

TAX

COVID-19 Practical Considerations: Proposed Deferral of DAC6

12 May 2020

WHAT IS DAC6?

Council Directive (EU) 2018/822 (“**DAC6**”) is an EU directive that imposes mandatory reporting of cross-border arrangements by certain intermediaries (and in some cases taxpayers). Under DAC6 the first reports were due to be submitted during July/August 2020 and Revenue authorities were first due to exchange reported information on 31 October 2020.

A DAC6 reporting obligation is triggered when a cross border transaction or arrangement falls within one of the “hallmarks” included in the annex to DAC6. Details of the hallmarks are

included at Appendices I and II.

The hallmarks can be sub-divided into two categories:

- a. Those where it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage, and
- b. Those which are reportable regardless of whether there is a tax advantage to the transaction.

There is considerable uncertainty with

regard to the application of the hallmarks to normal commercial transactions and many Revenue authorities, including the Irish Revenue are working on providing detailed guidance to intermediaries and tax payers in respect of reporting obligations under DAC6.

PROPOSED DEFERRAL OF REPORTING

The EU Commission has noted the overwhelming disruption of the COVID-19 restrictions around Europe and in this context has published a proposal to defer the upcoming DAC6 deadlines as follows:

PROPOSED DEFERRAL OF REPORTING		
Reporting Obligation	Original Date	Deferred Date
Reporting of the ‘historical’ cross-border arrangements (i.e. arrangements that became reportable from 25 June 2018 to 30 June 2020).	31 August 2020	30 November 2020
Beginning of the period of 30 days for reporting cross-border arrangements.	1 July 2020	1 October 2020
First exchange of information by Revenue authorities on reportable cross-border arrangements.	31 October 2020	31 January 2021

A further three month deferral may be adopted if, during part or all of the period of deferral, the exceptional circumstances of severe risks for public health caused by the COVID-19 pandemic persist and Member States have to implement lockdown measures.

While there had been requests for extensions to the deadlines of up to twelve months, this proposal for a three month extension (with a possible further three months) will be welcomed by intermediaries and taxpayers, many of whom have extensive work to do in

collecting information and coordinating reporting.

If you would like further information on this matter please contact a member of our tax team.

KEY CONTACTS



Fintan Clancy
Partner, Head of Tax
+353 1 920 1190
fintan.clancy@arthurcox.com



Caroline Devlin
Partner
+353 1 920 1224
caroline.devlin@arthurcox.com



Ailish Finnerty
Partner
+353 1 920 1207
ailish.finnerty@arthurcox.com



David Kilty
Partner
+353 1 920 1036
david.kilty@arthurcox.com

APPENDIX I - HALLMARKS LINKED TO MAIN BENEFIT TEST

Main Benefit Test – (MBT)

A reporting obligation will only be triggered in the following circumstances where the “main benefit test” is satisfied. That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

Category A - Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:
 - a. The amount of the tax advantage derived from the arrangement; or
 - b. Whether or not a tax advantage

is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.

3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

Category B – Specific Hallmarks linked to the main benefits test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through transfer of those losses to another jurisdiction or by the acceleration of the use of the losses.
2. A arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.

3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have similar features.

Category C – Specific Hallmarks related to certain cross-border transactions – where MBT applies

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where:
 - a. Although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction does not impose any corporate tax or imposes corporate tax at a rate of zero or almost zero; or
 - b. The payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes; or
 - c. The payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.

APPENDIX II - HALLMARKS NOT LINKED TO MAIN BENEFIT TEST

A reporting obligation will be triggered where the following hallmarks apply, irrespective of the rationale for the transaction.

Category C - Specific hallmarks related to cross-border transactions – where MBT does not apply

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where:
 - a. the recipient is not resident for tax purposes in any tax jurisdiction; or
 - b. although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative.
2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.
3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

4. There is an arrangement that includes transfer of assets and where there is a material differences in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

Category D - Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing European Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Examples of such arrangements are provided in the directive.
2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:
 - a. that do not carry on a substantive economic activity supported by

adequate staff, equipment, assets and premises; and

- b. that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and
- c. where the beneficial owners of such persons, legal arrangements or structures, are made unidentifiable.

Category E - Specific hallmarks concerning transfer pricing

1. An arrangement which involves the use of unilateral safe harbour rules.
2. An arrangement involving the transfer of hard-to-value intangibles.
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three year period after the transfer, of the transferor or transferors, are less than 50% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.