transposition bill in force — applicable as of July 1, 2020. The major part of the bill mirrors the Directive.
Cyprus	The Ministry of Finance has published draft legislation for public consultation (closed on November 12). Proposed law mirrors DAC6 text. Penalties proposed to be applied progressively, with a maximum of EUR 20,000 per transaction or arrangement.
Czech Republic	The Czech Government approved a draft law to transpose DAC6 into domestic law. The law will have to go through a legislative process which started on November 29, 2019 and may change accordingly. However, the Czech implementation generally follows the principles of the Directive.
Denmark	On December 31, 2019, the Danish Parliament adopted a bill to transpose DAC6 into Danish law. It will be fully operational on July 1, 2020. This follows the publication of a proposal by the Minister of Taxation in November 2019.
Estonia	DAC6 bill enacted on December 18, 2019. Closely aligned to the text of the Directive.
Finland	The Finnish Parliament approved the DAC6 implementation law which entered into force on January 1, 2020. Draft guidelines are expected to be published by the Finnish tax authorities in spring 2020.
France	DAC6 implementation complete — rules applicable as of July 1, 2020. Commentary published by the French tax authorities in March 2020, with further comments to follow.
Germany	On December 30, 2019, a bill to transpose DAC6 into German law was published in the Official Gazette. This follows approval from the Bundestag (German Parliament) and Bundesrat (Federal Council) on December 12, 2019 and December 20, 2019 respectively. Draft implementation guidance being discussed.
Greece	Discussions with Ministry of Finance; draft bill expected spring 2020.
Hungary	DAC6 implementation bill signed into law.
Ireland	Legislation implementing DAC6 signed by Irish President on December 22, 2019.

DAC 6 Local Implementation — Country updates (EU)

Overview on the current implementation status | 2

Italy	On October 18, 2019, legislation passed which allows Italian Government to incorporate DAC6 by way of decree. In January 2020, the Italian government signed the DAC6 Legislative Decree, which is subject to formal approval by the House of Representatives and the Senate. Once the Decree is in force, a further (Ministerial) decree will follow, with further implementation guidance.
Latvia	On February 20, 2020, the Latvian Parliament approved a bill to transpose DAC6 into domestic law. The amendments made to the Latvian Law on Taxes and Fees will enter into force on March 19, 2020. Additional regulations to be adopted by the Latvian Cabinet of Ministers.
Lithuania	Legislation transposing the core provisions of DAC6 signed into law. The text largely mirrors the Directive. Detailed reporting rules to follow in additional regulations and guidance.
Luxembourg	On February 14, 2020, the Luxembourg Finance and Budget Commission published a revised DAC6 implementation bill. The bill must now reviewed by the State Council with a vote to approve the bill scheduled for March 2020.
Malta	DAC6 implementation regulations gazetted on December 17, 2019. Regulations closely aligned with text of DAC6.
Netherlands	DAC6 implementation law approved by Dutch Parliament on December 17, 2019 — rules to be applied as of July 1, 2020. Largely 1:1 implementation of DAC6. Penalties for non-compliance can reach EUR 870,000 (valid for 2020).
Poland	MDRs apply as of 1 January 2019. Significantly broader scope (includes domestic arrangements and VAT). Criminal penalty for failure to report or inform the taxpayer of up to approx. EUR4.6 million. Discussions on implementation guidelines ongoing.
Portugal	Draft DAC6 bill published end of May 2019 and subject to review after first round of public consultation. Scope broadened to certain domestic arrangements (incl. related to VAT) and additional hallmarks. A revised version of the bill published in February 2020 — subject to Parliament approval.
Romania	Legislation to transpose DAC6 into Romanian law published on January 31, 2020. The rules mirror the Directive; further guidance expected in coming months.
Slovakia	DAC6 implementation bill adopted. Legal professional privilege upheld. Penalties for non-compliance may reach EUR 30,000.
Slovenia	DAC6 implemented in the Slovenian Taxation Procedure Act.
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.
Sweden	On February 4, 2020 the Swedish Government presented its proposal for a DCA6 implementation bill to the Swedish Parliament, for discussion and approval — vote scheduled for April 16, 2020.
UK	Draft legislation published July 2019 and was subject to public consultation. On January 13, 2020, final regulations were laid before parliament and HMRC's response to the input received during the consultation period was published. Further guidance is also expected.



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