



DAC 6

DUTCH AND LUXEMBOURG MANDATORY DISCLOSURE RULES FOR TAXPAYERS AND INTERMEDIARIES REGARDING REPORTABLE CROSS-BORDER ARRANGEMENTS

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The EU Directive regarding Mandatory Disclosure¹ (commonly known as the **DAC6**) refers to an EU Directive adopted on 25 May 2018 regarding mandatory exchange of information in the field of taxation in relation to reportable cross-border arrangements.

In the past years significant legislative changes have taken place in Dutch, Luxembourg and international tax law aimed at preventing the use of artificial structures and arrangements as well as at increasing transparency. Examples thereof, which derive from the OECD initiative to combat Base Erosion and Profit Shifting (**BEPS**), include:

- The implementation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (**MLI**);
- The adoption of the EU Anti-Tax Avoidance Directives; and
- The implementation of DAC6.

Current status of the Dutch and Luxembourg implementation of DAC6

The status of the implementation of DAC6 in the Netherlands and Luxembourg is as follows:

- In The Netherlands, DAC6 is implemented through the Act implementation EU-Directive reportable cross border constructions (in Dutch: *Wet implementatie EU-richtlijn meldingsplichtige grensoverschrijdende constructies*) which will enter into force on 1 July 2020; and
- In Luxembourg, DAC6 is implemented through the Act of 25 March 2020 regarding reportable cross-border arrangements, which will enter into force on 1 July 2020.

Who has the obligation to report?

Under DAC6, taxpayers and intermediaries such as tax advisors, accountants, trust offices and (in certain cases) lawyers that design, promote or implement tax planning schemes are required to report potentially aggressive tax arrangements to their competent tax authorities.

Under the Luxembourg implementation of DAC6, in order to preserve the client-attorney privilege, qualified lawyers (and also regulated accountants and auditors) are not obliged to report cross-border reportable transactions but have to inform another intermediary or the taxpayer about their (non-) reporting obligation.

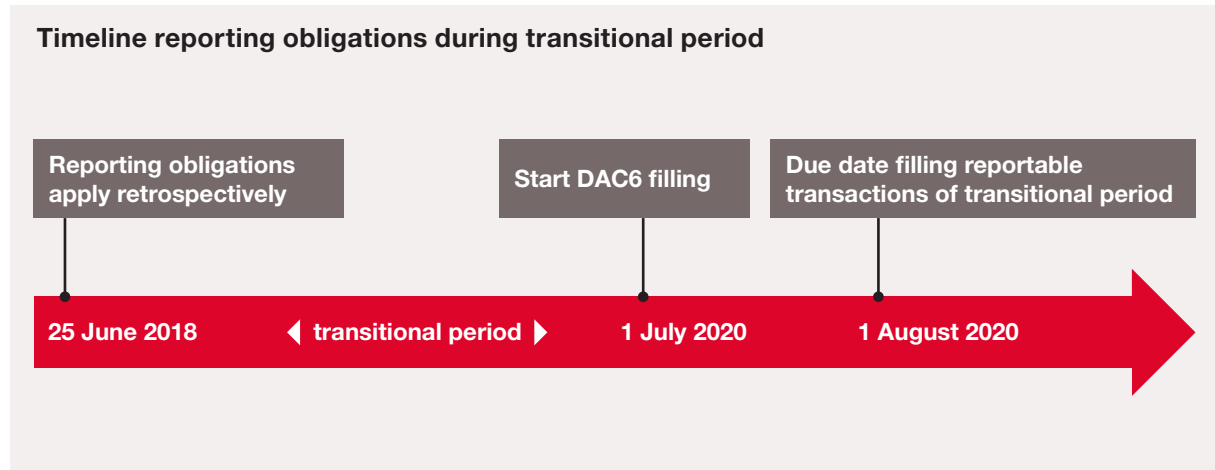
An intermediary may be relieved from its reporting obligation if that intermediary can prove that another intermediary has reported the relevant reportable transaction.

¹COUNCIL DIRECTIVE (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU.



When do you need to report?

Reporting obligations pursuant to the DAC6 apply retrospectively to transactions implemented as from 25 June 2018. Reportable arrangements which first implementation step is put in place during a transitional period starting on 25 June 2018 and running up to and including 30 June 2020 should be reported between 1 July 2020 and 31 August 2020. In this respect, reference is made to the below timeline:



As from 1 July 2020 reportable arrangements should be reported within 30 days starting the day after (i) the reportable arrangement is made available for implementation, (ii) the reportable arrangement is ready for implementation or (iii) when the first step of the implementation is made, whichever occurs first. An exception applies to 'marketable arrangements' which should be reported every three months.

What is the information to be reported?

For an arrangement to be reportable the arrangement (i) must be cross-border and (ii) must meet at least one of the objective or subjective hallmarks set out in the Annex IV of DAC6.

The Dutch act implementing DAC6 refers to the Annex IV of DAC6 for the definition of the reportable cross-border arrangements. In Luxembourg, the act implementing DAC6 contains an annex with the definition of the reportable cross-border arrangements which, in general terms, replicates the Annex IV of DAC6.

Currently, some uncertainty exists on the scope and meaning of the definition of hallmarks. With regard to the Netherlands, it is expected that the Dutch Ministry of Finance will publish a manual with guidance on this topic in the course of 2020.

Main Benefit Test

While the objective hallmarks trigger automatic reporting obligation, others are subject to a 'Main Benefit Test'. The Main Benefit Test is fulfilled if the main benefit or one of the main benefits that can be reasonably expected from the arrangement is obtaining a tax advantage.

It is worth noting that while the DAC6 and the Dutch implementation thereof do not provide a territorial scope for obtaining a 'tax advantage', the Luxembourg implementation of DAC6 provides that the Main Benefit Test is fulfilled if a tax advantage is obtained within or outside the territory of the European Union.

The definition of the term 'tax advantage' is neither provided in DAC6 nor the Dutch or the Luxembourg implementation thereof. The Main Benefit Test has the aim of filtering down the arrangements which shall be reported. The test does not examine subjective intentions, but rather builds a reference to objective facts and circumstances.

The below table provides a summary of the hallmarks and indicates to which of the hallmarks the Main Benefit Test applies.

Category	Hallmark	Main Benefit Test
Category A Generic hallmarks	An arrangement including a condition of confidentiality on how to secure a tax advantage.	Yes
	An arrangement entitling an intermediary to receive a fee depending on (the amount of) a tax advantage.	Yes
	An arrangement that has substantially standardized documentation and/or structure.	Yes
Category B Specific hallmarks related to main benefit test	Acquisition of loss-making company.	Yes
	Conversion of income into other categories of income.	Yes
	Circular transactions resulting in the round-tripping of funds without other primary commercial function.	Yes
Category C Specific hallmarks related to cross-border transactions	An arrangement that involves deductible cross-border payments made between two or more associated enterprises whereas the recipient	No
	a. is not resident for tax purposes in any tax jurisdiction;	
	b. is resident for tax purposes in a jurisdiction that does not impose any corporate tax;	Yes
	c. is resident for tax purposes in a jurisdiction that imposes corporate tax at the rate of zero or almost zero;	No
	d. is resident for tax purposes in a jurisdiction placed on a blacklist of non-cooperative jurisdictions;	No
	e. is resident for tax purposes in a jurisdiction which provides for a tax exemption for cross-border payments; or	Yes
	f. is resident for tax purposes in a jurisdiction which provides for a preferential tax regime for the cross-border payments.	Yes
	Deductions for the same depreciation on the asset are claimed more jurisdictions.	No
	Relief from double taxation is claimed in more than one jurisdiction for the same item of income.	No
	Transfers of assets including a material difference in the amount being treated as payable in consideration for the assets in the jurisdictions involved.	No
Category D Specific hallmarks related to automatic exchange of information and beneficial ownership	Arrangements which have the effect of undermining reporting requirements under agreements for the automatic exchange of information or beneficial ownership.	No
Category E Specific hallmarks concerning transfer pricing	An arrangement which involves the use of unilateral safe harbour rules.	No
	An arrangement involving the transfer of hard-to-value intangibles.	No
	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.	No



What happens if you do not properly fulfill reporting obligations?

In the event of non-compliance (including non-reporting as well as reporting incomplete or inaccurate information), Dutch taxpayers and intermediaries may be subject to a maximum penalty of EUR 830,000 or in certain situations to criminal prosecution. In Luxembourg, non-compliant tax payers and intermediaries may be subject to a maximum penalty of EUR 250,000.

Recommendations

In order to mitigate the risk of fines derived from non-compliance with DAC6 reporting obligations, we recommend taking the following actions:

- Verifying whether any transaction which may qualify as a reportable cross-border transaction under DAC6 has been implemented as from 25 June 2018;
- Documenting the reasons for which transactions are considered to qualify (or not) as reportable transitions under DAC6;
- Discussing the outcome with intermediaries involved in order to develop a common DAC6 approach;

- Reporting cross-border arrangements, if applicable.

We would be pleased to further assist you to comply with your DAC6 compliance.

Key contacts



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