

DAC 6 : How to comply with implementation differences ?

➤ **Executive Summary**

DAC 6 is an EU Directive that introduces Mandatory Disclosure Obligations for a wide range of cross-border tax arrangements.

EU Countries have aligned their national laws quite closely to the DAC6 Directive but some countries went beyond the content of such Directive adding extra requirements.

Addressing these differences is the purpose of this COUNTRY PER COUNTRY review.

➤ **DAC 6 in a nutshell**

✓ **Legal sources**

DAC 6 is based on the Council Directive amending the existing Directive 2011/16/EU (“The Directive”) on administrative cooperation in the field of taxation as regards mandatory automatic exchange of information in relation to reportable cross-border arrangements to disclose potential aggressive tax plannings.

The Directive is in force since 25 June 2018.

The Directive has been implemented into Luxembourg law by a law dated 25th March 2020.

The Directive has been amended by Directive 2020/876 to address the deferral of certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic.

✓ **Objective**

The objective of the Directive is to increase tax transparency by way of automatic exchange of information between the EU Member States on potentially aggressive tax planning arrangements. VAT is excluded from the scope.

➤ **Which transactions have to be reported ?**

Any cross-border transaction involving at least one EU Member State has to be reported where it meets certain hallmarks that may suggest aggressive tax planning.

Hallmarks are divided in 2 categories:

A) **Generic and specific hallmarks linked to the “main benefit test”** which means that obtaining a tax advantage constitutes the main benefit or one of the main benefits a person may reasonably expect to derive from the implementation and /or the management of a cross-border arrangement (Category A, B and Category C §1 (b)(i), (c) and (d).

Category A includes tax confidentiality arrangements, success fee arrangements with a fixed percentage of the tax advantage is charged and standardized documentation and/ or structure available for more than one taxpayer.

Category B includes certain acquisition of loss-making companies, arrangements converting income into any other type of revenues which are less taxed or tax exempt and certain arrangements which include circular transactions resulting in the round-tripping of funds.

Category C §1 (b) (i), (c) and (d) relates to deductible cross-border payments between two or more associated companies if the tax jurisdiction of the beneficiary does not impose corporate tax or the corporate tax is zero or if the nominal rate of tax is less than 1%, or the preferential tax regime.

B) **Specific hallmarks not linked to the main benefit test:**

Category C (a), (b) (ii), (2), (3), (4) and Category E.

Category C (a), (b) (ii), (2), (3), (4) is aiming at disclosing certain deductible cross-border payments, the relief of double taxation from the item as well as the deductions for the same depreciation in more than one country amongst others.

Category E is related to certain transfer pricing arrangements.

Specific hallmarks not linked to the main benefit test are related to CRS (undermining CRS reporting obligation or arrangement with a non-transparent legal or beneficial ownership chain)

➤ **Who is required to report?**

All EU based Intermediaries involved in the reportable cross-border transaction have to report. Under certain condition, if no Intermediary is involved for example, the taxpayer may be required to report.

Intermediaries in this context means “Promoters” and “Service Providers”.

“Promoters” is defined as any person that designs, markets, organizes, makes available for implementation or manages the implementation of a reportable cross-border arrangement.

“Service Providers” is deemed to be any person that knows, or could be reasonably expected to know based on facts, circumstances, available information and the relevant expertise and understanding that they have undertaken to provide directly or not aid, assistance or advice in relation to the design, the marketing, the implementation and /or the management of a reportable cross-border arrangement.

EU Member State may decide that Intermediaries entitled to legal professional privilege are excluded of the definition. In such a case, the disclosure of the reportable cross-border arrangement needs to be done by other Intermediaries or if no Intermediary is involved by the relevant taxpayer.

✓ **When should the Intermediary or as the case may be the taxpayer report a relevant cross-border arrangement?**

As from 1 January 2021, within **30 calendar days** beginning on the day after the arrangement is made available for implementation or is ready for implementation to the taxpayer or when the first step has been implemented whichever occurred first;

By 31 January 2021 for reportable cross-border arrangements when the first step was implemented between 1 July 2020 and 31 December 2020;

By 28 February 2021 for reportable cross-border arrangements when the first step was implemented between 25 June 2018 and 30 June 2020;

30 April 2021: first automatic exchange of information among Member States and every quarter afterwards.

✓ **Which is the content of the report to be sent by the Intermediary or the taxpayer as the case may be to the local tax authorities ?**

- Identification of the Intermediaries and relevant taxpayer;
- Details of the hallmarks;
- Summary of the content of the arrangement;
- Date of implementation of the first step;
- Details of national provisions related to the arrangement;
- Value of the arrangement;
- Identification of the Member State impacted.

DAC 6 Luxembourg Implementation Report

✓ **Date of implementation:**

This DAC 6 Directive has been implemented into Luxembourg Law by a law dated 25 March 2020.

✓ **Source:**

(Loi du 25 mars 2020 relative aux dispositifs transfrontières devant faire l'objet d'une déclaration
<https://www.legilux.public.lu/eli/etat/leg/loi/2020/03/25/a192/jo>)

✓ **Guidance issued by the Luxembourg tax authorities**

On 19 August and 14 October 2020, the Luxembourg tax administration updated its DAC 6 guidance.

A user manual and the XSD schema were published. These updates focus on the XSD schema and on reporting exemption for parent companies that arises when a permanent establishment with no separate legal identity has already submitted the declaration to be reported.

A new update was released on the 17th February 2021 explaining among other points the application of the rules in relation to the Brexit. As from the 1st January 2021, the United Kingdom is not any more belonging to the European Union.

The last consolidated version of the implementation guide is dated 12th February 2021.

Source : <https://impotsdirects.public.lu/dam-assets/fr/echanges-electroniques/dac6/Precisions-concernant-l-interpretation-de-la-loi-du-25-mars-2020-Version-PDF-20210212-.pdf>



✓ **Effective date of application:**

1st July 2020

✓ **Excluded intermediaries (professional legal privilege) if any**

Because of their professional legal privilege, lawyers, chartered accountants and regulated auditors based in Luxembourg do not have to report to the Luxembourg Tax Authorities but have to notify within 10 days other intermediaries or the relevant taxpayer as the case may be.

In Luxembourg, a relevant taxpayer cannot waive the legal professional privilege.

✓ **Fine:**

No reporting or inaccurate reporting may be subject in Luxembourg to a **maximum penalty of EUR 250,000**. The intentional character of the infringement will be taken into account when determining the amount of penalty to be inflicted.

✓ **Local comments / specificities**

- **Main Benefit Test**

The main tax benefit is not met (thus making an arrangement or transaction potentially not reportable) when the tax advantage concerned is obtained via an arrangement that is in line with the purpose or the aim of the applicable legislation and of the intention of the regulator.

- **Intermediaries**

Intermediaries do not have specific obligation to actively seek information, they do not have to go beyond existing professional obligations.

- **Arrangement “made available”**

An arrangement is deemed to be “made available” when the intermediary has delivered to the relevant taxpayer contractual documents or has made them available without an implementation step being required.

DAC 6 Hungarian implementation report



✓ **Date of implementation:**

The DAC 6 Directive has been implemented into Hungarian Law by a law dated 23 July 2019.

✓ **Source**

(Az adó- és egyéb közterhekkel kapcsolatos nemzetközi közigazgatási együttműködés egyes szabályairól szóló 2013. évi XXXVII. törvény módosítása <https://net.jogtar.hu/jogszabaly?docid=a1300037.tv>)

GUIDANCE ISSUED BY THE HUNGARIAN TAX AUTHORITIES

On 28 January 2021, the Hungarian tax authority issued its DAC 6 guidance.

The guidance is a comprehensive manual for both the official interpretation and practical application of reporting in Hungary. It gives further information on the scope, definitions, procedure, and specific hallmarks for the intermediaries concerned.

Source : <https://cdn.kormany.hu/uploads/sheets/8/86/860/86079bbdc998887093d10be76e13a2e.pdf>

✓ **Effective date of application**

1st July 2020

✓ **Excluded intermediaries (professional legal privilege) if any**

Because of their professional legal privilege, lawyers based in Hungary do not have to report to the Hungarian Tax Authorities, but are obliged to notify other intermediaries or the relevant taxpayer as the case may be without delay.

In Hungary, a relevant taxpayer can waive the legal professional privilege in a written statement.

✓ **Fine:**

No reporting or inaccurate reporting may be subject in Hungary to a **maximum penalty of HUF 500,000 (approx. EUR 1,315), or in case of non-cooperation with the authorities after their notification up to 5,000,000 (approx. EUR 13,150).**

✓ **local comments / specificities**

- **Arrangements**

The term arrangement is to be interpreted broadly, it may include any transaction, structure, contract or payment. It includes arrangements executed in one-step or several steps or parts and series of arrangements.

- **Intermediaries**

Intermediaries do not have specific obligation to actively seek information, they do not have to go beyond existing professional obligations.

- **Main Benefit Test**

The Main Benefit Test considers the result of the concerned structure and not the taxpayer's intention. The tax advantage does not have to be the only result, the test is met if it is the main result.

If the tax advantage is merely consequential or insignificant compared to the economic or business benefits, the test is not satisfied.